LEGAL PLURALISM IN MALAWI

Historical development 1858 - 1970 and emerging issues

Franz von Benda-Beckmann
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FRANZ von BENDA-BECKMANN

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Foreword

Franz von Benda-Beckmann did his tour of study in Malawi around 1967. As a lecturer in law at the University of Malawi, I without knowing it, was following his footsteps. This process started even as I studied African Law and Custom at the School of Oriental and African Studies in London in 1969.

At the Law School in Malawi while teaching Customary Law to undergraduates and to a succession of Traditional Courts Chairmen, one faced a dearth of authorities on the subject. There were no authoritative Malawian texts apart from the Restatements on African Law series that were just being published. The challenge was therefore, to collect as many case reports as one could. In the process, one also benefited from the contacts Franz mentions in the Preface to this book.

There are many more names which are not included of course, notably those in the office of the Chief Traditional Courts Commissioner and elsewhere. Mr. Phombeya’s name comes to memory. Much later, one was also to meet the Judges (both trained and lay) in the Regional Traditional Courts and in the National Traditional Appeal Court. The most memorable among these were Inkosi ya Makosi M’mbelwa III, Chiefs Chikumbu and Mzukuzuku. Franz profusely acknowledges the insights he obtained from the lower courts chairmen as well. I agree with him. To this list one should add the name of late Dr. Denis Nkhwazi who had agreed to and actually did produce a translation of Rechtspluralismus in Malawi from German into English in his own handwriting at my request. This version was never published.

It is now close to forty years since Rechtspluralismus in Malawi was compiled. The question is, what is the contribution of Franz von Benda-Beckmann to legal scholarship and to the understanding of law in a developing African context? One values the return to one’s roots which Franz brings
out in his description of the social setting of African societies. Even as early as the 1970's one also valued the insights into African jurisprudence through the copious bibliography which one was referred to. Many of these were cited in English. More interesting is the core theme, legal pluralism, which shows how complex norms relate to each other in an African jurisdiction. For one thing there is not one traditional law. Many tribal cultures produce differing norms. These also operate in the context of many received laws, and locally they have been affected by legislative initiatives. Besides references to numerous statutes, reports and case law from within and outside, Franz reminds us of the value of the annual departmental reports which were kept (they are no more). From the Annual Report of the Judicial Department, 1967, for example, one gets a picture of the volume of work which was handled by each of the following: Local Courts, Subordinate Courts and the High Court. The importance of the customary law system manifests itself in the realization that the informal systems handled by far more disputes than the High Court and the Magistrates put together.

Reading through the book, one may be disappointed by the rather thin analysis of the informal dispute settlement system which traditional court systems largely followed. So many lessons need to be brought out from that rich past in view of the resurrection of interest which truth commissions and informal justice systems are raising in South Africa, Rwanda and elsewhere. Of course, Franz never set out to analyse procedures exclusively.

Generations of law students will forever be grateful to Franz for this product. His product reminds us that law is a legal science. It seeks to effect, promote and implant African values. It is not just premised on technical procedures on the basis of which cases may be won or lost.

The author also attempted to prophesize: what for example is the future of customary law and the interventions which legislators ardently promote concerning land and criminal processes? Forty years later, old prophesies are as relevant as they were then. The law is a human science. It is not easy to prophesize and to predict future courses in a scientific fashion. Definitely, things did not turn out as predicted in detail.

A number of students who studied law in the early seventies are now towering legal practitioners, in public life and in the private sector in Malawi. To them and to future generations of students of law, I commend the scholarship which Franz von Benda-Beckmann displays. I commend to them the humility with which Franz set out to understand Malawi and to portray the spirit of the people of Malawi. The Law Commission has set up a special Commission to examine the gap left by the demise of the Traditional Courts, and it is possible that that system of lower courts may resurface in some form. Whatever course they will take I would particularly impress that the special Commission do closely study our own short lived experiences as described in this book in part. It means more learning before the design of a comeback of the local courts.

Finally, I am so grateful to Franz and to Dr. M. Ott for the opportunity I was given to express my delight and appreciation for the English version of Rechtspluralismus in Malawi. This publication means that many more scholars will access it.

L. J. Chimango, M.P., LLB, LLM (Lond); of Gray’s Inn Barrister-at-Law Speaker of the Malawi National Assembly
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Preface to the English Edition

This book was first published 1970 in German, with the title Rechtspluralismus in Malawi: Geschichtliche Entwicklung und heutige Problematik by Weltforum Verlag, München, as No. 56 of the series Afrika Studien, published by the Ifo Institut für Wirtschaftsforschung. It is the dissertation for my PhD in law at the University of Kiel, Germany. Its publication in English has a long history. It started around 1979 when Louis Chimango and I corresponded over some material I had quoted in my dissertation, which was no longer accessible to Malawian researchers. He suggested that the book be translated into English and commissioned the translation by Dr. Denis Nkhwazi, which with minor changes forms the basis of this publication. I am deeply indebted to both. Unfortunately, this early initiative for a number of reasons did not yet lead to publication. Chimango had been appointed to the first of his ministerial posts; I had just moved to the Netherlands; the first negotiation over a subsidy for the publication was eventually unsuccessful, and we both had too many things to do that seemed to be more important to us. So the translated text remained an unread bundle of paper in my cupboard. It was only when Dr. Martin Ott, the project manager of the Forum for Dialogue and Peace in Malawi, visited the Max Planck Institute for Social Anthropology in 2006, the institute where my wife and I have worked since 2000, that the publication plan was speedily and successfully resuscitated. I am very grateful to him for offering to have the English version published in the Kachere Series with financial support from GTZ. The Forum for Dialogue and Peace had a special interest in legal pluralism, since it is implementing a primary justice pilot project in Malawi. I also want to thank Ms. Linda Liwimbi for getting the book into shape at the Malawi end. In Halle, I want to thank Sung-Joon Park, our student assistant, and Ms.
Gesine Koch, our secretary, who helped to check and correct the manuscript, and, in Malawi, Celia Swann, who made the final editorial preparations for publication.

***

Being in Malawi in 1967 and 1968, and writing my PhD thesis on legal pluralism in Malawi, changed my whole life. I had not been a very industrious student and had no serious academic ambitions when I graduated. But after exposure to and learning about what law was in Malawi, how one could look at it, and which exciting social, political and economic problems it involved, I was lost for the normal lawyer's jobs. I had become affected by social anthropological perspectives on law and legal processes and by the complexity of legal orders in post-colonial states. British Central Africa was a well-researched region thanks to the work done by Max Gluckman and his collaborators in the Rhodes Livingstone Institute in Lusaka and later from the University of Manchester. I started to learn anthropology in depth by reading their ethnographies and theoretical and methodological ideas. Though the research I did for my thesis as well as the style of writing and argumentation was still that of a recently graduated law student, the interests developing within me were already running in a different direction, even if they would still take years of learning and reading to mature. I was lucky that I could find such time as was necessary to transform myself into an anthropologist. After coming back from Malawi and London where I had consulted the libraries and colleagues – the Restatement Project of African Law was in full swing – I did not yet dare to think seriously of an academic career. It was Simon Roberts, who had written his PhD on Malawi some years earlier, who encouraged me to go on. Still unsure of myself, I first finished the practical period of my legal training, two and a half years of supervised work in different courts, in a law firm, a public prosecution office and the city administration. And then I was lucky enough to hear that the professor of social anthropology at the University of Zurich, Switzerland, Lorenz Löffler, was looking for assistants to develop the field of anthropology of law. In the five years I worked there I had the time to read and learn, and engage in a new research project in West Sumatra, Indonesia, together with my wife Keebet. This time was devoted to anthropological field research, over an extended period of 16 months, when we were mainly living in a village, learning (without interpreters) about the complexities of the plural legal orders and social processes. Although the region and the people studied were different, my experience in the “matrilineal belt” in Malawi and Zambia played a role in the selection of our research area and people, the Minangkabau in West Sumatra, Indonesia. The Minangkabau are the world’s most numerous matrilineal people, in which matrilineal principles effectively governed group formation, authority, property and inheritance. At the same time the Minangkabau are devout Muslims. The tensions and conflicts between these very contradictory principles of social organisation and their legal expressions were already complex before the region became part of the colony of the Dutch East Indies in the early 19th century. After colonisation, and later after Indonesia’s independence in 1945/49, the situation became ever more complex. It does not need much imagination to see that it would be exciting to study the configuration of legal pluralism there. The experience of studying the changes in matrilineal inheritance in Malawi was a very good preparation for this.

I take the liberty of briefly looking back at my thesis, with a number of questions in mind. Of course I am aware that what I wrote in 1970 has become history; and if it is of any use to people now its main value is historical. Yet I want to take a look what it said about some issues that later became, and still are, relevant in the study of plural legal orders, and what I would now say about these issues. These issues are, in short, law and legal pluralism, the debates on the creation of customary law, and the issue of law and development in the sense of legal engineering.

Law and Legal Pluralism

When I searched for a title for my book, I came up with “Legal Pluralism in Malawi” quite easily. Dualism, with the emphasis on the coexistence of English and native law, seemed to be too easy, too superficial, for the following reasons: state law had many sources, there was a large variety of different native laws (which could also clash) and last but not least there were pockets of Islamic law. At the time, there was as yet no academic discussion on legal pluralism. Vanderlinden’s major article (which started the later discussions) was only published in 1971, and the two contributions on pluralism by Van den Berghe and Nader and Yngvesson in the 1973 handbook of social anthropology (Honigman 1973) had yet to appear. Existing writing on colonial law (Allott 1960, 1965; Elias 1962) and anthropological studies did
not – yet – problematise the interrelations between state and African law, apart from where legal doctrines and court decisions settled points of “conflict of law”. I was not daring enough to raise my own voice to enrich the many discussions about the difference between law and non-legal norms or collective customs. I used the term “traditional law” in the meaning of “customary law” as defined by the German legal sociologist Theodor Geiger (1964). I avoided the general question of whether African societies “had law” independent of the recognition and validation of such law through legislation or case law. I reasoned that in this general way the question had become irrelevant, because since the incorporation of tribal societies into the state and the legislative authorisation of the courts to apply “tribal law”, both tribal law and non-legal customs could be applied as law in the courts. In other words, courts could apply tribal law, even if the behavioural norms of a tribe before this authorisation would not have had the character of the dominant definition of law. However this neglects the question of which norms (both now and then) are legal norms, and which non-legal custom. It remains an empirical question to be found primarily in the decision-making practice of the courts. Looking at the practice in the Local Courts, I noted that most courts chairmen shared the (legal realist) conviction that it was the application of rules, custom, or whatever, in courts which transformed these rules into law (1970: 155, note 15 and 18). They had no doubts that they, the courts, had the right to declare and change the law. The English courts had a different opinion, based on a different understanding of customary law or of the conditions under which custom could become law. In the words of the Privy Council deciding a case from Nigeria “it is the assent of the native community that gives custom its validity, and therefore it must be proven to be recognised by the native community whose conduct it is supposed to regulate” (1970: 154). Although it was a principle of colonial state law that if customary law was to be applied in court it had to be proven by calling witnesses (at least until such customs have become so notorious that the courts will take judicial notice of them), this did not play a role in the Local Courts (1970: 143).

In terms of contemporary conceptual language, I had thus opted for a cautious preliminary “weak legal pluralism” perspective (Griffiths 1986). It was only later, when conducting our research in Indonesia and writing it up, that I developed my own ideas about suitable ways to develop the concept of law as part of a comparative analytical framework, in which the law of the state was only one way of linking law to social organisation and the legitimization of social and political power (F. von Benda-Beckmann 1979; 2002). In other words, recognition by the state or state courts was not a constitutive element in the definition of the concept of law. Other cognitive and normative schemes of meaning developed and maintained by other forms of socio-political organisation and having another basis of legitimacy would also have the character of law – such as the rules, principles and procedures of African politics, even if they were different from what European lawyers thought “law” was or should be, and from what they understood as “customary law”.

The Creation of Customary Law

This brings me to the second topic, the understanding of “customary law”. To look back at this issue is especially relevant because this topic has been dealt with most extensively and in great depth in materials from British Central Africa, and Malawi (the former Nyasaland) in particular by Martin Chanock (1985) and by Terence Ranger in the famous book he edited with Eric Hobsbawm on The Invention of Tradition (1983). These analyses showed how what the colonial courts and the literature called “customary law” could not be regarded as a timeless, pre-colonial local law, but was largely created in the interaction between the colonial administration and those local experts whom the administration mainly consulted, that is, senior males, often village headmen or chiefs. To some extent, local rules and procedures were interpreted through the conceptual language and assumptions of the colonists’ ethnocentric categories; to some extent the local rules were wilfully changed in line with social, economic and political preferences. In my research in Malawi, I regularly came across and analysed such instances when English judges had to apply native law, especially in the law of procedure and evidence, very important elements of criminal procedures and affiliation procedures. But as much as customary law was unconscious-
ly misinterpreted or consciously changed by English judges, the cases dealt with by Malawian judges in local courts – by far the great majority of all cases brought to court – also showed that such ethnocentric legal distortions of local people’s law in these contexts remained limited if compared with the interpretation and development of tribal law by the Malawi Local Courts chairmen. What “customary law” was, substantively and procedurally, in the minds and judgements of British judges differed from decision-making in the Native and Local Courts, and what happened there was probably different again from disputing processes in the villages. As Chimango points out in his Foreword, I did not study those processes at the time. But I drew two important lessons from the experience in Malawi for my further research. One was to be sensitive to the probability of such misinterpretations by colonial and, later, state judges, administrators and social scientists, whether they were foreign or of the county itself. The second was that most of these misinterpretations were context-bound. What was misinterpreted in the literature could influence generations of scholars but not necessarily the local populations involved. What happened in a Magistrate’s court could be made undone again in village politics. In the later research conducted by my wife and myself in West Sumatra and on the island of Ambon in Eastern Indonesia, the analysis of such multi-contextual processes came to play a very important role, in the reconstruction of the historical development of local legal pluralism and social practices as well as in our ongoing fieldwork (F. and K. von Benda-Beckmann 1985).

**Law and Development**

Last but not least, Malawi was the first time I was confronted with legal engineering, the purposive use of legal rules (mainly legislation) to change social, economic and political organisation. The direction in the 1960s was towards “modernisation” and participation in economic growth. Like many other African states after independence, Malawi’s political leadership, supported and influenced by foreign agencies (at that time mainly of the former colonial “motherland”), engaged in several legal reforms, mainly in the domain of land tenure, inheritance and marriage, and criminal law.

In fact, some of the changes effected in Malawi were unique, and I discussed several of these changes in my book. Not all went in the direction of what was understood as “modernisation”. The developments in criminal law and in the law of criminal procedure in fact amounted to a re-traditionalisation, which is probably unique in Africa. But most changes aimed at modernising social and economic relationships, and at reducing the extent of legal pluralism. The Wills and Inheritance Act of 1967 had for the first time regulated the inheritance law for all segments of the population in one piece of legislation, and had tried to get rid of, or rather standardise, legal pluralism in this field. The 1967 Act followed the first inheritance law, The Wills and Inheritance Ordinance of 1964, which also had as its goals “to promote family stability, the strengthening of marriage ties and proper provision for dependant wives and children”. This Ordinance had never come into force officially, but its spirit had been taken up by some courts. Another field of major reform was land tenure law. In 1967, three Acts provided the basis for a far-reaching reform of land law. Here the developmental goal of the law was evident. Dr. Banda, the then president of Malawi, stated that “these Bills when passed Acts of Parliament, enforced and carried out, will revolutionize our agriculture and transform our country from a poor to a rich one”. I was rather sceptical about what results could be expected and wary of the new problems the law would generate, especially in the regions of matrilineal tribes and post-marital uxorilocal residence of men. Moreover, the law involved a tremendous bureaucratic administration, presupposing a larger and well-trained civil service with the financial resources to execute the giant work. As can be judged from later publications on the land law reforms in Malawi the problems have not yet been solved and continue to trouble peasants, traditional authorities, administrators and donor agencies alike (Harrigan 2003; Peters 2004; Schukalla 1998). Experiences with land and water rights reform in other countries have shown this to be a general experience in most states dealing with ambitious legal engineering policies. Also, states much richer than Malawi, for instance Indonesia, have pursued a still largely unsuccessful land rights reform policy for decades. Law, as “scapegoat and magic charm in development theory and practice” (F. von Benda-Beckmann 1989), will always remain an important issue.

Franz von Benda-Beckmann
Halle, August 2006
Preface to the Original
German Publication of 1970

My stay in Malawi and this book would not have been possible without assistance from others. I sincerely thank all those who helped me in this undertaking. My journey to Central Africa was only made possible by participation in the Working and Study Programme in Zambia which was sponsored by the Study Circle Continents and Contacts Foundation (Stiftung Studienkreis Kontinente und Kontakte). Financial assistance from the Schleswig-Holstein University Society and from the Institute of International Law of the University of Kiel enabled me to stay for another seven months in Malawi where I collected material for my dissertation. I thank Professor Dr. Menzel, Director of the Institute and supervisor of my thesis, for his interest in my research.

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Franz von Benda-Beckmann
Kiel, June 1970

List of Abbreviations

A.C. Appeal Cases
A.D. Appeal Division (South Africa)
All E.R. All England Law Reports
All N.L.R. All Nigeria Law Reports
App.Cas. Appeal Cases
ARSP Archiv für Rechts- und Sozialphilosophie
Art. Article
Att.-Gen. Attorney-General
CA. (L.C.) Civil Appeal (Local Court)
Cap. Chapter
Ch. Chancery Division (1891-)
Ch.D. Chancery Division (1875-1890)
CILSA The Comparative and International Law Review of Southern Africa
Civ.App. Civil Appeal
Civ.C. Civil Case
Cr.App. Criminal Appeal
Cr.C. Criminal Case
Civ.Rev. Civil Revision
D.Ct. Divisional Court (Gold Coast)
D.N.C. District Native Court
Diss. Dissertation
E.A. East Africa Law Reports
E.A.C.A. 1. Court of Appeal for Eastern Africa
E.A.C.A. 2. Law Reports containing decisions of the E.A.C.A. and the P.C.
E.A.L.R. East Africa Law Reports
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>Earn.</td>
<td>Earnshaw's Reports (Gold Coast)</td>
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<td>E.R.L.R.</td>
<td>Eastern Region of Nigeria Law Reports</td>
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<td>F</td>
<td>File</td>
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<td>F.S.C.</td>
<td>Federal Supreme Court</td>
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<tr>
<td>G.L.R.</td>
<td>Ghana Law Reports</td>
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<tr>
<td>Gov.Pr.</td>
<td>Government Printer</td>
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<tr>
<td>H.M.S.O.</td>
<td>Her (His) Majesty's Stationary Office</td>
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<tr>
<td>I.C.L.Q.</td>
<td>International and Comparative Law Quarterly</td>
</tr>
<tr>
<td>I.L.R.</td>
<td>India Law Report</td>
</tr>
<tr>
<td>J.A.A.</td>
<td>Journal of African Administration</td>
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<tr>
<td>J.A.I.</td>
<td>Journal of the African Institute</td>
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<td>J.A.L.</td>
<td>Journal of African Law</td>
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<tr>
<td>J.A.O.</td>
<td>Journal of Administration Overseas</td>
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<tr>
<td>J.R.A.I.</td>
<td>Journal of the Royal Anthropological Institute</td>
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<td>J.Z.</td>
<td>Juristenzeitung</td>
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<td>K.L.R.</td>
<td>Kenya Law Reports</td>
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<td>L.A.C.</td>
<td>Local Appeal Court</td>
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<td>L.C.</td>
<td>Local Court</td>
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<td>L.Q.R.</td>
<td>Law Quarterly Review</td>
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<td>Mad.</td>
<td>Madras</td>
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<td>M.H.C.</td>
<td>Malawi High Court</td>
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<td>M.L.R.</td>
<td>Modern Law Review</td>
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<td>M.S.C.A.</td>
<td>Malawi Supreme Court of Appeal</td>
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<td>NADA</td>
<td>Native Affairs Department Annual (Salisbury)</td>
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<td>N.A.C.</td>
<td>Native Appeal Court</td>
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<td>N.A.C. (N &amp; T)</td>
<td>Native Appeal Court (Natal &amp; Transvaal)</td>
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<td>N.C.</td>
<td>Native Court</td>
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<td>N.L.R.</td>
<td>Nigeria Law Reports</td>
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<td>N.R.N.L.R.</td>
<td>Northern Region of Nigeria Law Reports</td>
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<td>N.R.L.R.</td>
<td>Northern Rhodesia Law Reports</td>
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<td>Ny.H.C.</td>
<td>Nyasaland High Court</td>
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<td>Ny.L.R.</td>
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<tr>
<td>P.C.</td>
<td>Privy Council</td>
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<tr>
<td>P.C. '78-'28</td>
<td>Judgements of the Privy Council</td>
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<tr>
<td>Q.B.</td>
<td>Queen's Bench Division</td>
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<tr>
<td>Ren.</td>
<td>Renner's Reports</td>
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<td>rev. ed.</td>
<td>Revised Edition</td>
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<tr>
<td>R &amp; N</td>
<td>Rhodesia and Nyasaland Law Reports</td>
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<tr>
<td>R.N.C.A.L.R.</td>
<td>Rhodesia and Nyasaland Court of Appeal Law Reports</td>
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<td>R.N.L.J.</td>
<td>Rhodesia and Nyasaland Law Journal</td>
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<td>S.A.</td>
<td>South Africa</td>
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<td>Sar. F.C.R.</td>
<td>Sarbah: „Fanti Customary Law“</td>
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<td>Sar. F.L.R.</td>
<td>Sarbah: „Fanti Law Reports“</td>
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<td>sec.</td>
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<td>S.R.</td>
<td>Southern Rhodesia Law Reports</td>
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<td>S.R.L.R.</td>
<td>Southern Rhodesia Law Reports</td>
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<tr>
<td>T.L.R. (R.)</td>
<td>Tanganyika Law Reports (Revised)</td>
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<tr>
<td>U.C.</td>
<td>Urban Court</td>
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<td>U.H.C.</td>
<td>Uganda High Court</td>
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<td>U.L.R.</td>
<td>Uganda Law Reports</td>
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<td>W.A.C.A.</td>
<td>1. West Africa Court of Appeal</td>
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<td>W.L.R.</td>
<td>Weekly Law Reports</td>
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<td>W.R.N.L.R.</td>
<td>Western Region of Nigeria Law Reports</td>
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<td>ZA</td>
<td>Zomba Archives</td>
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<td>Z.L.R.</td>
<td>Zanzibar Law Reports</td>
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Introduction

"The principles of English Law tested by centuries of experience have been accepted as the best method of administration here and no doubt the natives will learn to appreciate their advantages" (A senior English colonial officer serving in Nyasaland in 1936).^2

"We don’t need English Law, we have our own law" (A Malawian Local Court Chairman in 1968).

The statement of the Malawian Local Court Chairman reveals that although it is to date 67 years since the introduction of English law in Malawi through the British Central Africa Order-in-Council of 1902, the prophecy of the Nyasaland Chief Secretary has not been fulfilled. In other words, in spite of almost 70 years of the application of English law, it has not become “the law which has been accepted” by the African population.

This study will seek to provide an overview of the development of the legal system in Malawi. Given the wealth of the material and the wide range of problems, the general theme will have to be limited. In the analysis the following points will receive special emphasis. The development of the institutional structure of the Malawian legal system, i.e. the history of the judicial organisation and the constituent components of the Malawian law will be described. It will form the point of departure for understanding the development of the Malawian legal system, because the different courts and their judges were, and still are today, of crucial importance for the development of law.

I shall then show how the actual development of the law was accomplished within this structural framework and which ideas lay at the basis of this development. This description remains limited to the fields of law in

^2 The Chief Secretary, Nyasaland, in a letter to the Provincial Commissioner, Northern Region, dated 14.7.1936, in: File NN/1/15/1 of the Malawi National Archives, Zomba. (Hereinafter the Zomba files shall be quoted as ZA...).
which the traditional customary law of the various Malawian tribes overlaps with the English law. The branches of law dealing with the modern world such as commerce, economy and labour are largely not treated systematically. Given the uneven pace of their development, the various fields of law will first be discussed separately. Later, the development of the whole legal system will be analysed. In the conclusion the study develops some ideas about the future development of the Malawian legal system.

The method of inquiry employed in the first place focused on a legal-historical and legal-political approach, whereas the legal-sociological aspects of the development of the law are not treated systematically. The concepts “traditional law” and “customary law”, which have been used here as synonyms, for me are working concepts which correspond to the notions of “native law and custom” or “customary law” used in the English literature, and which in a somewhat general manner refer to the customary law of the African tribes. I do not intend to enter into the discussions over the nature of traditional socio-political organisation or to enrich the many attempts to distinguish between “law” and “non-law” or between “legal norms” and “norm-indifferent” collective custom (Geiger (1964: 183) by my own conceptual approach. The concept “traditional law” will be understood here in the sense that it is understood by Geiger (1964) as customary law. In this respect I assume that among the Malawian tribes the transition from “embryonic law” Geiger (1964: 125) to “legal custom” (Geiger 1964: 178) has been accomplished.

At this juncture, let me make a few remarks concerning this issue. The generally discussed question of whether the behavioural norms of the African tribes possess legal character at all, or whether they just should be treated as “non-legal custom”, is no longer so relevant today, because with the incorporation of tribal societies into the state and with the “legislative authorization” (Geiger 1964: 183) of the courts to apply customary law, both “traditional law” and “non-legal custom” can be used as law. To avoid misunderstanding: The courts can nowadays apply customary law, even when the traditional behavioural norms of a tribe were not classified as “legal norm” - in whatever was the prevailing definition of law - before the legislative authorization. The question of which contemporary norms were legal norms and which non-legal custom in the past is certainly not answered by this. This remains a question for empirical research and in the first place will have to be seen in the courts’ decisions.

In the material which I collected unpublished works were an important source. I would like to mention in particular the doctoral dissertations written at the University of London in 1966/67 by J.O. Ibik, a Nigerian lawyer (“The Law of Marriage in Nyasaland”) and by S. Roberts (“The Growth of an Integrated Legal System in Malawi: a Study in Racial Discrimination in the Law”). Both works, although differing in their points of emphasis, deal with similar themes as my dissertation. In addition, I was also able to use parts of the notes of J.O. Ibik on the Restatement of the Malawian Customary Laws. The Restatement of the Customary Law Project, directed from the London School of Oriental and African Studies, was carried out in Malawi in 1964.

During a seven-month stay in Malawi, I had the opportunity to study the past and present of the Malawian legal system on the spot. The research was mainly conducted by studying files in the National Archives and in the Ministry of Justice, by participation in court sessions, and by interviews with judges of all types of courts as well as with officials of the Ministry of Justice.
Chapter One

The Historical Development of the Court System in Malawi

1. The Position before the Establishment of the Protectorate in the Year 1891

As the first European to discover the area south and west of Lake Nyasa, now Lake Malawi, in 1858, David Livingstone found a land that was torn apart by tribal fighting. The tribes living there who had grown out of the people of Maravi who had immigrated towards the end of the 16th century – the Chewa, Chipeta, Nyanja, Mang'anja as well as Tumbuka, Kamanga, Henga and Tonga to the north of the land – had already experienced two invasions before the coming of the Whites. In 1820 the Ngoni, who rejected the domination by the Zulu King Chaka, had moved north. After long years of wandering which had brought them up to Lake Victoria, three Ngoni tribal groups settled in the area west of Lake Nyasa. Due to their superior military tactics the Ngoni conquered the tribes along their way and led a successful campaign of plunder, killed the men and enslaved the women and children. From the East, the present Mozambique, four groups of Yao had arrived, who together with Arab traders carried on a flourishing slave trade with the East African coast.

The political and social structure varied from tribe to tribe. The Ngoni

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The Chewa, Nyanja, Mang'anja and Yao lived in largely autonomous villages under the leadership of a village elder (village headman).

In most cases, however, the supremacy of a chief over the tribal groups and their villages was recognized. However, how far the chief could exercise his rule largely depended upon his personal authority and power (Mitchell 1966: 31ff.). Almost all tribes had more or less institutionalized court procedures which used unwritten customary law to settle quarrels and punish the guilty. Domestic quarrels were first settled by the elders in the family. Should this prove unsuccessful, the matter would be dealt with by the elders of the village, against whose decision the chief could be appealed to. Important cases such as murder, robbery and theft were taken directly to the chief. The village elders and chiefs, however, were only representatives of political and judicial power. They could not decide without the agreement of their advisers. In most cases the court proceedings were presided over by one of the counsellors. As a rule, the chief only confirmed the proposed judgement.

The first Europeans, especially the missionaries, found themselves in an ambiguous situation. They had come with the intention to put an end to the slave trade and to ensure peace and order among their converts. However, they did not have any basis in law which would have allowed them to pronounce judgements. One of the first major conflicts was in 1861. Livingstone and Bishop Mackenzie, who founded the first mission station of the United Missions of Central Africa (U.M.C.A.) at Magomero, attacked a Yao village, set it on fire and freed the slaves.

A little later Bishop Mackenzie organized another punishment expedition against a Yao village, because the village ruler had captured two of the Bishop's carriers. The missionaries stated, however, that what had actually been expressed in the document was that a murderer, if convicted, must also be executed. These incidents, particularly the behaviour of the missionaries in Blantyre, caused a storm of protest after they had become known in England. The missionaries were recalled. Their successors were expressly warned to resist any temptation to act as judges or rulers in the country.

W.P. Livingstone reports that Dr. Laws had taken the Bible as his guide and ruled that 40 strokes should be the highest sentence, finding justification in the Third Book of Moses, Chapter 25, Verse 3. The Blantyre missionaries exceeded even this limit. There are cases known where the missionaries considered 60 or even 90 strokes to be an "adequate" punishment. The missionaries in Blantyre were even responsible for the execution of a death sentence. A Yao suspected of the murder of a woman living on the mission premises was sentenced to death and executed without any formal legal proceedings although he had denied all guilt and no witnesses had been heard. The authority for the sentence has never been properly explained. According to Jones, one missionary, the Reverend Duff MacDonald, contended that all missionaries had signed a document in which they agreed with the verdict. Other missionaries stated, however, that what had actually been expressed in the document was that a murderer, if convicted, must also be executed.

2. The First Courts

The establishment of the Protectorate also founded the English judicial authority. British Central Africa, as the Protectorate was known until 1907, was pro-
claimed a “local jurisdiction” in the meaning of the Africa Order-in-Council of 1889. Thereafter, the Commissioner-General was empowered to promulgate laws for the maintenance of security and order, as well as to constitute courts for the administration of justice. At first these courts had jurisdiction only over Europeans, but after 1893 Africans were also covered by the jurisdiction. In Blantyre, a British Consular Court was established in which Her Majesty’s Consular Judicial Officer, and later the Chief Judicial Officer, acted as judge. In 1892, the administrative officers (the Collectors) were empowered to function as magistrates for the administration of justice over both Africans and Europeans. The Supreme Court of the Cape Colony acted as the Court of Appeal, with the possibility of further appeal to the Privy Council in London. Special procedural regulations applied in criminal cases when death sentences were to be passed. In the case of the conviction of Europeans, the sentence had to be submitted to the High Court, whereas in the case of Africans submissions were made to the Commissioner-General.

The Protectorate thus had received a rudimentary court system. Its further development can be divided into three phases:

- The establishment of a complete court system.
- The legal recognition and, partly, the new formation of African Courts.
- The reform of the judiciary through the separation of administrative and judicial powers.

3. The First Development Phase (1902-1933)

The British Central Africa Order-in-Council of 1902, the first constitution of the Protectorate, was the basis for the establishment of a full court system. Article 15 constituted a High Court. Article 18 contained the powers to create courts subordinate to the High Court. With the appropriate statutes governing the constitution of the courts, the High Court (Practice and Procedure) Ordinance and the Subordinate Courts Ordinance of 1906, the system was given the form which remained in practice until 1929/1933.

3.1 The High Court

The High Court was the highest court in the protectorate. Its jurisdiction was unlimited. Article 15(2) contained the reception clause for the English law. Should a case involve Africans, customary law could be enforced under certain conditions in accordance with Article 20. The law of practice and procedure conformed to English law. Apart from minor changes, the Rules of the Supreme Court of England of 1883 were adopted. The law of criminal procedure was also built upon English law.

In 1902 His Britannic Majesty’s Court of Appeal for Eastern Africa was created, which also heard appeals from the High Court of Nyasaland. In 1909, further appeal to the Privy Council in London was permitted.

3.2 The Subordinate Courts

The Subordinate Courts Ordinance created the following courts:
- District and Sub-District Courts, and
- District Native and Sub-District Native Courts.

