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Collective land rights: Can Africa learn anything from Norwegian practices?

Acknowledgments

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Some Definitions

Box 1 Property Rights (a general definition)

Property rights provide legitimate allocation to particular owners, of material or immaterial objects supplying income or satisfaction to the owner. They comprise a detailed specification of rights and duties, liberties and immunities citizens have to observe. These are partly defined by law, partly by cultural conventions, and they are different for owners and non-owners. Property rights are ultimately guarantied by the legitimate use of power.

The dynamics and performance of economic systems are intimately linked to the kind of property rights a state is able to enforce.

In Anglophone societies property rights to land is usually discussed under the heading "*land tenure*".

Box 2 Ownership

Legitimate "Ownership" is always defined relative to the social system organising the population. Ownership in the sense that western societies take for granted is a function of the power of the state and the cultural understanding of property rights. Effective possession is tied to legitimate ownership by way of beliefs in the rightness of the connection and ultimately backed by the power of the state.

Box 3 Bundles of rights

A standard conception of the property rights entailed by fee simple will differentiate between the following rights

- Access to an area (the boundaries of the area are defined collectively)
- Withdrawal of resource units from the area
- Management of the area and the resource providing units for withdrawal
- Exclusion of any particular person wanting to assert access, withdrawal or management rights
- Alienation for a period or forever of any and all of the above rights

The fee simple owner will hold all of these rights attenuated only by general societal regulations (e.g. environmental regulations, rules of inheritance, etc.).

Box 4 Fee simple

The term "fee simple" is derived from Fee or Fief or Feud. Today it means a freehold estate. Originally it meant that the land was held of a superior lord, as a reward for services, and on condition of rendering some service in return for it. Fee is used in contradistinction to allodial. Allodial means the land is owned and possessed in the man or woman's own right without owing any rent or service to any superior.

Box 5 Collective land rights

If two or more people hold legitimate rights to use the same land based resource or the same parcel of land then there is by definition a collective right in the land. If family is taken to mean the nuclear family or a family household, family property will both in Norway and Malawi be a form of collective land right. However, we shall basically exclude family owned property from the discussion. The problematic aspects of collective land rights are assumed to appear when the number of rights holders increase above the normal family size.

Owning in common or joint ownership

A basic distinction in collective land rights is between ownership in common and joint ownership. In joint ownership the death or removal of a co-owner will entail that his or her share in the property will devolve on the co-owners. Ownership in common means that each owner possesses a specific fraction of the property and that this fraction devolves on the the heirs of the co-owner.

Box 6 Commons

In discussions of land tenure a "commons" is usually understood to be a piece of land (or more generally a flow of goods generated by natural processes), held in common or jointly by a well defined group of people larger than a household.

Formally this implies

- that there is a list of people holding rights in the land held collectively (it is sufficient that the list can be made in principle), and
- that the area held collectively is delimited and the limits are known both to owners and to non-owners (in many cases approximate boundaries will suffice)

Box 7 Institutions

In current interdisciplinary studies an institution is usually understood as a set of rules governing some aspect of interaction among people including the mechanisms of enforcement. It is usually distinguished between informal and formal institutions where formal ones in democratic societies are created by public discussion and promulgation of the rules and creation of roles for the enforcement functions.

The informal institutions are embedded in the culture and language of a society and govern interactions in a taken for granted manner by supplying feelings of what is right and proper or improper and shameful. The new interdisciplinary theory of institutions emphasises that formal institutions always will be founded on the informal institutions. In so far as a formal institution is created to achieve a particular task it has to take care to work with the informal institutions. Ignoring the informal institutions will either mean rapidly rising enforcement costs or a high probability of being ignored.

Box 8 Equity

”Equity” denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men (Black 1891)

Box 9 Resource types used in legal specifications and differentiation of land rights

The technical details in the specifications of property rights are many and important to the dynamic of the economy. They are changing though time and across space, and are in general moving towards greater diversity and more detail. For management purposes, legal reasoning will divide resources into 3 types:

- **The Ground** (sometimes called the soil) meaning the abstract bounded area,
- **The Specific Material Resources** embedded in the ground, attached to the ground, or flowing over the ground (in general there are limits on how far into the ground and how far above the ground the rights reach), and
- **The Remainder** meaning the future interest in resources not yet discovered or not yet capable of being exploited.

These three types of resources are usually included in discussions of who owns what, and are routinely recognized by mature legal institutions. Landlords are, at a minimum, owners of the ground and are then entitled to the ground rent. It must be emphasized that in principle there may be different owners to the ground, to every single well specified resource, and to the remainder. More on the legal conception of property rights in Black (1891) and Simpson (1986).

Introduction

Indeed, can Africa learn anything from Norwegian practice of collective land rights? The default assumption would be to say: No, they cannot. Transplanting institutions from one culture to another never produces the intended consequences. But then again: learning is not transplanting. A closer look at the system of land tenure in Malawi suggests four areas where Malawian lawmakers might get productive ideas from a look at Norwegian practice. The four problem areas are

1. The specification and protection of family or lineage interests in individually held lands,
2. The definition, allocation, and protection of individual or household interests in land held collectively,
3. Clarification of the interests of the state and establishing legitimate boundaries of government lands, and
4. The incentives and (legal/ legitimate) competences of public bureaucracies (including traditional authorities) in monitoring and enforcing land law (including customary law).

To identify these as problems areas for the practice of collective land rights where Norwegian law might have some advice we have to go into first the nature of collective land rights, and then the nature of collective land rights in Malawi before we can point out how Norwegian society has solved similar problems.

The paper was commissioned to take a look at collective land rights in Norway recognizing that the political and historical context of their development is important for both how they are designed and why they are working. The idea was to highlight Norwegian legal and technical solutions in the area of collective property rights with relevance and utility to an African context. This entails not only attention to statutory and customary legal institutions, but also the broader cultural and social context of land holding for Norway and Africa.

The Norwegian state has a continuous history of some 7-800 years of statutory legislation on collective land rights. Even so there are still large jobs on customary usages waiting for clarification and specification. The special judicial commission on the mountains and wilderness areas of Nordland and Troms created in 1985 is still working on the clarification of exactly which areas are owned by the state and exactly where the boundary between the government lands and the private farms are. In 2005 a new act on land rights in Finnmark created a new type of collective land holding adapted to the requirements of the Saami people. For anyone looking at collective land rights in Norway the variety and adaptability of the system ought to be astonishing[61]. There is absolutely no reason to believe the variety is less in Africa. Indeed, narrowing my attention to collective land rights in Malawi, the only country in Africa I know anything about, provides quite enough both variety and problem areas. My standard for evaluation of the relevance of Norwegian practice will have to be Malawi[62]. And the kinds of land tenure problems displayed in Malawi will dictate which practices to present from Norway.

The devil is in the details. This is true for Malawi as well as for Norway. The hunt for relevant details would be an impossible task without a theory on how collective land rights work in a society.

Observations from the Theory on Collective Land Rights

As a point of departure it is important to keep in mind how the dialectic between individual and collective land rights tends to play out in the transition from land abundance to land scarcity. A theoretically informed discussion of land rights in land abundant cultures with rapid population growth (such as the case has been in Malawi) is presented by Platteau

[61] For some background on collective land rights in Norway see Sevatdal 1998, Sevatdal and Grimstad 2003, Berge and Stenseth 1998, Berge and Carlsson 2003, Berge 2006a.

[62] For background on collective land rights in Malawi see BDPA in Assoaciation with AHT International 1998, Kishindo 2004, Saidi 1999a, b, Ibik 1970, 1971, Griffiths 1983.

(2000) and will provide the backdrop to my own observations in this paper. From his discussion we note two forces that have helped shape the customary rules:

- Land abundance and
- The primacy of the lineage as land management unit

In addition to the theory of how land rights come to be established there is another important distinction we need to keep in mind. This can be phrased as the distinction between customary law and statutory law. This distinction tends to be confounded with a difference between a standard western style democratic-bureaucratic rule (Norway) and a currently weak presidential command style government with profound problems due to rent seeking incentives at all levels of government (Malawi). Any proposal for land tenure reform that do not take into account the characteristics of the government of a country is destined to fail. Thus many arguments about the problems that may ensue from a standard titling reform at times will sound more like arguments about the lack of fit between the reform goals and the capabilities of the government to follow up in good faith and consistency.

