LAW IN THINKING AND PRACTICE AROUND MAKING FORMAL AGRICULTURAL MARKETS MORE INCLUSIVE: LESSONS FROM AND FOR MALAWI

CYPRIAN KAMBILI

A thesis submitted to Kent Law School in fulfilment of the requirements of the University of Kent for the degree of Doctor of Philosophy in Law

University of Kent, Canterbury, August 2023

Word count: 90,350

Abstract

This thesis focuses on the participation by smallholder farmers in formal agricultural markets in Malawi—that is, markets that are directly or indirectly generated and sustained by public actors. It asks what roles law can, does and could play in prompting and facilitating the participation of small-scale farmers in these markets; and what factors prevent us from understanding relationships between small holder farmers and formal markets. The thesis is almost certainly the first sustained, sociologically informed, study of law and policy in agricultural economic life in Malawi.

It builds a bespoke conceptual framework using literature that can be gathered under the heading of 'Economic Sociology of Law' (ESL). The thesis argues that dominant economic and doctrinal approaches to the understanding of law are inadequate to understand and explain the limited participation of smallholder farmers in such markets. They should be supplemented by sociological approaches to the economy under ESL. The thesis argues that the integration of economic, doctrinal and sociolegal approaches law might be a more fruitful lens with which to look at agricultural markets to adequately explain the participation or non-participation of other actors in the markets such as smallholder farmer; it proposes that the integration is key to conceptualising and making or organising inclusive markets.

Such approaches are well suited to exploring the economic activities of smallholder farmers, including their reluctance to participate in formal agricultural markets for two reasons. First, they adopt wide definitions of law, including not only state law and related institutions, but also "law-related ideas, ideals, principles and rituals that permeate society" whatever their form. Second, they explore law at all levels of social life: micro-level actions, meso-level interactions and macrolevel regimes, all of which as underpinned by rationalities (ways of making sense of the world). The thesis shows that ESL can reveal analytically, normatively, and empirically the roles law can play in supporting small scale farmers to access formal agricultural markets in Malawi thereby suggesting ways of building inclusive formal markets where such markets have been avoided by smallholder farmers.

The thesis builds on the sociological approaches to law and includes postcolonial approaches to enrich explanations of how law fails or succeeds to legally constitute inclusive economic regimes in Malawi. Empirically, the approach is a qualitative theory-driven one in a manner that 'explains and assesses' the documents that are at the centre of legal constitution or destruction of agricultural markets. This thesis is important for at least two reasons. First it seeks to promote empirically grounded and theoretically informed, cross-disciplinary approaches to law in Malawi and beyond. Second it is important for policymakers, development practitioners, lawyers, researchers, and others with an interest in legally driven economic policy in Malawi and elsewhere.

Acknowledgements

quid dicam possum? '*ad majorem gloriam Dei*'.

There are more people and institutions around the world that have knowingly or unknowingly contributed to my thoughts in coming up with this PhD thesis than I can possibly acknowledge here. I am very thankful to my very understanding supervisors, Professors Amanda Perry-Kessaris and Diamond Ashiagbor. They provided me with constructive criticism from the word go that encouraged me to engage in critical reflection on my research in ways I could not have imagined. They provided the much-needed guidance, insight, and encouragement.

I am also thankful to the staff and colleagues especially the PGR community in Kent Law School at the University of Kent too numerous to mention. I would like however to single out Mrs Karen Finch who provided administrative support when I was joining Kent Law School until completion including her colleagues in the Law, Society and Social Justice Division. I am also thankful to the wider community at the University of Kent.

I am thankful to Kristian Schach Møller, the CEO of the Malawi based Agricultural Commodity Exchange for Africa('ACE') for generously sharing information spanning over 15 years about/on ACE. I am also grateful to friends and colleagues at the University of Malawi for the generosity with advice. I am thankful to the University of Malawi for granting me study leave to pursue this research.

I would also like to express my gratitude to the Commonwealth Scholarships Commission because of the generous PhD scholarship and research grant.

I am very grateful to friends and family, both immediate and extended, during the ups and the downs of the research process; special mention can be made of my sister, Mrs Nimia Colleen Kambili-Mzembe, who has always acted *in loco parentis* (so to speak) for over the past 30 years and my brothers, Dr Chrispin Kambili and Alexander Kambili Jnr and their respective families. My gratitude also goes to my wife Charity, my daughter, Pascalina Nitta, and my son, Daniel Karama.