Magistrates in these courts were the District and Assistant District Residents. They exercised the function of magistrates in the District and District Native Courts as well as in the Sub-District and Sub-District Native Courts, administrative and judicial functions being united in a single person. The jurisdiction of the District and Sub-District Courts was limited to disputes in which Europeans and/or Asians were parties.

In civil cases, the maximum compensation which could be ordered by the District Courts was £250, and for the Sub-District Courts £50. In criminal cases, the District Courts could pass any sentence allowed by the law, except the death sentence and imprisonment exceeding seven years. However,

13 Through the Royal Instructions of 31.7.1891.
14 The Commissioner-General until 1907 was the highest administrative official of the Protectorate. The Nyasaland Order-in-Council of 1907 renamed him Governor.
15 The jurisdiction was extended with the Africa-Order-in-Council of 1893.
imprisonment exceeding six months and fines exceeding £20 had to be confirmed by the High Court.

The Sub-District Courts could pass a sentence of imprisonment of only up to one month and/or impose fines up to £1. Appeals against the decisions of Sub-District Courts could be lodged with the District Courts, and with the High Court against the decisions of both courts if the value of the appeal exceeded £20 or when corporal punishment or a fine exceeding £5 was imposed.

The jurisdiction of the District Native and Sub-District Native Courts was limited to legal disputes between Africans. In civil cases, no maximum compensation was laid down. The courts could apply customary law under certain conditions, as was also the case with the High Court in accordance with the Order-in-Council of 1902. In criminal cases, the jurisdiction of the District Native Courts was unlimited. However, the imposition of the death sentence was subject to confirmation by the High Court. Imprisonment exceeding six months, fines exceeding £5, and corporal punishment exceeding six strokes also had to be confirmed by the High Court. The Sub-District Native Courts could impose only six months' imprisonment, a fine of maximally £1, and corporal punishment of up to 12 strokes. Appeals against the sentences of the Sub-District Native Courts could be made to the District Native Court, and from both these courts to the High Court.

All legal disputes between chiefs over the right of ownership to land belonged exclusively to the jurisdiction of the High Court and the District Native Courts.

The High Court had far-reaching rights of control over all Subordinate Courts. It could take over any case and decide itself.

3.3 The Customary Courts

The Protectorate thus had received its full judicial system, following the English model. With the exception of the regulation in Article 20 of the British Central Africa Order-in-Council of 1902, English law was administered. The judicial institutions of the African population were not legally recognised in this system. The District Administration (Native) Ordinance of 1912 and 1924 had opened the possibility that certain chiefs and village headmen could be authorized to administer justice in certain spheres and with limited administrative powers. However, no use was made of this authorization.

However, the absence of legal recognition did not mean that customary courts ceased to function. Many reports show that chiefs and village headman continued to exercise judicial functions, and that, as in Karonga, even written records of the proceedings were kept. In 1930, the Chief Secretary could state: "There is at present a system of Native Courts, which although not recognized by government, do function and in many cases not too badly".

Most Residents strongly approved of these unofficial courts. They soon realised that the traditional processes and the use of customary law were much more suitable in dealing with the numerous disputes between Africans than what they themselves could do in their District Native Courts. Some Residents even avoided deciding "purely native cases" unless a trial had already taken place before the village headman or the chief. An example of this view can be seen from the following report of the Acting Resident of Nkhotakota in the year 1921.

"An enormous number of civil cases are concluded by village headmen. I do little to prevent such decision-making in the Bwalo. I am actually convinced that there more justice is to be found than is possible in my court. One may take, for example, cases of adultery. Usually a man comes and alleges that his wife confessed to have committed adultery with Mr. X, while Mr. X denies this. Now the natives have a belief to the effect that a woman "never lies" when it is the question of whether she committed adultery or not. When I, due to lack of material evidence, reject the case and part from the wife's statement there usually is no further evidence - then all the listeners look at my decision with complete disapproval. They quickly find an opportunity to make me understand that the number of adulteries has increased in a quite surprising degree. I then can conclude that it is the consequence of my weakness..."

22 Ordinance No. 13 of 1912 and No. 11 of 1924, section 11 and 13 respectively.
ness. It would violate all rules of English justice and also of common sense, on the other hand, if I sentenced the named adulterer in such a case. If such a case, however, is dealt with in the Bwalo, the whole village deals with the case. Every detail is known, and here the belief that a woman cannot make such an accusation without reason probably is correct. Thus she will have realised that it is beyond her strength to deceive the whole village, whereas it is relatively easy for her to assert something to a European, who must obtain every bit of information through questions, and to whom the mentality of the woman and of the other participants in the case is a book with empty pages."

4. The Second Development Phase (1933-1962)

4.1 Indirect Rule in Nyasaland

During the 1920s, the idea of "indirect rule" had come to be accepted in London and in the overseas colonies, as had been propagated in Lord Lugard's book "The Dual Mandate in British Tropical Africa", published in London in 1921. Indirect rule was an attempt to grant traditional tribal rulers the status of independent organs by giving them limited political, administrative and judicial powers. In 1926, such reforms had already been introduced in Tanganyika. Sir P. Cuncliffe-Lister explained in the House of Commons what indirect rule would mean for Nyasaland:

"The Native Authorities will assist the Governor in administering local native affairs; they will be empowered to levy local rates and dues... The Native Authorities will then be primarily responsible for financing the development of native institutions and establishing native local services, such as courts, schools, wards, transport facilities, agriculture and so on. The system is designed to promote the declared and continuous policy of His Majesty's Government to train the natives for self-government by means of native institutions".

The Nyasaland Government undertook the reform only hesitatingly and had to be pressed by the Colonial Office. The last aspect of indirect rule especially met with little enthusiasm in Nyasaland. Above all, the settlers feared that strengthening of the tribal rulers would form an obstacle to their aspirations for a union of Nyasaland with the Rhodesian areas. But the Nyasaland Government had realised for some time that eventually courts would have to be created in which African judges would pass judgement. Until 1928, one had wanted to do this on the basis of the already mentioned District Administration (Native) Ordinance. This idea was dropped because one expected this law to be revoked soon. Attempts were made to create an authorization for the establishment of Native Courts in the Courts Ordinance, which was to be newly regulated anyway. Because of remaining uncertainties over the future powers of the Native Courts, even this was not accomplished. The enactment of the Native Courts Ordinance was postponed until 1933. The reason for this was that one wanted to first pass the Native Authority Ordinance, in which the political and administrative powers of the chiefs to be recognized as Native Authorities would be regulated.

The laws of Kenya, Tanganyika and Northern Rhodesia were used as models for drafting the Bills for Nyasaland. The final draft of 1932 was copied word by word from the law of Tanganyika. However, one point met with opposition in Nyasaland: Section 12 of the Bill for the new Courts Ordinance of 1929. This was in line with the view of the British Colonial Office. But the Judge of the High Court, the Attorney-General and the Secretary for Native Affairs demanded that the High Court should be the highest institution of appeal. They finally prevailed.

30 Quoted according to G. Jones, Britain and Nyasaland, pp.76, 77.
32 G. Jones, op. cit., p.77.
33 Native Courts (Proclamation) Rules were already worked out, see ZA S 572/1920.
34 Section 12 of the Bill for the new Courts Ordinance of 1929.
35 The new Courts Ordinance, Ordinance No. 24 of 1929, came out without any mention of Native Courts.
36 Ordinance No. 14 of 1933.
37 Ordinance No. 13 of 1933.
38 Tanganyika Native Courts Ordinance, Law No. 5 of 1929; see also the comparative tables in ZA 572/1931.
39 The Colonial Secretary to the Governor of Nyasaland, dated 24.1.1929. "It has been thought desirable to entrust the supervision of Native Courts to the Administrative Staff", in: ZA S 572/1920.
40 The Secretary of Native Affairs to the Governor, dated 20.1.1932: "The Tanganyika Laws have been used as a model because they were the best we know of. But I should be delighted to improve the work of Sr. D. Cameron.", in: ZA S 572/1930.
41 See the letter of the Governor to the Colonial Secretary, dated 17.3.1032, in: ZA S 572/1920.
4.2 The Native Courts

The Native Courts Ordinance of 1933 brought the following regulation: The Native Courts had to be established in accordance with customary law. Their jurisdiction was circumscribed in “warrants”, the constituent charters of native authority. The following regulation applied.

The jurisdiction was limited to legal disputes between Africans. In criminal cases both accused and plaintiff had to be Africans. In the first place, the Native Courts had to apply customary law, including customary criminal law. They could impose any sentence permitted by customary law, as long as this did not conflict with the basic principles of morality and justice. Besides customary law, the courts could also apply administrative regulations issued by the Provincial and District Commissioners, or those issued by themselves in their capacity as Native Authorities. Marriage cases not resulting from marriages under customary law or Islamic law were excluded. In criminal cases, the courts had no jurisdiction over offences that had caused death and offences which carried the death sentence or life imprisonment.

The administrative officials functioned as courts of appeal. Against the ruling of the Native Court, an appeal could be lodged with the District Commissioner, against whose ruling appeal would go to the Provincial Commissioner. The decision of the Provincial Commissioner could then be contested before the High Court. A different route was to the Native Appeal Courts. These consisted of one or more chiefs who together presided over the appeal against the decision of the Native Courts. Further appeal could then be lodged with the District Commissioner against the judgement of the Native Appeal Courts.

In the course of the following years, distinctions were made between Native Courts. Depending on their rank, chiefs and sub-chiefs were designated Native Authorities or Sub-Native Authorities, and their courts were classified accordingly as Native or Sub-Native Courts. From the Sub-Native Courts, appeals had to go to the Native Courts. In 1947 Native Courts were renamed African Courts.42

4.3 The Subordinate Courts

Through the creation of the Native Courts, a new arrangement of the Subordinate Courts became inevitable. As has already been pointed out, it was introduced before the enactment of the Native Courts Ordinance. The Courts Ordinance of 1929 created courts of the 1st, 2nd and 3rd classes.43 From 1948, a 4th class was added.44 Magistrates were:

- in the courts of the 1st class, the Provincial Commissioners and the Town Magistrates,
- in the courts of the 2nd class, the District Commissioners,
- in the courts of the 3rd class, the Assistant District Commissioners, and
- in the courts of the 4th class, administrative officers on probation.

The jurisdiction of all courts was unlimited in cases where Africans were parties. However, in legal disputes between Europeans and/or Asians a differentiated system, based on the maximum value in dispute, characterised the order of jurisdiction. The following limits applied:

- for the courts of the 1st class - £100 (since 1950 £200),
- for the courts of the 2nd class - £50 (since 1950 £100), and
- for the courts of the 3rd and 4th classes, £25.

In the beginning, different rules applied for appeal procedures in African and non-African cases. However, in 1950 appeal procedures were unified. Appeal to the High Court was allowed against all rulings of a Subordinate Court. The criminal process and the jurisdiction in criminal cases were regulated in the law of criminal procedure of 1929.45

4.4 A Review

With the introduction of the Native Courts, Nyasaland had officially received a two-tiered judicial system, connected only by the High Court. The appointment of chiefs and village headmen as Native Authorities and as

42 With the African Courts Ordinance No. 17 of 1947.
43 Ordinance No. 24 of 1929.
44 With the Courts (Amendment) Ordinance No. 26 of 1948.
45 Courts (Amendment) Ordinance, Ordinance No. 3 of 1950.
46 Criminal Procedure Code, Ordinance No. 23 of 1929.
judges in the Native Courts did not, however, mean that the traditional judicial system had been re-established in its original form. It often happened that those who were chiefs according to customary law were not considered. Instead Africans favoured by the administration were appointed and were often not accepted by the population. Many chiefs had lost their authority and power as a result of the Ngoni invasions and the following subjection by the British. Through their appointment as Native Authorities, these “warrant chiefs” received vast powers, which they did not possess before, a fact against which the population reacted with rejection and mistrust. Moreover, insufficient attention was often given to the different importance of the various chiefs during the establishment of the Native Courts. This led to an equalisation of existing status differences, which was received with disapproval by the insulted parties. For example, for the ten Tonga chiefs, who had received a Sub-Native Court, the Tonga Tribal Council was created as court of appeal. The Tribal Council comprised 28 village headmen, of which five at a time functioned as a Native Appeal Court over the contested rulings of the Tonga chiefs. The chiefs saw it as a great loss of prestige that their junior village headmen were now promoted to a level above them, and that (as the chiefs saw it) made them a laughing stock in the eyes of the population.

5. The Third Development Phase (since 1962)

5.1 The Judicial and Administrative Reform of 1962/63

This judicial administration lasted for 30 years. The next reform only took place after the political change in 1961. In 1961, direct elections were held for the first time in Nyasaland and the politicians of the Malawi Congress Party won 22 out of 28 seats in the Legislative Assembly and 5 of the 10 positions in the Executive Council. The African politicians pressed for the reform of the administrative and judicial system. Their main objective was the separation between judicial and administrative powers. This was primarily directed against the Native Authority system. Not without reason, Native Authorities were accused of having worked very closely with the officers of the Protectorate, and the criticism was made that their attitude towards the independence movement had been rather reserved.

Soon after the elections, an inquiry into the reorganization of African Courts was started, beginning with the intention to effect the separation of powers at the lower level.

5.2 The Local Courts

The result of these efforts was the Local Courts Ordinance of 1962. In comparison with the previous Native Courts, this Ordinance brought some essential changes:

- Native Authorities would no longer be at the same time judges in the new Local Courts. The new judges would in the first place be selected with due political consideration, i.e. as a rule, Africans politically close to the Party would be chosen as Local Courts chairman.
- For the first time, the jurisdiction of certain Local Courts was extended to include legal disputes between Africans and non-Africans. This regulation was a concession to a long-standing demand by the Africans, who suspected that the Europeans could often escape justice, particularly in affiliation cases, as they could not be sued in the Native Courts.
- The possibility to punish offences in accordance with customary law was abolished.
- The supervision of the Local Courts was transferred to a team of officers of the Ministry of Justice, especially created for that purpose.

50 The African politicians called the Native Authorities of the time: District Commissioners' glorified messenger boys.
52 Ordinance No. 8 of 1962.
5.3 Changes in the Sphere of the British Courts

The 1958 Courts Ordinance had not brought any essential changes for the Subordinate Courts except a renaming of the courts.\(^{53}\) The principle of the separation of powers was introduced in 1963 through an amendment of the law.\(^{54}\) Administrative officers would no longer at the same time function as Magistrates.

In 1963 Nyasaland enacted legislation creating its own highest court of appeal, the Nyasaland Supreme Court of Appeal,\(^{55}\) which henceforth had the sole jurisdiction to hear appeals from decisions of the High Court. Appeals against decisions of the Supreme Court of Appeal could go to the Privy Council in London.

6. The Present Constitution of the Courts in Malawi

The Protectorate court system was retained when Nyasaland, now Malawi, became independent in 1964. Until today nothing fundamental has changed. The unification of the judicial system, since 1963 a declared objective of the African politician, is not yet achieved.\(^{56}\) The two-tiered court structure, typical of the former British colonies, still remains: On the one hand, there are the "customary courts", the Local and Local Appeal Courts with the High Court as highest court of appeal; on the other hand the "British Courts", the Subordinate Courts, the High Court and the Supreme Court of Appeal.

6.1 The Customary Courts

6.1.1 The Local Courts

According to their importance, the 171 Local Courts are divided into three different classes: Urban and Grade A1, Grade A and Grade B Courts.\(^{57}\) For every court, members are appointed by the Minister of Justice, and one of these members is appointed as chairman.\(^{58}\) In civil cases the Chairman must sit with at least one assessor; in criminal cases, however, he is free to sit with assessors or not. The judgement is passed by the chairman alone; the assessors have only an advisory function.

The jurisdiction of most Local Courts is still limited to legal disputes between Africans. By end of 1967, 46 Local Courts possessed the wider jurisdiction to deal with disputes between Africans and non-Africans. The substantive jurisdiction is regulated in the following manner. In civil cases there is no limit on the value in dispute as long as the dispute is concerned with customary law. For other disputes, the limit of the value in Urban and Grade A1 Courts is £75, and £50 in Grade A and B Courts. Marriage cases resulting from contracting a marriage other than in accordance with customary or Islamic law may only be tried in the Local Courts if the grounds of the complaint are based on customary law, as in the matter of the payment or refunding of bride-price. In the court of first instance, customary law will be applied. The application of statutory law is possible with Ministerial authority or when the law itself provides for its application in the Local Courts. This has so far only happened in respect of the Affiliation Ordinance,\(^{59}\) and in respect of the new law of inheritance.\(^{60}\)

In criminal cases Local Courts may apply only certain provisions of the Penal Code and certain specified provisions of other administrative and regulatory laws.\(^{61}\) This mainly concerns small offences such as theft, traffic offences, etc. Crimes which attract capital punishment and those which according to the law are punishable with the death sentence or with life imprisonment are in principle excluded from the jurisdiction. The jurisdiction is further limited through the permitted punishments: Urban and Grade A1 Courts can impose fines up to £75, imprisonment up to one year, and corporal punishment up to 12 strokes. Grade A and B Courts can impose fines up to £25, imprisonment up to six months, and corporal punishment up to six strokes. Offences against customary law may no longer be tried, whereas the old Native Courts were free in this respect.

\(^{53}\) Ordinance No. 1 of 1958.

\(^{54}\) Courts (Amendment) Ordinance No. 8 of 1963.

\(^{55}\) From 1947, the Rhodesian Court of Appeal was the regional Appeal Court. In 1955, two years after the founding of the Central African Federation, the Federal Supreme Court was created for the member states.


\(^{57}\) On 1.1.1968 there were 6 Urban, 6 Grade A1, 41 Grade A and 118 Grade B Courts, total 171.

\(^{58}\) The Minister can also dismiss the appointees.

\(^{59}\) Ordinance No. 25 of 1964.

\(^{60}\) Wills and Inheritance Act, Act No. 25 of 1967.

\(^{61}\) G.N. 168 of 1962.
In line with customary law, legal practitioners may not appear in the Local Courts. However, husbands or wives, guardians, or any servant or master of any plaintiff can be allowed as counsel. Lawyers can, however, appear in the Local Courts which have been granted extended jurisdiction. But they are only allowed in criminal and civil cases that are not tried in accordance with customary law. This mainly concerns paternity and maintenance cases under the Affiliation Ordinance.

Towards the end of 1969, the Local Courts were renamed “Traditional Courts.” At the same time, the jurisdiction in criminal cases was extended. The Traditional Courts were permitted to try all criminal cases and could impose any sentence allowed by law, including capital punishment. It is further anticipated that the Minister of Justice, after consultations with the Chief Justice, can arrange that particular categories of cases should belong to the exclusive jurisdiction of the Traditional Courts.

6.1.2 Appeal

The jurisdiction to hear appeals against the decisions of Local Courts lies with the Local Appeal Courts. A Local Appeal Court consists of three Local Courts chairmen from the area concerned. The High Court, as the highest court of appeal, hears appeals against the decisions of the Local Appeals Court. In these cases, the judge is assisted by three assessors who advise him in questions of customary law. The assessors, however, do not participate in making the final judgement. The courts of appeal can quash the sentence and make an independent ruling in the case, or send the case back to the lower court for retrial. After the extension of the Local or the Traditional Courts’ jurisdiction in criminal cases one intends to create a special highest court of appeal for the Traditional Courts. As a result, the jurisdiction of the High Court as the court of appeal for cases originating from the Traditional Courts in criminal cases will be withdrawn. Until now no legislative steps have been taken in this respect, although Minister Aleke Banda has announced the Government’s intention to introduce the change within the current legislature period.

6.1.3 The Control of the Local Courts

Since 1962 the control of the Local Courts is carried out through the Local Courts Commissioners under the direction of the Chief Local Courts Commissioner. These are officers of the Ministry of Justice who are bound by instructions. They are to advise the Minister on questions relating to the establishment, staffing and the jurisdictional regulation of the Local and Local Appeal Courts. Further, they are responsible for the organization and supervision of these courts. However, the powers of supervision are not limited to purely administrative control. In response to an application by an aggrieved party, a court, or at his own initiative, the Local Courts Commissioner can order that “a case be tried again either by the same court, or by another court; send the case to a Subordinate Court; and quash any ruling of a Local Court and make an independent decision in the case.”

The last power especially goes far beyond the authority of control but means an exercise of judicial authority. At present, however, the Local Courts commissioners are completely overloaded with the administrative control of the Local Courts. Taking into account the number of Local Courts and the distances which must be covered during a control inspection tour, the team of officers is plainly insufficient to provide an effective judicial control of the various courts.

6.2 The British Courts

6.2.1 The Subordinate Courts

At present there are four types of Subordinate Courts: the courts of the Resident Magistrates and the courts of the 1st, 2nd and 3rd Grade Magistrates. The Resident Magistrates are qualified lawyers. Up to the present day, the Resident Magistrates in Malawi have been foreigners (English and Nigerian). All other magistrates are lay judges. The jurisdic-
tion of the courts is distinguished according to the limits of the value in dispute. The following limits apply: 74

- for the courts of the Resident Magistrate and the 1st Grade Magistrates - £400
- for the courts of the 2nd Grade Magistrates - £150
- for the courts of the 3rd Grade Magistrates - £50.

Excluded are legal disputes relating to land, marriage, divorce and custody of children, judicial disposal and invalidation of deeds, which are exclusively within the competency of the High Court. Appeals can be made to the High Court against all final decisions of the Subordinate Courts in civil cases.

The jurisdiction in criminal cases is reformed in the Law of Criminal Procedure of 1967. 75 The jurisdiction of the 3rd Grade Magistrates is limited to smaller offences. The other courts can try all crimes except treason and border offences. However, a further limitation is provided by the range of the permitted sentences. The Resident Magistrates and the 1st Grade Magistrates can impose any sentence allowed by law except the death sentence and imprisonment exceeding 14 years; the 2nd Grade Magistrates up to five years imprisonment and £100 fine; the 3rd Grade Magistrates up to 1 year imprisonment and £75 fine. If the sentence exceeds a certain amount – fines exceeding £50 and imprisonment exceeding two years with the Resident Magistrates, imprisonment exceeding one year with the 1st and 2nd Grade Magistrates, and imprisonment exceeding six months with the 3rd Grade Magistrates, as well as every corporal punishment – the court files must be submitted to the High Court for control. Appeals against any final judgement of a Subordinate Court can be lodged with the High Court.

6.2.2 The High Court

The High Court, established by Article 62 of the Republican Constitution, has three functions: it is the court of appeal for the Subordinate Courts and for the Local Courts and at the same time the highest court of first instance. In this respect its jurisdiction is unlimited. 76 It is staffed with the Chief Justice as Chairman, assisted by at least two Judges. All Judges are appointed by the President. In the appointment of judges, the Judicial Service Commission operates as an advisory organ to the President. The judges, once appointed, can be dismissed only for specific reasons and according to the procedure regulated in the constitution. 77 The reasons are incompetence in the performances of the duties of his office and misconduct. Even then, the President can dismiss a judge for one of these reasons only when a demand to this effect has been debated in the National Assembly has obtained a simple majority and has been presented to the President in the form of a petition. So far such a case has not happened.

By the end of 1969 the High Court was staffed by four judges who were all British. After the latest reforms of the Local (or Traditional) Courts and the consequent extended jurisdiction of these courts in criminal cases, all four judges resigned. At present it is still uncertain how and by whom the High Court shall be staffed.

Civil cases are tried by a single judge. In cases in which Africans are parties and in which customary law may be relevant for the judgement, the judge sits with two or three assessors. 78 In the recent past, the composition of the court in criminal cases has been changed several times. Until 1967, criminal cases were basically decided by a single judge. 79 When the accused was an African, the trial had to proceed with three assessors. An amendment of the law in 1967 made the presence of three assessors in all criminal cases obligatory. 80 In 1968 the jury system was introduced. 81 Henceforth all criminal cases had to be tried with a jury of seven members. The verdict must be given by at least five members of the jury.

The High Court, whose seat is in Blantyre-Limbe, functions according to the English model as an Assizes Court. According to need, assizes are held in the different towns of Malawi.

6.2.3 The Supreme Court of Appeal

The Supreme Court of Appeal, established by Article 67 of the Republican Constitution, is the highest court of appeal for the British Courts.

74 In accordance with the Courts (Amendment) Act, No. 47 of 1967.
76 It is, however, to be expected that the Traditional Courts shall be competent to try murder and other cases, in which elements of traditional law play a role.
77 Article 64, section 2-4.
78 Section 89 of the Courts Ordinance.
79 From 1906 to 1947 criminal cases could be tried with a jury. The jury system was abolished by the Criminal Procedure (Amendment) Ordinance, No. 18 of 1949.
80 Section 194 of the Criminal Procedure and Evidence Code, Act No. 36 of 1967.
Appeals to the Privy Council in London are no longer possible. Judges of the Supreme Court are the Chief Justice as Chairman, special Justices of Appeal and all judges of the High Court. Until their resignation at the end of 1969, the four judges of the High Court were—because of lack of personnel—at the same time the only judges at the Supreme Court of Appeal.

In its proceedings the Court is staffed by three judges. In situations where judges have differing opinions, the simple majority is decisive. Dissenting opinions are recorded in the judgement. In civil cases, appeal to the Supreme Court is permitted against all final judgments of the High Court. In criminal cases, appeals are allowed from the High Court as a court of first instance, and against its decisions as an appeal and review court. It is important to note that the appeal or revision will not be granted if the breach of law by a lower court did not result in a miscarriage of justice.

6.3 The Unofficial Dispute Settlement

Legal disputes concerning the succession of chiefs and village headmen and the allocation of customary land are excluded from the jurisdiction of all courts. Chiefs and village headmen continue to decide in these cases. Apart from this, the law threatens anyone who unlawfully assumes or exercises judicial power with imprisonment of up to twelve months and/or a fine of up to £50. In Malawi there are no legal rules regulating the unofficial conciliation of legal disputes. It does not seem to be regarded as usurpation of judicial power when contesting parties willingly accept the judgement of a traditional ruler. It was said in the case R. v. Karonga that the criminal sanction becomes relevant only in those cases in which someone assumes judicial power over an unwilling party out of his own wish, or if influenced by one party only. This is not the case when both parties willingly accept the judgement of a respected elderly man. It is difficult to assess how far the chiefs and village headmen nowadays violate the prohibition of section 25, or the extent to which they function as mediators in a permissible manner. For example, it was reported from Chiradzulu District that a chief and a village headman "held court" regularly once a week.

The Local Courts chairmen view these activities with mixed feelings. On the one hand they fear that their authority is being undermined, on the other hand, they see the advantages of such a "pre-court instance". Local Courts chairmen reported that they often advised the parties to have their disputes first mediated at home, in other words, before the elder of the family, the village headman or the chief. "If there is a dispute between brothers, we can pass judgement but then we establish enmity between them. There might be killing. Some don't pass judgement. Instead we send them back to the family elders".

The fundamental idea of the traditional process, to balance out social conflict to the satisfaction of all parties, is still widely dominant in the Local Courts. Should parties still remain in strife after the judgement, "then there is no peace in the village, but quarrel". There are even cases in which the court treated it as a weak point of the plaintiff that he had not brought the dispute before the Chief before going to court. This was the case in Chiwaya v. Khudzemba. Chiwaya had first been ordered by the Msitu Local Court to pay damages to Khudzemba because his cattle had allegedly trampled Khudzemba's fields and destroyed his maize. In the appeal trial, however, Khudzemba was questioned in the following way.

**Question:** "Before you went to court, what did you do in this matter?"

**Answer:** "I only went to court and summoned appellant."

**Question:** "In a village according to our custom do you go to court direct without approaching the chief?"

**Answer:** "In my opinion we go to the court for the matter to get settled."

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82 In accordance with the Independence Constitution of 1964 (Article 80), appeals to the Privy Council were still allowed. With an amendment of the Constitution, this was limited to civil cases in 1965. Under the Republican Constitution of 1966, this possibility was abolished completely.

83 Article 62 (2) of the Republican Constitution.

84 A good example is provided in Kazigele White and Victor Chiwanda v. The Republic, Cr. App. 68 of 1967, M.S.C.A.

85 In accordance with the Malawi Supreme Court of Appeal (Amendment) Act, No. 24 of 1968.

86 G.N. 197 of 1962.

87 Section 25 of the Local Courts Ordinance.


91 App. C. 8 of 1967, Mchini L.A.C.

92 Civ. C. 48 of 1967, Msitu L.C.
Chapter One

One of the reasons given in the successful appeal judgement then was that: "the chiefs at home did not settle the matter first according to our custom."

The government does not really interfere with the arbitration activities of the chiefs and village headmen as long as the authority of the national courts, the Local Courts, is not undermined. There is no known case concerning a violation of section 25 of the Local Courts Ordinance.

Chapter Two

The Pluralistic Structure of the Legal System of Malawi

1. The Elements of Malawi Law

The law that is applied in Malawi has different foundations of validity. Although it is now common to speak of a legal dualism, this only is a clumsy characterization of the coexistence of different laws, that is "English law" on the one hand and traditional law on the other. Considering the fact that the laws of the various tribes usually differ from tribe to tribe and that also "English" law is composed of different kinds of law, it is more appropriate to speak of legal pluralism. On the whole, four complexes can be distinguished: local statutory law, English law, the customary law of the Malawian tribes, and the religious law.

1.1 The Local Statutory Law

The local statutory law comprises the laws which in the course of time have been enacted by the various legislative organs of Nyasaland and now Malawi. These are:

- The laws of the Legislative Council\(^1\) in the period between 1907 and 1963.\(^2\)

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1 The first Legislative Council of the Protectorate was created with Article IX of the Order-in-Council of 1907.
2 So far as they were accepted by the later constitutions. The last legal instrument of reception is found in section 5 (1) of the Republic of Malawi (Constitution) Act, No. 23 of 1966.
1.2 The English Law

As far as the English law now valid in Malawi is concerned, one has to distinguish between the law that was received with the first constitution and special separate laws.

1.2.1 The Received English Law

With Article 15(2) of the British Central Africa Order-in-Council of 1902, the English common law, the law of equity and special laws – the statutes of general application – were received as valid law. This reception was expressly confirmed in the later constitutions. Since the reception clause of the Republican constitution does not mention the statutes of general application it is certainly disputable whether these English laws are now still in force in Malawi. In E.J. Nyirenda v. W.L. Magodi however, the High Court still applied the English Sale of Goods Act of 1893 as a statute of general application.

The Statutes of General Application

The English statutes of general application, which on 11.8.1902, the date of the reception, were in force in England (and not necessarily in Scotland and Ireland), became applicable law in Nyasaland. Which statutes actually come into consideration within this category cannot be said definitively; decisions in this question must be taken by the court confronted with the question in each particular case. For instance, for Nyasaland it was first

recognised in Estate Mtemanyama and another v. Kitty and others that the English laws of inheritance were statutes of general application. The rules used to ascertain whether an English Statute was a statute of general application were laid down for the first time in a Nigerian case Att.-Gen. v. J. Holt. The court had to find out by which courts the law was used and for which segments of the population. The judge came to the conclusion that a law which was only applied by certain courts and which was valid only for a certain part of the population could not be a statute of general application. This interpretation has received wide recognition. In Malawi most of these laws have by now been replaced with local laws.

The Common Law and the Law of Equity

The common law was originally the law that was equally valid throughout England as opposed to the "customary laws" of certain areas. These local customary laws have long since disappeared, and for hundreds of years common law means the general English law which was developed by the judges in the old common law courts until the reform of the English constitution of the courts in the 1870's, and which since then has been developed by the judges in all English courts. Common law is case law: the principles of common law are found in earlier decisions and developed on their basis.

The law of equity is the unwritten portion of English law, which until the reform of the constitution of the courts in England was applied in a special court, the Chancery Court, in order to supplement the rules of the common law.

The doctrine of stare decisis, the binding force of precedents, was also accepted along with the English law. The extent to which the decisions of English courts and those of earlier regional courts of appeal still bind the Malawian courts at present cannot be exactly defined. However, the follow-

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6 L.C. (C.A.) 19 of 1967, M.H.C 7 But see Chief Young Dede v. African Association (1910) 1 N.L.R., 130 and Re Sholu (1932) 11 N.L.R. 37, where (in Nigeria) it was decided that the English Land Transfer Act of 1897 was not a statute of general application, since it was not in force in Scotland and Ireland. This ruling was, however, overturned in the judgment of W.A.C.A. in Young v. Abina (1940) 6 W.A.C.A. 180, where it was said that the Act was valid in Nigeria as it was a statute of general application.
8 1957 & N 234.
9 Especially the Statutes of Distribution of 1670; The Statutes of Distribution of 1685; The Wills Act of 1837; The Intestate Estates Act of 1884; The Intestate Estates Act of 1890.
10 (1910) 2 N.L.R., 1.
12 The Court of King's Bench, The Court of Common Pleas, The Court of Exchequer.
ing rules seem to be valid. Before Malawi's independence, decisions laid down by the Privy Council, the English Court of Appeal and Criminal Court of Appeal, as well as the decisions of the East African Court of Appeal and of the Federal Supreme Court, bound the Malawi courts, although they could be declared to be not binding by the Supreme Court of Appeal. Since Malawi's independence, decisions laid down by English Courts are only of persuasive force.