The distinction between customary law and statutory law is of another kind. The distinction is problematic because both academics and bureaucrats tend to misunderstand it or disregard it altogether. Customs are, as a rule, not law. But some customs are. For a variety of reasons customs with legal force are often not recognized or properly documented. Many such reasons will be typical for rent seeking bureaucracies; but some are less obvious or visible. In Norway, for example, it is easy for bureaucrats to rely entirely on their own learning, disregarding the customs they have been told to regulate or replace with statutory rules. In land tenure issues this disregard for customs seems to be a rule rather than an exception in most of the world. Hernando de Soto for example observes:

> "Where have all the lawyers been? Why haven't they taken a hard look at the law and order that their own people produce? The truth is that lawyers in these countries are generally too busy studying Western law and adapting. They have been taught that local practices are not genuine law but a romantic area of study best left to folklorists. But if lawyers want to play a role in creating good laws, they must step out of their law libraries into the extralegal sector, which is the only source of the information they need to build a truly legitimate formal legal system." (de Soto 2000:187)

In Norway the previous Chief Justice Smith admonishes the readers of Aftenposten (17 September 2004) that "Statutory law and customary law have been the foundations for our rule-of-law state for centuries[63]". He also laments that the Saami customs have not been taken into proper regard by the Norwegian state and supports a proposal to create a judicial

[63] "Lov og sedvanerett har vært grunnvollen for vår rettsstat i århundrer."

commission to determine which Saami customs have legal force in terms of establishing collective land rights.

Hence this is one stipulation we need to agree on at the outset: Customs can and do determine rights to land with legal force - even against the state[64]. This is, as Smith says, a foundation for the Norwegian approach to land rights both for individuals and collectives. And unless and until this is accepted I do not believe Africa will benefit much from studying the best Norwegian practice.

Customary land tenure does not differ in principle from ordinary land tenure even if the language used to describe it may be different. The key terms are "legitimate allocation" and "legitimate use of power". The "legitimization" part is always grounded solidly in the beliefs of people: their belief in the agency that provides the ultimate power defending their property rights, and their beliefs about what constitutes a fair and equitable allocation of rights. Neither customary nor statutory property rights work properly without a high degree of legitimacy. Deteriorating legitimacy is perhaps most obviously seen in declining trust in those authorities assumed to be the protectors of the rights. The operative word here is "declining". The general level of trust in social power is always problematic. But declining trust is an indicator of more specific problems. This may or it may not be accompanied by increasing rates of crime against property, increasing frequency of litigation over trespass, and increasing expenditures on private security (guards, fences, locks, alarms) depending on how the changes in legitimacy affects the distribution of wealth and income in the society.

Land tenure systems have long roots and develop with complex pressures. From pondering the available literature a few basic hypotheses have come to guide my interpretations. The hypotheses are concerned with how history may be seen to shape the informal institutional rules governing choices that people make. The choices are always done within a present context with certain constraints.

Four historical legacies have to be kept in mind:

1. While many countries now report an incipient scarcity of land in many parts of Africa, and certainly very visible in the southern part of Malawi, the historical experience for most of Africa has been land abundance (Phiri 2004). The ability to just pull up your stakes and leave for virgin lands is a powerful check on many kinds of power. And it has implications for the kind of tenure system you need. With land abundance there will for example be little need for trade in land.

[64] It has not always been taken for granted that a law applies also to the sovereign. In England at the turn of the 16th century Lord Coke championed the view that the law of the land was binding on King, parliament and judges. The struggle against privileges of the sovereign and misuse of legal powers (the privilege against self-incrimination, the right to confront and cross-examine those with evidence against one, and the right to trial by jury) was at the core of the bourgeois revolutions in England and France (see Tigar&Levy1977:257-274).

2. The historical experience of social power may be of two kinds. From time immemorial and in a situation with land abundance where exit was easy, the origin of local power had to be based on charismatic authority[65] over time institutionalising itself as traditional authority through custom and ideology. With growth in population and territory this might be bolstered by military power and a self-conscious development of ideology (including religion). A link between the charisma of powerful persons and belief in their abilities at witchcraft may have been part of the power ideology. Perception of power as a personal and capricious thing not bound by the rule of law will be a strong undercurrent in how people behave in relations to power. In general it is assumed that people's behaviour in relation to power can be characterised as "Exit, Voice or Loyalty" (to borrow Hirschman (1970)'s phrase). With land abundance making exit easy one might expect to find voice of less significance and loyalty of higher significance.
3. The English land laws introduced in Malawi between 1893 and 1963 (including the body of English common law as of 1902) are an important part of the current thinking about security of tenure. One part of this legacy is the persistent belief that "the general thrust of colonial policy was to appropriate all land to the British sovereign and facilitate access to it by the settler community on the basis of private title, while preserving African rights to it strictly as "occupation rights" thus ensuring the availability of cheap labour for settlers." (Saidi Report 1999a:i). Another part, and rather paradoxically in view of the previous point, is the comparative neglect of the role and evolution of customary law after independence. The effort seems to have gone into developing statutory law in the English tradition. But this neglect, apparently, is common to many developing countries.
4. Land administration systems in Western countries grew out of the states' needs for taxation. Hence the identity and wealth characteristics of land owners and land renters were key factors in the development of cadastres. Without a credible register of owners there could be no credible register of lands and no enforceable titles. Notably voting rights were at the outset tied to being registered as a land owner or renter of registered land. Holding of rights in land as a key to citizen rights also applied to the indigenous reindeer herding Saami. And later on it led to workers buying small parcels of worthless land to get into the register of voters.
5. Since the rise of the church and the state as "immortal" institutions, they have accumulated land as owners. The Crown, the Church, and the nobility have throughout European history been the dominant landholders. Fragmentation of land rights due to population growth and inheritance, and transfer of land to Church and Crown made land renting a major form of land tenure. This tendency is very visible also in Norwegian history even with almost no nobility. In modern times the complicated medieval mixture of ownership and rentals

[65] Charismatic authority is here used in the meaning given to it by Max Weber in his 1919 publication "Politics as a Vocation."

has slowly changed in the direction of the fee simple: the owner-occupier of agricultural land. But again much more so in Norway than for example in England.

In the present social situation the historical legacies are joined by three other forces exerting pressure and pushing for development of the land tenure system:

1. One force is the perception of land scarcity as being caused by either population growth or transfer of customary land to estate agriculture. Demand for land is very closely determined by number of people and available land as long as there is no growth in urban employment. The political drive to remedy the scarcity is conditioned by the perceived cause.
2. A second pressure is the prevailing ideology of land tenure entertained by international institutions such as the World Bank and most large international development agencies. Their perception of land tenure seems to be a rather simple version of the western land market with a distinction between private and public lands, and a belief that the key to a functioning land market are individual title deeds, contracts and a system of mortgages (usually taking for granted their foundation on stable personal identities, land surveys, valuations, and registrations). The last decade seems to have brought a greater appreciation of the role of collective land rights. But in general the complexities of western land tenure systems, and in particular the reasons for their complexity, seems to be forgotten on arrival in Africa.
3. The third pressure comes from the activities of a small group of inventive individuals out to grab all, particularly inequitable, opportunities to make a profit on land transactions. The size of the group is obviously unknown. But if just a few get into positions of power in the land management system their activities will be felt throughout society and will confirm a belief in power as not bound by the rule of law. Some of these profit making transactions will also transcend the law into corruption and crime.

Both in relation to historical legacies and contemporary pressures we have to keep in mind two general and perhaps culturally invariant forces shaping land tenure systems:

1. If people put time and effort into tilling land, and planting crops, they want to be sure to harvest the outcome.
2. As land becomes a scarce resource, the interest in passing on to one's children[66] the lands that have sustained the family seems to be growing in all parents.