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Vignette on smallholder farmers

Let us meet three typical smallholder farmers, two women and one man. Martha, Mary, and James. They live somewhere in the rural parts of central Malawi which is a renowned area for agriculture. They live in a village about 40 kilometres from the capital city called Lilongwe in central Malawi. The crop season coincides with annual rainfalls from November to March.

The first lady is Martha. She is farmer with over 5 hectares of land. She grows tobacco on 2 hectares, maize on another hectare, kidney beans on another and soybeans on 1 hectare. She has a contract with preseason agreed prices. The tobacco company, Green Leaf as part of the contract for growing tobacco, it requires Martha to grow maize on at least 25% of the land. She works on her piece of land with her husband and her 4 children help during school holidays. During the tobacco harvest, she must get extra labour for plucking the leaves and airdrying, bailing and transporting to the formal tobacco markets in the city known as Central Tobacco Auction Floors.

The tobacco company, Green Leaf, provides her with inputs on credit for both tobacco and maize, repayment to be made in full on sale of the tobacco at the Central Tobacco Auction Floors. However, Martha would have loved to increase the production of kidney beans and soybeans by adopting better varieties and practices that are being offered by a company that requires her to sign an agreement and pay in kind, which is with peanuts and soybean at prices that are above government mandated minimum prices. However, she is reluctant to trust institutions in agriculture marketing. There have been too many changes and she does not see the reason. She even failed to appreciate why the state marketing bard called ADMARC had to stop giving out input loans to smallholder farmers like her. She was also surprised to see an end to government smallholder loans for no apparent reason.

Just like the tobacco company, this other company called ACE has its own field staff that advises farmers on good agricultural practices. She is interested in working with ACE to sell her surplus maize, kidney beans and soybeans once she gathers enough trusts in ACE. For the

time being, she is closely watching those smallholder farmers who have registered under their farm inputs loans.

Mary has two pieces of land; one is 3 hectares and the other some distance way is 1 hectare. She grows tobacco on 1.5 hectares for Green Leaf under terms like Martha's. On the other 1.5 hectare she grows maize for food. In a good season, when she has had good access to inputs for maize, she is able to sell locally through itinerant buyers or if the local market for the state agricultural market board known as ADMARC has funds, which quickly run out before she is able to sell at ADMARC. In a bad season she must buy maize for food from Martha. Mary and her husband work on their land and her 3 children help during school holidays. There was an NGO that encouraged her to use the agricultural markets as much as possible. She is not comfortable with markets that are only interested in her harvest and barely take an interest in the challenges that she has as smallholder farmer.

James has 1 hectare and only grows maize for his family's food. He regularly asks for casual work from Martha together with the rest of his family. He asks to be paid in kind, sometimes when he is hard up on food and regularly takes out advance payments. He must commit to work for Martha during the tobacco plucking and air curing season to repay the loans. He is on the Government's list of beneficiaries for subsidized inputs. James is entitled to coupons for subsidized fertiliser and sometimes seeds. However, he regularly enters in to 'arrangements' where he 'pawns' his inputs coupons to Martha. This helps him build a good relationship with Martha who willingly advanced food. James declined opportunities from a nearby tobacco farm to be a sharecropping tenant on the farm. He felt that he would rather work with Martha who not only lent him money but had also promised to help send his children to school in the following agricultural seasons. Martha has also been helpful in paying for medical bills at a nearby private hospital when he could hardly afford to pay even half of the bills. Martha indicated that she believed she had a good relationship with James and his family. It would be folly to take on an unknown opportunity with strangers no matter how lucrative.

1 Introduction

This thesis explores the roles of dominant economic and doctrinal ways of legal thinking and practice, and their impact on the participation of smallholder farmers in agricultural markets generally and formal agricultural markets in Malawi in particular. While the dominant approaches have been challenged in the global north for promoting and sustaining misunderstandings about the role of law in economic life, in Malawi as a global south economy, these dominant approaches need to be challenged for promoting, *inter alia*, the exclusion of sections of the population in economic life such as smallholder farmers from participation in formal agricultural markets. The vignette has introduced profiles of smallholder farmers usually excluded from participation within formal markets. The study uses documents used in the legal constitution of agricultural markets, informed by Economic Sociology of Law ('ESL') to highlight how the dominant economic and doctrinal approaches do exclude smallholder farmers and what could be done to build more inclusive markets. Documents were used instead of the original plan to conduct interviews among the key actors in agricultural markets due to restrictions imposed by the governments around the world due to the Covid-19 pandemic.