The Form of Reception

Due to unclear wording of the Reception Clause, it was at first doubtful whether the common law and the law of equity as well as the statutes of general application should be valid in the form in which they were in England on the 11.8.1902, the date of the reception. In Nyasaland this question has been answered by the later constitutions. Common law and the law of equity are in principle valid in the form and content which they have in England at the same time. Only the statutes of general application were "frozen" on the 11th of August, 1902.

In the beginning, however, the received English law could not be strictly applied in the form it had been received through the British legislature or English judges, but only so far as local circumstances permitted. The judges in the colonial courts thus were free to adapt the English law to local conditions. However, the judges of the High Court, particularly in the earlier colonial period, were very cautious to use their right to modify English laws. In fact they were inclined to use as much English law as they could.

Only very few were as bold as Lord Justice Denning, who in the East African appeal case before the Privy Council, Nyali Ltd. v. Att.-Gen., compared English law to an oak-tree. In the interpretation of Article 15 of the East Africa Order-in-Council of 1902, he said:

"Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over; but it has also many refinements, subtleties, and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they themselves understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges in these lands."

In recent times one can observe a tendency towards a greater flexibility in the application of the received English law. The authorization to modify received laws is not included in the Malawian Constitutions of 1964 and 1966, so that it is doubtful whether the Malawian courts today may adjust the received English law to suit local conditions. According to Allott the courts have the inherent right to modify the English law even in the absence of a corresponding legal authorization. This view has, however, been recently challenged by Park. The Malawian courts have not yet taken any decision in this question.

1.2.2 Other English Laws

Besides the received English laws that were introduced by the British Central Africa Order-in-Council, the following laws with English origin are

15 In this sense the Privy Council ruled in Trimble v. Hill (1879) 5 App. Gas. 342 (New South Wales) and in Chettiar v. Mahatmea (1950) A.C. 481. In Robins v. National Trust Co. (1927) A.C. 515 (Ontario) the Privy Council held that only those decisions of the Privy Council itself were binding for the colonial courts.
16 In R. v. Ziyya 4 Ny. L.R. 54, the High Court of Nyasaland declared the rulings of the E.A.C.A. as binding. At this time the E.A.C.A. was still the appeal court for Nyasaland.
17 This was expressly confirmed in Willard Andiseni Lufazena v. The Republic, Cr. App. 40 of 1967, M.S.C.A.
18 Of persuasive authority as opposed to binding authority.
19 Compare the text of the Reception Clause on p. 58.
21 The question was first clarified in Article 83 (1) (a) of the Nyasaland (Constitution) Order-in-Council of 1961.
22 Article 15 (2) British Central Africa Order-in-Council of 1902.
23 (1955) 1 All E.R. 646.
25 "Otherwise the application of English law should be stultified and the legal system would be brought into justifiable contempt." A.N. Allott, Essays on African Law, p. 25.
26 "It is of course, highly desirable that the courts' decisions should always result in justice, but the duty imposed on them is not a general one to administer justice, but rather to administer the rules of law that they are directed to apply by the relevant statutory enactments." A.E.V. Park, The Sources of Nigerian Law, p. 39.
also valid:

- Orders-in-Council that had been enacted by the English Crown directly for Nyasaland.
- English laws (imperial Acts of Parliament), whose sphere of validity had been extended to Nyasaland with the Order-in-Council. This possibility was provided for by the English Foreign Jurisdiction Act of 1890.
- English laws that were declared applicable in Nyasaland with a law of reception by the Legislative Council. Article 12 of the Order-in-Council of 1902 provided that the Legislative Council could receive any law of the United Kingdom, India or another colony.

1.3 The Customary Law

In Nyasaland, as in all former British colonial areas, tribal customary laws were not completely repressed with the reception of English law. Article 20 of the British Central Africa Order-in-Council provided that in legal disputes between Africans the courts “should be guided” by customary law. However, at the beginning there was doubt as to whether this legal formulation meant that, as a result of this authorization customary law had become a constituent component of the “general law” of Nyasaland. But after the introduction of the Native Courts and the instruction to these courts to administer customary law, the traditional customary laws had in any case become part of the law of Nyasaland.

From the very beginning the customary laws were only valid in so far as they were not “repugnant to the principles of justice and morality” or “inconsistent with any law in force”. With this general clause, which somewhat corresponds to our ordre public, the English judges were given a regulatory mechanism with which they could exclude the application of customary law. The same limitations were still valid and remains today, including the customary courts.

1.3.1 The Repugnance Clause

The exact meaning of this clause can be outlined only with difficulty. Justice and morality were always used as one uniform concept. For the English judges in the colonial High Courts, the measure for repugnance was the English legal and moral sense. This attitude was particularly clear in the Tanganyikan case Gwao bin Kilimo v. Kisunda bin Ifuti, where the judge in interpreting Article 24 of the Tanganyika Order-in-Council of 1920 (which had the same wording as Article 20 of the British Central Africa Order-in-Council) said:

“Morals and justice are abstract concepts, and every society has its own standard on which it measures what morals and justice mean. Unfortunately, the standards of different societies are never the same. But to which standard does the Order-in-Council refer, the English or the African? I have no doubt that the only standard on which a British Court can measure morals and justice is his own British standard.”

Generally it can be said that the English judges were bold enough in their interpretation of the repugnance clause, and that many customary legal principles which surely contradicted the normal sense of English morals, like polygamy, were not declared to be invalid. Everywhere the wise words of the Southern Rhodesian High Court in Tabitha Chiduku v. Chidano were received with approval: “Whatever these words (repugnant to natural justice and morality) may mean, I consider that they should only apply to such customs as inherently impress us with some abhorrence or are obviously immoral in their incidence.”

There are only very few cases known in which principles of customary law were declared inapplicable because of being held to be repugnant. In the West African courts, situations similar to slavery particularly were declared prohibited. In the case already mentioned (Gwao bin Kalimo v. Kisunda bin Ifuti), the judge found it repugnant that a father was made liable for the

27 In so far as these were received with the later Constitutions.
28 For example, the laws which were received with the Law Reform (Imperial Acts Application) Ordinance, Cap.3, 1957, rev. ed.
29 Section 12 (a) Native Court Ordinance No.14 of 1933.
30 Article 30 EG BGB. “Our” here refers to West German law (note of the translator).
31 Section 12 (4) Local Courts Ordinance No.8 of 1962.
33 1922 S.R. 55 p. 56.
actions of his adult son. From Malawi's (Nyasaland's) High Court no judgments are known in which a principle of customary law has been held to be repugnant. In G.J. Kamcaca v. S.P. Nkhota and another the already mentioned sentence from Tabitha Chiduku v. Chidano was quoted in agreement. There are only a few decisions of Subordinate Courts dealing with this question. In a case before the Acting District Resident of Nkhota-Kota, the defendant (a Christian African) opposed the obligation to pay damages with the argument that the payment of a sheep demanded by the plaintiff was a claim based on a pagan custom, which contradicted the English (i.e. a Christian) moral idea. He referred to a statement by the plaintiff, who had said that the spirits of the dead would not rest before the payment had been made. The magistrate thought this demand was not immoral. His judgement was upheld by the judge of the High Court.

In connection with another case, the Provincial Commissioner of Southern Province delivered his judgement on the sororate. The sororate is a customary legal institution, according to which a man has the right to marry the younger sister of his wife, and/or that his permission has to be asked if she wants to marry another man. The Provincial Commissioner commented on the judgement: “The only justification (for the judgement of the District Commissioner of Karonga) is that the sororate is an immoral custom. This view has not been held in Nyasaland or in any other country where this custom is found.”

1.3.2 The Inconsistency Clause

Before customary law can be applied in the courts, another condition had to be fulfilled: it must not be inconsistent with the other law or with particular components of the law. How far the inconsistency clause extended was and is differently regulated for the various courts. For the Local Courts, section 12 of the Local Courts Ordinance says that customary law should not be inconsistent with the constitution or with other laws. For the High Court and the Subordinate Courts, the wording of the inconsistency clause covers even

the received English law. The interpretation of this clause creates difficult problems. The courts which dealt with this question arrived at different decisions. There are only a few decisions which attempted to provide an exact definition. An extreme point of view is to be found in R. v. Robert and Aluwani. Concerning section 12 of the Native Courts Ordinance, according to which the inconsistency clause extends to “any Order-in-Council or any other law”, the judge said:

“In this section the legislature is writing the same language as that contained in Article 20 of the British Central Africa Order-in-Council, and to effect the same purpose, i.e. to make the application of native law and custom entirely subservient to the laws applied in the Protectorate and to any local Ordinance.”

A similar view was held by the appellant’s counsel in the Nigerian case Malomo v. Olushola. Counsel argued that a particular gift, which according to customary law would have been valid, did not fulfil the conditions of the English Statute of Frauds. As the inconsistency clause in Nigeria at this time referred to “any law for the time being in force”, and as the Statute of Frauds was in force as a statute of general application, the gift should have been treated as legally invalid in a strict interpretation of the inconsistency clause. Unfortunately the question was not decided by the court as the court found another way to settle the matter.

A strict interpretation of the inconsistency clause thus would mean that the application of customary law had to be excluded from all the legal spheres where English law and customary law exist side by side and show diverging regulations. As this is in fact the case in many legal spheres due to the different conceptions of both kinds of law, the systematic application of the clause would in a way have resulted in the complete elimination of customary law which would have turned the recognition of customary law on its head.
Understandably, the view expressed in *R. v. Robert and Aluwani* has found only little support. Also, the Nyasaland High Court departed from it in other decisions. In *Mphumeya v. Regina*, the court was concerned with the question whether theft between husband and wife is punishable. According to the common law, theft between husband and wife is not an offence. However, depending on the circumstances it can be punishable under Chewa or Ngoni law. The principles of common law and those of local law were therefore clearly inconsistent with one another. The judge said: "Be that as it may, the court does not feel that it would be justified... in adapting the common law in its application to the extent of displacing the native law and custom which governs the matter."

However, a satisfactory statement as to when inconsistency is given is thereby not made. Interpretations that rely on emotional or irrational considerations do not really engage with the wording of the clause. Also other attempts which seek to harmonise the wording of the clause with a desired equitable regulation seem to be somewhat far-fetched. Allott emphasises the will of the legislator. By this he means that in the situation of a conflict between customary law and English law, customary law different from English law must be applied so long as the English law was not introduced with the explicit objective to replace or abolish the customary law. Since this is not usually the case, inconsistency cannot be presumed. One therefore would have to assume that the legislator had the specific local conditions in mind and wanted to regulate them. To this presumption another one should be added: It could be expected of the legislator that he would make his laws after due consideration of the customary laws, and that he would choose his provisions in such way that they are in harmony with the prevailing law. In other words: Should customary law not be mentioned in the local legislation, it should then be understood that no change of the customary law had been intended.

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5 Ny. L.R. 2.
47 1956 R & N 240.
48 See Mphumeya v. Regina "... it would be justified..."
49 See A.N. Allott, *Essays in African Law*, p. 196: "...on the whole it is unreasonable to invalidate a rule of customary law because it is inconsistent with an introduced rule of English law."

However sensible this interpretation may be, it is of rather dubious standing with regard to the concept of inconsistency. For in the enactments of the local legislator one should expect a clear indication that the customary law remains untouched in order to clarify that the customary laws are not inconsistent and can be applied. Such a rule is found, for instance, in the Marriage Ordinance of 1902, the marriage law of Malawi, and in the Limitation Act.

The following example may elucidate how dubious it is to rely on the will of the legislator. In the appeal case *E.J. Nyirenda v. W.L. Magodi*, the High Court ruled that the sale of a machine between two Africans had been regulated by the English Sale of Goods Act of 1893 and not by the respective customary law. This decision caused some attention in professional circles, and especially in the Ministry of Justice. The case was decided before the parliament had passed the Malawian Sale of Goods Act, which essentially restated the provisions of the English law. The local act, however, was not yet in force at the time the case went to court. The will of the legislator in fact was to leave the traditional sales law untouched. However, the law did not contain any indication of recognition or exclusion of customary law, and it is not clear whether this was simply forgotten or whether the parliament shared Allott's view. After *E.J. Nyirenda v. W.L. Magodi*, one thinks that it is necessary to clarify the legal situation with the insertion of a corresponding provision. According to Ibik, the inconsistency clause can only be effective if the court dealing with the case is empowered to apply both types of the law in question. Park sees another solution. For Nigeria he interprets "incon-
consistent with any other law" to the effect that "any other law" should be understood to mean only the local Nigerian legislation. It is apparent that with the inconsistency clause no clear and appropriate statement could hitherto be made as to when customary law is applicable and when it is not. The Malawi Government intends to solve the problem with new provisions, as has already happened in Ghana and Tanzania.

1.3.3 The Interpretation of the Incompatibility Clauses in the Local Courts

The question of when customary law cannot be applied due to reasons of repugnance or inconsistency had not been easy to answer for the English judges in the British Courts. It is easy to imagine how much more difficult, for purely practical reasons, it must be for the chairmen of the Local Courts. How should they decide whether a particular principle of customary law contradicted the English rules of justice and morality when they did not even have an idea about these? How should they decide whether a rule of customary law was inconsistent with the prevailing laws, when they can neither read and write nor speak English? Most Local Courts chairmen thus simply cannot make the consideration demanded of them. This, in fact, does not worry them in the least, as one Local Courts chairman assured me.

1.4 The Religious Law

For the Asians living in Malawi who do not belong to any Christian religious denomination, the law which their religion prescribes is valid for specific fields of law, such as marriage, divorce and inheritance. Marriage and divorce law is governed by the Asiatic (Marriage, Divorce and Succession) Ordinance. For inheritance, however, section 18(3) of the Wills and Inheritance Act now has become the applicable law. Muslim law does not play any role in legal relationship between Africans. Although a large section of the Yao population is Muslim, issues of Yao marriage, divorce, affiliation and inheritance are regulated solely according to their customary law.

60 It is estimated that about half of the Malawian Local Courts chairmen could not read or write English.
61 Ordinance No. 13 of 1929.
62 Act No. 25 of 1927.

2. Jurisdictional Conflicts in Cases of Customary Law

2.1 The Present Situation

The Local Courts are primarily competent for actions according to customary law. Whether customary law can also be applied in the British Courts at present is doubtful. The jurisdiction and the question as to which law should be applied was regulated for the High Court and the Subordinate Courts in the same manner in the Nyasaland constitutions and also in the Independence Constitution of 1964: one provision governs the material jurisdiction, another one the reception of English law, and a third one regulates the application of customary law. The following are the relevant provisions of the British Central Africa Order-in-Council of 1902:

- Art. 15(1): There shall be a High Court with full jurisdiction, civil and criminal over all persons and matters in the Protectorate.
- Art. 15(2): Such civil and criminal jurisdictions shall, so far as circumstances admit, be exercised in conformity with the substance of the common law, the doctrine of equity and the statutes of general application in force in England on the 11th August 1902.
- Art. 20: In all cases, civil and criminal, to which natives are parties, every court shall (a) be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order-in-Council or Ordinance and (b) shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

Until 1964 these provisions were taken over literally by the successive Constitutions. As regards the application of customary law, also the law constituting the courts refers to Article 20 of the Order-in-Council of 1902. In the Republican Constitution, however, there is no provision corresponding to Article 20. Also, section 14 of the Courts Ordinance was repealed by

64 For the last time Article 75 of the Constitution of Malawi of 1964, section 15 (a) and 15 (b) of the Malawi Independence Order.
2.2 The Situation up to the Enactment of the Republican Constitution of 1966

The situation before 1966 is relevant because prior to the creation of the Native Courts in the year 1933 the question of whether customary law was a constituent component of the law of Nyasaland at all depended upon the extent to which it could be applied in the courts. Moreover, it has been held recently that British courts may now apply customary law even without a proviso corresponding to Article 20. In the following pages, I shall begin with an analysis of the situation before the enactment of the Republican Constitution.

2.2.1 The Application of Customary Law in the British Courts before 1966

Since, according to Article 20, the courts had only to "be guided" by customary law, the question arose whether customary law could at all be applied as law. The courts dealing with the interpretation of this concept came up with different decisions. That this did not lead to a uniform administration of justice was partly the result of the fact that no court made its statement on this point the ratio decidendi. In J.S. Limbani v. Rex the following was said:

"Articles 15 and 18 set out the jurisdiction of the High Court and the Subordinate Courts, but do not include in it native law and custom. Article 20 states that the court shall be 'guided', it does not say that the jurisdiction shall be exercised 'in conformity with native law'." 68

66 That was confirmed by high ranking officers of the Ministry of Justice. The High Court case of G.J Kamcaca v. S.P. Nickota and another, Civ:C. 346 of 1967, M.H.C., J.A.L. Vol. 3 (1968), p. 178ff., in which customary law was applied does not contradict this situation as here Rhodesian customary law was applied, and the judge saw it as a question of application of "foreign" law. Certainly the court did not thoroughly consider the question of jurisdiction. Compare J.A.L. Vol. 3 (1968), p. 181.


68 Which has binding force as opposed to the obiter dictum in the judgement.

69 6 Ny. L.R. 6.

70 Similar decisions were Mwase and the Blackman's Church of God which is in Tongaland v. The Church of Central Africa (Presbyterian) Sanga Division 4 Ny.L.R.45; Chitema v. Lupanda 1962 R & N 290; R. v. Robert and Aliwani 5 Ny. L.R. 2; Mwale v. Kaliu 6 Ny. L.R. 169 and in Mubalira v. Kayisi C.A. (L.C.) 5 of 1964, Ny. H.C. Both the last decisions in the first place deny concurrent jurisdiction in customary law cases between "Customary" and "British Courts".

71 1935 S.R.L.R 86.

72 1918 S.R. 59.

73 1922 S.R. 55.

74 5 Ny. L.R. 11.


76 1956 R & N 240.

77 Present designation: Nsanje.


79 See, for example, Civ. C. 151 of 1931, D.N.C., Karonga, in: ZA 9/83.

The view that to be guided did not allow the application of customary law was made particularly clear in the Southern Rhodesian case Komo and Leboho v. Holmes 71, where the interpretation of section 50 of the Rhodesian Order-in-Council of 1898 was involved. Section 50 runs as follows: "In civil cases between natives the High Court and the Magistrates Courts shall be guided by native law and custom so far as that law is not repugnant to natural justice or morality, or to any order made by Her Majesty-in-Council or to any proclamation or ordinance." The judge said:

"Should the provision mean that the native law should have precedence before the general law of the country when Africans are parties, then an abnormal situation would arise: In the relations of an African to a European, another law would have to be applied as in his relations to an African. If one considers this possibility and the use of the concept 'guided', one comes to the conclusion that section 50 must be interpreted and applied very restrictively. In my opinion, the provision provides that native law shall not precede common law, but that in legal disputes between Africans it must be applied as a guide in the application of the common law."

This decision, however, contradicts other Rhodesian decisions, as for example Duma v. Madidi 72 and Tabitha Chiduku v. Chidano 73, where it was explicitly emphasised in a custody case that customary law had to be applied.

But also in Nyasaland, not all judges argued like their colleagues in the cases mentioned above. In E. Thipa v. K. Thipa 74, R. v. Sidney and Emily 75 and Mphumeya v. Regina 76, to be guided was interpreted in a much more flexible manner, with the result that customary law could be applied. The reports from the Subordinate Courts also show that customary law was applied there at least before the enactment of the Native Courts Ordinance without any legal hesitation on the part of the District Magistrates. The District Commissioner of Port Herald 77, for example, reported divorce cases in which the repayment of "lobola" (bride price) was involved. These cases were exclusively judged according to customary law. One sees the same in cases tried in other areas of Nyasaland. 79 One should not conclude that lay
judges here gave decisions in accordance with customary law without the control of the legally qualified judges of the High Court. The Acting District Resident of Nkhotakota reports the following case in his report to the Chief Secretary for the year 1920: “The plaintiff demanded a sheep from the defendant, to which he had a claim in accordance with customary law, because his niece, the defendant’s wife, had died giving birth. All persons present agreed that damages should be paid according to customary law. And so I decided for the plaintiff. My judgement has been confirmed by the judge of the High Court.”

Therefore we can note that despite the conflicting High Court decisions at least during the first development phase of the Malawian legal system, in disputes between Africans customary law was predominantly applied. In the first place this concerns the Subordinate Courts since actions based on customary law were seldom brought to the High Court. Those decisions which associated the concept “to be guided” only with the possibility to moderate the rigid application of English law with a reference to customary law, have therefore been criticised as faulty interpretations of Article 20.

In the search for an answer, Roberts presents a theory which so far is unique among the prevailing views or commentaries on Article 20 or on the corresponding provision in other colonial constitutions. According to his view, the application of customary law at least in the High Court was already justified by reference to Article 15(1) of the British Central Africa Order-in-Council. “There is nothing in the Order-in-Council to suggest that ‘all matters’ do not include claims based entirely on customary law.” Article 20 had to regulate the question how customary law would be applied, namely “in its own right, subject to inconsistency and repugnance.” However, this view cannot be supported. Article 15(1) fixed the jurisdiction of the High Court only in so far as it concerned the circles of persons (over all persons) and the subjects of dispute (over all matters). But Article 15(1) did not say anything as to the law which should or could be applied in the High Court. Therefore the words all matters were restricted. They were all-inclusive only in as much as they were known to the law to be applied in the High Court. But which law was to be applicable was a matter settled by the reception clause in Article 15(2). The wording of Article 15(2) contradicts the view presented by Roberts. The jurisdiction of the High Court was not to be exercised somehow in conformity with common law or equity, but as such jurisdiction, and such jurisdiction was the jurisdiction over all persons and matters. The jurisdiction of the High Court as outlined in Article 15(1) only becomes alive and understandable through the prescription to apply the received law. The clear wording of Article 15 therefore does not allow the conclusion that customary law in Article 15(1) was implicitly recognized as valid law. The application of customary law could, therefore, only be based on Article 20 as the supplementary provision to Article 15.

The problem lies in the interpretation of the phrase to be guided. What makes the interpretation so difficult is the combination of the obligatory wording of “shall” with the somewhat colourless concept “guided”, which is not the same as “apply” or “administer”. One thing is clear: when the other conditions of Article 20 were given, the judge had to be guided by customary law in his decision. To that extent the room for his judicial discretion was limited. The concept to be guided may therefore be determined negatively in the following manner. The courts shall be guided does not mean:

- The courts must apply customary law. In this case, the legislator would have used concepts such as apply or administer.
- It is within the discretion of the courts whether or not to apply customary law at all or to consider it in its decision. The meaning of shall speaks against such view.
- Customary law should only be used as a guide in the application of English law. The possibility of a rigid application of English law was already present as the courts were free to adapt the English law to the special circumstances.

From this it can be concluded that the phrase to be guided compelled the courts to refer to customary law when the other conditions of article 20 were given, but that the intensity of this reference was not legally fixed but

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80 In: ZA 572/1920.
82 S. Roberts, op. cit., p. 110.
83 S. Roberts, op. cit., p. 110. The logical consequence of this view would be that the High Court could apply customary law in accordance with Article 62 of the Republican Constitution, which somehow corresponds to article 15 (1).

84 The application of customary law in the discretion of the courts is provided for, for example, in section 11 (1) of the Native Administration Act 1927 of the Union of South Africa, "... it shall be in the discretion of the courts... to decide such questions according to the native law".
remained in the discretion of the judge. Guided by native law and custom thus included the full application of customary law, but also allowed only a loose reference and partial application of customary law in a given case. This means that the customary laws were already constituent components of the laws of Nyasaland even before the enactment of the Native Courts Ordinance, since they could be applied in a British type of court. 85

2.2.2 The Question of the Concurrent Jurisdiction

In the light of this insight, the issue of the concurrent jurisdiction that had been raised and answered negatively in some of the cases mentioned has become rather clear. As already pointed out, the provision of Article 20 was valid for all Subordinate Courts. Besides, section 12 of the Subordinate Courts Ordinance of 1906, and since 1929 section 12 of the Courts Ordinance of 1929, explicitly stated once more that in their administration of justice, the Subordinate Courts were bound by Article 20. According to section 20 of the Subordinate Court Ordinance of 1929, the magistrates were not compelled to follow the written law of procedure in “native matters” but could also follow Article 20 in procedural questions.

Since the Subordinate Courts could apply customary law before 1933, and, as has been shown, in fact did so, the introduction of the Native Courts, which had been created especially for the application of customary law, automatically had to lead to a concurrent jurisdiction in customary law cases, unless the jurisdiction of the Subordinate Courts would have been limited at or after the enactment of the Native Courts Ordinance. But this was not the case. The old situation was retained, nor was it to be changed with the introduction of the Native Courts, as appears from a letter of the Governor to the Colonial Secretary. 86

The court decisions which basically reject a concurrent jurisdiction between the Subordinate Courts and the Native or Local Courts must be therefore be opposed. In Mwase and the Blackman’s Church which is in Tongaland v. The Church of Central Africa (Presbyterian) Sanga Division 87, it was said obiter:

85 J.O. Ibik, *The Law of Marriage in Nyasaland*, p. 49 also comes up with the same conclusion.

86 “The introduction of the Native Courts Ordinance should not be accompanied as yet by the repeal of section 12 of the Subordinate courts Ordinance.” From the letter dated 17.3.1932, in: ZA S 592/1933.

87 4 Ny. L.R. 45.

One has to agree with the judge that section 20 indeed could not establish a concurrent jurisdiction because this section only permitted deviations from the law of procedure. But surely (and this point is not closely examined in the decision) section 12, read together with Article 20 of the Order-in-Council of 1902, could establish this. In any case, the question of whether the legislator intended to establish concurrent jurisdiction of the Subordinate Courts with the Native Courts through section 20 or section 12 was irrelevant because these provisions had been enacted at a time when the Native Courts did not yet exist, and the problem of concurrent jurisdiction had not arisen at all. Concurrent jurisdiction, therefore, existed to the extent that customary law could be applied in the High Court and the Subordinate Courts.

3. The Internal Conflicts of Law

In the pluralistic legal system the judge who has to take a decision in a case is often faced with the question from which set of norms he should draw the ones for his decision. This is called internal conflict of law 88, which is to be distinguished from the international conflict of law governed by the rules of Private International Law. Of primary interest are the conflicts in the legal spheres in which English law had been superimposed on traditional law. In Malawi there are only a few legal regulations for the settlement of internal conflicts of law, and no use is made of the rules of Private International Law. 89 In the following it will be shown where in cases of internal conflicts of law the matter is decided in favour of the application of customary law. Two general criteria, those of repugnance and inconsistency, have already been discussed. Besides, it is regulated that customary law (a) can only be applied in the legal relationships of a distinct circle of persons, if (b) it is applicable at all.


3.1 The Circle of Persons

3.1.1 Customary Law in the Relations between Africans

Until 1966, customary law could be applied in the British Courts if all the parties to the legal dispute were Africans. For the Local Courts this is basically the same since their jurisdiction is normally restricted to disputes between Africans. The category of persons thus covered was, however, not always the same. In the course of years the concepts of “African” or “native” had attained different meanings.

At first, the term native was used to mean every African who was not of European or Asian extraction, including also Arabs, Somalis and Baluchi. The position of coloureds caused problems since there existed no special regulation for them. In Carr v. Suleman Abdul Karim, the High Court decided that the son of an Indian father and an African mother was not a native, because of his Asian descent. Another definition was valid according to section 2 of the African Courts Ordinance of 1947: Natives were the members of the tribes living in Nyasaland, Southern and Northern Rhodesia, Tanganyika, South Africa, Swaziland, Bechuanaland, Mozambique and the Belgian Congo.

At present yet another concept is valid according to section 2 of the Local Courts Ordinances: African is any member of an African race or tribe as well as persons who live like a member of such a tribe. The meaning of “live as members of such a tribe” is rather unclear. Africans from other African states certainly fall under this concept as well as people of other races who, for instance by marriage, are fully integrated into tribal life.

3.1.2 Customary Law in Relations between Africans and non-Africans

In the Local Courts with extended jurisdiction customary law can be applied even in legal disputes between Africans and non-Africans. The conditions for this are regulated in section 10 of the local Courts Ordinance in the following ways:

“Provided that in respect of any cause or matter involving an issue to be determined by customary law, any jurisdiction conferred under this section shall extend to the determination of such cause or matter only where it is shown that every non-African who is a party has voluntarily assumed a right, liability or relationship which is the subject matter of the dispute and which would have been governed by the customary law concerned if all the parties had been Africans.”

It is not always easy to say when a non-African voluntarily assumes a right or a liability according to customary law. The first place it will very much depend upon the intention of the non-African concerned. As a rule, however, this will only seldom have been explicitly stated, so that one is left with conjecture. Roberts lists a few presumptions: When a non-African enters a legal relationship with an African or an African lady who, for example, enters into a marriage under customary law, which in this typical form is known only by the customary law, it can be concluded that he has voluntarily subjected himself to the application of customary law. The local conditions would also play a role. Should a non-African buy a couple of eggs in a village, then customary law should govern this contractual relationship.

The concept voluntarily assumes, when supplemented with such presumptions, may help to determine the question for contractual relationships, but certainly not for the sphere of torts. For example, does a motorist driving in the bush voluntarily assume, in accordance with customary law, whatever rights or liabilities that might result from an accident? The practice of the courts has established another assumption: The party complaining in a Local Court, or who lets himself be sued there without opposition, indicates that he does not object to the application of customary law in his case.

90 Section 15 (b) Malawi Independence Order of 1964.
92 On the situation in other African countries, see A.N. Allott, op. cit., p. 173ff.
94 S. Roberts interprets the concept in yet another way. He writes: “In the absence of authority it is suggested that neither ethnic connection nor reciprocal adoption (of the type necessary to constitute membership of the tribal group) are necessary to bring persons within the second limb of the definition.” S. Roberts, The Growth of an Integrated Legal System in Malawi: A Study in Racial Discrimination in the Law, p. 137.
95 O. Chirwa, then parliamentary secretary of state, interpreted the rule in the following way: “You assume ... in the ordinary way by marrying my daughter, you assume it by walking into my house and picking a quarrel, you assume it by giving babies to our daughters”. See the 2nd Reading of the Local Courts Bill. In: Records of the Proceedings of the 76th Session of the Legislative Council, p. 195.
98 Should objection be raised against the jurisdiction of the Local Court, the question is decided by the Resident Magistrate.
Local Courts chairmen do not really concern themselves with the question of whether a non-African had voluntarily assumed a right or a liability according to customary law. The case Malindi v. Therenaz99 from the Blantyre Urban Court may serve as examples: An African sued the proprietor of a watch business, a Swiss, for damages as his watch had allegedly been lost while in the repairer’s custody. The case was decided in accordance with customary law. Surely one could not assume that the watch-maker by agreeing to repair the watch had voluntarily subjected himself to the application of customary law. Several Local Courts chairmen asserted unanimously that in such cases customary law would always be applied.100 The following answer may stand for all others: “We follow cases, not not colour.”

3.2 Customary Law as the “Law to be applied”

In order to be applied, customary law must in the first place be applicable. This may sound self-evident, yet two important sets of questions are concealed in this sentence.

In the first place customary law must contain a legal rule according to which the decision of an individual case is possible. This question is of special interest considering the socio-economic development which has taken place in Malawi during the last 70 years. As I have pointed out already, the legal relationships of modern life, as for example, economic, tax, labour and company law, are governed completely by English law or by Malawian laws based on the English model. However, it is sometimes disputable how far customary law has at all been able to adapt itself also to developments outside these fields. Are there customary legal principles at all, which, as in the case of Malindi v. Therenaz101, state rules in accordance with which a proprietor of a watch-making business is liable for the loss of a watch during the repair?102

Customary law must further be the “law to be applied”. The rule that customary law should be applied in the legal relationships between Africans is not without exceptions. To be sure, the Malawian law does not give Africans the possibility to opt for the English personal status through a formal declaration.103 However, Africans in Malawi can change their legal status albeit for a special category of legal relationships only. Should Africans for instance marry in the form of English law according to the Marriage Ordinance104, a large part of their family relationships will thereafter be governed by English law. Customary law is then no longer applicable.