One way or another people craft their land tenure systems to comply with these requirements. But people do so within the parameters set by the historical legacy and the current pressures.

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[66] In the European tradition this always meant children born to the couple or legally adopted by them. In African family systems it may have a wider meaning, e.g. brothers children in patrilineal systems and sisters children in matrilineal.

Based on theoretical discussions of collective land rights there are a couple of fairly common misunderstandings I want to dispose of. In many contexts (admittedly fewer these days than it used to be) it is taken for granted that holding rights as a collective is a sign of backwardness. Only individually held rights are "true" or "proper" rights and only the right to trade land rights is a real property right. Such a restricted view of land tenure or property rights in land is simply not useful in any way. The benefits flowing from use rights are as real as those flowing from trade, and collective rights are as useful as individual rights. In fact, collective land rights are pervasive also in modern economies. Far from being on the decline they have during the last 100 years grown in leaps and bounds (Berge 2006a and b). It will be difficult to argue that for example the people in Malawi have more collectively held rights in land than people in Norway.

Modernisation and individualisation of rights in land are by assumption taken to go hand in hand. As a generalisation it is simply not true, and only by proper qualifications will it be possible to read the history of the western world in this way. Individual or household based rights are as pervasive in land scarce pre-modern agricultural societies as today[67]. But the qualification of land scarcity is important. From competition for land comes conflicts and needs for clarification and third party defence of rights.

Thus I find it fair to say that neither collective nor individual land rights are problems in and of themselves. My conclusion is that social and economic modernisation goes hand in hand with development of both collective and individual rights in land. The development of property rights can best be called specification and differentiation. Rights become differentiated and better defined, both individual rights and collective rights. This may entail specification and differentiation of land holding agents as much as lands and resources. And above all the state develops capabilities to defend the interests of the holders of recorded and verified rights.

If Malawi is to learn anything from Norwegian practice of land law, it is my belief that we will find the most useful examples in the following arenas:

- Procedures for allocating rights in land to individuals or groups
- Procedures for discovering customs and determine customary law
- Procedures for differentiation and specification of rights in land

The emphasis is put on procedures since substance and culture by assumption are very different. This does not preclude cultural invariants either in problems or solutions. Besides, it is my opinion that Norwegian best practice is defined precisely by procedures where democratic governance and human rights are given specific expression.

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[67] See e.g. the description of the agricultural system of high-land New Guinea encountered by the first explorers there in the 1930ies, summarised by Diamond 2005. For a specific discussion of their land tenure system see Armitage 2001.

But are there problem in the areas of land allocation, application of customary law or specification of rights in Malawi today? To answer that question the next section will discuss some of the problematic sides of current land tenure in Malawi. A survey of Malawian land tenure is not intended. The discussion will use technical terms and concepts from both law and social science. Some of these are defined and explained above[68].

Soma land tenure problems in Malawi

The official statistics of Malawi tells us that in 2000 about 75% of the land surface of Malawi was customary land (NSO 2004: table 1.1). In 1964, at independence, the figure was about 85%. Customary land means that customary law govern the allocation and usage of these lands. But the figure of 75% cannot be taken as more than an indicator of the order of magnitude we are discussing. One of the problems encountered in discussing land tenure in Malawi is the relative paucity of statistics on relevant land tenure categories.

Since freehold and leasehold land are well understood tenure categories, and in the statistics said to comprise less than 4% of the surface, nothing more will be said about those[69]. Our concern will be customary land and the relations between customary and government land. In this discussion we need to keep in mind the problems of transition from land abundance to land scarcity. Problems of transition are often different from problems at equilibrium both before and after the transition.

The point of departure: land tenure in Europe

Based on observations from medieval and parts of contemporary Europe that are sparsely populated, one might propose the following generalisations:

1. In pre-modern land-abundant agricultural societies the legitimate allocations of land rights usually occur at village or lineage level[70] and go to individuals or households. Thus also in a customary law society a farmer household will often hold many rights similar to those defined in the bundle of the fee simple.
2. A person wanting land needs to fulfil some minimum requirements (for example being a member of the village or lineage) before land can be allocated to the person.

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[68] As a general source for explanations see for example Black 1891.

[69] The Malawi National Lands Policy 2002 estimates that estate lands comprise 13% (Ministry of Lands, Physical Planning and Surveys 2002). The reasons for the discrepancy are unknown, but it is an interesting question. It will not be pursued here.

[70] Village or lineage? While village in Europe today tend to mean a settlement consisting of several households and covering a contiguous area, the village in Malawi is more to be seen as a kinship network, a lineage. In the time of shifting agriculture and land abundance this also meant a settlement in a contiguous area. In recent years, due to population growth, two distinct developments can be noted. First, population growth with land scarcity leads to a growing tension between an original lineage and a growing number of obwera (the Chichewa word for a household that has been given land use rights but do not belong to the lineage). Next, and now spurred by the way government subsidies are distributed, we see a fragmentation of larger village settlements into pure lineage villages. Their settlements are now mixed with that of other similar "lineage villages".

3. There is a significant distinction in terms of rights and duties between the arable: lands used for intensive agriculture (garden and crop land), and non-arable: lands used for extensive harvesting (pasture, firewood)[71].
4. It is usually the case that most of the arable is privately (individual or household) owned or controlled, while the non-arable often is collectively owned or controlled. However, moving from the village (settlement) square to the midway point to the next village settlement one will often find a graduated shift from clear and strong individual control of parcels to open access in the most distant non-arable. In between there often will be grey areas where rights are contested and in the process of being redefined. One will for example expect frequently to find that there is a perimeter band of non-arable land around the arable that is more individually than collectively controlled. In medieval time there often also was a seasonal transition from arable cropland to commons pasture. This is a notable feature of the open field agricultural system of England.

These tendencies are observed in the history of European countries, and they conform to the case of Malawi as described in the various background documents of the Presidential Commission of Inquiry on Land Policy Reform (Saidi 1999a, b) and the more formal descriptions of customary land law provided by Ibik (1971). In particular one might take note of the similarity between Malawi and Europe in the "individualisation gradient" in rights from individual rights in garden land to collective rights in pasture and woodland and seasonal shifts between individually used arable and collective grazing on the same land.

This gradient in rights is in Europe today observed in sparsely populated mountain regions such as in Norway, Sweden, Scotland, and Navarra. It is considerably less noticeable in England or Denmark[72]. This suggests that in Europe the persistence of the property rights distinction between arable and non-arable depends either on low demand for land (no real scarcity) or a lot of land not suitable for arable but perhaps for extensive exploitation as pasture or for firewood production. In the more

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[71] We shall here use arable to mean all land that currently is cultivated, fallow or allocated for future cultivation, and non-arable to denote the rest including pastures, forests, mountains, rivers, and small water bodies. English language does not have a word that distinguishes well between these two classes of land. In Scandinavian languages words similar to the Norwegian "innmark" and "utmark" captures this distinction with the added connotation of differences in property rights.

[72] But judging from the Commons Act 2006 England and Wales may have more of it than appears from standard textbooks. For example the standard treatments of the law of property (Singer 1993, Lawson and Rudden 1982) do not discuss "Right of Common". Profits are defined as a type of easement by the law of servitudes (Lawson and Rudden 1982:129-130); Singer 1993:367). In discussing profits Lawson and Rudden (1982:130) divides them into two types, one type is seen as "survivals of old manorial customary arrangements, whereby the tenants of a manor had the right, for instance, to pasture their animals on the waste of the manor". This type of profit is linked to some tenement. The other type of profit exists "in gross", i.e. it belongs to a person. Rights of common is discussed by Simpson (1986:107-108) but also he sees them as "essentially incidental to a system of agriculture which is no longer in use in most of the country, though in hill-farming country the right to pasture sheep on moor land commons remains essential to the type of farming practised." (Simpson 1986:261).

densely populated areas in Europe the interdependencies of various land holdings are defined in terms of easements and servitudes rather than rights of common[73].