This chapter is organised as follows: Section 1.1 provides a background and context of the importance of smallholder farmers to the agricultural markets in Malawi and to the research problem. Section 1.1 sets out the research problem that will determinethe scope and scale of this thesis. Section 1.2 sets out the research questions. Section 1.3 sets out the broader context of smallholder farmers and why they are an important group for the Malawian economy. Section 1.4 explains the methodology adopted for this thesis and explains the methods or techniques in the selected methodology. Section 1.5 sets out the structure of the thesis and section 1.6 indicates the original contributions to knowledge that this thesis seeks to make.

1.1 The research problem

Smallholder farming in Malawi of the likes of Martha, Mary, and James in the vignette is important for many reasons because, *inter alia*, it contributes over 70% of agricultural

production with most small farms averaging 1 hectare in size.[1] They have attracted the attention of the state since colonial times as an important group for economic growth.[2] There is a common perspective inspired by the experience of Asia where smallholder agriculture is said to have 'laid a firm foundation for industrialization, which in turn led to broader economic development'.[3] It is believed that this is the path that 'the less accomplished countries of the world' such as Malawi and others should take.[4] Following the trend of economic development in Asia since the 1970s, it has been suggested by international financial organisations such as the World Bank and others that for countries like Malawi to achieve increased growth rates and reduction in wide spread poverty need to include 'agricultural development' as the main driver of their economies.[5] From these experiences, the normative proposition has merged that a 'large percentage of the rural smallholder population [must] participate in the process' as a way to reduce widespread poverty.[6] Driven by this almost universal perspective, the World Bank and others have since the 1960s called for greater reliance of Malawian agriculture on smallholder farmers for three reasons.[7] The first reason was that most of the agricultural production was by smallholder farmers; secondly the phenomenon of poverty in Malawi and Africa which has tended prevalent in rural areas amongst the smallholder farmers and; finally, it was argued that targeting smallholder agriculture was the most cost-effective way to raise the productivity for most crops.[8] Starting with the time 'Robert McNamara was appointed President of the World Bank in 1968, the World Bank in a number of policy statements … declared a shift in lending policy, towards agriculture generally, and towards providing resources to the urban and rural poor, and particularly to the small farmer' through projects.[9] These attempts to increase the market participation of the smallholder farmer,

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[1] Andrew Dabalen and others *Pathways to prosperity in rural Malawi (English)* Directions in development; poverty (World Bank Group, 2017) p 46.
[2] Leroy Vail, 'Peasants, Migrants and Plantations: A Study of the Growth Of Malawi's Economy' (1984) 11 Journal of Social Science (Malawi) 1.
[3] John Williams Mellor (ed), *Agriculture on the Road to Industrialization* (JHU Press for International Food Policy Research Institute 1995) viii.
[4] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 1995) 3; Greg Mills and others, *The Asian Aspiration: Why and How Africa Should Emulate Asia–and What It Should Avoid* (Oxford University Press 2020).
[5] World Bank, *Agriculture for Development: World Development Report 2008* (The World Bank 2007).
[6] Muli Muyanga and others, 'The Future of Smallholder Farming in Malawi' (MwaPATA Institute 2020) MwAPATA Institute Working Paper 20/03.
[7] World Bank. *Accelerated Development in Sub-Saharan Africa-an Agenda for Action* (World Bank Group 1981)
[8] Above, p 50.
[9] Gavin Williams, 'The World Bank and the Peasant Problem' in Judith Heyer, Pepe Roberts and Gavin Williams (eds), *Rural Development in Tropical Africa* (Macmillan Press 1981) 19.

though commendable have been disappointing because, '[by] any criteria, successful projects [were] the exception rather than the rule.'[10]