3.3 The Choice between Two or More Customary Laws

Section 12(d) of the Local Courts Ordinance provides a cue according to which the courts shall decide which of the possibly applicable customary laws is to be applied. The Local Courts are to apply the law prevailing in their court district.105 This provision does not cause problems as long as members of only one tribe live in the court district. However, conflicts arise when the parties belong to different tribes, when in the district of the court the law of a third tribe prevails, or when in the area of the court, as for example in a city, none of the customary laws prevails.106 Largely ignoring the wording of section 12(d), fairly clear rules have been established in the course of time:

- In marriage cases the law of the tribe according to which the marriage was contracted will be applied. This rule has its most important consequence in cases of mixed marriages between Africans. The respective marriage law of one of the parties may or may not recognize the bride-price, lobola. In a mixed marriage between a Ngoni and a Chewa, for instance, the woman will have validly married in accordance with Ngoni law, if, as is normal with the Ngoni, the lobola had

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100 During discussions with the author.
101 Civil Cause No. 71 of 1968, Blantyre Urban Traditional Court.
102 This question will be analyzed in more detail in the following chapter.
103 In the French colonies Africans could opt since 1946 for the French “statut moderne” and renounce their “statut coutumier”. This resulted in the application of French law for their entire legal relationships. See P.F. Gonidec, Les Droits Africans: Evolution et Sources, Paris: Librairie générale de droit et de jurisprudence, 1968, pp. 255/56.
104 Ordinance No. 3 of 1902.
105 Section 12 (d) “...prevailing in the area of the jurisdiction of the Court.” “Prevailing” in this connection should be understood as dominant: compare A.N. Allott, Essays in African Law, p. 160 and the Nigerian case mentioned there: R. v. Ilorin Native Court, ex parte Amenu (1953) 20 N.L.R. 144.
been paid. Should this not have been the case, she will be regarded as having married in accordance with Chewa law.  

- In inheritance cases, the law of the tribe to which the deceased belonged will be applied. This idea was for the first time enacted in section 11(a) of the inheritance law of 1964 which, however, has not come into force.  
  Although this provision was not included in the inheritance law which is valid at present, this rule has never been questioned.

For other civil disputes Elias' statement on English colonies in general also holds true for Malawi, namely that the Local Courts apply a kind of jus naturale and thus achieve a more or less just solution to the conflicts.

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108 Wills and Inheritance (Kamuzu's Mbumba) Protection Ordinance, No. 36 of 1964


110 Compare with the decision of the Privy Council in the Indian case Balwant Rao v. Baji Rao (1920) L.R. 47 I.A. 213: "Now it is absolutely settled that the law of inheritance is, in any given case, to be determined according to the personal law of the individual whose inheritance is in question".

111 T.O. Elias, op. cit., p. 213.


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Chapter Three

Legal Development, Legal Conflicts and Planning in Individual Spheres of Law

1. Preliminary Remark

The following pages will show how legal development has progressed within the basic structure of the Malawian legal system described in the first two chapters. The inquiry will primarily focus on legal pluralism, the conflicts between the different bodies of law, and on the legal-political planning ideas applied by the different governments of Malawi (or the then Nyasaland) in order to influence legal development. Since levels of development and the problems and nature of the individual spheres of law are different, the latter will as far as possible be described separately in this chapter. An analysis summarising the whole legal development will be given in a later chapter. Due to the wealth of material, the description of the individual spheres of law must necessarily be limited to certain basic principles. Within the individual spheres of law emphasis will be given to those in which customary law and the Local Courts have their widest validity and efficiency, namely in the law of marriage, inheritance and land.

The significance which the Local Courts and the customary laws at present have in Malawi is clearly shown by the number of cases decided in the Malawian courts in the year 1967.

1 For a summary description of the legal policy see chapter 4.


2. Legal Pluralism, Legal Conflicts and Planning Ideas in Marriage and Family Law

The family law of Malawi comprises several coexisting laws: the various customary laws, English law and Malawian statutory law. In the following discussion, the most important of the principles of these laws will be described first.

2.1 The Traditional Family Law

An understanding of the traditional family law is not possible without a knowledge of the family structure of the tribes, as these not only determine the social but to a great extent also the legal relationships among Africans. Before an inquiry is made into specific legal problems, first a short overview of the family structure of the tribes must be given. Generalisations are, regrettably, inevitable. 10

2.1.1 The Family Structure of the Malawian Tribes

The tribes of Malawi consist of clans whose origin goes back to an historical or mythical ancestor or ancestress. As political units, the clans have become meaningless in most of the tribes, because they no longer live in close association but are mostly scattered all over the country. With the Ngoni, clan membership determines the special political status of the individual, i.e. whether he belongs to the king’s family, to the aristocracy, or whether he is a commoner.

All tribes determine their membership unilineally. The Chewa, Nyanja, Chipeta, Mang’anja, Yao and Lomwe are matrilineal. Clan membership is determined by the mother’s line. The Ngoni, Tumbuka, Ngonde, Nyakyusa and Tonga 11 are patrilineal; membership is determined according to the father’s line. 12 Generally, kinship relationships which come with clan membership are more important than those resulting from marriage. Kinship rela-

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12 Examples of tribes which determine their membership dualistically are the Yoruba in South East Nigeria and the Nyaro in Sudan. In: A. Radcliffe-Brown and D. Forde (eds.), African Systems of Kinship and Marriage, p. 333.

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<table>
<thead>
<tr>
<th>Local Courts</th>
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<td>13,803</td>
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<tr>
<td>Civil cases</td>
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tions are expressed in classificatory terms, i.e. a certain class of relatives is named with the same term. Thus father is not only the proper father, but also his (father's) brothers. By mother not only the proper mother is meant, but also (the mother's) sisters. Accordingly all children of fathers and mothers are referred to as brother and sister.

All tribes allow polygamy. A man may be married to several women at the same time. The clans are exogamous, however an exception is made by almost all tribes to permit marriage between cross-cousins. The children of a brother and a sister (cross-cousins) may marry whereas marriage between the descendants of two brothers or two sisters (ortho-cousins) is forbidden as incest between brother and sister. With most of the tribes – predominantly among the patrilineal ones – the sororate and levirate marriages were very common in the past. In case of the sororate, it was generally common to give the son-in-law a sister of the wife as second wife when the first wife was infertile. In this way the relationship between the two families would be strengthened. In case of the levirate marriage, the levir, in most cases the brother of the deceased, took the position of the original husband after the husband's death and continued the marriage. The children of this marriage were considered as the children of the deceased. Through this custom the social security of wives who had lost their bread-winner was provided for.

The Matrilineal Tribes

In all matrilineal tribes, the most important unit in the family is the mbumba. This is composed of a group of full sisters and their descendants under the guardianship of the eldest brother of the sisters. The matrilineal extended family consists of the mbumba, who go back to a common ancestress and who constitute the members of the clan who live together. In practice, they rarely embrace more than three to four generations. The extended family usually constitutes the nucleus of a village. The eldest matrilineal male relative is the head of the family and as a rule also the village headman. Conflicts between the guardians of the individual groups of sisters often lead to splits in extended families and the foundation of new villages. This often happened when an adult man who was a guardian of his group of sisters was no longer willing to submit to the authority of the guardian of the group of

sisters of the next higher generation, who was the eldest brother of his mother. Status and property are inherited within the matrilineal family, i.e., a man's heirs will not be his own children but his brothers' or his sisters' children.

The nuclear family (father-mother-child) has no great significance in the matrilineal tribes. The relations coming with membership of the matrilineal family are stronger than those coming from the marriage; the relationship of a wife to her brother is more important than the one between herself and her husband.

The husband who after the wedding lives in the village of his wife (or wives), i.e. uxorilocally, is a stranger in his wife's family. "He is a beggar; he has simply followed his wife." His wife's brother has far more authority over the children than the father himself; he (the wife's brother) must provide for the education of the children and punish them when necessary (a father might not beat his children, for example). Accordingly, his nephews help him in the field, tend his cattle and can expect one day to benefit by inheriting his property.

Chiefs, village headmen and the heads of extended families in most cases reside in their natal village so that they may properly discharge their duties. In other cases, the wife's relatives do not normally permit the husband to take the wife out of the village. For that reason the "cross-cousin-marriage", which allows a man to marry in his own village, is favoured and widespread. The husband, especially when he lives in his own village, i.e. virilocally, is permanently exposed to conflicts, because of the difficulty he has in reconciling his position as guardian of his group of sisters with his position as husband and father.

13 Compare with A. Radcliffe-Brown and D. Forde (eds.), op. cit., p. 4.
14 Here I use this concept according to R. König (ed.), Soziologie, Das Fischer Lexikon Nr.10, Frankfurt am Main: Fischer, 1967, p. 74.
17 Richards also emphasizes that the position of the maternal uncle with the matrilineal tribes of Nyasaland is much stronger than that with other matrilineal tribes of Africa. A.I. Richards, op. cit., pp. 230, 231.
The English tribes, the nuclear family has by far greater importance than in matrilineal tribes. Marriage is virilocal in principle. The wife lives in her husband's village. However, the Ngoni in Mchinji, Dedza and Ntcheu Districts have adapted the uxorilocal marriage form of the matrilineal tribes in their neighbourhood. Inheritance and succession to the position of chiefs and village headman are nevertheless still determined according to patrilineal rules. On the other hand, the matrilineal Mang'anja in the south of the country have largely adopted the patrilineal marriage form of the Sena. Inheritance and succession to positions of chiefs, however, are still determined according to matrilineal rules.

In polygamous marriages the significance of the individual nuclear families, the "houses", is determined according to the principle of seniority. The extended patrilineal family consists of the families of a man and his sons and mostly comprises three generations.

2.1.2 Marriage and Legal Relations during Marriage

All Malawian tribes distinguish sharply between a marriage - the legal association of two persons of different sex - and friendship which is not recognized as marriage. The criteria which make the living together a marriage are to a great extent the same with all tribes:

- The consent of the marriage partners.
- The consent of the wife's guardian.
- The formal meeting of the marriage witnesses, the *ankhoswe*.
- In case of the tribes practising the lobola marriage, agreement over the payment of the lobola is an additional requirement.


22 The English translations mostly used are: marriage guardian, trustee, advocate, surety, sponsor, and witness.

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The formal introduction of the marriage partners to one another is accompanied by an exchange of various gifts. However, the absence of the presents and the required ceremonies does not affect the validity of the marriage if the conditions mentioned above have been fulfilled. The exchange of gifts is to be distinguished from the payment of the lobola, the "bride-price", the payment or non-payment of which has important legal consequences and which, at the same time, constitutes the criterion that distinguished the two basic types of traditional marriage found in Malawi.

The conditions for the validity of a marriage common to all tribes will be presented first.

**The Agreement of the Marriage Partners**

A marriage contracted without the agreement of both marriage partners is not a binding marriage. That is also true for marriages in which the relatives have chosen the future marriage partner for their son, nephew or daughter or niece, or where girls are already "betrothed" before puberty, as is common with the Chewa. Of course, as in all societies, a certain amount of social control could be exercised on stubborn children, which, as in the case of the sororate and levirate, was even institutionalised and sanctioned. However, there were no legal means to enforce such marriages. Generally the probability of forced marriages was much lower than in other forms of society. In the tribes practising bride-price-marriage, a father who forces his daughter into marriage must take into account the probability that there soon will be a divorce and that he would have to repay the bride-price, a situation which would lead to considerable social conflicts between the two families.

Among the other tribes forced marriages are hardly possible due to the relatively strong position of the women.

In 1936 the question of forced marriages in Nyasaland was the subject of an extensive inquiry in reaction to the demand by the Colonial Office for a report on the local situation. It is clear from the Provincial Commissioners' reports that in Nyasaland forced marriages were not common. 23 "Consent is always in

23 See the report of the District Commissioner of Fort Herald (present designation: Nsanje) on the bride-price system of the Sena, dated 3.3.1931, in: ZA NS 1/26/6.

24 See the letter of the Colonial Secretary to the Governor, dated 17.8.1936, in: ZA 1918/31/ in the House of Commons, a question was put to the Colonial Secretary over an article in the Africa Standard on forced marriages in Kenya.

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the hand of the girl”, reports the Provincial Commissioner of Northern Province, emphasizing that in such a case the court would quickly decide to nullify the marriage and punish the guardian who exercised force.

The Consent of the Guardian

No marriage can be contracted without the consent of the guardian, in particular the woman’s guardian. Consent is required irrespective of the age of the individual wanting to marry. However, the consent of the father in patrilineal tribes or of the maternal uncle in matrilineal tribes was not a decision of the guardian as an individual. The whole family considered the matter, sought the advice of the village elders and questioned the girl, as the marriage concerned the whole family, even the whole village. Roberts reports that especially among the Tonga, the man’s whole village participated in the choice of the wife – his wife was also “their wife”.

The Ankhoswe

Every marriage partner as a rule has one, among the Yao and Chewa often two, ankhoswe. The ankhoswe are the protectors of the marriage. They see to it that the marriage does not break apart and they settle marriage disputes. In most cases this role is performed by a close male relative – the brother of the father or the mother, one’s real brother or a good friend. During the preparation of the marriage, the ankhoswe play an important role. After the young man wanting to marry has announced through a friend or personally that the girl wants to marry him and that her guardian is willing to give his consent, he sends his ankhoswe to those of the girl. As a rule a gift will be presented by the man to the guardian of the girl at the meeting and then the proposed marriage will be discussed. This formal meeting of the ankhoswe is the irrevocable condition for a legally recognized marriage.

That this is still the case may be illustrated by the following case. In Derby Bweya v. A.D. Poya, plaintiff B. petitioned for a “divorce”. B. and P. had intended to marry. The appointment for the formal meeting of the ankhoswe was made and the amount of the bride-price had already been fixed. But somehow the meeting had not taken place. B. and P. lived together for a year until they separated. During their living together P. had changed the name of “Miss B.” to “Mrs. B.” on a certain document. “He changed my name to be his wife” is how the complainant expressed herself. The Local Court divorced the parties, treating them as having been married. “The second proof is that he changed the name of Miss B. to Mrs. B. which of course reveals the marriage between them.”

But the court of appeal held a different view. Since no formal meeting of the ankhoswe had taken place, it was “proved beyond reasonable doubt that there was no proper marriage”. Consequently the order of divorce was set aside.

The Local Court in this case should not be considered “progressive”. At present, even within the urban population where traditional ties are no longer strongly binding the formal meeting of the ankhoswe is still considered to be the decisive characteristic which legalizes the association between husband and wife. The Local Courts chairmen of Blantyre, Zomba and Lilongwe, the three biggest cities of Malawi, asserted unanimously that they could not accept the existence of a marriage if the ankhoswe had not met. Even a “wildly” started marriage can be legalized with the subsequent meeting of the ankhoswe and the agreement of the guardians.

The Bride-Price Marriage

Two major marriage forms under customary law can roughly be distinguished. The distinctive criterion is the payment or non-payment of bride-price. The bride-price marriage is practised among the patrilineal tribes, at present mainly among the Ngoni in Mzimba District and among the Tumbuka. In the past the bride-price was paid only in cattle. Nowadays, however, money is often acceptable, too. What has become known as “bride-price” is not a price in the sense of a sales contract. The bride-price was probably originally considered to be compensation for the girl’s family for the loss of the girl, but it served primarily as security for the continued existence of the marriage. The father-in-law cannot simply incorporate it into his property. It must be kept separately, for under certain conditions it must be refunded after divorce. Should an animal die, the father-in-law must salt the meat and send it back to the husband who must then replace it. Should the father-in-law and his family consume the meat, the court should quickly decide to nullify the marriage and punish the guardian who exercised force.

30 Civil Case No. 372 of 1967, Linga Local Court.
31 Derby Bweya v. A.D. Poya, Civil Appeal No. 22 of 1967, Lilongwe Local Appeal Court.
32 During discussions with the author.
it must be replaced with a living animal. For the husband the bride-price is not necessarily “lost property”. Should the father-in-law be happy with him, a cow will be returned to him for each child born to his wife, or he may even waive a part of the agreed amount. This is at the discretion of the father-in-law. There is no right to demand the return of a cow for each child of the marriage.

The full payment of the bride-price is not a condition of validity for the marriage. As soon as the father-in-law and the son-in-law are in agreement over the bride-price, the meeting of the ankhoswe has taken place, and the father-in-law has allowed his daughter to live together with the young man, the marriage is legal. However, the father-in-law will only very seldom agree to the cohabitation with the future husband if the young man is not in the position to give at least a part of the bride-price.

The payment or non-payment of the bride-price has great legal importance because it determines the right over the wife and the children. Only a husband who has given the bride-price has the rightful guardianship over his wife and the children. “The children are where the cattle are not” (Radcliffe-Brown & Forde 1950: 80). For that reason the marriage is virilocal. As long as the son-in-law has not paid the bride-price, he cannot expect or demand that he may take his wife to his village. As a rule the husband makes the payment at his convenience. At the latest he would pay when his wife begins to have children, for otherwise they would belong to the father-in-law. Should the bride-price be paid only in part, then it is up to the father-in-law whether he will allow his daughter to leave. The husband then still remains under the obligation to pay. With the full payment of the bride-price he can extinguish the right of the father-in-law over the children at any time. After the husband’s death, the father-in-law can demand the remaining unsettled part from the husband’s relatives. Should they fail to pay, the wife will return to her father with the children. The relatives of the husband have the right to complete the payment. The father-in-law has no right to reject the payment and demand the return of his daughter and his grandchildren instead. Thus the guardianship over wife and children remains with the husband. As long as the children are small, “until they understand”, they generally remain in the care of the mother.

The privileged position of the husband is also evident in the married couple’s property relationships. In the past, anything the wife brought into marriage and which was part of the common household belonged to the husband. The idea behind this also was that wife and children belonged to the husband. As a Tumbuka Local Court chairman expressly said rather sadly: “Wife and children are owned by the husband; it is only the law which neglects this.” Nowadays it is recognised that also wives can own at least personal property, over which they can dispose as they wish. However, a wife cannot dispose of common goods, for example household goods, without the husband’s consent. A husband could do it, although he would be blamed for such “bad behaviour”.

**Marriage without Bride-price**

Among the matrilineal tribes usually no bride-price is given. The husband comes to live in the village of his wife and has only a few rights there. His children “belong” to his wife and remain under the guardianship of the wife’s eldest brother. The husband must build a hut for his wife and in most matrilineal tribes first work in the fields of his parents-in-law. Compared with patrilineal tribes, the wife has a much stronger position vis-à-vis her husband. She has the same rights as her husband over the fruits of the common work and over the common household goods. What she earns from her own work, for instance by brewing beer or selling pots, belongs to her alone.

Men in matrilineal tribes often try hard to bind their wives and children through a bride-price marriage. Many Malawians working in South Africa and Rhodesia therefore marry wives from the generally patrilineal tribes in these countries. They normally would not be able to marry a wife from their own tribe with a bride-price-marriage as the guardians only very rarely would accept the bride-price. If they did, the wives and children would “belong” to the husband.

**2.1.3 Marriage Disputes and Divorce**

**The Settlement of Marriage Disputes**

All family disputes are first settled domestically and not in court. Should a wife have a dispute with her husband, she will normally first go to her

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34 According to information from Local Courts Chairmen.

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According to A.I. Richards, Civil Case No. 74 of 1967, Mapuya Local Court confirmed in Civil Appeal No. 31 of 1967, Lilongwe band and wife cannot be forced to live together, i.e. to be married against their assent of the other members of the community

Divorce

Among the matrilineal tribes divorces have always been frequent. If the husband was not liked by the wife's relatives or if she herself no longer wanted him it was quite easy "to get rid of him". Marwick speaks of the Chewa wife and her "current husband". With the Ngoni divorces were very rare in the past. A wife could only seldom withdraw from the authority of her husband; she could not count on the support of her father since he would be afraid of having to refund the bride-price. At present, however, divorce is quite frequent with all tribes.

Family law is governed by the general basic principle which says that husband and wife cannot be forced to live together, i.e. to be married against their will. The grounds on which a divorce can be considered adequate and win the assent of the other members of the community in the village are impotence, adultery.

36 Civil Case No. 74 of 1967, Mapuya Local Court confirmed in Civil Appeal No. 31 of 1967, Lilongwe Local Appeal Court.
39 See the judgment of the judge in William Makumba v. Katerina Kara, Civil Appeal (Local Court) 26 of 1967, Malawi High Court: "The three assessors unanimously advised me that in African law and custom one spouse cannot be compelled to cohabit with the other..."
40 However, it is not usual to allow divorce solely on the basis of one act of adultery. Mostly one will seek "compensation" from the adulterer. With the Ngoni the wife has no right to seek divorce when her husband has committed adultery.

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cruelty and quarrelsomeness. With the coming of migrant labour, a new reason should be added here, namely the desertion of the wife. A divorce is only possible if the ankhoswe have been unsuccessful in their attempts to save the marriage. The act of divorce, which made the end of the marriage visible, also required the cooperation of the ankhoswe. In the case of a bride-price-marriage, the husband's ankhoswe would bring the wife back to her village. Apart from her personal things the wife could not take anything with her. Household and children remained with the husband. The question of a refund of the bride-price was handled in various ways. A husband would only very rarely sue for the bride-price if he himself was to blame for the divorce, since his right over the children of the marriage rested on the payment of the bride-price. On the other hand, it was considered unfair for a father-in-law to get his daughter back and, circumstances permitting, receive another bride-price in case of a later marriage. For this reason, the chiefs, i.e. the courts, in most cases ordered the refund of the bride-price; often one cow was subtracted for every child which remained with the husband. Among the matrilineal tribes, divorce was effective when the husband presented a hen, an arrow or a necklace to the wife's father in the presence of the ankhoswe who then passed these on to the wife's guardian. The man would then leave his wife's village. The children remained with the mother and her family. The food provisions were divided between husband and wife. The husband could take nothing else with him except the windows and doors of the house that he had built for his wife. In addition a small compensation was usually given to him, and the (head or hut) tax which he had paid for the wife during the last years was refunded.

2.1.4 New Tendencies in Marriage and Family Law

In recent developments the nuclear family (father-mother-child) becomes increasingly significant. This is especially true in matrilineal tribes. The husband's position vis-à-vis his wife's brother is growing stronger, especially if he does not live in his wife's village but in a city or if he has moved to another part of the country. Educated husbands as a rule do not allow the brother of their wife to interfere any longer in their marriage.

41 See Nyanalaad Government, Memorandum No. 2 on Native Customs in Nyanalaad (Marriage, Divorce, Succession and Inheritance). Government Printer Zomba 1937, p. 8.
At present divorces are increasingly tried and decided in the courts. An illustration of the changed view can be seen from the attitude of the complainant in Alesi Kaseza v. Sandreya Andreyab. She complained that her husband had given a hen to her ankhoswe, who had given it to her to show that the marriage had ended. She went to court “because one is not divorced at home but in court”. The courts dissolve the marriage or confirm the divorce. The divorce “at home”, however, at present is still a valid divorce, as the Local Courts chairman asserted. The reason why nowadays divorce suits are mainly brought to court by wives in the first place is to be found in the associated compensation and maintenance suits. This is perhaps one of the most interesting changes in the traditional law. The idea that a husband must support his wife and children after the divorce is completely new, and foreign to “old” customary law. The practice of the Local Courts in these questions is not yet very uniform. The grant of maintenance after divorce appears to be practised as yet only in the Urban Courts. For instance in Mchoma v. Chikaonda and Usumani v. Dickson the Blantyre Urban Court ordered the defendants to pay to the divorced wives £1 monthly per child until the children reached the age of 16 years.

Concerning the issue as to which marriage partner should pay the compensation, the following principles seem to have been established: the courts primarily consider who had taken the initiative for the divorce, i.e. who in life and in the education of their children. However, it is difficult to estimate the extent to which a change in the law may have taken place here, as such disputes have hardly been tried in the courts.

As a result of the changed view the marriage law has developed in a new way. The principle concerning who in the marriage must be declared to be at fault now plays a secondary role. Who in fact no longer wants the other marriage partner. Considerations of guilt only play a secondary role. Who in fact no longer wants to have the other spouse bears the responsibility for the divorce - “he/she is to divorce his wife/husband”. In such cases it does not matter whether or not the person concerned is the complainant, or whether he has told the court that he does not want the divorce. In Seliva Banda v. Kassalika Chirwa, for example, the wife had sued for divorce. Towards the end of the trial, the defendant explicitly affirmed that he did not want to be divorced. Nevertheless, the court concluded: “This court has proved beyond reasonable doubt that it is the defendant who does not want his wife...”, and ordered the defendant “to divorce his wife”.

Similar considerations govern the division of the bride-price and common property. Also the question “to whom the children belong” is determined according to the traditional principles.

2.2 Marriage and Family Relations according to the Marriage Laws

2.2.1 Marriage according to the Marriage Ordinance

The Marriage Ordinance regulates marriage on the basis of English law. Any inhabitant of Malawi can marry in accordance with the Marriage Ordinance; there are no racial or religious restrictions. Both marriage partners must be at least 21 years old. For minors the consent of the father must be presented; in case of his death, that of the mother. Should the mother also be dead, the consent of the guardian must be given. The other conditions of English law.

The marriage can be concluded in church or before a marriage registrar. In both cases, the marriage partners must produce a certificate of marriage which is obtainable from the registrar. The application for the certificate of marriage has ever been contracted in Malawi (Nyasaland) according to this law.
marriage is followed by a period of public notice, which can last between three weeks and up to three months. The intent to contract the marriage is registered in the marriage notice book and displayed publicly. During the period of public notice of an intended marriage, any person whose consent to the marriage is required or who knows an impediment to the marriage can register a caveat. The High Court decides on the validity of the objection in a summary proceeding in which the marriage partners and the person who has registered the notice must be heard.

For Africans who marry according to the ordinance some special provisions apply. None of the marriage partners may be married to a third person according to customary law. An offence against this provision nullifies the marriage. Until 1967 the Ordinance Marriage had far-reaching legal consequences for inheritance for Africans. According to section 40, the deceased's estate, with the exception of customary land, would be inherited according to English Law. This was not only valid for a husband and wife but also for their descendants. All church marriages Africans had contracted before the enactment of the Marriage Ordinance were treated as marriages under the ordinance, with the consequence that section 40 was also valid for the Africans who had been married by missionaries without any knowledge of the Ordinance.

Bigamy was punishable. Relating to ordinance and customary law marriages there were some special criminal provisions. Any African already married according to customary law who married another wife according to the Marriage Ordinance as well as any African already married according to the ordinance who married an additional wife according to customary law was liable to be punished with imprisonment of up to five years.

The law of divorce was regulated in the Divorce Ordinance of 1905. The grounds for divorce were based on English law. The Divorce Ordinance regulated the questions of nullity of marriage, maintenance claims after divorce and guardianship over children. In principle, according to section 4 the applicable law was that applied by the High Court of Justice in England, i.e. English Law.

2.2.2 The Marriage according to the Christian Native Marriage Ordinance of 1912

This marriage law was only in force from 1912 to 1923. It simplified the formalities for the contracting of marriage of Christianised Africans. According to section 6, any priest of a Christian religious denomination could function as a registrar of marriage in the sense of the Marriage Ordinance. The legal consequences of this marriage were the same as those of a marriage contracted according to the Marriage Ordinance. The only difference was that both spouses had to be Christians. It was not sufficient that they professed a Christian religion, they also had to be baptized, as the High Court stated in Amisi v. Zingarembo and Mchenga v. Menesi.

2.2.3 Celebration of Marriage according to the African Marriage (Christian Rites) Registration Ordinance of 1923

The African Marriage (Christian Rites) Registration Ordinance allowed the church celebration of marriage by ministers of all Christian religions. However, section 3 stated the consequences:

"Provided that the celebration of marriage under this Ordinance shall not as regards the parties thereto alter or affect their status or the consequences of any prior marriage entered into by either party according to native law and custom or involve any legal consequences whatever."

Thus the celebration of marriage and the registration of this celebration have no legal consequences. Only a marriage under customary law prior to or at the same time as the celebration of the Christian rites marriage was legally relevant. All legal relationships between the marriage partners are decided according to customary law. The judge also expressed himself in this sense in Gombera v. Kumwenda, the only decision dealing with the interpretation of section 3: "I read this as meaning that the marriage in such a case is completed by carrying out whatever is necessary to be carried out accord-

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54 Section 40 of the Marriage Ordinance was replaced by the Wills and Inheritance Act of 1967, Act No. 25 of 1967.
55 This was explicitly confirmed by the High Court in Grayson and Harry Machinjiri v. Kapusa and others, 5 Ny. L.R. 74.
56 Section 54, 55 of the Marriage Ordinance.
57 Ordinance No. 5 of 1905, Cap. 106, 1961 (rev. ed.).
Chapter Three

ing to native law and custom, and that the ceremony is merely an additional matter which enables the marriage to be registered under the Ordinance."

Recently this view has, however, been opposed. Ibik maintains the following interpretation of section 3:

"It is our contention that on a proper analysis and careful balancing of the actual words utilized in the proviso under review, a marriage celebrated under the Ordinance of 1923 may be regarded as a marriage *strictu sensu*; albeit sui generis."

Point of departure for this contention is the somewhat hypothetical situation that two Africans get married in church according to the Registration Ordinance without first having been married according to customary law. From the words "as regards the parties thereto", Ibik concludes that the absence of legal consequences refers only to the relations of the "marriage partners" themselves; it does not however affect a third person. Consequently, section 3 notwithstanding, a "husband" could claim compensation for adultery, the legal reason being the violated "marriage" according to the Registration Ordinance. The children from such a "marriage" must also be regarded as legitimate children by third persons. English law would apply with respect to the marriage partners' legal capacity to marry.

Ibik's view cannot be supported. Upon which law, for instance, should an action for adultery be based? This is a question Ibik does not discuss. If English law does not come into question, should customary law be the relevant law? But such an action could not be based on customary law since the prerequisites for a marriage according to customary law do not exist. "Where were your *ankhoswe*?" would be the court's question to the complainant. How would the "marriage" be ended, in case external legal consequences towards third persons existed? A divorce would not be possible as the marriage partners are not married. By an act of the church? But this would be legally irrelevant. Externally the "marriage" would not be dissolvable, but the "marriage partners" would be free to do what they like in their internal relations, for instance, they could marry, etc. How could the children be con-

64 The same view is also held by T.D. Thompson, *Notes on African Customs in Nyasaland*, Government Printer, Zomba (1956), p. 4.

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2.3.1 The Recognition of the Customary Law Marriage by English Law

Right from the beginning the customary law marriage was recognized as a valid marriage and one with legal consequences. In contrast, judges in other colonial countries often found it difficult to reconcile marriage under

68 S. Roberts, *The Growth of an Integrated Legal System in Malawi: A Study in Racial Discrimination in the Law*, p. 346 also asks the same question but he does not proceed further on the problem.
69 1958 R & N 849, Ny. H.C.
70 The High Court judge emphasised in G. Bema v. Alieit Beneti, Civil Appeal (Local Courts) No. 5 of 1967, Malawi High Court, that an application of canonical laws was not possible in the public courts.
71 Ordinance No. 13 of 1929, Cap. 105, 1961 (rev. ed.).
72 See the report of the Attorney-General, dated 28.6.1929, in: ZA L 3/30/5.
73 Section 2.
74 Section 36 of the Marriage Ordinance speaks already in 1902 of the "validity of any marriage contracted under or in accordance with any native law and custom..."
customary law with the definition of the marriage in Hyde v. Hyde for the English law, according to which marriage is “the voluntary union for life of one man and one woman to the exclusion of all others.” It has already been pointed out elsewhere that institutions such as like polygamy and sororate did not fall victim to the repugnance clause although they were condemned by the missionaries as pagan.

The recognition of the marriage under customary law as a valid marriage, even if measured by English standards, did not mean, however, that both forms of marriage had the same legal consequences in every case. This became particularly problematic in criminal law where the law attached a special legal consequence to the status of a married partner. How this problem was solved in Malawi (Nyasaland) will be described in connection with the analysis of criminal law.

In the sphere of civil law this question was important in the law of inheritance. According to English law, a will is revoked if a marriage follows the drawing up of the will. The question now arose whether this would also be a valid consideration when a marriage under customary law followed the drawing up of the will. The Malawian courts did not deal with this problem. But the situation in Rhodesia (then Southern Rhodesia) may serve as an example. There the mentioned rule was laid down in section 7 of the Deceaseds’ Estates Succession Act. “It was first decided in Seedat v. The Master that a marriage under customary law did not cause the retraction of a will.” However, this decision was invalidated in 1958 by the Federal Supreme Court in Estate Mehta v. The Acting Master. For Malawi the situation has been clarified by section 9 of the Wills and Inheritance Act of 1967. A will is revoked only by a marriage contracted in accordance with the Marriage Ordinance. Thus even in civil law, marriages under customary law and the Marriage Ordinance do not necessarily have the same legal consequences.