The more or less automatic response of European experts (including colonial administrators) to problems of scarcity has been to introduce trade in title deeds. This is probably the most visible part of the European land tenure system. But in Sub-Saharan Africa it has proved very difficult to get such a system to work as intended. One reason is obviously the vast differences in the invisible infrastructure of culture and rule-of-law. Another is the problem of keeping track of the identity and characteristics of owners. Assuming that there in fact is a need for trade in title deeds, mechanisms to meet the need have to be fashioned according to the cultural conceptions and legal realities of the lands in each country. In Malawi this means the lex non scripta of customary land and owner identities.

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[73] Rights of common are defined as rights to remove something of value from another owner's property (Black 1891, Lawson and Rudden 1982:130). These "profits-à-prendre" (today called profits) can be classified into 4 types:

Rights vest	Inalienable	Alienable
In land	Appendant	Appurtenant
In persons	All men's rights (a public easement)	In gross

In England Simpson (1986:108-113) recognizes three varieties of profits: 1) "Profits appendant": the right to the resource is inalienably attached to some holding or farm unit. Appendant profits were in England exclusively rights of pasture (Simpson 1986:111). If the holding were split up the appendant rights would also be subdivided (Simpson 1986:112). 2) "profits appurtenant": the right to the resource is attached to some holding, but alienable, 3) "profits in gross": the right to the resource belongs to some legal person in ordinary ownership (Simpson 1986:107-114). Simpson's discussion of "profits" does not contain any category where the right is inalienably attached to a person like citizen rights or human rights are. However, the right to kill ground game is vested inalienably in the occupier of the land where the game is found, and the right to kill other game is usually vested in the freeholder (Lawson and Rudden 1982, p.74).

In Norway and Sweden the "All men's rights" (Allemannsretten) to such goods in the outfields as right of way, camping, and picking of berries and mushrooms can be described as an inalienable personal profit. Technically they may be called public easements on all lands. The all men's rights have no restrictions on who can enjoy them, but of course there are clear limits on how to enjoy them. Some other rights vest inalienably in persons as long as they are citizens of Norway, or are registered as living in a certain area or are members of a certain household.

The principle of all men's rights as defined in Scandinavia seems to be unknown in the USA and England, but fairly common - although with variations - elsewhere in Europe (Steinsholt 1995). The struggle to keep and extend the rights of way tied to the system of footpaths and to establish a freedom to wander in England is vividly described by Marion Shoard (1987) and has provided results (Countryside and Rights of Way Act 2000).

In the USA public rights of access varies widely from region to region. The only places public rights are assured are on the beaches below the mean high tide mark where the public has rights of navigation, fishing and recreational uses, including bathing, swimming, and other shore activities (Singer 1993:249-258). Fishing could here be described as an inalienable personal profit.

Explaining similarities in land tenure

Observation of characteristics of customary land tenure in Malawi similar to those of land tenure in medieval Europe might in part be caused by the use of the technical language of European land tenure. But it does not seem quite likely that this can be a complete explanation. If the similarity indeed is (partly) true and not an artefact of description, it will be relevant for the discussion of the evolution of individual property rights. The labour theory of property rights (see e.g. Becker 1977) states that the more time and effort people invest in a plot of land the more it is justified to award them property rights to that plot[74]. This will be true regardless of land scarcity and supports the generalisation that there usually are individual or household rights to arable lands.

A scarcity argument of property rights states that if there is no scarcity there are no gains from defining and enforcing property rights. Combining these two arguments and applying them to Malawi the evolution of individual rights in land should be more advance here than in surrounding countries since Malawi is more densely populated than its neighbours in Sub-Sahara Africa. However, comparative data are not available.

Within Malawi population densities vary much, from 173 persons per square kilometre in the south to 47 persons per square kilometre in the north (data from 1997, Saidi 1999a:37). Immigration and population growth are main causes of the density of the south. But a confounding factor will be the presence and size of commercial estates. This is also largest in the south. Most people will attribute the land scarcity in the south to the presence of many and large estates rather than to population size, and with some justification. But the consequences of scarcity, more individual rights, should in any case be the same. If data were available on degree of individualisation of property rights to plots within settlements, the prediction would be that it is most pronounced in the south, least in the north. Peters' (2002, 2004) long term studies of southern Malawi support the individualisation argument. And already the Jackson report[75] of 1921 noted that "in certain areas of Malawi where land is scarce individual rights were being asserted" (see Griffiths 1983:5).

At this point we should note a tendency to talk of different types of rights in relationto individualisation. The labour theory of property rights says that labour should lead to property rights in use and withdrawal rights. It does not say anything about exclusion and alienation. As scarcity increases, however, the need for ability to exclude and the desire to give away or control the devolution of the use and withdrawal rights would seem to be increasing. Thus the labour theory of property rights and the scarcity theory of individualisation can be seen as supporting each other.

A second point relates to the political or collective response to land scarcity. If the cause

[74] A very unfortunate corollary to this was that nomadic peoples were barred from gaining property rights in land: they did not invest in the land as commonly understood.

[75] Report of a Commissioner to inquire into and report upon certain matters connected with the occupation of land in the Nyasaland Protectorate (Jackson Report) 1921

of the scarcity is seen as illegitimate transfers of customary land to public land with the political class as the force behind the transfer, the most likely collective response will be land grabbing in the form of unregulated access and use of parts of these lands.

Customary Land Law and Land Tenure

Based on the fact that it is some 40 years since Ibik's (1970, 1971) observations on the lex non scripta of customary land were recorded, and given the fact of increasing land scarcity and declining number of cattle one might venture some predictions:

1. Reserve lands will in the most densely populated areas have disappeared. This translates into considerably less standing for the TAs and a corresponding unclarity about their powers of land management.
2. Population growth and land scarcity will lead to fragmentation of lands (or alternative to land rights) and a need for a system of land rentals or land consolidation procedures.
3. In areas with high population density and no or few cattle the commons will be in the process of disappearing, also the seasonal shifts between individual arable and commons. Often the redefinition of common lands to household land or government land occurs in processes lacking legitimacy.
4. Disappearing commons will cause particular problems for the land poor villagers in finding firewood, various food sources and also grazing. Grazing rights on the remaining commons such as road banks and along foot paths become more important.
5. With decline in forested areas the right of common to firewood increases in importance. This will mean that the requirement of consent for collecting firewood on individual lands probably is being strengthened and probably causing conflicts.
6. With declining populations of game the right to hunt will decline in importance

The consequence of this is that for some important products from the commons the increasing scarcity has led to increasing commercialisation. This is very obvious for firewood and building materials such as sand, gravel and bricks (produced from soil). For other products where the demand is more flexible it may not be quite as obvious (medicinal herbs and roots, honey, mushrooms, etc). With increasing commercialisation new problems of property rights will follow. Rights of access to and withdrawal from commons are today valuable rights that might need specification and protection.

Taking the fee simple as the standard for individually held land rights the differences between say Norway and Malawi go along 5 dimensions:

- In Malawi land rights are not formalised to the same degree as in Norway. In Malawei they usually are based on common knowledge among the group of villagers and depend to a variable degree on the balance of powers in the community.

- In Malawi validation of individual identities is done by the lineage and TA and the definition of membership in land holding collectives are done locally at customary law. In Norway all this is done by the state.
- In Malawi the rights held by a farmer may in principle vary from area to area. That is the essence of customary law. Statutory law can mirror such variation, but often it will not want to do so for valid reasons. But the possibility should be noted. Also Norway has geographical variation in access to land held jointly by the citizens of Norway. But land rights held severally are freehold and governed by the same rules everywhere and for everyone in Norway.
- Land rights are never exhaustively defined. This is as true for Norway as for Malawi. But there are reasons to say that Malawi lack some procedures and concepts that might facilitate specification and differentiation. For example, there seems in the customary law to be no conception of the remainder[76]. Of course, received statutory law will have it. But without a foundation in cultural practice and belief statutory law is often ineffectual.
- In Malawi as in Norway the rights of alienation are severely attenuated with preferential treatment of relatives within the lineage and powers of intervention by traditional authorities. But in Malawi the specification and delimitation of the rights of lineage members are seen as flexible. Need for land varies along the life course and rights will mirror this. Problems related to land scarcity may as easily be dealt with by redefining the lineage as by keeping to a fixed schedule for inheritance. This practice may perhaps be linked to the factor of land abundance. Also the powers of intervention by traditional authorities may be seen as flexible, tailored to the situation including the balance of powers in the village.