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2.3.1 The Legal Status of Africans after Entering into an Ordinance Marriage

Legal problems of a special type arise when Africans marry under the Marriage Ordinance, as some of the prerequisites for validity in both spheres are quite different. In such a case the legal provisions of the Marriage Ordinance displace the corresponding rules of customary law. An ordinance marriage can also follow a marriage under customary law, when for instance Africans married under customary law decide to enter marriage under the Marriage Ordinance in addition. In such a case the legal consequences of the marriage under customary law will be displaced by the law of the second marriage, at least to the extent to which the legal provisions of the Marriage and Divorce Ordinance intervene.

The Ordinance marriage has a higher legal status. Its legal consequences cannot be removed or displaced by a subsequent marriage under customary law. This is only possible after a divorce. Thus the marriage under the Marriage Ordinance changes the legal status of the marriage partners; customary law is no longer applicable.

It has long been disputed how far this change of status goes. In the course of time the English colonial courts have arrived at deeply conflicting decisions. In the early colonial period, the dominant opinion was “that a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law”. During this period the courts of Nyasaland did not deal with this problem. But the view appeared to prevail in Nyasaland that with the ordinance marriage the totality of legal relationships of the married Africans, and in any case their family relationships, should henceforth be governed by English law. In 1916 the judge of the High Court wrote the following to the Chief Secretary: “Educated Christians

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76 (1866) L.R. 1 P.D. 130.
77 Cap. 51, 1950 (rev. ed.)
78 1917 A.D. 302.
80 Act No. 25 of 1967.
natives who marry under this Ordinance \textit{ipso facto} lose their rights and position as members of a native community and acquire rights and duties of a totally different nature."\textsuperscript{85} The Attorney-General of Nyasaland spoke in a similar manner in reply to an inquiry by the District Commissioner of Karonga: "A native who enters such marriage forfeits all his rights which he had under customary law."\textsuperscript{86} As Phillips correctly notes, the maintenance of this view would have led to the formation of a class of assimilados.\textsuperscript{87} But gradually the view was established that it was not fair to regulate all legal relationships of an African according to English law only because of an ordinance marriage.\textsuperscript{88} In the Nigerian case Smith v. Smith,\textsuperscript{89} the judge stated:

"It would be quite incorrect to say that all persons who embrace the Christian faith or who married in accordance with its tenets, have in other respects attained that stage of culture and development as to make it just or reasonable to suppose that their whole lives should be regulated in accordance with English law and standards."

In Bangbose v. Daniel the Privy Council confirmed a decision of the West African Court of Appeal according to which the fact of being a child of a monogamous marriage is no legal impediment to entering into a marriage in accordance with customary law.\textsuperscript{90} Wide attention was given to the decision of the Ghana Court of Appeal in Shang v. Coleman,\textsuperscript{91} which was confirmed by the Privy Council.\textsuperscript{92} Henceforth in the case of an ordinance marriage of Africans, only those legal relationships shall be regulated by English law which are especially mentioned in the ordinance as well as other necessary consequences resulting from the marriage (...and other matters which are the necessary consequences of the marriage under the Ordinance).

\begin{footnotesize}
\begin{itemize}
\item From the letter dated 15.8.1916, in: ZA S 3337/12.
\item Already in 1912 it was decided in B. Jembe v. P. Nyondo (1912) 4 E.A.L.R. 160 that the fact that the marriage partners had married in a Christian way did not affect the question of inheritance. However, in Nyasaland and question of inheritance was legally regulated by section 40 of the Marriage Ordinance.
\item (1924) 5 N.L.R. 102.
\item (1955) A.C. 107.
\item Coleman v. Shang (1961) A.C. 481.
\item 5 Ny. L.R. 11.
\end{itemize}
\end{footnotesize}
from Nyasaland, had married Grace, a Ndebele girl according to Ndebele law in Rhodesia in 1962. In 1964 the couple moved to Malawi and married again, this time according to the Marriage Ordinance. In the course of a marital conflict Grace killed her husband. She was sentenced to death by the High Court, but acquitted on appeal. Whilst she was in prison her husband’s relatives had taken the children with them. After her discharge, Grace Kamcaca demanded the children from the relatives of the deceased. The judge decided the case in accordance with customary law. One of his reasons for that was the application of the rule of interpretation expressio unius – exclusio alterius. Since the application of English law for Africans married under the Marriage Ordinance had been prescribed only for section 40 of the Marriage Ordinance to cover cases of inheritance, one had to conclude that all other legal relationships of Africans who are normally subject to customary law should be determined in accordance with customary law. The application of English law for the issue of custody over the children where there is a relationship between a spouse and a third party was, in the eyes of the judge, not a necessary consequence resulting from the Ordinance Marriage in the sense of Shang v. Coleman.

The decision calls for some attention because of its logical point of departure. It is generally accepted that because of an ordinance marriage certain relationships between the marriage partners and between them and third parties must henceforth be determined in accordance with English law – whether or not this makes sense in every case is a different question. This includes the relationship between parents and children. Custody during the marriage is treated according to English law. As has already been mentioned, this also includes the matter of custody over persons who intend to marry under the Ordinance Marriage. Also in the event of divorce, the question of custody is decided in accordance with English law, at least when the children are minors in the sense of section 3 of the Divorce Ordinance. “To whom the children belong” is no longer decided according to customary law – whether bride-price had been paid or not – but according to the principle of common law according to which the well-being of the children must be the most important consideration of the judge.

Why should customary law regulate the relationship between the surviving parent and the children or third parties, when the marriage is terminated not by divorce but by the death of a spouse? Such a solution is absurd. Would, for instance (a variant of the Kamcaca case), in a marriage of two Chewa partners the children be awarded to the wife’s brother after the wife’s death, because the husband had not paid a bride-price? Surely not. The decision as to custody of children after the death of a spouse is an essential logical consequence of the ordinance marriage.

However the question how far the legal change of status goes, is not answered by this. There is only a hint in section 11(d) of the Local Courts Ordinance according to which all disputes “in connexion” with an ordinance marriage cannot be tried in the Local Courts, with the exception of bride-price claims. Thus customary law cannot be applied in the Local Courts in these marriage cases. On the other hand, since 1966 the High Court can no longer apply customary law, and so all “cases in connexion with (an ordinance) marriage” are to be decided according to English law. One has to consider as “cases in connexion with marriage” all cases where the right or obligation forming the subject matter of the dispute has come into existence through the marriage. All such cases have to be decided in accordance with English law, unless there are special legal regulations. Hence also questions of custody are to be decided in accordance with English law.

In the majority of cases, these legal consequences of an ordinance marriage rarely fit the social circumstances of the parties. The change of legal status is usually not accompanied by a change in social status. After their marriage, Africans married under the Marriage Ordinance are still exposed to the claims which the traditional marriage and family law impose. Even if they may no longer be compelled to observe these obligations due to non-

95 The Ndebele are a patrilineal tribe and practice the bride-price.
97 See F. von Benda-Beckmann, op. cit., p. 188.
98 1959 G.L.R. 590.
100 See E. Thipa v. K. Thipa, 5 Ny. L.R. 11. The general rule clearly results from sections 4 and 31 of the Divorce Ordinance, which were certainly not referred to in the considerations in G.J. Kamcaca v. S.P. Nkhota.
101 Philip v. Philip (1872) 41 L.J. (P & M) 89.
102 On this see Mchenje v. Kanaka, 1912 S.R. 107.
103 According to the text the concept also includes inheritance disputes. That is why in the African Wills and Succession Ordinance (Law No. 13 of 1960, section 24 (2), which however did not come into force) it was explicitly stated that inheritance cases were not to be treated as “cases in connexion with marriage”.
104 In a new Bill for the amendment of the civil law, the Civil Law Bill of 1968, see sec. 3 (2) (ii), “proceedings in connexion with marriage” are defined as “the expression … includes any proceedings in which the matter in issue is the custody or guardianship of any child of a marriage.”
applicability of customary law, the customary legal principles nevertheless affect them as social norms. The equalization of this imbalance can only be achieved with a change of the law. The attempts which have already been made in this respect will be closely analysed in the next section.

2.4 Ideas behind the Development of Family Law

2.4.1 The Introduction of the Marriage Ordinance

The Marriage Ordinance and the Divorce Ordinance are largely model laws, which were also in force in similar form in the other British colonies. There were differences with respect to the regulation of inheritance of Africans and the general preconditions for marriage of Africans. In other places one party, as in Tanganyika or both parties as in Sierra Leone, had to be Christians. In Northern Rhodesia Africans until 1963 did not even have the opportunity to marry under the Marriage Ordinance at all.

Apart from this general issue, the development of family law was determined by the inactivity of the government and the conflict of interests between the missionaries and the representatives of African interests. The objective of the missionary activities at that time was to convert as many Africans as possible to Christianity and to force them, with the help of the law, to lead a "Christian life", to make divorce more difficult and, if possible, abolish polygamy.

The Marriage Ordinance went far in honouring these wishes. At least the Africans married under the ordinance had to live a monogamous life. Should they nevertheless marry other wives they must expect the penalty of imprisonment. A divorce of such marriage was only possible after considerable difficulties. Already the limited grounds for divorce did not correspond to the African conceptions; the condition that only the High Court in Blantyre was competent for divorce cases made a divorce nearly impossible. Should a wife in the North want a divorce, she might have to travel 700 kms to Blantyre and then also pay a fee of approximately £6.

The success of this legislation was as could be expected. Africans who had married under the Marriage Ordinance were not willing to bow to constraints placed on them by the law. They simply left their wives without a formal divorce or married wives according to customary law. The concubinate replaced the Christian marriage, undeterred by the criminal provisions. The administrative officers and judges also did not take serious care to pursue bigamists, a matter that the missionaries complained bitterly about. The missionaries did not let themselves be hindered by the intricate formalities of the Marriage Ordinance in their activities. Many marriages were contracted which did not fulfil the requirements of the law. This led to conflicts between the government and the missionaries. "Since 30 years", the Bishop of Likoma wrote to the Governor, "We marry Africans in church. We have never assumed that our celebration of marriage constitutes legally binding marriages, but that the church celebration of marriage is a purely religious, and legally indifferent, formality." However, the governor's reply did not share this understanding. He explicitly requested the Bishop and his missionaries to abide by the law; otherwise they could (or would) be prosecuted under criminal law.

2.4.2 The Introduction of the African Marriage (Christian Rites) Registration Ordinance

The first attempt to find a suitable form of marriage for the Christianized Africans was the Christian Native Marriage Ordinance of 1912. Apart from simplifications in the procedures for contracting a marriage this ordinance brought no further innovation. Already in 1920, it was clear to the Government that a new law must be introduced. The Governor appointed a commission which was to prepare a Bill. The commission consisted of missionaries and administrative officers, each of whom made an alternative draft. The point of departure for both drafts was

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105 Section 3 of the Tanganyika Marriage Ordinance, Cap. 109.
106 Section 4 of the Civil Marriage Ordinance, Cap. 35.
107 Section 47 of the Northern Rhodesia Marriage Ordinance, Cap. 132. Section 47 was first abolished by Ordinance No. 48 of 1963.
109 See the letter of the Assistant Chief Secretary to the High Court Judge, dated 18.10.1919, in: ZA 1622/19.
111 See, for example, the speech of Dr. Hetherwick: "I have seen cases in which natives who transgressed their rule of polygamy, author's note), were not strictly dealt with by those before whom they were brought", in: Summary of the Proceedings of the 27th Session of the Legislative Council, April 1923, p. 13.
112 In the letter dated 27.1.1913, in: ZA 1622/19.
113 Letter dated 1.3.1913, in: ZA 1622/19.
114 Notes on the Proceedings of a Conference relating to the Marriage of Christian Natives according to the Rites of the Christian Churches, dated 7.4.1920 and Report of a conference appointed by the Governor to consider upon the 1902 and 1912 Ordinance and on the amendments which are desirable, 29.10.1920, in: ZA 1622/19.
that there had to be a previous marriage under customary law, and that disputes resulting from such a marriage must be decided in accordance with customary law. The question of divorce remained controversial. The missionaries' demand to fix the grounds for divorce was not complied with. The African Marriage (Christian Rites) Registration Ordinance, which in the sphere of African marriage legislation remains unique, was a typical compromise between the missions and the government: the missionaries were allowed to do what they had already been doing without permission. However, the state did not provide its law and courts for the sanctioning of this new kind of marriage. The new form of marriage soon achieved wide popularity. An extract from the marriage statistics may make this clear:

<table>
<thead>
<tr>
<th>Year</th>
<th>Marriages under the Marriage Ordinance</th>
<th>Marriages under the Christian Native Marriage Ordinance</th>
<th>Marriages under the Registration Ordinance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1918/19</td>
<td>27 (36)a</td>
<td>387a</td>
<td></td>
</tr>
<tr>
<td>1920/21</td>
<td>54 (65)a</td>
<td>415a</td>
<td></td>
</tr>
<tr>
<td>1922</td>
<td>44 (55)a</td>
<td>274a</td>
<td></td>
</tr>
<tr>
<td>1923</td>
<td>59 (70)a</td>
<td>388a</td>
<td></td>
</tr>
<tr>
<td>1924</td>
<td>19 (27)a</td>
<td>Ca. 1,150a</td>
<td></td>
</tr>
<tr>
<td>1933</td>
<td>4 (23)a</td>
<td>3,129d</td>
<td></td>
</tr>
<tr>
<td>1938</td>
<td></td>
<td>3,461d</td>
<td></td>
</tr>
<tr>
<td>1960</td>
<td>9 (95)b</td>
<td>4,923b</td>
<td></td>
</tr>
<tr>
<td>1965</td>
<td></td>
<td>6,512c</td>
<td></td>
</tr>
<tr>
<td>1966</td>
<td>9 (69)c</td>
<td>6,826c</td>
<td></td>
</tr>
</tbody>
</table>

After the introduction of the Registration Ordinance, the number of marriages under the Marriage Ordinance dropped suddenly and at present is even lower than, for example, in 1919, although in the last 50 years the total population has more or less quadrupled. In contrast, the number of the Registration Ordinance marriages has remained fairly constant in relation to population growth. The popularity of this form of marriage is easy to explain. It combines the old marriage under customary law with the ceremony of a “Christian marriage” and bestows a certain prestige on the marriage partners. Especially the wife of such a marriage will be proud to show that she is to be the “only” one. On the other hand there is only a moral and no legal force to preserve this form of monogamous marriage - an aspect highly valued by men. Among my acquaintances within the “educated youth” (just as a passing comment), no one had married in accordance with the Marriage Ordinance.

2.4.3 The Proposals of the Brown Committee

The situation described above existed in 1923. Up to now this legal situation, considered inadequate even then, has not been changed. The last attempt at a reform was undertaken after the Second World War. On 13.10.1945 the Governor appointed a committee, the so-called Brown Committee, whose duty it was to prepare a new bill. The committee was composed of five missionaries and five laymen, of whom two were Africans. The committee completed its work in 1948. The published report and the attached bill provided the following innovations:

1. The new African Christian Marriage Ordinance should apply to marriages of African Christians. Those already married under customary law and the Registration Ordinance should be given the opportunity to opt for the new legal status (section 5).

2. Section 40 of the Marriage Ordinance, which had kept many Africans from marrying under that Marriage Ordinance, should not apply to Africans married under the new law. It was envisaged that customary law should be applicable for all spheres of life, except when

- it excluded widows and children from a reasonable portion of the inheritance,
- a widower was forced to leave the house in which he lived,
- a widow was forced to marry a relative of her deceased spouse.

3. The reasons for divorce were not legally prescribed. The Magistrates of the 1st and 2nd class as well as the Native Courts were to be competent in

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116 Sources:
(a) ZAJ 7/11 The numbers in brackets are the totals including the marriages by Europeans under the Marriage Ordinance.
(d) Colonial Office, Nyasaland Colonial Reports No. 1739 and 1902, London: H.M.S.O.

divorce cases. The precondition for a divorce suit in a Native Court, how-
however, was that a church representative had been given the opportunity to settle
the dispute prior to the court action. Should this be unsuccessful, African members of the church must function as assessors during the divorce pro-
ceedings.

4. The jurisdiction in divorce cases of Marriage Ordinance marriages
should be extended to the Magistrates Courts.

5. The criminal provisions of the Marriage Ordinance should be repealed.
Bigamy should only be punishable when a person entered into another
marriage under the Marriage Ordinance and/or the new law.

Rarely had the interests of the missions and the representatives of
Africans collided so strongly as in the discussions preceding the final
proposals. The central point of difference was the issue of divorce, where the
missions attempted to push through their extreme and barely understandable
demands. One of the law drafts submitted to the committee by one of the
missionaries in 1946 proposed, for example, to exclude a legal divorce alto-
gether and subject divorce purely to church law. In addition, Christianized
Africans should not be allowed to marry under customary law at all. These
demands were acceptable neither to the administrative officers nor to the
Africans. One would scarcely have been able to put them into practice. The
African members of the committee especially insisted that the Native Courts
should be competent in divorce cases because Africans had no confidence in
the British courts: “Native Courts know our custom best.” Finally, the
compromise described above was reached.

2.4.4 The Present Situation

The Bill prepared by the Brown Committee did not come into force; it was
not even discussed in the Legislative Council. No new attempt has been made
since then to change the family law. As will be shown in the next section, the
development in the law of inheritance constitutes one exception. But it was not
until 1967 that section 40 of the Marriage Ordinance was repealed. At
the moment it does not seem to be the aim of the government to create new laws
or to change the existing laws. Also interventions into the traditional marriage
law are not planned. However, as will be described in more detail, the traditional
marriage law will be influenced by the new inheritance and land law.

3. Legal Pluralism and Legal Development in the Law of
Inheritance

3.1 The Applicable Law of Inheritance according to the Wills and
Inheritance Act of 1967

For the first time in the history of Malawi, the law of inheritance for all
groups of the population was combined in one law, the Wills and Inheritance
Act of 1967. The law of wills was unified without regard to any customary
law or religious limitations. However, in regard to intestate inheritance, a
differentiated regulation has been retained.

3.1.1 The Law of Wills

The provisions concerning the making and the validity of wills are largely
modelled after English law, although the English Wills Act of 1837, which
was valid in Malawi as a statute of general application, was explicitly
rescinded. Also the provisions regulating the position of the close relatives
in case of disinheritance resemble English law, namely the Inheritance
(Family Provisions) Act of 1938. Upon application, the court can set aside
up to two thirds of the estate for the maintenance of the dependants.
However, the definition of the concept “dependant” has taken into account
the structure of the African family. According to the law, dependants are not
only wives, children and parents but also the mother’s brother and all per-
sons who were living together with the deceased and all minor children
whose education was provided for by the deceased, thus including nephews
and nieces.

118 Section 9 of the draft: “No marriage celebrated under this Ordinance may be dissolved except in accordance with the tenets and rules of the Church in which the parties of the marriage were married.” In: ZA A.C. 84.
119 Section 2 of the draft: “No marriage contracted by native law and custom by a Christian native is of any legal effect.” In: ZA A.C. 84.
120 See the minutes of the meeting of the committee, dated 6.11.1946 and 6.12.1947, in: ZA A.C. 84.
3.1.2 Intestate Inheritance

For intestate inheritance a tripartite scheme has been established. There are separate provisions for the inheritance of a deceased person depending on whether before enactment of the law the inheritance had not been governed by customary law, had been governed by a special minority law, and had been governed by customary law.

As Roberts already has emphasised, the demarcation of the first category is difficult. As section 40 of the Marriage Ordinance has only been repealed by the new inheritance act, a literal interpretation would lead to the situation that all Africans married under the Marriage Ordinance would belong to the persons for whose inheritance customary law had not been the relevant law. Whether the legislator intended this consequence is unclear. When the act was discussed in parliament, this point was not mentioned.

The Inheritance Law for Persons to whose Estates Customary Law was not the Valid Law before 1967

For those persons for whom customary law was not applicable before 1967, i.e. for the European population, the provisions have been modelled on the English Intestate Estates Act of 1952. The remaining spouse inherits the first £5,000. The remainder is inherited by the children. If there are no children, the spouse inherits one half, with the other half going to parents, siblings, their children, and half-siblings. In case the deceased leaves no spouse or the relatives just mentioned, the grandparents inherit, thereafter the uncles and aunts. If none of these relatives exists, the state inherits.

For the minorities for whom there was a special inheritance law before the enactment of the law ("member of a community among whom an established custom existed prior to the coming into operation of this Act, governing the rights of inheritance"), this special law continues to exist. This proviso refers to the Asians resident in the country whose inheritance law since 1929 according to the Asiatic (Marriage, Divorce and Succession) Ordinance was the religious law of the respective individuals.

Should the deceased leave behind wives in different villages, then each wife and her children become heirs only to the estate which the deceased had in the village concerned. Should a husband leave behind neither wife nor children nor dependants, his entire estate devolves in accordance with customary law.

For wives the following regulations apply: Should she leave children behind, then these inherit her entire estate. Should she leave no children behind, then everything will devolve according to customary law.

125 Section 18(1) and (2)
126 Section 18 (3)
127 Ordinance No. 13 of 1929.
128 In the areas in which the patrilineal tribes live.
129 In the area of the matrilineal tribes.
130 Section 17
The provisions of the law do not, however, apply to customary land which continues to be inherited according to customary law (section 1 (3)). The High Court is in principle competent for all disputes pertaining to a deceased person's estate as well as the administration of the estate. If the value of the deceased person's estate does not exceed £5,000, a Subordinate Court can also perform these duties. The Local Courts have the jurisdiction in disputes over the estate when the value of the estate does not exceed £2,000. However, the close relatives can distribute the estate without the cooperation of the courts if the value does not exceed £2,000. The court decides only in case of dispute.\(^1\)

### 3.2 Inheritance under Customary Law

To a certain extent customary law is still relevant even after the coming into force of the new Act. At this juncture it is not possible to give a full picture of the inheritance law of all tribes with the relevant local variants.\(^2\) For that reason what will be shown here concerns only the principles according to which inheritance proceeds and which persons in general are entitled to the estate.\(^3\)

#### 3.2.1 General Principles of the Law of Inheritance

The most important principle, to which reference was already made elsewhere, is that property and status rights are inherited only within the clans, within the matrilineal or patrilineal kin group. All tribes make a sharp distinction between the administrator of the estate and the person(s) entitled to inherit. The administrator, in cooperation with the family elders, has to determine the form and time of the burial and the duration of the time of mourning. During the time of mourning, the administrator must collect the deceased's estate and after mourning has ended he has to distribute it to the heir(s) or heirs. To this end he can recover outstanding debts and also pay the deceased's debts. He cannot, however, appear in court in disputes over the deceased's estate. There are different principles for inheritance.\(^4\)

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\(^1\) Section 61; a new regulation was provided for in the law of 1964 which did not come into force, however.


\(^3\) The information on the traditional law of inheritance is partly based on the Restatements of the Malawi customary law.


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- Sole inheritance by one person. Here the heir enters into the legal position of the deceased with all rights and duties.
- The inheritance by more than one person. This is accomplished in most cases in such a way that one person is the principal beneficiary and inherits the rights and duties of the deceased, while other persons become co-beneficiaries.

Generally, but not necessarily, there are also differences in the way in which the legal consequences of inheritance take effect. With some tribes, the heir is predetermined by customary law. With the death of the predecessor he automatically becomes the heir; the inheritance does not require the confirmation of the family elders. With other tribes the successor is appointed by the family elders. While in such cases there is only a limited circle of persons who can become heirs, the legal consequences of inheritance only occur with the resolution of the family elders. With all tribes it is further possible that the predecessor can disinherit his prospective heir. The condition for this is that there is a good reason for disinheriting him and that the family elders give their consent. The following examples in particular are quoted: incest, adultery with a wife of the predecessor, incessant thieving, witchcraft and open disobedience. However, such disinheritance will only become effective if after the death the family elders comply with it and proclaim the person next in line to be the heir. A predecessor can also decide orally on the distribution of estate. But this "oral will" will only be effective if after the death it was approved by the proper heir. In principle, such a last will and testament will be followed out of respect for the deceased. However, it remains in the discretion of the proper heir whether he will hand over the portion of the inheritance to the person concerned or decide otherwise.

In principle, the sole heir or the principal and the co-beneficiaries inherit everything that belonged to the deceased. Also all social and economic responsibilities which the predecessor had during his lifetime transfer to the heir(s) with inheritance. Thus the heir must support all persons who had been supported by the predecessor, which includes not only the relatives within the clan but, depending on the tribe, also wives and children. This duty is quite clearly recognized as a legal duty. As a rule the heir gives a portion of the estate to these persons, which, however, does not mean that such a legal responsibility exists in all tribes, for instance in the patrilineal tribes. The heir or principal beneficiary assumes the liabilities and debts of the predecessor. However claims originating from insult, adultery or similar offences cannot be validly made against him.
3.2.2 Patrilineal Inheritance

The Ngoni, Tonga, Nyakyusa, Ngonde and Sena are tribes with patrilineal inheritance. In these systems, the administrator of the estate is the father of the deceased, or in case he is already dead, a brother of the father. The estate of a woman is administered by her husband.

Depending on the status of the deceased, there are different circles of persons entitled to the inheritance. As a rule, the heir of an unmarried person is the father. Local variants provide that the father can install the siblings of the deceased as co-beneficiaries, or that the family elders can add certain relatives of the deceased as co-heirs.

The heir of a married woman is generally her husband. Personal property goes to the wife’s father. A married man is as a rule succeeded by his eldest son from the “oldest house”. Only if there are no heirs from the first house can the children from the second house inherit. Among the Ngonde and Nyakyusa, the father of the deceased inherits after the eldest son.

Among the Ngoni and Tumbuka of Karonga District inheritance is the same as in the case of an unmarried man. Should the widow enter a levirate marriage, the estate will go to the levir. The estate of a widow usually goes to her father. However, if she was living in a levirate marriage, the levir succeeds among the Ngonde, Nyakyusa and Tumbuka; among the Tonga the widow’s father and her husband’s father are joint heirs.

3.2.3 Matrilineal Inheritance

The Chewa, Yao, Lomwe, Nyanja, Mang’anja and Chipeta are tribes with matrilineal inheritance. Administrators of the estate are the brother, the eldest son of the eldest sister, or the maternal uncle. As a rule these persons are also the principal heirs of a deceased man. The generational level at which inheritance takes place varies. Among the Yao, for example, it is almost always the nephew who succeeds, but among the Chewa it is often the brother of the deceased before the nephew. As a rule, the inheritance of a wife goes to her uncle on the mother’s side; otherwise to her brother.

3.2.4 Changes in Traditional Inheritance Law

The inheritance law of the Malawian tribes is in a slow process of change. The new socio-economic factors have not left the law of inheritance untouched. Two factors are particularly important: The gradual dissolution of the traditional family structure with the turn towards a monogamous nuclear family, and the new structure of property. In the past, mainly land (whose value in the eyes of Africans cannot be measured in terms of an exchange equivalent) and cattle were inherited, and the estate was preserved as an economic unit for the extended family, even if some individuals could control it through individual property rights. At present inheritance increasingly concerns houses in the city, cars, radios and bank accounts, which can only with the greatest difficulty be distributed in a way that would be considered just by those concerned.

The departure from the basic principle of traditional inheritance, namely that it only takes place within the clan, is a very complex process, with different characteristics in different parts of the country. Most strongly affected by modern development are the matrilineal family structure and inheritance. Fathers increasingly dislike the idea that one day their inheritance will not go to their own children with whom they live together, but to their nephews with whom they may not have had any contact. Thompson reports a meeting of the Yao Chiefs in the year 1950 in which all the important chiefs and village headmen participated. At this meeting it was suggested that in the future the following rules should apply for inheritance: A husband’s heir should be his wife and children. A widower should be allowed to bring up his own children and not be forced to abandon the house (in the village of his wife) in which he lives. However, Yao Local Courts chairmen told me that those proposals did not fall on fertile ground, due to the conservative attitude of the rural population.

It is difficult to estimate how far the population rejects the traditional inheritance law. However, it can be said in a general way that the desire to give preference to one’s children is strongest among the population in densely populated regions, in particular in the cities, and among those who have received an education, whereas in the remote rural areas the old tradition is preserved. The following statement by a Local Courts chairman may serve as example:

135 This is the case, for example, with the Tonga from Nkhata Bay
136 This happens among the Ngoni and Tumbuka in Mzimba District.
137 Especially with the Tonga, Ngonde and Nyakyusa,

A special problem in establishing the inheritance rules which are used in actual practice is that inheritance disputes only rarely come before the court but are usually settled by the family elders. Social control strengthened by the "knowledge" of supernatural powers of certain persons also plays an important role in the settlement of inheritance disputes. If there is a quarrel, they will say the death came from the quarrel", as one Local Courts chairman told me. This means that the person who initiates an inheritance dispute, i.e. the one who does not accept the distribution of the estate by the family elders or in some circumstances even by the village headman, must have had quite a special interest in the death of the deceased. It is easily assumed that he therefore caused the death by mfiti, witchcraft. The fear of being accused as a witch certainly prevents many Africans from taking action before a court which would possibly ensure a more just distribution of the inheritance to their benefit. However, it must also be pointed out that this "weapon" is not only effective for the maintenance of the "old custom". In the areas where it is regarded as evident (as law?) that the children succeed to the larger portion of the deceased's estate, the fear of witchcraft accusations may prevent some nephews nowadays from going to court in order to demand the estate from the son "according to our custom".

From my discussions with Local Courts chairman, the following picture of the present inheritance law emerges. It is still predominantly recognized that the matrilineal relatives have the right to administer and to distribute the deceased's estate. Generally, even in rural areas, wives and children participate in the inheritance to a much greater degree than was previously the case. In the "civilized areas" and especially in the cities, wives and children have a right to a part, if not to the larger portion of the estate.

3.3 The Problem of Applying Customary Law within the Structure of the Wills and Inheritance Act of 1967

It has already been shown to what extent customary law is still valid at present under section 7 of the Wills and Inheritance Act. Two questions still remain open:

- There are some overlaps with respect to the distribution of the estate, since "wife", "issue" and "dependants" could at the same time be "customary heirs". Which category of persons, it must be asked, is or should be advantaged by this overlap? Does a male child, who as heir in accordance with customary law would receive half of the estate in a Tumbuka setting, cease to fall under the category of persons within which the other half of the inheritance is to be fairly distributed? Do the dependants, who at the same time are heirs according to customary law, albeit only as co-heirs, cease to be in the category of "customary heirs" since they can already demand a portion from the other half of the estate to be fairly distributed?
- The second question is perhaps the more important one: How does the court decide who is a "customary heir"? The ascertainment of heirs in accordance with customary law is extraordinarily difficult, especially in the light of modern development.

139 Malawi Hansards: 5th Session, 1st Meeting October 1967, p.45
140 See M.G. Marwick. Sorcery in its Social Setting, with detailed case descriptions and analysis.
141 The opposition between son and nephew here somewhat equated with the contract of "old" and "new" customary law.
142 One Local Courts chairman had in fact experienced such a case (as son).
143 One Local Courts chairman showed that he felt uncomfortable with the provision of the new law according to which 2/5 of the inheritance should go to the "customary heirs". To him 2/5 only for wife and children was too little.
It would be futile to lay rules down here for the solution of these questions. The decisions will have to be taken by the Local Courts chairmen depending on the nature of the case.

3.4 Development and Planning in Inheritance Law

3.4.1 Development until Independence

The first actual intervention into customary law took place when the Wills and Inheritance Act of 1967 was passed. The colonial government had not attempted to abolish or change the inheritance law of the African tribes. There were only special provisions (discussed earlier) for the few Africans who had married under the Marriage Ordinance. The envisaged changes in inheritance law already described in connection with the development of the family law had also been limited to those Africans whose marriage was “Christian”.

However, since the reception of English law with Article 15(2) of the British Central Africa Order-in-Council all Africans had the possibility of making a will, which did not under the provisions of the English Wills Act of 1837. In the early years hardly any use was made of this possibility since, quite apart from other reasons, such formalities as asking and paying for the assistance of a lawyer were too much of a bother. When the private accumulation of wealth of the Africans increased, and with this also the desire to care for one’s wives and children, Africans wanting to make a will were confronted with the alternatives of making a will under the Wills Act or under customary law. The making of the will in accordance with the Wills Act was far too cumbersome; on the other hand, with a “verbal” will under customary law it was uncertain whether the expressed will would ever be carried out at all.

In 1960 the African Wills and Succession Ordinance was passed, which simplified the making of wills by Africans. However, the ordinance, which was also to replace section 40 of the Marriage Ordinance, did not come into force.