[76] The remainder is that which is left when every positive "profit" from the land is accounted for. This will include all yet undiscovered resources and in some instances also new ways of exploiting old resources.

Collectively held lands hold particular problems as well as problems caused or compounded by the variable individual rights and rules of membership of a collective.

- In Malawi as in Norway the management of commons needs particular attention. Management of common lands is an exercise in collective action with no assured sustainable solution. Problems in the management of resources characterised as social dilemmas[77] will only occasionally be resolved in a sustainable manner without an institutional framework designed to avoid the "tragedy" outcomes. Developing such a framework without guidance or ideas will at best take time. To counter deforestation on Norwegian forest commons old procedures had to be adapted and new ones were invented[78].
- In Malawi the powers of the traditional authorities (Village leaders, Group village leaders, Traditional authority chiefs – usually referred to as TAs) to intervene in trade of land and management of commons are broad but not very specific. The abilities of the traditional authorities to manage scarcity of land are basically untested for two reasons. The history of land holding until about mid 20th century was one with land abundance. There was enough land for the kind of agriculture preferred by local villagers. In Malawi after independence in 1964 most of the customary rights of management of common lands were taken over by the government. Thus there is no reason to believe that the TAs and customary law will "know" how to handle scarcity induced conflicts over land. However, with the many TAs all trying to find ways of dealing with the problems the learning curve is bound to be much steeper than if all mistakes had to be done by the government.
- In Malawi government ministries are responsible for government lands like forest reserves, wilderness areas and national parks. But the formal rights and duties to dictate solutions do not help if you do not know how to do it or if you have other priorities like short term incomes. The government seems to have a dismal track record in finding sustainable solutions for the use of commons.
- For a country like Malawi it should be kept in mind that the poor, landless or near landless households of the villages usually will depend on commons for a larger proportion of their livelihood than the average household. This will be true even if the rich on average take a larger proportion of the commons than the poor. The poor will also be disproportionate users of the seemingly insignificant rights among the NTF products (Non-Tree Forest products) and small pasture opportunities like roadsides, along fences, and after harvest

[77] A typical parable illustrating a dilemma is the choice of number of cattle to put on a common pasture made by each member of a group of cattle farmers. Without constraining decision parameters it is easy to see that the number of cattle will tend to be larger than the pasture can sustain in the long run.

[78] In 1687 new legislation limited the rights of common to timber from the King's commons to the needs of the farm. The reason was probably to increase the remainder for the King's profit. Fifty years later the rule started to be enforced as a means of countering deforestation, and somewhat later pasturing was limited in a similar way by restricting the number of animals to those that could be fed over the winter on the farm.

stubble. In most formalisation processes these kinds of rights tend to be forgotten. And if they are not recorded in the formalisation process they are usually lost.

From this preliminary discussion the following four topics of collective land rights represent problems in the Malawian land tenure system that mirrors problems encountered in Norway:

1. **Specification and protection of family or lineage interests in individually held lands. This may include a procedure or specification of what constitutes a lineage.**
2. **Definition, allocation, and protection of individual or household interests in land held collectively**
3. **Clarification of the interests of the state and establishing legitimate boundaries between government and customary lands**
4. **The incentives and competences of public bureaucracies (including traditional authorities) in monitoring and enforcing land law (including customary law).**

To this list we might also add a fifth point on those aspects of Malawian society alien to Norwegian and in general European culture. While we cannot offer advice on how to handle matrilineal agricultural systems or inheritance in polygamous marriages, we should try to put up warnings against advice for other problems based on our own (usually) hidden premise of monogamous patriarchy. Suggested solutions should be kept open in relation to marriage and inheritance systems.

1. The specification and protection of family or lineage interests in individually held lands

Despite the longstanding fact of individual and household use rights to land, the nature of customary land holding in Africa has been labelled communal. External observers see traditional authorities, lineages and villages as the significant units for holding land and exercising management powers. But the European preoccupation with the missing rights of exclusion and alienation may have made us unable to see the profound significance of the well established individual use rights.

It is true that in Malawi, at customary law, land is held by groups of people variously called families, lineages or villages, but with exclusive use of arable garden lands and management rights for individual households or persons. Between Ibik's (1971) observations and now there are indications that rights have become more individualised. The role of the village leader has diminished both because there is none or very little unallocated land but also because individual users of the land respond to new opportunities as if they were owners of a freehold. The rights of the collective typically take effect on two occasions: trade in land rights or devolution on new generations. Firstly, the collective will assert its interests if or when any individual user wants to trade in land rights (give away, rent out, etc) and secondly, the collective will want to oversee devolution of the land on new generations.

This may even occasion the reallocate of some of the land belonging to the household of a deceased person. Both the leaders of a lineage and the more formalised traditional authorities have rights and duties to represent the collective interest in such cases. During the last generation increasing land scarcity is said to be the cause of conflicts both between members of the lineage and between lineages and "stranger" households[79].

For a Norwegian land owner one similarity between Malawi and Norway ought to be rather obvious. A Norwegian farmer and his or her household have the rights of use and management of their land. But if they want to trade in the land both the larger family group and the local municipality have rights to intervene. At times of change in ownership (land sold, willed or given to some "outsider") the family line known as those with "odel" rights[80] can assert pre-emptive buying rights to an independent and standardized value assessment ("odel" assessment). At the same time, even for transactions within the family, the municipal council (or its representative committee) has to approve of the trade by granting concession rights.

The difference between the family rights in Norway and the family rights in Malawi are basically those stemming from the nature of customary law: Customary law is local and determined through practice. It is not easy for those outside the local community to know what the local rules are. The local rules are also subject to the vagaries of the memories of the local population and they are always weighted by the power of the persons involved. While the vast majority of cases go without problems, the unclear rules in the area of trade and inheritance do create problems. Some rather visible cases are labelled "land grabbing". One may wonder if the number of problem cases is increasing.

2. Definition, allocation, and protection of individual or household interests in land held collectively

The great reduction in the amount of commons both through conversion to arable and conversion to government lands raises in particular the problems of land rights for the land-poor and landless households of the villages. The registration and verification of those rights that the poor rely on to a much larger degree than those with sufficient household lands needs particular attention and care. But it also involves problems of sustainable management of key resources in these areas.

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[79] Saidi & al. 1999:41-42 observe that "... access rights were becoming more restrictive than before. This was evident for example, in the fact that land users not related to core lineage members in their communities, referred to as akudza or obwera, were increasingly becoming targets for eviction, and were often compelled to share land legitimately allocated to them with newer immigrants or members of the core lineage. It was difficult under these conditions for akudza to accumulate land."

[80] "Odel right" is sometimes translated by "allodial right". But this is not helpful. Allodial rights are used in opposition to feudal rights meaning that the holder of allodial rights do not owe allegiance to any overlord. This has nothing to do with the rights and interests of a lineage.

This problem translates into 3 different tasks:

- The delimitation of collectively held areas and the definition of the rights that may be asserted in these areas.
- The definition and identification of persons that have rights to withdraw resource units from a specified area. This needs to involve a conscious choice of how distributional justice can be achieved.
- The organisation of management, monitoring and enforcement.

In Norway we have to go back some 100-200 years to find a comparable situation and our track record of protecting the poor is not much to boast about. Some basic practices we developed, for example the system of governance of "bygd" commons, may be useful to study. But for legislation more directly aiming to benefit the poor villagers we should look to Navarre, Spain (Berge 2006c; Berge, Aizpurua, and Galilea 2002). The process of delimiting the commons from individually held lands we have handled much better.

3. Clarification of the interests of the state and establishing legitimate boundaries between government and customary lands

Specification of legitimate boundaries between individual lands and collectively held lands, particularly those claimed by the government, is a pervasive problem for Malawi. Today the Malawian state would seem to have low legitimacy as land owner. During the period 1970-2000 about one million hectare of land was redefined from customary land to government land. This land was further redefined as wilderness areas, nature parks or leased for periods of up to 99 years to commercial enterprises or farmers. The leased lands are known as estates[81]. The commercial farmers on leased land will of course regard the land as their land, almost like freehold land. But many of the traditional authorities will maintain that this land belongs to the local communities and will not fault any villager encroaching upon the estates or nature parks. In many cases the boundaries between customary law land and government and leasehold land are not legitimate in the eyes of the villagers. Cases of land grabbing are reported in the newspapers. The question is if the number is increasing.

The tug of "war" between the government and the farmer communities ought to be a familiar problem at least for those who have read the history of land ownership in Norway. The disputes between local communities ("bygder" in Norwegian) and the state go back at least to the King's efforts to appropriate "his" commons. And it goes on today in the disputes between the state and the local communities in Nordland and Troms counties as well as in relation to the Saami people. In southern Norway the mountain commission working from 1909 to 1953 created legitimate boundaries between the farmers and the commons of the state. It took time but boundary disputes are now few.

[81] Some of the estates are much older. The older estates are found on freehold land, land held under an original certificate of claim or registered as private land under the Registered Land Act.

4. The incentives of public bureaucrats (including traditional authorities) to do their job and their competences for interpreting and applying legal rules, and monitoring and enforcing land law (including customary law).

The Malawian bureaucracy involved in land use planning and land management has two core problems:

1) The bureaucrats do not have proper role models. They do not appreciate the difference between their role as private citizens and their role as state employees[82]. This opens for both unclear and confused motivations as well as outright corruption. A confounding factor is the low level of wages. Without extra income few of the middle and lower level bureaucrats could survive.
2) The second problem of the bureaucracies is that they usually have too large a job in relation to their resources[83]. One basic reason is that their tasks are modelled on the administrations of the western world. For example creating forest reserves and natural parks in the style of Western Europe with no regard to the monitoring and enforcement problems entailed invites disasters of the tragedy of the commons type. This is of course closely tied to the legitimacy problems for the state as land owner noted above.

Such problems seem to be generic to bureaucracies in the former British colonies, but some particular aspects in land management needs attention. These problems are the bottlenecks of

- legitimately defined boundaries,
- verifiable identities of owners, and the
- establishment of legal and verifiable records of land based rights whatever they are.

These particular problems of the Malawian land management bureaucracy are less familiar to Norwegians than the previous two problems areas. But looking back in our history to the start of our own land management bureaucracy we should see that low cost local solutions can work and approximate, piecemeal solutions are much better than nothing and also much better than the theoretically "optimal" solution that cannot be implemented. The approach to this problem is to keep the rules simple and to demand open and transparent decision procedures and decision outcomes.

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[82] Also the double role of TAs as both state employees and representatives of the local communities are often seen as strained, making the role of TA difficult.

[83] The situation is of course well known to both governments and donors. Unfortunately the solution is often sought in advanced technology and formal education rather than practical low-tech and on the job training.

5. Characteristics of Malawi where Norwegian practice is irrelevant or even misleading
Malawi has several family systems completely alien to the Norwegian way of thinking. Norway is still today a patriarchal culture. Even though we try to move away from its practice our patriarchal culture colours our thinking in unguarded moments. This is reasonably obvious in our way of thinking "farmer" or farmer household. We do not automatically think of a female and her daughters as the main persons to talk to when we come to ask about customary land tenure in a village. We do not think of a farmer with several wives and how this is reflected in decision making on farming activity or land inheritance. Once our way of thinking is pointed out it can be countered. Problems come when we unthinking take something for granted.

Ideas about marriage systems are at their highest salience in questions of inheritance and succession. In this area the best we can do for development of land tenure procedures in Africa is to advice against looking for models in the western world.

Concluding Remarks
Two forces were assumed to have shaped the customary rules of Malawi: Land abundance and the primacy of the lineage as land management unit. Both are known from Norwegian history. But land abundance in the arable has never been a feature shaping our culture. After the 14th century plague there was land abundance also in the arable. Its most visible impact was to cause marginal arable land to revert to non-arable. The commons were growing. But by about 1500 this episode was over. Land abundance in Norway has been experiences foremost in the non-arable lands, the mountainous areas not suitable for intensive exploitation.

Lineages are not assumed to exercise power over land in Europe, but in Norway one finds vestiges of lineage powers in what is called the "odel" right of the family members of a landowner.

In looking for relevant ideas and examples of good practice in land tenure and land management there may be more to find in Norwegian legal history than in contemporary society. One reason for this is the need for a fit between formal procedures and societal practice. Three-four hundred years ago customary law had a larger space in Norwegian land management than today.

A big chunk of formal law in a western society has as its main or only task to help people solve social dilemmas by providing decision parameters encouraging collectively optimal outcomes rather than the individually rational outcome (the Hobbesian argument for the power of a sovereign)[84]. To do so the lawmakers need to take a close look at the kinds of problems people actually experience in Malawi (de Soto 2000) rather than only look at what

[84] If one could agree on a system for assigning fishing quotas to fishermen in Lake Chilwa with appropriate monitoring and enforcement characteristics, the supply of chambo to Malawian consumers would be significantly better.

legislation one finds in Norway. In Norwegian history this close look at the experiences of ordinary people was routinely done. One cannot but be impressed by the kind of information collected by the government of Norway in their procedures to institute new legislation (for example new laws on commons in 1857 and 1863, new law on mountains 1920[85]). Today one may at times wonders if lawmakers are starting to forget these old and tested tenets.

After identifying some major land tenure problems in collective land holding encountered in Malawi the attention turns to Norway and the legal and technical solutions we might have to inspire design of solutions in Malawi. Again the discussion is very selective.

Land Tenure Procedures from Norway Relevant for the Problems Found in Malawi

Learning from Norwegian practice

If Malawi is to learn from Norwegian practice we have to recognize that current practice in land management has a history, and history matters. It matters particularly in the design of important economic institutions such as land ownership and land transactions. Formal law will never be exhaustive and even in the best of circumstance it needs interpretation. The missing parts of formal law and even the inspiration for its interpretation we find in the vast territory of "lex non scripta". The customary law of the land cannot be copied from anywhere. It has to develop on its own. But it does so within the parameters set by local culture, formal law and government policy.

Based on this it is here suggested that decision making procedures designed to embody principles from the democratic rule-of-law and human rights may be easier to apply in a new context than prescriptions of particular outputs. With this in mind we shall take a closer look at Norwegian practice in the four problem areas identified above.

1. Specification and protection of family or lineage interests in individually held lands

The lineage is a collective with significant interest and power in land holding, but without much attention in discussions of land tenure. Their presence is to some extent taken for granted, but in other ways it is also ignored in discussions of land reform in Malawi.

The Norwegian solution to the interests of a lineage in the lands of a member household is known as the "odel" right (Act of 28 May 1974 no 58 on "odel" right and "aasete"

[85] Act of 12 October 1857 on forest commons, Act of 22 June 1863 on forestry, Landbruksdepartementet. 1918 and Act of 6 June 1975 no 31, on rights in state commons ("the mountain law").

right)[86]. The "odel" right is usually listed together with the "aasete" right. The "aasete" right ("åsetesretten") applies only where there exists "odel" right and says that the descendant that takes over a farm has a right to take it over undivided. Of course, there is no duty to do so. The "aasete" right is about use of the land. It is not supposed to have anything to do with land as wealth. On the occasion of a farm being transferred from one generation to the next, the total value of the farm is as a default condition divided equally among siblings or else according to how a will stipulates the devolution to occur. The "aasete" right is supposed to have been instituted to maintain the farm as a viable unit for household based production. It is not to affect how inheritance is distributed. However, in a society where there are few or no alternatives to farming it will of course have serious distributional consequences. It is a principle that should not be adopted lightly. But the principle of differentiation between inheriting a share of the value of the farm and the allocation of the use right to the farm should be useful.