3.4.2 The Wills and Inheritance (Kamuzu’s Mbumba Protection) Ordinance of 1964

In 1964, shortly before independence but already under the responsible government of the African politicians, a new law of inheritance was passed, the Wills and Inheritance (Kamuzu’s Mbumba Protection) Ordinance. Apart from bringing new provisions in the law of wills for Africans, this law was the first attempt to adapt the traditional family structure to clearly expressed social and political objectives through a massive intervention into customary law. This law, which is unique among the English-speaking African countries in the field of inheritance legislation, was quite correctly characterised as revolutionary. The title of the law already contains a social and political programme. It says:

“An Ordinance to provide for the making of wills and for intestate inheritance of Africans, for the purpose of promoting family stability, the strengthening of marriage-ties and the proper provisions for wives and children.”

According to this law, the following provisions relating to intestate inheritance were made. Should a husband leave behind wives and children, one fifth of his estate would devolve in accordance with customary law. Should he be survived by only one wife, then the widow would succeed to the remaining 4/5. Should he leave behind several wives, the following distribution formula would apply (section 11). The first wife inherits 2/3 of the 4/5. The second wife inherits 2/3 of the rest, or, in the case of only two wives, the whole rest. The third wife inherits 2/3 of the new rest (or the whole remaining portion in case of three wives). The fourth wife succeeds to 2/3 of the new remaining portion or to the whole rest. Should the deceased leave behind children besides wives, the children would inherit half of their mother’s portion in equal shares. Should the mother have predeceased, the children would inherit her full portion. An example may clarify this complicated regulation.

A husband dies. He was married to four wives. The first wife

148 Ordinance No. 36 of 1964.
149 Kamuzu is one of the first names of Dr. Banda, the President of Malawi. When this law was passed, he was Head of Government.
died before him. With his first wife he had a daughter, with his fourth wife, four sons. He leaves an estate worth £500.

From the £500, £100 will devolve in accordance with customary law.

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<tr>
<td>The daughter of first wife inherits</td>
<td>266</td>
<td>13</td>
<td>4</td>
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<td>The second wife inherits</td>
<td>88</td>
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<tr>
<td>The third wife inherits</td>
<td>29</td>
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<tr>
<td>The fourth wife inherits</td>
<td>7</td>
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<td>The sons of the fourth wife each inherit</td>
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This example with simple money figures is the simplest example imaginable. Applied to the African conditions of property, the calculation of the individual inheritance portions would be much more difficult. The disproportionate distribution in favour of the first wife was a direct attack against polygamy, while the preference given to wives and children was in general an attack against the matrilineal family system. This was particularly emphasized in the instructions to the court contained in the ordinance (section 15), stating that "...every Local Court shall have strict regard to the desirability of promoting:

- family stability;
- the strengthening of marriage-ties; and
- proper provision for defendant wives and children."

In order to ensure the implementation of the law it was provided that each death had to be reported to the Local Court. After the expiration of a period of six months during which the Local Court would administer the deceased's estate and pay the liabilities attached to the estate, etc., the Local Court was to distribute the estate in accordance with the prescribed rules.

Legal Development, Legal Conflicts & Planning in Individual Spheres of Law

The law did not come into force. However, it appears that some Local Courts decided inheritance disputes following the provisions of the ordinance.\(^1\) It is not difficult to see why the law did not come into force. The provisions relating to inheritance were too modern and not practicable in this complicated form. Moreover, it would have been impossible to manage the resulting organisational problem. According to the estimate of the Solicitor General, every year about 100,000 persons die in the age of older than 18 years, which means about 40,000 to 60,000 inheritance cases. Accordingly each Local Court would have to administer one deceased's estate during each working day, that means that after half a year each Local Court would have had to administer and supervise the estates of some 150 deceased persons at the same time.\(^2\)

For this reason it was to be expected that the law would not be put into force. Irrespective of this, the new law of 1967 is considerably different from the law of 1964 with regard to the rules of inheritance. Since it gives a more prominent place to customary law, it is distinctly more conservative if compared with the provisions of the 1964 ordinance. It seems that it was not the plan to change the traditional law of inheritance decisively with the Wills and Inheritance Act of 1967. The primary intention was to create a reasonably appropriate structure adequate for the present stage of development. "This Bill", said Minister Tembo during the Second Reading of the law, "is intended to make practical provisions for most matters as they are today."

Roberts explains the rather conservative character of the law with the changes in domestic politics since 1964.\(^3\) The general position of the government at that time regarded "tradition" as an obstacle to the envisaged political and economic independence. But since independence and the subsequent cabinet crises and political unrests, where six "progressive" ministers left the country, another political climate became predominant. Dr. Banda seems to rely much more on the chiefs and other traditional elements and could not permit legal changes which would not be agreeable to this part

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\(^1\) whilst the Ordinance has not been brought into force, the spirit of the Ordinance has been adopted in all cases involving the division of deceaseds' estates referred to in Local Courts. To cite an example, the estate of the late Mr. J.M. Phiri, M.P, where the sum of £8,000 was involved. File remark of the Solicitor General, in: File A.G. 996 of the Ministry of Justice. (The Files of the Ministry of Justice shall hereinafter be quoted as: F).


\(^3\) Cf. Roberts: The Malawi Law of Succession p.88.
of the population. However, this seems to be a somewhat one-sided view. It should not be overlooked that the law of 1964 was not practicable for the reasons already mentioned. Had it come into force, it would most probably have remained a dead letter. Moreover, the initiative for the new law did not come from the President but from the predominantly English officers of the Ministry of Justice. Certainly purely pragmatic considerations stood in the forefront during the creation of the Wills and Inheritance Act of 1967.

4. Legal Pluralism and Legal Development in Land Law

English law and customary laws also exist side by side in the field of land law. In order to reform the land law, a new legislation was enacted in 1967, which so far, however, is only applicable in a small part of Malawi, the District of Lilongwe. In the following analysis of the present legal situation, reform will be dealt with at the end of the section.

4.1 The Classification of Land under the Land Act

According to the Land Act of 1965, the whole land surface of Malawi was divided into three different categories of land - public land, private land and customary land.

4.1.1 Public Land

At present, about 12.5% of the total land surface of Malawi is public land. This is land in public ownership and under the authority of the Ministry of Natural Resources. Public land consists primarily of forest reserves, urban real estate and other land which serves the public interest. The Minister can lease public land and customary land so long as this directly or indirectly serves the public interest. The leased land is classified as private land and falls under the law which governs private land.

4.1.3 Customary Land

Customary land forms the largest part (84.5%) of the total land area of Malawi and is the property of the Malawian people, represented by the President. It is under the control of the Ministry of Natural Resources. Through an official regulation the Minister can declare customary land to be

156 See the Draft Memorandum to His Excellency on the Wills and Inheritance (Kamuzu's Mbumba Protection) Ordinance, No.36 of 1964, dated 1.9.1966, in: F.A.G. 996
157 How little consideration sometimes is paid to the chiefs and the traditional population by the government can be seen in the land reform laws.
158 Act No. 25 of 1965.
public land, or vice versa. The actual control is exercised by the chiefs and village headmen recognized under the Chiefs Act of 1967 under the supervision of the Ministry.\textsuperscript{167} The chiefs are to regulate the distribution and use of land in accordance with customary law.\textsuperscript{168}

4.2 The Land Law of the Malawian Tribes

The land law of the Malawian tribes is fairly uniform. However, the different social structures cause some variation.\textsuperscript{169}

4.2.1 The Distribution of Land and the Entitlement to the Distribution of Land

All tribes share the common principle that the chief is the "father" of the land. He administers the land for the tribe as trustee of the spirits of the ancestors. He is the highest authority in the control and administration of land; he still decides in all disputes concerning the distribution of land. He distributes land to his junior chiefs or the village headman, who in the past had to pay tribute for this. In the densely populated Southern Region of Malawi nearly all available land is already distributed, so that the chief only exerts control over the area in which he himself lives. The village headmen then distribute land to the heads of the extended families, who in turn allocate it to the individual family members. When a family does not have sufficient land, an individual can directly ask the village headman for a piece of land. As a rule, uxorilocally living husbands have no land control or distribution rights.

Basically every adult man in the village is entitled to be allocated a piece of land. It is not clear to what extent women have rightful claims. In the past women could not have an independent right to land.\textsuperscript{170} The Restatements say that this principle is still valid with the Islamic Yao in Fort Johnston District.\textsuperscript{171} About the other tribes the following is said: "...in practice infants and females are not considered 'eligible' to acquire an interest in land as the legal (rather than the beneficial) owner thereof." However, there is an excep-

167 The Chiefs Act, Act No. 39 of 1967 replaced the Native Authority Ordinance.
168 Section 23 of the Land Act.
169 The information on the traditional land law is partly based on the Restatements of the Malawian customary law.
170 See Notes on the Chewa (Liitognwe District), in: ZA 123/36.
171 Probably for religious reasons.
or by forfeiture. The forfeiture can only be pronounced by the chief if there are certain reasons such as the continuous committing of offences by the person concerned or if the individual despite many warnings leaves his land in derelict. Forfeiture is seldom pronounced; nowadays the approval of the Minister would seem to be necessary in addition. In the absence of these conditions no chief, village headman or head of a family can recover allocated land for himself. A case which was tried in the Native Court of the Chewa Chief Mwase of Kasungu in 1934 may illustrate this rule. The following was said in the judgement:

"Village headman Chanama has been found guilty for taking away Alifeyu's gardens without reason. It is a serious thing for any man, though he may be a headman, to take away other people's properties. Therefore the court has ordered him to pay £5 fine and to give back Alifeyu all the gardens so that he being a headman must not take things from his people."

There is, however, an exception in matrilineal tribes concerning uxorilocally living husbands. The right to land allocated to them in their wife's village expires in principle with the end of the marriage and is never inheritable. For this reason, uxorilocally residing husbands have in most cases no real interest to develop great agricultural productivity on the fields in their wife's village. That is why they often have a piece of land in their village of birth.

4.2.3 The Transferability of Rights

Under the law of all tribes no land may be sold. Also purchases disguised as pledge and lease for rent are not permitted. The idea of receiving money for land is foreign to African thought. None of the informants for Restatements could remember a case in which land had actually been given for money. Duly reports some cases from the densely populated Southern Region in which land was to be "sold". A "buyer" defended himself before the court by arguing that he had paid money for the land and therefore must be allowed to keep it. But in all cases the involved persons had been punished and the land returned to its original possessors. "The laws of the chiefs are that no land should be sold or rented this way."176

This principle is still valid today. The Local Courts chairmen maintained that they had not yet experienced such a case. A purchase of land could not be accomplished before the court. "We ask them: Why do you want money for your land? Did you pay for it?" However, land may be leased free of charge for a certain period, but the consent of the village headman is required. Should land be leased to strangers, the consent of the village headman "should" be sought. In such cases it is quite usual for the leaseholder to do something to show that he is grateful to the landholder. For example after a successful harvest he may give him a chicken or he may brew beer for him or the whole village. These lease agreements are usually limited to a specified period. Otherwise, the landholder can terminate the agreement at any time. However, he must allow sufficient time for the leaseholder to harvest the crops. The lease expires with the death of the leaseholder or the landholder, even if it was originally given for a period extending well beyond the time of the death. However it can be renewed by a new agreement with the heir or heirs. It is unclear what the situation is when the lease agreement is withdrawn on the "communal", certainly recognizes individual rights to land, which come close to our conception of absolute ownership. It is only that land may not be withdrawn from the final control by the community, represented by the chief, village headmen or family elders. The big question is whether this barrier will also allow the sale, mortgaging or encumbrances, will also be passed in

172 Alifeyu v. Village Headman Chamama, Civil Case No. 8 of 1934, Kasungu N.C., in: ZA NN 1/172.
173 Mitchell reports that he gave some avocado seeds to some Yao men and told them that it would take seven years before they would bear fruit. None of the men planted the seeds in the village in which he was married. All of them planted the seeds in their villages of birth. J.C. Mitchell, "Preliminary Notes on Land Tenure and Agriculture among the Machinga Yao", in: Nyasaland Journal, Vol. 5, No. 2 (1952), p. 18ff., on pp. 24, 25.
174 But in the "olden days" land could be given as compensation, see Phiri v. Chief Malanda, Civil Case No. 160 of 1934, D.C. Chiwembe, in: ZA NN 1/172.
4.3 Legal Conflicts in Land Law

The Land Act makes it clear that legal relationships affecting land can only be regulated by principles of the respective legal spheres. Concerning customary land, the Minister can only dispose of it within the framework of the legislation. Otherwise all legal relationships are determined by customary law. In contrast with the situation in the family law, Africans cannot withdraw from the application of customary law by choosing English law and for instance transfer a right to customary land in the form of English law. On the other hand all legal relationships to private land are determined in accordance with English law, even when the owners are Africans. The question as to which law is applicable is determined by reference to the category of the land. For that reason legal conflicts are not possible.


182 Section 5, 22-27.

183 This is deduced from section 23 of the Land Act.

184 On the situation in Ghana cf. A.N. Allott, Essays in African Law, p. 242ff., especially p. 258ff. These conflict situations are possible in Ghana since customary law allows the disposition of land and the land does not have a differentiated status; there is no land under native tenure.

185 Act No. 5 of 1967.

186 Act No. 6 of 1967.

187 Act No. 7 of 1967.

188 As land registration district, as customary land development area, and as local land boards division.

189 Section 13 of the Customary Land (Development) Act.
property forms recognised by English law – sole property, joint property and property in common – the law, leaning towards customary law, also provides a special property form, family ownership.196 Should land be family property, the head of the family will be registered as owner with the remark “as family representative”. In external relationships, the family representative alone has the right of disposal. In internal relationships, the right of disposal can be regulated in accordance with customary law.

For a transfer of ownership, a written contract and registration in the land register are required.191 The registration in the land register establishes good faith and makes possible a bona fide acquisition.192 The other material and formal laws affecting registered land - leases, encumbrances, mortgages, etc. – are exhaustively treated in the Registered Land Act. In the case of gaps in the law, recourse to English law is not allowed, but the matter must be decided in accordance with the principles of “justice, equity and good conscience”.193

The new law is not applicable to private land under the Land Act.194 The jurisdiction over all disputes over registered land remains exclusively with the High Court. However, the Resident Magistrates are also competent in cases where the disputed value is below £200.

The Local Land Boards are of special importance in the framework of the new land laws. They control all land transactions. Without the Board’s consent, no sale, encumbrance, lease, division or any other disposal of registered land is permissible or valid. This is even the case with inheritance if it would lead to the division of the land.195 The Boards are also responsible for the distribution of family land. This can be applied for by the head of the family, any adult member of the family, or the Minister. They also decide on the appointment of a new representative of the family. The Local Land Board is bound by the decision of the Minister (Ministry of Natural Resources). Its decisions are not justiciable; they may only, upon application, be submitted to the Minister for another revision.196

190 Section 121 of the Registered Land Act.
191 Section 79 of the Registered Land Act.
192 Section 32 of the Registered Land Act.
193 Section 160 of the Registered Land Act. The concept “equity” here means “fairness” and is not identical with the “law of equity”.
195 Section 6 Local Land Boards Act.
196 Section 7 Local Land Boards Act.

Legal Development, Legal Conflicts & Planning in Individual Spheres of Law

4.4.2 The Development Background to Land Law Reform

In order to understand this radical departure from traditional land law, it is necessary to understand the economic situation of Malawi. Malawi is a poor agricultural country without significant mineral resources or industries. About 90% of the population earn their living from agriculture, making the relatively small contribution of 55% to the Gross National Product. The main agricultural products of the African farmers are maize, tobacco, groundnuts, rice, cotton and beans; on the European farms tea is the predominant product. At present only about 15% of the cultivated land produces market-oriented products, while about 78% of the cultivated area is used for the cultivation of maize, the staple food of the African population. Shifting cultivation has to a large extent already disappeared. In some parts of the Southern and Central Regions high population density has already led to a shortage of land.197 It is estimated that with better agricultural methods the present average production could be raised three to four times.198

For the necessary transition to a market economy, raising the rates of agricultural production is particularly important, since the area for subsistence food production would be reduced and more land would free for cash crop production. For that reason Malawi’s development policy is primarily an agricultural policy. The agricultural extension service system has been expanded with the objective of advising the Malawian farmer on the use of better seeds and fertilizer, on the use of draught-oxen and on better timing of farming.

Besides the general agricultural development programme, the law is to serve as a means of development. “These Bills when passed Acts of Parliament, enforced and carried out, will revolutionize our agriculture and transform our country from a poor one to a rich one”, declared Dr. Banda, the President of Malawi who initiated the land law reform199 during the second reading of the reform legislation.200 In the first place it is hoped that with the new law shifting cultivation will come to an end and that a more economic distribution of the land will be made possible through the re-allocation and consolidation of land provid-

198 Compare with the tables in: op. cit., p. 31.
199 The laws were drafted by an English lawyer. They lean very strongly towards the Kenyan land reform laws of 1959. However, the establishment of family property is new and today still unique in the African land law. See R. Simpson, “New Land Law in Malawi”.
ed for in the law. It is moreover considered to be of great importance that land can be given as security for credits in order to enable farmers to borrow money for the purchase of agricultural machines, fertilizer, etc. The expectation of creating something on one’s “own soil” is to be a heightened incentive for the farmers to increase their agricultural production.

With the Local Land Boards one hopes to have an instrument at hand with which it will be possible to evade the dangers associated with the introduction of land law reforms, such as rent capitalism, disintegration of the rural population structure, and frivolous taking of credits not directed at agricultural development, etc. Dr. Banda said the following about the Local Lands Board Act:

“Ts purpose is to prevent people to whom land has been allocated, from disposing of it irresponsibly, too easily, too freely, and too frequently or stupidly. You know there are many, many people who are stupid or careless about their own future. The intention of the Bill is to protect the foolish people.”

As yet there is no practical experience of the new land law. Until now only Lilongwe District, an area of 500,000 acres with a population of 190,000, has been declared a development district. The implementation of the reform is expected to take 13 years. It is financed with a £9 million loan from the World Bank. Apart from this, the Government wants to extend the area of the reform laws only very carefully and slowly and “not force ownership upon persons who do not want it”.

### 4.4.3 The Probable Effects of the New Land Law in other Spheres of Life and Law

Should the new law become valid law throughout Malawi, it would certainly bring about considerable changes in family and inheritance law, which would not leave the social structure of the rural population untouched. While this in fact is the intention of the law as far as agriculture and land law are concerned, one has to ask whether further far-reaching consequences have been sufficiently considered. A special problem is posed by the matrilineal family systems and uxorilocal marriages. Can the land which a husband has been apportioned in the village of his wife, be registered? If so, it would be difficult to take it away from him after the dissolution of the marriage. Moreover, polygamy would then become make an enriching business along the idea of “the more wives, the bigger the area of land”. Should on the other hand no private land be registered for uxorilocally living husbands, men certainly would have even less interest to work productively on a foreign piece of land, which under the new form of ownership would be even more foreign. Precisely the opposite of the aspired objective, namely the binding of the male rural population to their soil, would follow. Or would husbands be forced “to buy themselves in” in the villages of their wives, a practice that could lead to a disguised form of a “bride-price” marriage? Another alternative would be the eventual decline of uxorilocals marriages, which could lead to an increase of bride-price marriages. The trend towards a gradual dissolution of the matrilineal family structure could thus be speeded up by the new law.

In order to facilitate a gradual transition from the old to the new law in Lilongwe District, one intends to start not with registering individual ownership for African farmers but only with family ownership. In Lilongwe District, predominantly inhabited by the Chewa, “family” means the matrilineal family, and “family representative” means the head of the matrilineal extended family or the guardian of a group of young sisters, in any case a matrilineal relative. This brings with it the danger of consolidating the matrilineal family structure, whose eventual dissolution, on the other hand, is regarded as an inevitable developmental necessity, and which probably is such a necessity. The development towards the nuclear family would be retarded and traditional conditions of dependence would be more or less artificially reinforced. Moreover, the already-mentioned question of the legal position of uxorilocally residing husbands still remains to be solved.

The law of inheritance is also affected. As has already been mentioned, the new land law changes the applicable inheritance law with the effect that the distribution of inherited land is subject to approval. This is because for land registered in the land register, unlike customary land, the provisions of the Wills and Inheritance Act would have to be applied. Considering the complex legal regulation of inheritance, with each death of a land proprietor the Local Land Boards would in practice be faced with the question of

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201 See the speech by Dr. Banda in: *Malawi Hansard*: 4th Session, 4th Meeting, April 1967, p. 403.
203 The experiences in this connection which have been made in Kenya are a glaring example.
whether consent should be given. If it were given, there would be the danger of an uneconomic subdivision of land. If it were not given, then novel problems of compensation would arise since the other heirs lose something of monetary value. What can the deprived heirs (who as a rule also have a family themselves) do? Who will give them land?

Considerations of population policy are perhaps the most serious problem. Today Malawi has 4 million inhabitants and already land has become scarce in certain areas. Within 20 years, i.e. within one generation, the population of Malawi will have doubled. Will one be able to compensate the expected rural exodus through the establishment of a secondary industry and the creation of new jobs? The problem will be aggravated by the decline of migratory labour. However, the Malawi Government will be able to gather experiences from the experiment in Lilongwe District and use these for further planning.

5. Legal Pluralism and Legal Development in Criminal Law

5.1 The Criminal Law of Malawi

With the reception of English law through Article 15 of the British Central Africa Order-in-Council of 1902, common law criminal law was also received. In 1929 this was superseded by the Penal Code and to a large part rescinded. However, the Malawi Government will be able to gather experiences from the experiment in Lilongwe District and use these for further planning.

5.1.1 The Penal Code

The Penal Code goes back to a model draft by the English Colonial Ministry, which is in force in all former British colonies in more or less the same form, partly even with the same wording. It is a comprehensive codification of the general and special criminal laws. The first part contains provisions on the criminal legal responsibility, agency and penalties (sections 7-37). These are mainly codified common law. The following important principles should be emphasised.

Criminal legal responsibility begins at the age of seven years. However, a culprit who has not attained the age of twelve years can only be punished if it is proved that he was in a position to realise his wrong (section 14).

Reasons that exclude criminal legal responsibility are:

- Self-defence. This is extended to “unavoidable putative self-defence”. (section 17).
- Mistake of fact, if the action would not be punishable in the erroneously assumed situation. Ignorance of the law in principle has no influence on the liability for punishment.
- Insanity (section 12).
- Action under the direct coercion by a joint principal.

In the second part the individual punishable offences are covered in a very casuistic manner.

5.1.2 The Relationship between the Penal Code and Common Law

From section 2 of the Penal Code it can be concluded that the Penal Code does not exclusively regulate the special criminal law. The liability to punishment under the common law and other criminal law remains as it was. However, this must be understood in a restrictive sense. If a criminal offence is dealt with in the Penal Code, a corresponding matter covered by the common law cannot become relevant.
Chapter Three

It is uncertain to what extent English law and English decisions may or must be referred to in the interpretation of the individual provisions of the Penal Code as far as the characteristics of the offence are also found in the common law. This question was especially acute in relation to the Penal Code definitions of the concepts “provocation” and “insanity”. In the Ghanaian case Wallace Johnson v. The King,218 the Privy Council decided that in the interpretation of this concept any reference to the interpretation rules of the common law should be disregarded as long as the law did not explicitly prescribe the contrary.219 This decision was followed in Nyasaland220 in MacLean v. The King221 and Mussa v. R.222 In the Northern Rhodesian case R. v. Tembo223 the court laid down the principle to be followed in trying such cases:

“It seems apparent that section 13 of the Penal Code224 though founded upon relevant English law, is intended to contain as far as possible a full and complete statement of the law as to the circumstances in which insanity removes criminal responsibility in this Territory. It must therefore be construed in its application to the facts of this Case free from any glosses or interpolations and from any exposition, however authoritative, of the law of England”.

This pronouncement of the court and also the other decisions which have been cited, however, stand in conflict with section 3 of the Penal Code, which establishes as general principle that the provisions of the law should be interpreted in accordance with the English rules of interpretation.225 Thus it cannot be said with certainty whether the Malawian courts would follow Mussa v. R in the future. 226 In the meantime, the Zambian Court of Appeal decided in J. Chitenge v. The People227 that the rule in Wallace Johnson v. The King is no longer to be followed.

5.1.3 The Application of Traditional Criminal Law

As section 2 of the Penal Code permits criminal responsibility “under any other law”, traditional criminal law could in principle also be applied via Article 20 of the Order-in-Council of 1902. This possibility was however taken away from the Local Courts in 1962 and from the British Courts in 1966. But already before this, not all courts held the view that customary criminal law could be applied. In R. v. Robert and Aluwan228 the judge gave a number of reasons for his refusal to sentence the accused for adultery:

- “Native law knows nothing of what we call criminal law.” That is, in the sphere of criminal law customary law does not come into consideration as applicable law at all.
- “Any other law was never intended to include native law.” That is, the courts would not be competent to apply customary criminal law, even if this existed.
- Even if customary law could be applied in principle, the criminal prosecution of adultery could not succeed, because it would be “inconsistent” with the Penal Code.

From the present perspective the two first reasons mentioned above can be regarded as no longer relevant. Adultery was prohibited in most of the tribes and could well have been given the character of criminal law by the European judge.229 Elsewhere it has already been shown that in accordance with Article 20 of the British Central Africa Order-in-Council, the British Courts could apply customary law.230 Many courts also convicted persons in cases involving customary law. Until 1963 the statistics of the Subordinate Courts have a separate category for “offences against native law and custom”. As late as 1962, 24 such cases were tried, out of which 20 ended in convictions.231 However the third reason mentioned above is still cogent. Customary law, which could be applied only on

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218 (1940) A.C. 231.
219 As for example in section 17 of the Penal Code for the concept of self-defence: “... criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English law”.
222 1959 (1) R & N 1.
223 1961 R & N 858.
224 Which word by word corresponds to section 12 of the Malawian Penal Code.
225 Section 2: “This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as it is consistent with their context, and except as may be otherwise provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith”.
226 1959 (1) R & N 1.
228 S Ny. L.R. 2.
229 See W. Rangeley, “Notes on Cewa Tribal Law”, p. 29ff. Chief Mwase Kasungu had the noses of the adulterers cut off.
230 In R. v. Sidney and Emily 4 Ny. L.R., the court held itself competent as criminal court in a case of adultery.
the basis of Article 20 of the Order-in-Council, may not be inconsistent with the Penal Code. And what would be more inconsistent than an acquittal on the one side and a conviction on the other? The reasoning on which the courts based their decision to punish adultery was — even if it was never mentioned expressis verbis — that customary law was not inconsistent, where the Penal Code remained silent, even if in English law the silence meant freedom from punishment.

5.2 Special Problems in the Application of the Penal Code to Africans

The application of the Penal Code and the common law criminal law to Africans brought and still brings with it a number of problems, especially in cases where the written law departs too far from the traditional legal thought and concepts. In the following, the most important problems will be briefly analysed.

5.2.1 The Evaluation of the Status of Husband and Wife

The English law and the Penal Code for a number of offences proceed from the fiction that married people are to be treated as one person due to the extremely close human and legal bonds between them. For example, spouses cannot enter into a conspiracy amongst each other or "steal" from each other. Because of the differences between the monogamous English marriage and the — at least potentially — polygamous traditional marriage, it was disputable whether this privileged status of spouses should also hold for Africans married under customary law. In R. v. Kwalira and another,\(^{233}\) where the court was confronted with the question as to how the status of the couple married under customary law was to be evaluated\(^{234}\) with regard to the right of refusal to give evidence, the East African decision in Laila Ghina Mawji and another v. R.\(^{235}\) was quoted with approval. In this decision, which was later confirmed by the Privy Council\(^ {236}\), the East African Court of Appeal had stated that a husband and a wife in a potential-

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...polygamous marriage could not “conspire” with each other in the sense of the Penal Code. On the other hand, in Mphumeya v. Regina\(^ {237}\) and Neva v. Regina\(^ {238}\) it was decided that a wife married under customary law should be convicted for theft of her husband’s property, in contrast to the basic rule of the common law indirectly adopted in the Penal Code.\(^ {239}\)

A peculiar subsumption was at the basis of the judgement in Mphumeya v. Regina. The wife was accused of theft under the Penal Code. The court stated:

- that the privilege of husband and wife was not relevant for the husband and wife married under customary law, and
- that the wife must be convicted because according to customary law theft between husband and wife is punishable.

With the last consideration the judge proceeded from the view that customary law displaced the basic principle of common law. However, the wife was convicted for the offence of theft under the Penal Code, even if customary law was used to ascertain whether the conditions of the Penal Code offence were fulfilled.

5.2.2 The Evaluation of the Concept "lawful"

There are similar problems when it has to be considered whether a certain behaviour is lawful or unlawful. Is it possible, according to customary law, to assess whether the behaviour of an African bound by traditional legal thinking was lawful, if this lawful at the same time constitutes an element of the definition of the offence? A clear opinion was expressed in the Northern Rhodesian case R. v. Ndhlouvu\(^ {240}\). N. was accused of “common assault”\(^ {241}\) because he had beaten his wife. The defence argued that the violent attack of the husband on his wife had been lawful since it was justified under customary law. The judge rejected this argument since customary law could not be applied in the High Court. The decisions of the High Court in Nyasaland or Malawi in R. v. Damaseki\(^ {242}\) and The Republic v. Ganizani Inusa\(^ {243}\) are more flexible. In both cases the judges conceded that in deciding whether the conduct of the accused...
African had been unlawful, customary law could play a role. However this question was not decided conclusively.

5.2.3 The Evaluation of the Concept “reasonable”

English and traditional legal thinking are in conflict even more clearly when the conduct and thinking of an accused must be measured with general legal concepts such as reasonable. This is for example the case when an accused is allowed the benefit of a mistake on the basis of which, as with “provocation”, the liability for punishment can be reduced, or as in the case of putative self-defence, even excluded. The rule of English law is that the belief underlying the mistake must be honest and reasonable. This problem became particularly relevant when Africans had killed sorcerers whom they held responsible for the death of relatives or because they felt threatened by their supernatural powers.

Whether the belief in the magical powers of certain persons was “honest” and “reasonable”, was judged quite differently in the beginning. The problem can best be illustrated with the controversial decisions of R. v. Jackson and Att. Gen. for Nyasaland v. Jackson. The case was first decided by the High Court of Nyasaland. An elderly female relative had put a curse on Jackson as a consequence of which he believed he was in danger of immediate death. She had threatened him by saying “that he would not see the sun again”, which he had understood to mean that he would not see the sun go down on this day. He was therefore convinced that his only chance of survival was to kill the woman. He looked for her, found her, and killed her with a bow and arrow. The High Court judge decided that Jackson honestly and reasonably had believed that the woman would kill him with her supermatured powers and that he would save his life only by killing her. While this had been a mistake, he could not be subject to greater legal criminal responsibility than if this mistaken assumption had been true. There was no difference between a physical and metaphysical attack on Jackson, and his behaviour was to be evaluated as if the woman had attacked him in order to murder him. Jackson therefore was acquitted.

On appeal by the Attorney-General the Federal Supreme Court decided that Jackson’s action should be considered as murder. For the following reason: The test of reasonableness in the common law is an objective case, which is measured by what the average man in the streets of London holds to be reasonable. Since the average man in the streets of London regards the belief in the effectiveness of witchcraft as senseless, this belief could not be considered in the evaluation of whether there was a case of actual or putative self-defence, which would free Jackson of criminal liability. If the judge of the High Court had believed that what is reasonable could be measured on the conceptions of the African, then “he was wrong in law”.

The judgement of the Federal Supreme Court was criticized and declared to be wrong in later judgements. In Willard Andiseni Lufazema v. The Republic the Malawi Supreme Court of Appeal revoked the decision of the Federal Supreme Court and declared the legal principle which the Malawian courts must follow in future: What is reasonable is to be decided on the basis of what the average person in the community to which the accused belongs considers reasonable. While this had only been explicitly pronounced for the concept “provocation” in the Penal Code, the idea was immanent generally to the Penal Code. However, self-defence or putative self-defence which would remove the liability to punishment, was only given when the threat was immediate and the accused could not evade the threat without the use of force.

244 In R. v. Damaseki, the judge asked himself: “... unlawful means contrary to law: quaere if this includes customary law? And later came to the realization, “that customary law might conceivably affect the matter”.

245 In Tanganyika the question whether an apprehension is “lawful” was determined in Ndembera v. Rex in accordance with customary law, (1947) E.A.C.A. 85.

246 Section 10 of the Penal Code defines the “mistake of fact” as follows: “A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminal responsible... to any greater extent than if the real state of things had been such as he believed to exist.”