The "odel" right ("odelsretten") is the main institution. This right protects the relation between a lineage and their land. According to current legislation the "odel" right is created if some person possess and use his or her land for 20 years. After 20 years the land is burdened with "odel" right. The rules of "odel" assign a priority rank to the children (including adopted children and children from previous marriages) of the person establishing the "odel" and further down their family lines. At any point in time there is assumed to be one person with the best "odel", the first in line. All the others are then lined up in a queue behind the on with the best "odel". The one with best "odel" is assumed to be the one that will take over the land when the current owner(s) die. The importance of the "odel" right appears on the occasion that the land is offered for sale to anyone outside the lineage defined by the rules of "odel" rights, or to a person further down the queue among those with "odel" rights. The person with best "odel" can then force the sale to go to her or him at a particular valuation called "odel" assessment.

Behind the scene of the "odel" and "aasete" right we find an important distinction between owners and users. In the centuries before map making techniques made it easy to link a suitably mapped parcel to a particular owner by the stipulation that the land owner at a minimum would be the owner of the abstract ground, a distinction between owners and users of a parcel was achieved by linking owners to a certain share of the tax assessment of the land (the "skyld") while users were tied to the use and enjoyment of particular well defined resources for a time. Thus siblings could inherit a share of the farm (a share of the tax assessment) while the one with best "odel" could assert the "aasete" right and take over the use of the whole farm, or the land could be divided between the siblings if they agreed to do so rather than be paid off by their share of the tax assessment. This ability to be able to share the value of an "indivisible" object can be seen to be economically beneficial

[86] The history of the "odel" right is contested. Due to the pervasive practice of land rentals one may argue that its importance is a "social construction" with real downstream consequences. It is part of the little studied process taking Norway from a country of primarily land renters to a country dominated by owner-occupiers.

without increasing the conflict level over inheritance. One consequence over time was an intricate web of cross-ownership where users of one parcel would be fractional owners of parcels used by others as well as the parcel they had the use of.

The number of contingencies in the act on "odel" and "aasete" rights is large and apparently it has been increasing as the rest of the Norwegian society has been changing. Both the level of specification and the many exceptions are in our context of less significance. The important point is that if customary law, for example in Malawi, is taken seriously, then the interests of the lineage in the lands of their members needs to be accounted for. The possibility for doing so is demonstrated by the Norwegian act on "odel" and "aasete" rights[87]. The importance of being able to distinguish routinely between owners and users should also be noted.

2. Definition, allocation, and protection of individual or household interests in land held collectively

Norway can boast 6 types of "commons". They can usefully be called Farm commons, Private commons, "Bygd" commons, State commons of southern Norway, State commons of northern Norway, and Finnmarkseiendommen[88]. Three types are public in the sense that the ground is owned by a public body. Three are private. But the particulars of the various types of commons may not be of much help in general. However, the great variety should be noted and in this it may be instructive to look at more general principles of how rights to various resources are defined and how they are allocated to users and people with withdrawal rights.

[87] It may be of interest to note that in general most experts on land management have been against the "odel" right and have at times proposed its abolition mostly because it has made adaptation to more economically efficient agricultural production difficult. Its protection in the constitution of 1814 and its later development (acts of 1821 and onwards) is therefore a testimony to the importance attributed to the lineage by politicians and their constituencies. It may also be conjectured that free trade in agricultural land is not the only road towards increased agricultural production.

[88] Created in 2005 by Act of 17 June 2005 no 85, on rights to and management of lands and natural resources in Finnmark County (Finnmarksloven)

	Resource types for which there are enacted specific rules				
Characteristics of resource specific rules	Ground and remainder	Pasture, timber, and fuel wood	Fishing and hunting of small game except beaver	Hunting of big game and beaver	Pasture and wood for reindeer herding
Rights of common	No	Yes	Yes	Yes	Yes
Co-ownership	In common	Joint	Joint	Joint	Joint
Unit holding rights	Cadastral unit	Cadastral unit	Registered persons	Registered persons	Reindeer herding unit registered in the local reindeer herding district
Use and quantity regulation	Internal ("Owner decision")	Internal ("needs of the farm")	Internal ("owner decision")	External ("publicly decided quotas")	Internal ("Needs of the industry")
Alienability	Inalienable	Inalienable	Inalienable	Inalienable	Inalienable
Power of local choice	Yes	Yes	Yes	Yes	Yes

TABLE 1 Resource specific property rights regimes in Norwegian forest commons ("bygd" and forests in state commons)

Sources: Act of 6 June 1975 no 31, Act of 9 June 1978 no 49, on reindeer herding, on rights in state commons ("the mountain law"), Act of 19 June 1992 no 59, on "bygd" commons, Act of 19 June 1992 no 60, on timber in state commons, Act of 19 June 1992 no 61, on private commons.

A key technique for linking resources to appropriators is tied to the concept of owning the ground versus owning specific and well defined resources. The bodies that hold rights to the ground are the "owners" of a parcel. This facilitates a register of parcels and owners. Those who hold rights to specific well defined resources are commoners whether they are owners of the ground or not. The commoners own the rights of common, and their rights are tied to the register of ground. The fact that the owner of a commons owns the ground is rather inconsequential. The important part is to own the remainder. In Norway the presumption is that the owner of the ground also owns the remainder. This is not the case in England and presumably not in Malawian statutory law.

On the commons the remainder is what is left of valuables after the commoners have withdrawn what they are entitled to. In Norway it is a long time since the commoners were entitled to take whatever they wanted or were able to take. Throughout our history there has been a running battle between the commoner and the owner of the commons about attenuating the rights of the commoners. The battle is older than the concern about sustainability of the productive capacity of the commons but the outcome can today be interpreted as rules that sustain the commons. Owning the remainder also means owning that which is not defined as a well specified resource to which right of common can be asserted. Then it means owning all the tiny resources often overlooked or forgotten in inventories of land rights. This demonstrates the importance of doing a thorough job in recording rights. It is at this stage of a formalisation procedure that the landless households of a village can loose the rights they hold according to customary law. Owning the remainder also means owning the yet undiscovered resources on a parcel of land and in some cases the benefit from new ways of exploiting existing resources.

To link rights of common to specific appropriators two techniques are used. The most important is to link the right of common to a cadastral unit, in this case to a farm[89]. To assert rights of common in a commons a person has to own a farm. This technique ensures that the rights of common stays within the settlement (”bygd”) where it was first defined. It does not travel to town if the holder decides to sell his farm and go to town. A more common technique used in other countries is to tie rights of common to settlement in a village. In both cases it is necessary to consider which of two ways of owning something in common to apply to the commons. If commoners own their rights of common “jointly” it means that for each commoner the rights devolve on his or her co-owners rather than to personal descendants. If the rights of common are owned “in common” the rights will be defined as a fraction of the total commons and will devolve on the owner’s descendants. The distinction applies to cadastral units as well as to persons. The importance of the distinction lies in the long term dynamics. With ownership in common the number of persons owning a commons may have a tendency to multiply out of manageable bounds. The problem is less when cadastral units are the owners.

Both the listing of resources and the list of commoners require a system of keeping legally valid records. In a country like Malawi this is not a trivial problem. It takes us to the quality of public bureaucracies (see below). That is not part of the mandate for my discussion but it should be pointed out that the quality of a land reform will be intimately tied to how one conceives the necessary public bureaucracy. In no other field will it be more likely to find that the best will become the enemy of the good enough.

A key feature of commons is the diversity of interdependent resources. Sustainable use and a high volume of harvest require cooperation and concerted efforts by both commoners

[89] This is basically the same as easement appurtenant where the easement is created to serve a particular parcel of land. This is in contradistinction to an easement in gross where the benefit of the easement serves the holder personally.

and owners. One of the more difficult problems for the management of commons is to create local commitment to a system of governance. A common technique used for example for "bygd" commons and state commons in the south of Norway is to create a board of governors elected by the commoners and owners of the commons jointly. This board is then given some standards for how to proceed in taking various kinds of decisions. The rules given by statutory law does not say what should be decided. Instead there are instructions on how to go about deciding.

For example in the act on "bygd" commons it is required that the board shall make bylaws about the use of the resources of the commons. Exactly how the bylaws will be expressed is up to the board but the act lists 14 different types of questions that the bylaw has to address. The bylaws have to be submitted to the ministry. Upon approval they become binding on the commoners with legal force. Such bylaws have to be revised at least once for every 20 years. The act on "bygd" commons further contains detailed rules about how elections to the board are to be done and what kinds of decisions have to be made by the yearly meeting of all commoners and owners. The act also says that there are some decisions that will be illegal to take. The board is forbidden to alienate any part of the commons (except for a few well specified exceptions) and to use it as collateral for a mortgage. These rules seem to have served the Norwegian agricultural communities well since they were first introduced in 1857 and 1863.

For the state commons the rules of governance are in most respects very different except for those commoners that have rights of common to forest. The rules for forests in state commons are similar to the rules for "bygd" commons. And then again, for farm commons and private commons there are no formal act devoted to their governance. They are governed by the more general acts on owners in common and contract law. And for Finnmarkseiendommen and the state commons in Troms and Nordland there are again special rules.

One major lesson from this should be that also formal law can be made to fit particular ecological contexts, geographical variations in settlement patterns and particular social and economic patterns of exploiting a resource. In this area there is no such thing as a one size fits all approach. Compromises accommodating the diversity of interests are the order of the day.

3. Clarification of the interests of the state and establishing legitimate boundaries of government lands

A particular problem in Malawi is to define legitimate boundaries between government land and the customary law land of the settlements. This has been a problem also in Norway, a problem that still occupies us. As a means for solving such problems we have great faith in special judicial commissions that can take evidence and decide on outcomes with legally binding force.

To employ such commissions raises tree kinds of problems

1. The members of a special judicial commission must be picked in a way that make all stakeholders trust in their integrity and respect their decisions as legitimate.
2. The working procedures of the commission must take care to collect evidence in an impartial and comprehensive way including review and correction before decisions enter into force of law.
3. Evidence taken and decisions made need to be recorded in a way making them accessible to the local public for consultation later if disputes arise.

The Norwegian experience cannot give much advice in these matters except to emphasis the importance of taking note of all evidence and keeping the reasoning and decisions public and transparent to all stakeholders in an area. It may also be worth pointing out that not all areas can be investigated and decided at once. The optimal course of action is to take on first those areas where problems are most obvious.

4. The incentives of public bureaucrats (including traditional authorities) to do their job and their competences for interpreting and applying legal rules, and monitoring and enforcing land law (including customary law).

While perverse incentives and weak competences are generic problems for government bureaucracies in most countries in Sub-Saharan Africa, they are in Malawi particularly visible in the management of government land and in the strained relations between traditional authorities and public bureaucracies in land issues.

The generic problems of incentives in public bureaucracies in countries like Malawi make the Norwegian experience with bureaucratic management of government lands (state commons or protected areas) of little direct relevance.

Looking back on our history, however, we should be able to appreciate the possibility of building up competences "from below". The Khaila commission's proposal of a land clerk attached to the Customary Land Committee may be the opportunity to start such a process by providing on the job training in such tasks as to take evidence on land conflicts, to clarify land rights by means of concepts like ground and remainder, well specified use rights, easements and servitudes, to draw maps of land parcels, and to keep publicly accessible records. Finding recording procedures and techniques for archiving that are resistant to manipulation is very important, and the importance of public and transparent decisions cannot be overstated.

In relation to management of commons the land clerk might be of particular significance. As discussed above keeping verified and legitimate records of the commoners and the rights they hold is the first step towards a viable bureaucratic management of lands held jointly or in common.

Concluding Remarks

In terms of political priorities there are several reasons for making or keeping land rights collective. Two ways of reasoning, one based on resource dynamics and one on considerations of justice and equity, can lead to such a conclusion.

Resource dynamics: Interdependence of various resources and extent of ecosystems may dictate management plans for larger units than what one may reasonably allocate to one individual, family or corporation. Once there is more than one stakeholder the problems of distribution of benefits and devolution of rights need to be defined along with rights of access and withdrawal. One has to create a commons tailored to the resource characteristics and the interests of the stakeholders.

Justice and Equity: In the presence of dispersed, diverse and variable quantities of resources used by a group of people with a matching diversity of interests where at least some people depend on one of the resources for their survival, equity in distribution of benefits will most reasonably be served by collective rights managed by principles from the theory of good governance (such as conflict mediation by third parties, trials by jury, public access to arguments and decisions, simple and low cost court procedures, and particular attention to the landless and land poor households). Also, in a process of specification of access and withdrawal rights considerations on variation in resource dynamics may suggest that justice will best be served by holding an area collectively rather than in severalty.

The discussion has suggested that in discussions of how to solve Malawian problems in collective land tenure four areas from Norwegian practice might be of particular interest.

First it was noted that clarification and specification of the rights and duties of a lineage in the lands of its member households might profitably take a look at the Norwegian "odel" right. Second we noted that the registration and specification of the rights of households to resources in collectively owned lands might find it useful to study the Norwegian procedures for registration of interests, holders of interests, and procedures for management of resources. A third area where Norwegian experience might be useful is in the area of recording evidence from customary law and judging on boundaries between government lands and lands belonging to villages and villagers. The fourth area is the problem of good governance in land tenure matters. Here we noted from Norwegian history the importance of developing competence and role models for land management bureaucrats from below.

At the end I would like to emphasis some aspects of African land holding that Norwegian legal techniques and best practice do not address at all. The Norwegian system for defining collective land rights does not address the problems encountered by land poor villagers. Neither does the Norwegian system present any ideas about differences between matrilineal and patrilineal land holding and how to give justice to both. To see how the land rights of the land poor villagers can be formalised the legislation of Navarra, Spain, might be consulted. For ways of handling different family systems the best advice may be to

warn against the kind of bias that may lie hidden in our habitual way of thinking. Once recognized, habits can be dealt with.

An interesting example of differences in ways of thinking can be seen in the different approaches of Anglo-Saxon common law and Scandinavian customary law to public access to non-arable lands. In Norway and Sweden the public right of access is formalised in law. In most of Europe it is assumed to be customary law. In Anglo-Saxon legal systems there is no tradition for right of way or right of access on any private land. But in 2000 the Countryside and Rights of Way Act was passed providing for access to registered common land and "open country" defined as mountains (above 600m), and uncultivated moor, down, and heath land.

A large part of Malawi's statutory law is inherited or modelled on the laws of England. This means by no public right of way in formal law while customary law assumes right of access to the non-arable. It might be helpful for Malawian land reform to open up for questioning some of the taken for granted assumptions hidden in their received statutory legislation.

An often taken for granted part of land tenure systems is the registers of owners making their identities and characteristics verifiable. This applies to individuals as well as collective land holding agents. In Malawi the definition and registration of collectives with land holding abilities will have to be made part of land reforms redefining rights and duties of land holding.

In the discussions of a land tenure system and how to reform it to achieve particular goals there is need for a technical language and a clarity of concepts that is not usually present in the customs and cultures of a people. Used with understanding and critical distance such language should help development of local adaptations, specifications and differentiations of rights and duties needed to achieve improved security of tenure and justice in distributional outcomes.

Theoretical developments backed by a lot of evidence tell that the social dynamic of collective land rights depends crucially on interactions among cultural characteristic, legal details and resource characteristics. Whether the resource is a private good, a common pool resource, a club resource, or a pure public good will to a large extent determine excludability of consumers and competition in appropriation of resource units. However, both excludability and competition are to some extent determined by technological capabilities for exclusion and political priorities in distribution of resources. It is also important to note that the dynamic consequences of combinations of rules and resource types are very sensitive to how rights and duties interact with cultural characteristics tied to the development of collective action and cooperative associations. Collective land rights depend in the end on the ability to enact and enforce rules steering individual action in the direction of the collectively rational.

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