247 Reduction of punishment considered in R. v. Feresiya, 5 Ny. L.R.38; not considered in Kwaseka v. The King, R.N.C.A.L.R. 1947-1952, 25. Compare this with the unambiguous statement in the South African case R. v. Mhombela, 1933 A.D.269: “In deciding whether a mistake of fact is reasonable, the standard is that of a fictitious legal figure ‘the reasonable man’... the race, idiosyncrasies, superstitious or intelligence of the accused do not enter into the question”.

248 1956 R & N 666.

249 1957 R & N 443.

250 In Mapeto Chitewera Nyuzi and Jackson Kudemera v. The Republic, Cr. App. 331 of 1966, M.H.C., the judge’s statement was striking: “With respect, there is a certain Olympian detachment from reality by imputing to the accused, who was occupied in a pre-scientific culture, awareness of modern scientific culture, with the result that he was judged, not upon the facts as if honestly believed in them, but as though he could not have honestly believed in them any more than an ordinary educationed Englishman could have believed in them”.

251 By the High Court in The Republic v. Willard Andiseni Lufazema, Criminal Case No. 34 of 1967, certainly without being entitled to do so, since the decision of the F.S.C. was binding on the High Court. The question in Cummings Kholiyo and Fernande Mablesi v. R., was left open, Civil Appeal Case No. 25 of 1965, M.S.C.A, J.A.L., vol. I (1966), p. 63.

252 Civil Appeal Case No. 40 of 1967.

253 In section 214.
5.3 Legal Development in Criminal Law

The decisions in Mphumeya v. Regina, R. v. Damaseki, R. v. Jackson and Willard and Willard Andiseni Lufazema v. The Republic characterize the most important tendency in the development of the Malawian criminal law: the slow adaptation of customary law and the Penal Code to the specific African conditions. The method used is very similar even if not always the same. In Mphumeya v. Regina the judge used traditional law when deciding whether the criteria of a Penal Code offence were given - although he was justly criticised for not having applied the Penal Code "cleanly". This is similar to the concessions made by the judges in R. v. Damaseki and The Republic v. Ganizani Inusa, i.e. that customary law could play a role in the evaluation of the unlawfulness of a certain conduct, and that this idea is not to be completely rejected as had been done by their Southern Rhodesian colleague in R. v. Ndhlovu. The reasoning in R. v. Jackson and Willard Andiseni Lufazema v. The Republic did not really constitute recourse to customary law; what was reasonable was measured in terms of general African understanding. However, all decisions depart from the offence as defined in the Penal Code or common law. It is the offence of theft as defined by the Penal Code for which Mphumeya was convicted; it was the objective test of the common law which decided whether Jackson's conduct was not. And all decisions appear to be based on the same principle, irrespective of "application" defined in the general African understanding. However, all decisions depart from the offence as the Constitution recourse to customary law; what was reasonable from the substantive meaning, which has been objectified and become law in England over the course of centuries, and concede that for Africans a new substantive content of the concept can be established. However, there is no attempt, and this is particularly clear in


6.1 Preliminary Remark

The different substantive rules and principles of "English" and traditional law which have been presented in the preceding sections can still be understood relatively easily. This is much more difficult with respect to the logic immanent in both legal systems, which mainly finds its expression in the technicality of procedure and in the assessment of evidence. Here the conflict between "English" and traditional law is probably greatest, for while the material principles can be the same in both normative orders, their logic and assessment of evidence rarely are. This is the more important as "English" and traditional law in both branches of the courts are applied by judges who have only grown up in one system of judicial thinking and who are mostly not in the position to comprehend the legal logic inherent in the other system and to think and act in its terms. This in turn becomes an impediment to an eventual growing together of both ways of legal thought.

254 1956 R & N 240.
255 1961 R & N 673.
256 1956 R & N 666.
257 Civil Appeal Case No. 40 of 1967, M.S.C.A.
258 Roberts The Growth of an Integrated Legal System in Malawi: A Study in Racial Discrimination in the Law, pp. 115, 116: "It is submitted that the approach adopted by the court involved a confusion of readily severable issues...".
259 1962 R & N 556
260 N.R.L.R. 298
261 To me this appears to be the most appropriate characterization of this process. In German law, too, the concepts are objectified. But with the greater emphasis to subjective elements a greater flexibility is given, which permits an adaptation to conditions of life that are different from those which in Germany led to the objectification of the concept. Because of a lesser emphasis on the subjective element and the lack of a differentiated treatment of guilt in criminal law in English law, the substantive content of the concepts have to change in order to enable an adaptation to other conditions of life. This then appears as change of law.

262 Civil App. 40 of 1967, M.S.C.A.
263 Even if the abstract principles on which they are based in both systems of law may be similar or the same.
the casting of the lots had to prove his innocence. As a rule, he or she had no other choice than to undergo an ordeal.

The one mostly used was the Mwabvi ordeal. Mwabvi is a poisonous substance extracted from the bark of a tree and mixed with water. In court it was given to a hen or a dog, but mostly to the accused himself. Should he vomit it, his innocence was proved. If he died, it was proof that he had been the offender. The most important aspect of the ordeal was the ritual incantations with which the Mwabvi was requested to kill the liar. Without these, the Mwabvi could not unfold its powers of discovering the truth. The whole procedure had to be directed by a diveriner who alone knew the secrets behind the preparation of Mwabvi magic and the ritual incantations. In disputes with contradictory accusations, often both parties had to take the Mwabvi.\textsuperscript{265}

The most important function of the Mwabvi ordeal lay in the discovery and conviction of sorcerers. The belief that some people can operate and cause damage through supernatural powers ("people kill people with witchcraft") was widely spread among the Malawian tribes, especially the Chewa, Lomwe and Yao.\textsuperscript{266} For Africans, mfiti, witchcraft is the logical ex-post explanation for inexplicable extraordinary incidents\textsuperscript{267}, giving a satisfactory answer to the question "why?"\textsuperscript{268} It is estimated that even today about 3/4 of the Malawian population strongly believe in mfiti. Some Local Courts chairmentold me about personal experiences, which had cleared all doubts from their eyes about the existence of witchcraft. Also a large section of the "enlightened" population still believes in some way or other in witchcraft. The story reported by Gluckman is typical of this more refined form of belief. An African teacher blamed witchcraft for the death of his child who had died from typhoid. Upon reproach that he knew that typhoid was really transmitted by the bite of a louse, he answered that he indeed knew this, "But why did the louse come to my child and not to his playmates?"

\textsuperscript{265} Compare the report on the Mwabvi ordeal in the Annual Report on the Southern Province for 1930, in: ZA NS 2/1/2.


If a series of inexplicable incidents had occurred in a village, for example, should many people have died without visible cause, it was clear that only "mfiti" could have been the cause. If no one in particular was suspected right from the start, then often the whole adult population of a village underwent the Mwabvi ordeal under the direction of a diviner. Often a large number of people died in such situations. Thus in 1920, the Provincial Commissioner of Central Province reported 20 cases of death within two months in one district.

The confirmation of the accused and the exposure of the witches through the Mwabvi ordeal were not only fortuitous. In Kapeto Chitewera Nyuzi and Jackson Kudmera v. The Republic the judge mentioned a new scientific theory according to which the Mwabvi alone is not a lethal poison, but only becomes poisonous in combination with adrenalin, a hormone of the adrenal medulla. Adrenalin is discharged in a situation of great excitement. Hence the Mwabvi could operate as a "lethal lie detector" and kill only those persons who, due to a sense of guilt, are particularly prone to excitement.

The discovery of an unknown offender or a witch by the diviner in most cases was the result of a careful analysis of the social conflicts in the village. The diviner first asked the reason why one sought his advice, and whether all the circumstances of the case had been explained to him; he then gave a vague indication of who could be the culprit. The person seeking advice interpreted this together with his suspicions and suggested the probable culprit. The diviner then asked his instruments whether the suspicion was correct or not. In this way he always found the reason that led to the suspicion.

The Rules of Evidence

The rule that the accused has to prove his innocence governs the whole traditional procedure of proceedings. However this should not be misunderstood. It only says that credible accusations will be believed as long as the accused cannot prove the opposite, i.e. that credible accusations shift the onus of proof to the accused. The probability of truth inherent in a plausible accusation is evidence. The standard by which credibility is measured is the conduct of the parties. That person was credible who behaved or had behaved as one would expect according to the norms of conduct valid for a group of persons of the same status. Who departed from this was incredible, and this incredibility was a sign of the person's probable guilt. In the "atmosphere of confidence", one did not make accusations without reason. "If people live friendly together, why should they lie?" as a Local Courts chairman told the author. If, however, a good reason for the accusation was recognised, for example if the parties had recently had a quarrel, then an accusation was no longer credible. Then "it was of course clear" that it just was a case of seeking vengeance. The "atmosphere of confidence" was sanctioned with severe punishments. The one who had unjustly accused someone - which was shown by the fact that the accused vomited the Mwabvi and therefore was innocent - had to pay heavy damages in compensation. Should he have done so several times, then he could be banished or killed.

The one who several times falsely accused others "was breaking the village". His conduct affected the whole village since his example questioned the atmosphere of confidence.

Certain evidentiary presumptions were founded on magical assumptions. The instruments of the diviner did not lie. A woman could not lie in naming the man with whom she had committed adultery or who was the father of her child. Other evidentiary presumptions were based on logical principles, like the principle of sufficient reason, e.g. if a creditable statement is produced, it is reasonable to accept it as being true, and other evidence may be dispensed with. But the accused has the burden of proof in the sense that it is up to him to produce a sufficient reason why something is true instead of believing the accuser's story. A substantial body of evidence is required. The rule that the accused has to prove his innocence governs the whole procedure of proceedings.

274 Africans clearly characterize their procedure of proceedings in this form, see point (f) and (i) of the incidental report to the Presidential Commission on Criminal Justice. However, Gluckman who has so far certainly made the most detailed study and analysis of traditional court procedure among the Barotse in the present Zambia, speaks of the "mistaken idea that African courts consider the defendant guilty till he is proved innocent". M. Gluckman, The Judicial Process among the Barotse of Northern Rhodesia, London: Manchester University Press, 1955, p. 76. "Law must be satisfied to test the validity of its conclusions by the logic of probabilities rather than the logic of certainty". As an abstract principle this rule is valid in all legal systems, it is only different when a credible statement is produced.

275 Compare B. Cardozo, The Growth of the Law, New Haven: Yale University Press, 1924, p. 33: "Law is not a rule that ... that is true". That principle is valid in all legal systems, it is only different when a credible statement is produced.


child. For if she did, her child could not be born or not be born alive. Should the child die during delivery without an “admission” from the wife, then this was due to the adultery of her husband and the husband must pay heavy damages to his wife or her relatives.279 It was a system of “self-fulfilling prophesies”. People did not make false accusations and the court mostly only had the task to settle disputes in which the “facts were uncontested” and to fix the amount of compensation.280

6.2.2 The Validity of the Traditional Law of Procedure in the Local Courts

The framework of the procedures in Local Courts is extensively regimented at present. The course of criminal proceedings is described in some detail in the Local Courts (Procedure) Rules.281 The application of the traditional law of procedure in civil procedures is also limited by the Local Courts (Procedure) Rules.282 The form of bringing an action, the keeping of files, the summoning of witnesses and the taking of oaths – all are legally regulated. Nevertheless, and especially in the rural courts, civil and criminal aspects of a case are still settled in the same process. Most actions are still general complaints on which the courts decide after thorough assessment of the issues. It often happens that an issue is decided upon which had not at all been mentioned in the original action at all, and without a formal change of the action. The courts also do not limit themselves to the complaint, but may also decide without formal counter-plea in favour of the defendant.283

Apart from the limitations mentioned above, the traditional law of procedure is still valid according to section 35 of the Local Courts (Procedure) Rules. The basic rules according to which the Local Courts chairmen decide whether to believe the complainant or the defendant have only slightly changed compared with earlier times. Should a woman take action against the father of her illegitimate child, the rule “that the woman is the only witness to the child” today is still valid without exception. Should the defendant admit that he had sexual intercourse with the woman once, the evidence is sufficient. He may insist that he could not come into question as father at all since he had not cohabited with the woman at the relevant time, etc. He may demand a blood test – the court will regard this as a way of evasion.

The case S.T. Kanthumkumwa v. Laisi Labsoni284 may illustrate how self-evident this rule is for Local Courts chairmen. K., the appellant, was in the first instance285 held liable for “adultery”286 and ordered to pay £15.5 damages. Had he admitted that he had had sexual intercourse with the complainant, but remained adamant that the child could not be his since it was born much too early. The Local Court had not taken his defence into account. During the appeal trial, K. was questioned: “Do you agree to have committed adultery?” Answer: “I agree about the adultery.” Question: “Why did you appeal then?”

With this laconic question, the court clearly confirmed the legal position: the appeal was “without reason”, senseless. Consequently, it was said in the judgement: “Since adultery was committed, there is no doubt as to whether or not the adultery was the result of the baby as is suggested by the appellant’s defence.”287

If the court holds the conduct of the complainant to be sensible, it does not help the man to deny that he had sexual intercourse with the complainant at all. In Edala Banda v. R.E. Kaunga Nyirenda,288 a school-girl sued one of her teachers for “adultery”. The defendant denied this and maintained that he had not been in the school at all during the time in question. However the court was convinced that the complainant told the truth, for “... there are six teachers at the school where defendant was teaching and this is proof that as defendant was mentioned, he is the one who committed adultery with her”. If the complainant had wanted to lie, she could have named another teacher as the father.

The majority of these cases came from Local Courts in the rural areas where there is still a strong belief in the magical sanction of a woman’s lie.

279 Rangeley, op. cit., pp. 43, 44.
281 G.N. 175 of 1962, in section 26-33.
282 In the Native Courts traditional law of procedure was still valid in accordance with section 21 of the Native Courts Ordinance. The influence of procedures in the English Courts interrupted a witness who spoke rather far too detailed: “None of these long stories. We are conducting the case according to the customs of the whites”. J. Mitchell, “Political Organization of the Yao of Southern Nyanasaland”, p. 156.
283 As for example in E.J. Nyirenda v. W.L. Magodi of Ntenjera Local Court. N. sued M. for payment of £10, the court ordered N. to pay £5 to M.
284 Civil Appeal Case No. 8 of 1967, Dedza Local Court.
285 Laisi Labsoni v. S.T. Kanthumkumwa, Civil Case No. 198 of 1967, Maonde Local Court.
286 Any form of sexual intercourse between two unmarried persons is referred to as “adultery”.
288 Civ. C. 386 of 1967, Nthembwe Local Court.
But also in the Urban Courts this principle remains unchanged. The Urban Courts Chairmen of Blantyre, Zomba and Lilongwe, Malawi's three biggest cities, well acquainted with the existence of modern scientific advances such as blood group tests, were strongly convinced that the statement of the woman had far more weight than "some sort of European invention". The blood group test can lead to a wrong result, "but a woman cannot lie".

The one who wants something to be considered as valid that does not correspond with the generally recognized rules of conduct must prove it. How little the generally recognized rules of conduct have changed for some Local Courts chairmen despite modern socio-economic development can be shown by the case Henoki Tsoka v. Malinesi Nkhomphola from the Mapuyu Local Court, which, however, was quashed on appeal. The complainant's account was as follows:

"In 1943 my elder brother went to South Africa together with the defendant as migrant labourer. Later the defendant together with three other people from our area wanted to return home from South Africa, and my brother and two other persons gave him money. From this money the defendant had to buy a cow and give it to my second brother who lives here. I myself have known about the whole thing when my second brother died and my eldest brother wrote to me from South Africa to find how his cattle were doing. I wrote back that I did not know anything about this. That is when my brother wrote to me about the whole story."

Witnesses or other evidence were not available. The Local Courts chairman asked the defendant:

**Question:** "What made him (the brother in South Africa, author's note) send no money with you like the others did?"

**Answer:** "He had no money as he was fond of high life."

**Question:** "How many of the area were you?"

**Answer:** "We were four."

**Question:** "Why did he (the complainant, author's note) not accuse the rest but you?"

**Answers:** "I don't know why he accuses me of that."

**Question:** "Whom do you think he would accuse?"

The judgement contained the following statement:

"According to the evidence given and questions answered I find there is a case to answer. If you would have been only two there would be another way, but since you were four but he did not claim anything from the rest but from you, I believe you had such an agreement."

Two points convinced the court. First it was usual that Malawians working in South Africa gave money for their relatives to their colleagues returning home. Why should the brother of the complainant be the only one not to have done this? Secondly, the complainant could have accused one of the other three working colleagues, had he wanted to accuse a false person. The court also indicates the limits of credibility. If only one other colleague had returned with the defendant, the court would have had to be suspicious.

The logic of the judges in the last two cases clearly shows that they proceed from the view that an accusation which makes sense according to their own legal thinking is truthful and that this forces the defendant to prove his innocence. But the arguments "otherwise he could have sued one of the other teachers as father", or "otherwise he could have sued one of the other working colleagues" cannot be further pursued. For if the complainant had really sued another working colleague, the court would have confronted this defendant with exactly the same argument.

### 6.2.3 The Application of Traditional Law by the English Judges

The aspects of traditional law just mentioned and the functioning of the Local Courts chairmen already foreshadow the difficulties with which English judges must are confronted when applying customary law in the British courts. De jure one must distinguish the way in which judges apply customary law. If customary law is to be applied in first instance, the fundamental principle of *jura novit curia*, the court knows the law, is not valid. If the existence of a rule of customary law is asserted by one party, it must be proven, at least until a rule of customary law has become notorious to the court. In appeal cases from the Native or

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290 Civ C. 175 of 1967, Mapuya L.C.
Local Courts, however, judges have to apply the same law as the Local Courts. 290 De facto, however, this difference is (and has been) meaningless. The problem in the application of customary law by the English judge is that while he can be well informed about the customary law by the statements of witnesses or the opinion of assessors, 296 he cannot weigh the evidence and apply specific customary law rules to an individual case in the customary way. 297

An example is the application of Ndebele marriage law in G. Kamcaca v. S. P. Nkhotc and another. 298 Milton Kamcaca had paid £23 bride-price. An unknown amount still remained to be paid. The judge recapitulated the statement by the Ndebele witness knowledgeable of the Ndebele law: “When the bride-price has not or only been paid in part, the father of the wife can claim the return of his daughter and her children”, and concluded from this reason alone that the defendants, the brothers of the deceased husband, had no claim to the children. 299 The following comment seems to be in order. The statement of the witness on Ndebele law is correct, the conclusion of the judge is, however, wrong. 300 In other words, the use of the legal principle mentioned was not an application of customary law, for the following reasons:

- The husband’s relatives had the right to the children at least as long as the wife’s father did not claim the remaining part of the bride-price.
- The wife’s father, and not the mother of the children, had the right to claim the still unpaid part of the bride-price.
- Even if the father had made the claim, the relatives of the husband would have been entitled to satisfy it in order to keep the children for themselves.
- In respect of the incomplete bride-price instalments, Grace Kamcaca herself could not have made a claim at all “because a woman can never dispute on her bride-price”.

295 Chitema v. Lupanda on p. 292. “Where, however, the court of first instance administers customary law it would only be reasonable that an appellate court must administer the same law, and as the court of first instance takes judicial notice of the customary law then the appellate court does also”.

296 The statements by the assessors on customary law have probative weight of evidence, section 89, Courts Ordinance. In this respect the situation in Malawi (Nyasaland) was surely different from most of the other African countries, where this was not the case. Compare A. N. Allott, Essays in African Law, p. 79.

297 This is not to say that there were no English judges who could not do that. In West Africa the situation is different where Africans were judges in the higher courts already in the early times.


300 I have discussed this case with a number of Local Courts chairmen and Mr. Fumulani who made a statement in the proceedings as an expert in Ndebele law. All were thereby agreed that in accordance with customary law, the children should remain with the relatives of the father.

301 C.A. (L.C.) 6 of 1967, M.H.C.

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The danger of a “false” application of customary law by the English judges is most clearly revealed in appeal proceedings. Here the English judge must decide whether the traditional judge had “correctly” applied customary law. Apart from cases in which the judgements of the Local Courts are obviously false, the “correction” of the contested judgements often proceeds in two typical ways:

1. The decision of the judge is consciously or unconsciously dictated by his English legal thinking from which he cannot detach himself. A good example of this are the cases where the judge quashes decisions of Local Courts due to (in his eyes) missing evidence, or where he substitutes the judgements with decisions clearly not based on customary law. An example of the first type is Clement D. Muyebe v. Laston Kumbali. 301 Here the Mulanje Local Appeal Court had come to the conclusion that the appellant must be the father of the illegitimate child. The appellant refuted this, maintaining that the woman had had sexual intercourse with several men. This was, however, rejected by the court on the grounds “that he had failed to reveal who these other men were”. The High Court judge commented:

“I consider this to have been a wrong approach as it was Mr. Kumbali and his daughter (the mother of the illegitimate child, author’s note) who were alleging that Mr. Muyebe was the father of the child. That being so, the onus was on them to prove it, there was no onus on Mr. Muyebe to prove that some other man might have been the father of the child.”

The court thus failed to recognize that the allegation by the mother according to customary law forced Mr. Muyebe to prove his assertion. 302

The decision in William Makumba v. Katerina Kara may serve as example of a decision quite obviously conflicting with customary law. 303 Here the High Court quashed the order of divorce passed by the Zomba Local Court and substituted it with an order of judicial separation, which does not exist at customary law.

2. The judge evades making a decision himself or accepts the opinion of the assessors, or the majority of the assessors, as legally binding. This hap-


303 C.A. (L.C.) 26 of 1967, M.H.C.
ened for example in Chokandwe v. Chigwaya. Two assessors in the court of appeal held that the defendant was entitled to damages since the appellant had had sexual intercourse with her. The third assessor did not share this view, as the woman was unmarried and she already had two illegitimate children. Although the judge himself doubted the view that the woman was entitled to a claim, he followed the view of the two assessors.

6.3 Legal Development in the Law of Procedure

6.3.1 In the Law of Civil Procedure

Over the course of time, only a few changes have taken place in the law of civil procedure. As most of the civil disputes between Africans were tried in the Local (Native) Courts and as traditional procedural law was still largely valid in these courts, there was no compelling need to terminate the existing dualism with, for instance, the introduction of traditional conceptions into the English law of procedure. It is significant that changes were made in those areas where Africans would necessarily come into contact with English law. The most important change in this respect is the new evidentiary rule in affiliation cases under English law within the framework of the Affiliation Ordinance. This rule was initially regulated in section 5 of the Affiliation Ordinance:

"... a Magistrate shall hear the evidence of such and such other evidence tendered by or on behalf of the person alleged to be the father and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the Magistrate, he may adjudge the person summoned to be the father of the child..." (italics supplied).

In 1963 the part of the provision in italics was deleted; the evidentiary requirements were more or less adapted to those of traditional law. The political background to this change has already been mentioned. It was made to prevent Europeans from evading their paternity obligations regarding children with African women.

304 C.A. (L.C.) 23 of 1967, M.H.C.
305 One of the less decisive amendments was the extension of the period of limitation for claims of third parties resulting from manslaughter from one to three years; section 4 Statute Law (Miscellaneous Provisions) Act, No. 27 of 1967. Minister Msomba told the European Members of Parliament: “As regards African customs even these three years is not enough. We have in our language - Chinyanja - a saying ‘Mlandu suwola’ - ‘A case is never rotten’.” In: Malawi Hansard, 5th Session, 1st Meeting, October 1967, p. 26.
306 Ordinance No. 25 of 1946

6.3.2 In the Law of Criminal Procedure

The General Situation

The situation was different in the law of criminal procedure. Although 75% of all criminal cases are decided in the Local Courts, the procedure in the British Courts has nevertheless quite a marked importance because of the gravity and importance of the cases. In the British Courts the rules of procedure modelled on British law were valid, in which hardly any concessions had been made to traditional law. It was simply provided that a fine could be given to the aggrieved party as damages, which would have to be considered in a later civil suit. This did not really help the relatives of a murdered African who, during the trial in the High Court against the murderer of their father or brother, had expected that the court would award them damages. If, as generally was the case, the judge did not do this, they would return to the village deeply disappointed with “English justice”. They seldom knew, and just as seldom did the English judges advise them that a claim for damages could be pursued successfully in separate civil proceedings.

As in civil law, the traditional ideas differed widely from the English law of evidence. The Republic v. Kazigele White and Victor Chiwanda, a spectacular murder trial in the year 1967, is a good example to illustrate this. W. and G. were accused of having murdered an eight-year-old girl in order to make “medicine” out of her sexual organs. The accusation rested on the statement of a young boy D., who had observed how W. and C. had dragged the dead girl through the bush. Apart from some other circumstantial evidence both accused had also admitted the deed. In the main hearing, D. who had reported his observation only some days after the incident, explained that he had only made this testimony because the police officer S. dealing with the case had beaten him up. Both accused retracted their admissions and explained that they had made the admissions only because after the confrontation with D., S. had beaten them up and tortured them. S. declared that he had neither forced the accused nor the witness to make any form of statement.

307 Section 74 of the Subordinate Courts Ordinance of 1906; section 180 of the Criminal Procedure Code of 1929, the same regulation is valid in the Local Courts at the present, section 15 of the Local Courts Ordinance.
After a thorough assessment of the evidence the judge concluded that D.'s original statement was credible, that there was a high probability that the accused had been beaten by S., and that they had made their admissions independent of the beating because they saw themselves exposed by D. The three assessors agreed that they did not have any doubt concerning the guilt of the accused. And so the accused were sentenced to death.

On appeal the Supreme Court of Appeal quashed the sentence and acquitted the accused. One of the appeal judges concurred with the High Court judgement but was out-voted by his colleagues. They proceeded from the view that the admissions, whose content they held to be true, had been obtained by force through the maltreatment by S. Since according to the law in force, involuntary statements may not be used as evidence, and since no additional evidence (corroboration) was available, the accused had to be acquitted. Once again it was "proved", in the minds of the Africans, that with English law and with the English judges "technicality" was placed above justice. Also the judges themselves could not fully withdraw from this conflict as can be observed from their impressive conclusion:

"We feel impelled to say that while we do not want guilty persons to escape just punishment we accept that this is bound to occur from time to time if the laws of evidence applicable in Malawi are to be observed. While we are impatient of an over-technical approach we think that it would be disastrous if judges were to override the rules of evidence whenever they personally believe an accused person to be guilty. To do so would not, in our opinion, advance the cause of justice, for the rules of evidence exist in order to protect members of the public from the limitations to which all persons, including judges, are subject. It has long been recognized that to admit exorted confessions is highly dangerous, not only because a confession so obtained may well be worthless but also because to do so would encourage those in authority to exercise intolerable methods. We consider ourselves obliged to do what we conceive to be our duty in accordance with the judicial oath which we have taken, even if occasionally there were what may be considered a miscarriage of justice."

309 In Kazigele White and Victor Chiwande. The Republic, Cr. App. 68 of 1967, M.S.C.A.
310 In the judgement it was said: "There is a strong indication that the statements contained in general a true account of what took place."
311 In the judgement it was said: "...The number of cases in which it has been ruled that confessions must be proved to have been made freely and voluntarily is legion..."
312 Both the judges who accepted the admissions as conclusive evidence did this certainly from purely legal grounds.

Cases such as this and the negative reaction of the population were the cause for several changes in the law of criminal procedure during the ensuing years, which at the same time represent an important chapter of the Malawian legal policy.

The Presidential Commission on Criminal Justice

Towards the end of 1966, Dr. Banda appointed a commission which was to make proposals for a new law of criminal procedure. Members of the commission were the Chief Justice, the Attorney-General, the leader of the white minority in parliament, three leading chiefs and the chairman of the Blantyre Urban Court. The Commission presented its report in February 1967. Apart from proposals for making criminal prosecution courts more efficient, the recommendations of the commission also contained concessions to the African population:

- The problem of damages in cases of manslaughter should be reviewed. After the end of a case of manslaughter, the Registrar of the High Court should notify the District Commissioner in whose district the family of the deceased person lived. The District Commissioner should then advise the family of the deceased with regard to seeking compensation in the Local Court.
- The jurisdiction over sexual offences should be extended to the Local Courts since they are better suited to try such cases.
- A conviction should no longer be quashed because of a fault in the procedure, but only if the court of appeal is convinced that the accused has been unjustly convicted also irrespective of procedural errors.

The report of the Commission as well as its proposals for change are not, however, a true reflection of the critique of English law by the African population. How wide the discord between English and traditional legal thinking still is even at present is shown by the unpublished interim report which the three chiefs and the chairman of the Blantyre Urban Court presented to the full commission. Before the completion of this report, the chiefs had collected complaints against the "English" law of procedure in the different regions. The most important points of the interim report are the following:

314 On the report see also the report as"English" law of procedure in the different regions. The most important points of the interim report are the following:
(b) "That any confessions made by the defendant at a Police Station should be accepted by all courts, as was done in customary law, because most criminals find loopholes in modern courts by saying that the confessions were made involuntarily."

(e) "That in criminal cases such as murder, manslaughter and theft which may have been tried by a competent Magistrate or Judge and the defendant convicted, it is proposed that such decisions should not be reversed or substituted by acquittals in Appeal Courts. If in murder cases the defendant or the defendants were sentenced to death the same sentence must be carried out with the least possible delay."

(f) "That the practices of casting lots, or ordeals which were previously uniform in Malawi are not encouraged. But we strongly recommend their rules of evidence according to which the defendant was presented guilty unless he satisfied the court to the contrary."

(g) "That there were no lawyers in customary law to defend their clients. But while we appreciate the fact that they usually appear in modern courts to help the sound administration of justice, we recommend that they should not disturb certain facts in criminal cases on technical reasons with the view to saving such criminals when it is clearly shown to all members of the public including the lawyer himself that such criminal had actually committed the crime and that he has been acquitted due to certain technicalities."

(i) "It will be appreciated that the rules of evidence were alike throughout the country in all criminal cases especially when the defendant was asked to prove his innocence at the Bwalo where each of them suggested 'ordeal' for a final proof. In order to have uniform administration of justice in cases of that nature we recommend that such a rule must be strictly adhered to and that the defendants should give a last proof to the court of their innocence similar to the one which did not give doubts to the chief and his assessors in customary law."

The Changes in the Law of Procedure

Following the report of the commission, a new law of Criminal Procedure was passed, the Criminal Procedure and Evidence Code. The new Code mainly builds upon the old Criminal Procedure Code but is extended by a part covering the law of evidence. Besides, some innovations were made that partly go back to the proposals of the commission:

- As a new maxim of legal procedure it is provided that substantial justice must be done without unnecessary regard to procedural formalities.317
- No conviction may be quashed on grounds of procedural errors alone, unless the error of procedure has led to a miscarriage of justice.
- If the case requires the presence of defence lawyers, the defendant must appear as witness under oath. Should he refuse to take the oath or to make a statement as a witness, the court should be free to construe this conduct of the accused to his disadvantage.

Regarding the recommendations in (g) and (i), the new law meets the mentioned demands in the interim report of the commission halfway, although it is questionable as to how a defendant can exonerate himself in a way "similar to the one which did not give any doubt to the chief and his assessors". Obligatory oath-taking, quite apart from its dubious nature, certainly is no full substitution for the Mwabvi ordeal. The change regarding the oath-taking probably is the most remarkable change, since it breaks with a sacred and basic principle of English legal tradition. According to English law a defendant may indeed make a statement as a witness, but he does not have to. And the court may not construe the silence of the defendant to his disadvantage.

In 1968, the law of criminal procedure was changed again: The jury system was introduced for all criminal cases in the High Court.318 The aim of this change was to prevent acquittals in cases such as Kazigele White and Victor Chiwanda v. The Republic, where "everyone knew" that the accused persons were guilty. Dr. Banda explained very frankly the background for this change during the second reading of the amendment bill. After he had spoken about a similar case, which had happened in Fort Johnston, he said:319

"The same in Nsanje. The whole world knew, that these people, they were two or three, had literally roasted that woman to death. Every one knew it was, how it was done - and nevertheless, as the case was tried before the court, these people were acquitted because of insufficient evidence And after one had been acquitted, he said as he left the courts: 'Ndili ndi mankhwalatu

315 Act No. 36 of 1967.
316 Almost word for word, the provisions of the Uganda Evidence Act, Cap. 43, 1964 rev. ed. were taken over.
317 Section 3 reads: "The principle that substantial justice shall be done without undue regard for technicality shall at all times be adhered to in applying the provisions of this Code.
318 With the Criminal Procedure and Evidence (Amendment) Act No. 23 of 1967.
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"ine", that means, 'I have medicine, the court could do nothing to me because I had medicine.' And the people believed him, that he had only been acquitted because he had 'medicine' and because he had therewith bewitched the judges. That is why I asked Mr. Roberts, the Attorney-General, to prepare a Bill for the introduction of the jury system so that the judges in the High Court no longer try such cases and then can say 'not proved'."

But even the introduction of the jury system did not seem to protect justice sufficiently for the government and the population. It was therefore decided that cases of this nature should henceforth be completely withdrawn from the jurisdiction of the High Court and be tried in Traditional Courts, which would be newly established. For "justice to be justice in this country it must satisfy the sense of justice of the four million Africans in this country and not the sense of justice of the 8,000 Europeans or 12,000 Asians in this country".

Whereupon the four English judges of the High Court announced their resignation.

320 Whereupon the four English judges of the High Court announced their resignation.

Chapter Four

Summary Analysis of the Development of the Malawian Legal System

1. Analysis of the Legal Development

The two major constituent parts of the present Malawian law, the "modern" English and written law, as well as the customary laws have not remained in their original form since they came into contact. The following overview intends to give an explanation as to how far the two systems of law have changed and the extent to which they have come closer to each other.

1.1 Developments in the English and the Malawian Written Law

The written law of Malawi is still to a large extent based on English law—that is English written laws, model drafts of the Colonial Office and codified common law. The incorporation of traditional legal principles into the written law took place only in those fields where the dualism between traditional and modern law had been abolished either fully or for specific situations. The most important examples are the changes in the law of criminal procedure, the changes in the evidentiary requirements in affiliation actions, the creation of family land in the new land law and the concept of the "dependant" in the law of wills. As long as the relations within the African population remained deter-

1 In 1967 the Malawi Parliament "Malawianised" a great part of English statutes in an ambitious process of clarifying the law. The text of the English legislation was adopted word for word with very few exceptions. Thus in 1967 alone the following laws were passed: The Sale of Goods Act, The Limitation Act, The Bills of Exchange Act, The Trustees Act, The Arbitration Act and The Administrator General Act.
mined in accordance with customary law there was no compelling need for the incorporation of traditional legal conceptions into the written law.

The received common law and the law of equity have also hardly been changed by the courts in the nearly 70 years of their validity and application to Malawi (Nyasaland). Despite the authorisation to adapt the received law to the special circumstances which existed until 1964, the judges continued to orient themselves mainly according to the development of the law in England by the English courts. Here exceptions were only made where, as for example in the criminal law, the dualism between English and traditional law had been abolished. There is, however, a difference between the change of English law by the legislature and by the courts. The legislature changes the whole law; the incorporation of traditional legal conceptions concerns the whole population. The change by the courts, in contrast, concerns only a specific group of people, namely the African part of the population. The basic content of English law as it is applied to persons living under modern circumstances has not been lost.

1.2 Developments in the Customary Laws

1.2.1 Changes in the Traditional Law

In the description and analysis of the development in the individual legal spheres many manifestations of tendencies to change have been noticed in the traditional laws, and it was established that the traditional laws have largely adapted themselves to the changed socio-economic conditions. The evident factors causing these changes are the following:

- Economic development, in particular the introduction of the market and money economy as well as migratory labour.
- Social development, in particular the gradual disintegration of the tribal societies and the increasing mobility of the population.
- Political development, in particular the disempowerment of the traditional rulers, the appointment of judges selected on the basis of political consideration, and the abolition of customary law by the legislature and English law.
- Cultural development, in particular the influence of Christianity, English culture and the introduction of a modern educational system.

1.2.2 The Agents of Legal Development

The agents of legal development, as long as it is not directly influenced by the legislature, are today the chairmen of the Local Courts. The change and creation of law by Native or African Courts was not considered permissible by the English courts. “It is the assent of the native community that gives custom its validity, and therefore it must be proved to be recognized by the native community whose conduct it is supposed to regulate”, the Privy

2 In the sphere of land law this question was not acute in Nyasaland; however, it was in other African States, see for example for Nigeria, Oyekah v. Adele, (1957) 1 W.L.R. 876, P.C.

3 Is for example the dissolution of the traditional family structure and the resulting change in the family and inheritance relationships a consequence of economic development, or of the influence of Christian religion or of English Law? Is the recognition of documents as evidence an incorporation of English legal conceptions or just a recognition of the fact that in the present life documents play a role and that is why they must be considered?

4 See also Malindi v. Therenaz, Civil Case No. 71 of 1968, Blantyre U.C.
Council explained in the Nigerian case E. Eleko v. Officer Administering the Government of Nigeria. Legal changes, which in principle were assumed to be possible and were also recognized, had to obtain the consent and recognition of those subject to the law. The duty of the courts was to find the law and to apply it, but not to change it, as the Nyasaland High Court clearly stated in J.S. Limbani v. Rex. The transfer of this European legal theoretical idea at first met with little difficulty in Nyasaland. In the egalitarian tribal societies the chiefs and village headmen could not change the law without the consent of the population. In this context reference can again be made to the meeting of Yao chiefs already mentioned earlier, whose proposals for the new arrangement in the traditional law of inheritance were ignored by the population. This is also still the case at present in a sphere in which the courts have no jurisdiction, namely the succession to positions of chiefs and village headmen, which in the matrilineal tribes still strictly keeps to matrilineal principles. Many chiefs today would rather have their sons and not their nephews as successors. But people would laugh at them. They would say: “Do you want to monopolize us?” as a Local Courts chairman said.

Compared to the chiefs and village headmen the Local Courts chairmen today are in a stronger position. The Local Courts chairman with whom the author discussed the question of customary law and legal change had no doubts that they (in their view) were entitled to change traditional law: “The courts have gone through to make the children happy (in the law of inheritance). Courts have power to change the law.”

5 (1931) A.C. 662
7 6 Ny.L.R.6.
8 It has already been emphasized in the introduction that it is not intended to give a new definition of the concept of law in this work. Customary law here is understood in the sense of Geiger: “Custom produces the essence of standards, the functioning of the mechanism of law bestows on it specific-legal (binding) stigma”. T. Geiger, Vorstudien zu einer Soziologie des Rechts. Soziologische Texte. Band 20, p. 173. Also in Europe the doctrine that judges must apply the law pure and simple has been widely weakened, and the possibility of a creation of law by judges recognized. For England, see Lord Danning, M.R., in Att.-Gen. v. Butterworth, 3 W.L.R. 819 (1962): “It may be that there is no authority to be found in the books, but if this be so all I can say is that the sooner we make one the better”.
9 The understanding of customary law by the Local Courts chairman is in harmony with Geiger’s definition used here: “Customary law is custom which is used as law.” Exemplified in the example of inheritance law: “Inheritance is custom. If it is enforced in court it becomes law.”
10 C.A. (L.C.) 12 of 1967, M.H.C. in reference to Kharaj v. Khan, 1957 R&N 4, where the High Court reproached a Subordinate Court for a blunder against the same principle.
12 With the example of the Barots. Gluckman has demonstrated in a detailed and convincing manner, how the concept of the reasonable man is used to evaluate conduct in both factual and legal ways. See Gluckman, The Judicial Process among the Barots of Northern Rhodesia. His proposition that the figure of the reasonable man exists in all, and also in traditional legal systems is also confirmed by my (albeit more limited) experiences with Malawian Local Courts chairmen.
13 See Geiger, op. cit., pp. 246, 247.
Chapter Four

“Old” rules of customary law are questioned using the same method, if they no longer correspond with what “one” would reasonably do and think at present. A typical example in the law of inheritance is the slow development entitling a son rather than the nephew to inherit. A Local Courts chairman who already had frequently decided in favour of the children in inheritance disputes of members of matrilineal tribes, explained to me his reasons:

“When a nephew comes from the village and demands the inheritance from the son in the city, then we ask him: Have you helped him (your deceased uncle) building his house? Did you tend his cattle? Where were you during the dry season when your uncle needed help? In the city? No! It was the son. Therefore, what do you want? The estate must be inherited by the son!”

In his questions the Local Courts chairman clarifies his assessment of standards of conduct: one can expect from an “heir” that he helps his uncle, tends his cattle, etc. If not, then he does not behave as an heir would reasonably behave, and cannot make any claims. The example shows that the Local Courts chairman, the traditional judge, consciously abstracts the old rules from their social content and gives a new substantive meaning to the abstract concept “an heir is who behaves like an heir” under the changed conditions of life.

1.3 Conclusion

In the analysis of the legal development in the individual spheres of law and in the summary observation it has become clear that legal pluralism still exists in almost all legal spheres in which traditional customary laws were superseded by English law. The dualism between the two major legal spheres, the English and written law on the one side and the traditional laws constituting the courts and a large part of the local colonial legislation were based on model drafts from the Colonial Office. As for example with the Barotse in Zambia (Northern Rhodesia) and the Buganda in Uganda.

14 An interesting comparison shows itself in the idea of the ‘reasonable man’ in the English law of procedure. I have described earlier how difficult it was for English judges to apply this to African standards of conduct, as the concept ‘reasonable’ was interpreted by reference to the English outlook on life and standards of conduct (of the average citizen on the streets of London). Traditional law here is much more flexible.

15 As for example with paternity actions in accordance with the Affiliation Ordinance. The extension of the application of this law to proceedings in Local Courts has the effect that paternity actions based on customary law are to be seen as “inconsistent” with the statute, as the High Court established in Chikandwe v. Chiqwaya, Civil Appeal (Local Courts) No. 23 of 1967 (obiter). In practice, however, most of the Local Courts still proceed today in accordance with customary law. The abolition of dualism is planned in land law. However, the land reform laws have as yet been put into force only for one of the 23 Districts.

Summary Analysis of the Development of the Malawian Legal System

2. Concluding Analysis of the Legal Policy in Malawi

2.1 The Legal Policy of the Colonial Government

Generally the development of the Malawian legal system followed the general structural principles which were also decisive for the other former British territories. When looking at the establishment of the courts and the general framework governing customary law, one finds the same periods as in the other English-speaking states in Africa, except for the special cases of South Africa and Rhodesia. However, in comparison with most other countries the situation in Malawi (Nyasaland) was less complex because Islamic law hardly played a role and because the government was not faced with the problem of making special concessions to a particular tribe or kingdom regarding a separate court organization.

This uniform development was decisively influenced by the colonial policy of the English governments, which established the general structure of the judicial organisation through the colonial constitutions. Moreover, the laws constituting the courts and a large part of the local colonial legislation were based on model drafts from the Colonial Office. The largely uniform abolition in the sphere of criminal law. It is true that the processes of adaptation of traditional law to modern conditions and the incidental incorporation of traditional legal ideas into the English and statutory law have led to a certain approximation of the two legal spheres. However, in the legal spheres in which dualism still exists, the traditional and the modern law constitute two strictly different spheres of norms. This difference is emphasised as both laws are “administered” by their respective representatives. The question arising for an observer acquainted with the problems and history of received laws, whether there is a tertium quid, a new law constructed from both elements, therefore must be answered negatively and can only be speculatively posed for legal development in the future.


17 As for example with the Barotse in Zambia (Northern Rhodesia) and the Buganda in Uganda.

18 Even if the constitutions themselves were enacted by the King- or the Queen-in-Council.

19 As for example the Penal Code.
legal development was also based on the received English laws received in all colonial countries and by the binding effects which the decisions of the highest English courts and the Privy Council had for the colonial courts. As one of the last countries to be discovered and opened up by the English, Nyasaland trailed behind the development achieved in other colonies. And so the government of Nyasaland in its administrative and judicial political reforms could always refer to the models that had already been developed and tried out in other colonies. On the one hand this inhibited the development of an independent initiative, but on the other hand it offered the opportunity to learn from the experiences of the other countries. Deviations from these models were rare. The most important exception is the development in the marriage legislation, which however had been more due to the initiatives of the missions than to the government. Apart from the marriage legislation, which concerned only a small circle of the African population, namely the Christianised Africans, no attempt was made directly to change the traditional laws or to influence their development in other ways.

2.2 The Legal Policy of the Malawian Government

The African politicians who since 1961 increasingly had influence on the business of government, quickly initiated political activities in the law, the first successes being the judicial reform of 1962/63 and the extension of jurisdiction of the Local Courts in the sphere of affiliation actions. Since Orton Chirwa, Malawi’s first Minister of Justice, left the country in 1964 in connection with the Cabinet crisis and Dr. Banda took over the Ministry of Justice, the legal policy of Malawi has been more or less determined by the latter in all essential matters. His legal policy moves between two poles. On the one hand economic development should be promoted as fast as possible, and “modern” law should serve as one of the most important means for this. On the other hand, consideration must be given to the interests of the traditional population for internal political reasons and more room given to traditional law.

21 One of these illustrative deviations was the establishment of the High Court as the highest court of appeal for the Native Courts in the year 1933.
22 By the middle of 1968 all the leading officers in the Ministry of Justice – the Attorney-General, the Solicitor General, the Director of Public Prosecutions, the Chief Local Courts Commissioner – were foreigners.

27 Jenkins, op. cit., p. 46.
hand and the actual conditions and the legal conceptions of the population on the other, the new law will not become legal reality, because the population will withdraw from the legal sphere. This has clearly been shown with the Africans married under the Marriage Ordinance. The spiritual stimulus of Christianity could not bridge the gap between the actual conditions of life and the legal consequences prescribed by the Marriage Ordinance.

It is here that we find the special problematical nature of the land law reform. "Land is and will always be a hot iron", said Mr. Blackwood, the minority leader in the Parliament of Malawi, during the Second Reading of the land law.28 He knew it from personal experience. During the colonial period the government had in vain tried to force the African population through legal instruments and the threat of punishment to adopt land conservation measures and modern farming techniques. The Malawi government (i.e. the former independence movement), which for political reasons had fought against this form of agricultural "education"29 is faced with the same problem today.

Of course a small part of the population will already know how to appreciate what private ownership can mean in the modern economic sense. But the new law offers little to the majority of the population. The Malawian rural dweller has land, and is independent. He can move into another area, where he can expect that the chief will allocate him a piece of land. The land law reform will deprive him of this freedom; instead it will force him to think in ways which will bring him few advantages. The politically desirable land allocation programme, in particular, will impede the execution of the land law reform. Since, as has already been mentioned, at first only family property for the matrilineal family is to be registered as private ownership, the one part of the population for whom a change of land law could be really important, the uxorilocally residing husbands, remains unconsidered.

However the Malawi government must be commended in that it tries all possible methods through propaganda and training courses to convince the farmers of the advantages of an economic method of farming based on private ownership but it does not plan to enforce the laws against the will of the population. To a large extent this cannot be implemented without causing considerable internal political problems. What Dr. Banda indicated for the case of "failure" could certainly not be realised without great political difficulties. He had said: "Anyone who owns land, whether as an individual or as the head of a family is strictly responsible for the economic and productive use of his or her land; otherwise it must be taken away."30

2.2.2 The Consideration given to Traditional Law

The decisions not to intervene incisively into traditional law or even to expand its sphere of application as can be expected in the sphere of criminal law, are motivated by internal political and pragmatic considerations. "Our government is the government of the people", Dr. Banda frequently emphasises in order to clarify the difference with the colonial period. His people take him at his word. "If we want to be a nation, we must have our own law", was the explanation of the view of the population given to the author by a Local Courts chairman. This does not however entail a rejection of English or English-formed laws in principle. That the legal relationships in the modern economic sphere and those of the Europeans are regulated by English law is regarded as self-evident by most people.

However, over 99% of the Malawian population are Africans; only 8.2% live in the cities or in urbanised settlements.31 Hardly anyone of those would understand why their own sphere – as in family, inheritance, land or criminal law – should be touched by the foreign and incomprehensible English law. The demands mentioned in the interim report of the chiefs to the Presidential Commission on Criminal Justice are a persuasive testimony to this. The same applies to the legal relationships between non-Africans and Africans in which customary law is enforced without exception in the Local Courts by passing the legal regulations: "We enforce our customary law to anybody, regardless of colour."32 Some Local Courts chairmen even considered that this must also apply for disputes between Europeans: "In this case, we would explain that in England English law would be applied. But as we are in Malawi, the law of our people must govern the case."

29 Referring to this Minister Chidzana said the following during the Second Reading of the Land Bills: "The past schemes, tried by the old colonial government were discouraging because people were suspicious of them. It was not our Government. And they suspected that they intended to group people together and leave the wide land to people who would come and occupy it. So we (the Malawi Congress Party) went and politically educated the people not to accept this scheme. This is our Government now. As Kamuzu Government we must see that it works."; in: Malawi Hansard, 4th Session, 4th Meeting, April 1967, p. 421.
30 Malawi Hansard, 4th Session, 4th Meeting, April 1967.
31 Länderbericht Malawi, p. 23.
The Chairman of the Blantyre Urban Court told the author about his experiences as a member of the Presidential Commission on Criminal Justice. The population had been happy and pleased since they saw in the work of the Commission a sign at last "that there is a government", that the government cared about the complaints of the people, and that it (the government) wanted to get rid of the irksome foreign law. The population was especially disturbed by a recent series of murders, which apparently were being used as propaganda by the political opponents of the government living outside the country. About these fears, Dr. Banda said the following:

"... someone... writing lies in the Rhodesian Herald saying that part of these murders are political, because people who commit those murders are against the Government. There is absolutely no political implication in those murders at all. It's simply ufiti, witchcraft, superstition. The only people are bringing politics into those murders are the people in Dar-es-Salaam and Lusaka, Chipembe and Chiume, and Chaponda in Lusaka, who are twisting what they read in the papers... They twisted the whole thing and said it was the Government that was killing the people because it wanted blood to send to South Africa."

The reforms in the law of criminal procedure should also be understood against this background. Acquittals in these murder cases due to "technicalities" of English law, as for example in Kazigele White and Victor Chiwanda v. The Republic, could only feed these rumours. Dr. Banda, who so far had been rather reserved in this matter, therefore took the lead over those who read in the papers... They twisted the whole thing and said it was the Government that was killing the people because it wanted blood to send to South Africa."

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2.3 Short-Term Objectives of the Malawian Legal Policy

2.3.1 The New Regulation of the Applicability of Customary Law and Conflicts of Law

Since 1968 the Ministry of Justice has been working on a Bill to reorganize the sphere of validity of customary law generally and specifically. It is expected that it will be passed in the Malawian parliament by 1970. As far as can be judged from one of the first drafts prepared in the middle of 1968, the bill, the Civil Law Act, will bring the following renovations and clarifications:

1. The law of Malawi is composed of written statutory law, common law, equity and customary laws.

2. So far as specific conditions of life are regulated by legislation, customary law cannot be applied without an explicit proviso. The concept of "written law" is defined restrictively. Only local legislation excludes the application of customary law. Exclusion by English law still in force is only possible if the court is convinced that the parties intend to have their relationships governed by the English law in question. Generally customary law has priority over the application of common law and equity. This law is only applicable if neither written nor customary law contains rules relevant to the case, or where the application of customary law is excluded by statutory provisions.

3. A general exclusion of customary law is effected by the rule in section 11(d) of the Local Courts Ordinance according to which cases in connection with marriage resulting from a marriage under the Marriage Ordinance must be determined by English law. For clarification it is emphasised that also custody and guardianship cases fall under cases in connection with marriage. It is further intended to restrict the application of customary law in some fields of torts. The considerations move into the direction that only adultery, affiliation and maintenance cases as well as damages to property by cattle should be decided in accordance with customary law.

4. The category of persons to whom customary law is applicable will be governed by the new definition of the concept African of Malawi: Africans are persons who live in Malawi as members of an African community in which the rules of customary law are valid. In the relationships between

33 One of the newspapers published in Salisbury (Rhodesia)
35 Private information of the author.
36 In the old English sense.
37 For that reason the Sale of Goods Act will be supplemented.
39 Clause 2 of the Civil Law Bill: "African of Malawi means any person who lives as a member of an African community in Malawi in which rules of local customary law are established."
Africans and non-Africans, customary law is applicable according to the rules mentioned above, that is, if a non-African has voluntarily accepted the disputed right or liability under customary law, or if the court thinks that, all circumstances considered, customary law can be applied without injustice.

The New Definition of the Category of Persons

The provisions which in the future will regulate the application of customary law in all courts are in the main much clearer than the previous rules. With the new definition of the concept African of Malawi, Malawi follows the example of other African states and no longer uses race as decisive criterion for the application of customary law, but membership of the community and their way of life. The questions of when someone by his way of life belongs to such a community — which for instance was explicitly regulated in Tanganyika — and how one can change one’s membership in such a community, however, indicate the limits to exact definition. In particular, it is difficult to classify Africans living in the cities and urban settlements. In racial terms the non-African population, Indians dwelling in the rural areas and villages as businessmen, would probably fall under the concept of African. A particular conceptual clarification however is not achieved by the new definition. Perhaps this is also not intended, as one can more easily achieve the adaptation of law to the social status of the population during the transitional period with a flexible proviso.

For disputes between Africans and non-Africans, the Civil Law Bill retains the unfortunate formulation of voluntarily assumes and adds a new criterion which must, additionally, be fulfilled: the judge, after considering all circumstances, must come to the view that customary law can be applied "without injustice". With this additional emphasis on the discretion of the judge, the tendency of the Local Courts to apply customary law without regard to racial or community membership will certainly be further strengthened. There are no indications that the government would stand in their way.

The New Determination of the Applicability of Customary Law

The application of customary law between the Africans of Malawi, however, remains subject to the general legal regulation of the individual fields of law ("so far as it is applicable"). This brings with it certain restrictions. In family law the applicable law is governed by the law of the respective marriage. For Africans married under the Marriage Ordinance, the Civil Law Bill provides that guardianship cases are also "cases in connection with marriage" to be judged by English law. Here is a new potential conflict: does customary law continue to be applicable to family disputes between Africans who are married under customary law but who no longer live in a traditional community?

In the field of inheritance the respective regulation of intestate inheritance is covered by the Wills and Inheritance Act of 1967. After the coming into force of the Civil Law Bill inheritance issues will be determined on the "basis of the community to which the deceased belonged" in accordance with section 16.

For land law, the rule that the application of the respective law is determined by the category of land and is independent of racial or community membership is not affected.

What remains are the other spheres of civil law, the law of contract and tort. For the sale of goods the Civil Law Bill contains a proviso in favour of the continued application of customary law. Otherwise every local statute would exclude the application of customary law. Particular mention should be made of the regulations of maintenance actions by unmarried mothers and the provisions regulating claims for damages by relatives in cases of manslaughter in the Affiliation Ordinance. However, it is to be expected that for the latter claims there will either come a new proviso for the applicability of customary law without regard to racial or community membership will certainly be further strengthened. There are no indications that the government would stand in their way.

Summary Analysis of the Development of the Malawian Legal System

The provisions of this section shall apply to the intestate property of the estate of a person to whose estate customary law would, but for the provisions of this Act, apply. Compare this with the position in Tanganyika, section 9 (1) (b), 6th Schedule, Magistrates Courts Act.

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In the Sphere of Local (Traditional) Courts

Although the government of Malawi shares the general objective of all African governments to create a single-track court system\(^{49}\) – “to constitute... the Local Courts... as an integral part of a totally independent judiciary exercising jurisdiction on a non-racial basis, with a practical jurisdiction gradually becoming larger as the members and the staff of the courts become progressively more experienced”\(^{50}\) – a unification of the court system is not to be expected in the near future.

In the near future one is not likely to change the structure and the staffing of the Local Courts. This is quite in line with the legal policy of the Malawi government. For the desired natural development of traditional law, the function of Local Courts chairmen is the decisive factor. If the judge cannot think like members of the community, if he cannot decide and assess situations by reference to the criteria which prevail in the society, then there can be no talk of an application of “customary law”. The future of customary law will be determined in a decisive way by the selection and training of the Local Courts chairmen.\(^{51}\) If one wants to gradually extend the jurisdiction of the Local Courts, on the other hand, it will be necessary to have chairmen who possess some legal education, and who can at least speak, read and write English.

The Malawi Government at present promotes the training of Local Courts chairmen at the Institute of Public Administration in Mpemba. There Court

\(^{49}\) See the Dar-es-Salaam Conference, p. 14ff.
\(^{50}\) This was already in 1963 proclaimed by the African (Nyasaland) representatives at the conference in Dar-es-Salaam, see Dar-es-Salaam Conference, p.15. The validity of this statement for the present situation is explicitly confirmed in the government internal exchange of letters between the Legal Draftsman and the Solicitor General of 22.2.1968. As the first state of the countries formerly under British administration, Tanzania had created a unified court system in 1963/64 for the Tanganyikan courts.

with the policy of the colonial government. The present situation, however, is different. Most legal phenomena considered "repugnant" have disappeared from customary law. The judgements are no longer made by traditional rulers distant to the government, but by judges close to it. From a factual and political perspective the main task of the High Court increasingly has become one of legal control only. Without doubting the competency of the English judges, it must be said that with its present staffing the High Court is not suitable for its function as the court of appeal in cases of customary law. Three assessors, who must first explain the law to the judges who are not particularly conversant with customary law, but who themselves do not take part in the decision-making, cannot guarantee a proper functioning of the High Court as a court of appeal.

In this connection, the solution that has been found in Tanzania for the High Court in Tanganyika may be mentioned. The appeal cases from the Primary Courts, the lowest courts of the unified Tanganyikan court system since 1964, and which correspond to the former Local Courts of Malawi, are decided by a special chamber of appeal, in which a special judge qualified in customary law participates in the taking of decisions besides the judge (or judges) on an equal basis. The introduction of "Associate Judges", who could be appointed from particularly competent Local Courts chairmen, would also be a welcome development in Malawi.

**The Concurrent Jurisdiction in Customary Law Cases**

According to the Civil Law Bill the jurisdiction in customary law cases is to be extended to the Subordinate Courts and to the High Court. In this way the Government takes up a proposal which found the consent of all delegates at the conference in Dar-es-Salaam\(^54\) and which revives the situation prevailing before 1966.\(^55\) This plan also raises doubts. Given the present staffing of the High Court and the legal-political plans of the Malawi Government according to which the development of customary law should take place through the Local Courts, a parallel development in the British Courts would only have disturbing effects. One would also have to consider that against the judgements of the High Court as a court of first instance in customary law cases, there would only be an appeal to the Supreme Court. The doubts expressed here, it should be stressed, are not of a fundamental nature. They pertain to the current state of development and the foreseeable near future of the Malawian court system. A period in which British courts are Africanized and in which the development of case law in customary law would seem an appropriate legal policy, will necessitate a reconsideration of the problems of the constitution of the courts. In the meantime, the problem of the unification of the court system seems to be primarily a cosmetic problem.

### 3. Possible Future Developments in the Law

Summarizing the current legal political ideas in Malawi, one could say that with the exception of the still unpredictable changes in criminal law, no fundamental changes are to be expected in the Malawian legal system in the near future. Different law will continue to be applied in different courts. However, the gradual approximation of traditional law to modern English and statutory law will continue, a development which can be expected to be strengthened with the eventual "Malawianisation" of the courts and judicial officers. Also, the various customary laws will continue to assimilate with each other. Therefore it can be expected that the crucial reason for the application of a specific law will no longer so much be membership of a specific tribal group but rather the social status of the individual.\(^56\) However, as long as the changing ways of life in society or in specific social groups do not solidify into new generally binding models of conduct there will be no unified traditional law consisting of fixed legal rules.

Nevertheless the question arises as to how the direction of the development of traditional laws could or should be influenced. In English-speaking African legal circles, generally speaking, two contradicting views are represented:\(^57\)

1. The material substance of customary law should continue to be formed by rules emerging from customary practices and sanctioned by the courts.
2. The responsibility for the application and the further development of customary laws should be steered centrally by the Government.

Those states that prefer that the main responsibility for the application and development of customary law should lie with the government, favour the unification and codification of customary laws, the so-called "low-level

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54 Dar-es-Salaam Conference on p. 33.
55 Even if in a modified form, as in accordance with the Civil Law Bill all courts shall apply customary law along the same basis, which was not the case before 1966.
56 The development in the traditional law of inheritance offers an example.
57 Dar-es-Salaam Conference pp. 32, 33.
unification". Tanzania is the first country in English-speaking Africa to begin to unify and codify the law of marriage, divorce, bride-price, guardianship and inheritance of the various tribes. Overriding considerations seem to have been the psychological-political aspect of "one nation - one law" and the legal security expected from the unification. The codification of customary law has quickly met with criticism, both in regard to the Tanzanian practice as well as on a question of principle. This critique can be summarized under three aspects:

(a) The criticism is in the first place directed against the method used in making the inventory of customary law. In Tanganyika it was primarily "customary law experts" - mainly former chiefs, village headmen and members of regional African self-governing administrative organs (District Councillors) elected by the District Councils - who were called upon for the restatement of customary laws. The criticism has been lodged that "customary law experts" who could make generally binding statements on customary law did not exist at all, and that moreover with the choice of elderly experts a conservative element had been introduced into the codification right from the start.

(b) The criticism is further directed against the new method of the functioning of customary law, which would lose its customary legal character with codification. In fact it is probable that the population no longer perceives customary law as its own law and can no longer identify itself with, and that a gulf will open up between the State as law-maker and the individual as the law-recipient. Seidman's remark is to the point: "Forging a 'common' customary law based on the lowest common denominator actually creates a new 'customary' law that, more likely than not, reflects nobody's Volksgeist except perhaps the compiler's."

(c) The third point of view is perhaps the most important one. Since codification ties customary law to current conditions, there is the danger that just in the transitional period the development of law will be inhibited. The critique that is justifiably made against the unification and codification of customary law, should on the other hand not overlook that the other extreme, the completely uncontrolled development of customary law, is equally undesirable. One should take care that the development of customary law proceeds as much as possible in uniform directions, that the emergence of undesirable tendencies is blocked while the development of desired norms (if needed) may be enforced - without otherwise hindering the natural process of the development of customary law. The legal-political conception underlying these (by no means original) insights could be termed "synchronization". The task of synchronizing legal development is not limited to the legislator, but could also be undertaken by the competent customary law appeal courts.

However, with regard to the present state of development of the Malawian legal system, two doubts arise. First of all, given the current structure of the courts, the courts are hardly suited to the exercise of this function. Secondly, a synchronization of the case law, which like a codification would focus on the content of the law rather than the general framework, would hinder development.

The new Malawian law of inheritance offers a precedent for successful synchronization. Here, the legislator has directed the development on a specific course by a bare minimum of provisions, which take into account the needs of all parts of the population without strongly narrowing down the

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59 In the latest period, the first codification of customary laws was the Natal Code of 1878, 1891. On the criticism of this law, see Dur-es-Salaam Conference, p. 25, footnote 1.
60 With the Local Customary Law (Declaration) Orders No. 1-4 of 1963 the customary laws of most of the patrilineal tribes in Tanganyika were codified.
62 The criticism has been lodged that "customary law experts" who could make generally binding statements on customary law did not exist at all, and that moreover with the choice of elderly experts a conservative element had been introduced into the codification right from the start.
63 M. Tanner, op. cit., pp.107, 108.
65 See M. Tanner, op. cit., p. 115.
67 If at all, see the criticism to (a).
68 See also F.A. Ajayi, "The Future of Customary Law in Nigeria", p. 68.
70 See also F.A. Ajayi, "The Future of Customary Law in Nigeria", pp. 68, 69.
flexibility of the natural development of law. With the open concept “customary heir”, and the wide discretionary powers vested in the deceased’s relatives in the case of undisputed inheritance on the one hand and in the Local Courts Chairmen in disputed cases on the other, the adaptation of inheritance to social development is guaranteed. A similar synchronization would be conceivable and desirable for other spheres of civil and family law. In particular the positive aspects of the conciliation of marriage disputes outside the courts could be considered, and, for instance, could be formally institutionalized in the form of a legally prescribed “atonement session”. 71

Since it is not expected that the reformed land laws for a larger part of Malawi will come into force in the near future, the development of traditional land law has to be watched closely, for it is possible that it may lead to the development of absolute rights to land (full ownership, transferability, etc.) before the laws come into force. A synchronization would be especially important here, because the development of land law, traditional and statutory, is probably of the greatest importance for the future social, economic and legal development of Malawi.

71 This is also suggested by A.N. Allott, “The Future of African Law”, p. 233.

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This book is a pioneering study on how various systems of law coexist and interface in a developing country like Malawi. Prof. Franz von Benda-Beckmann’s research on “Legal pluralism in Malawi” dates back to the late 1960s and yet, in the year 2007, it has not lost its significance. With the systems and institutions of the formal legal system in place, the vast majority of Malawians (and Africans in other parts of the continent) continue to use non-formal systems of conflict resolution and local laws, even if these may have been influenced by their incorporation into the state system. The “Malawi Growth and Development Strategy”, officially launched by the State President as Malawi’s policy framework for the years 2006-2011, recognizes this fact and asks for “improving civil dispute settlement mechanisms” and “developing an informal legal system that is accessible, efficient, and equitable”. This volume serves as a resource book for academic researchers and for development practitioners alike who seek to improve the access to justice especially for the rural population in Malawi.

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