However, the smallholder classification is applied in the agricultural literature to farmers 'operating less than 5 hectares [that] constitute the bulk of agricultural producers in Malawi' mostly rural based although there are notable differences in land sizes as the vignette illustrates with Martha's over 5 hectares, Mary's 3 hectares and James 1 hectare.[11] Therefore, average land sizes masks the fact that small-scale farmers have 'a diverse set of households with varying farm and household characteristics.'[12] Malawian scholars writing on agricultural markets in Malawi focused on these characteristics of smallholder farmers and suggested that there were broadly three groups, namely, 'net food sellers', 'intermediate' and 'net food buyers'.[13] This classification maps onto the three smallholder farmers in the vignette above with Martha being the net food seller, Mary copying the intermediate position and James being a net food buyer. This classification reflects the various sizes of farmland and other assets owned or used by these smallholders. It is worth mentioning that since colonial times through Malawi's independence in 1960s up to the 1990s, the classification as smallholder tended to reflect 'systems of landholding rather than farm size'.[14] The majority of smallholder farmers are in the group of Mary and James.[15] This view is supported by national statistical data of 2020 which shows that 56.6 percent of the Malawian population is poor and largely rural based smallholder farmers.[16] According to the Malawi National Statistics Office, the poor are classified by reference to consumption levels with any household whose consumption trends are below approximately USD 200 per annum, deemed poor.[17]

[10] Williams, 'The World Bank and the Peasant Problem' (n 9); BH Kinsey, 'Integrated Rural Development, Agricultural Growth and Equity in Malawi: Redefining Development Strategies and Tactics for The 1980's' (1984) 15 Agricultural Administration 45.
[11] Muyanga and others (n 6).
[12] Shenggen Fan and others, *From Subsistence to Profit: Transforming Smallholder Farms* (International Food Policy Research Institute 2013).
[13] Ephraim W Chirwa ," Fostering private food marketing and food policies after liberalization: the case of Malawi" (1998) 12 *World Development Studies* 63.
[14] Jane Harrigan, *From Dictatorship to democracy: Economic policy in Malawi 1964-2000* (First published by Ashgate 2001, Routledge Revivals reissue 2018), 48 (n1).
[15] Andrew Dabalen and others, *Pathways to Prosperity in Rural Malawi* (The World Bank 2017).
[16] Malawi National Statistics Office, 'Malawi Poverty Report 2020' (National Statistics Office 2021).
[17] ibid.

Smallholder farming in Malawi and other African countries is mainly subsistence (production for own consumption) oriented which is seen as the major obstacle for its contribution to market-led economic growth.[18] Institutions such as the World Bank and others have believed that the smallholder farmer can 'increase production and income in the traditional [subsistence] sector,' by greater reliance on markets.[19] It is an almost universal perspective in international development with respect to countries like Malawi and others that there should be 'smallholder commercialization – a transition from subsistence to market-oriented patterns of production and input use.'[20] Smallholder agricultural markets in Africa have been subject to the interest of international organisations such as the World Bank more intensely as this thesis will demonstrate since the 1980s.[21] There has also been both local and international research and scholarship on markets for smallholder farmers since the World Bank inspired agricultural markets reforms of the 1980s.[22] Markets for smallholder farmers continue to be subject to research and scholarship, local and international with their connection to issues of food sufficiency or food security among smallholder farmers.[23]

Scholars in Malawi, mostly economists, have noted 'a myriad of problems' in increasing the market participation for smallholders including 'low productivity, dependence on rain-fed production systems with only one growing season and limited use of irrigation, and low return opportunities within agriculture.'[24] They also point out that 'policy uncertainty' and 'unpredictability and occasional inconsistencies in policy intervention' present 'a key determinant[s] of the economy's overall performance'.[25] Studies of agricultural markets published in 2004 in Malawi and elsewhere in Africa established that agricultural commodities such as grain are 'purchased from a myriad of small farmers by collecting agents, assembled

[18] Dabalen and others (n 15) 46.
[19] Escobar (n 4) 157.
[20] Muyanga and others (n 6).
[21] Peter Gibbon, Kjell J Havnevik and Kenneth Hermele, *A Blighted Harvest: The World Bank & African Agriculture in the 1980s* (Africa World Press 1993); Kjell Havnevik and others, *African Agriculture and the World Bank: Development Or Impoverishment?* (Nordiska Afrikainstitutet 2007).
[22] Mylene Kherallah and others, *The Road Half Traveled: Agricultural Market Reform in Sub-Saharan Africa* (International Food Policy Research Institute 2000); Mylene Kherallah and others, *Reforming Agricultural Markets in Africa: Achievements and Challenges* (Intl Food Policy Res Inst 2002).
[23] Stuart Kent and John Magrath, *Making Maize Markets Work for All in Southern Africa* (Oxfam 2016); Sergio Gomez y Paloma, Laura Riesgo and Kamel Louhichi, *The Role of Smallholder Farms in Food and Nutrition Security* (Springer Nature 2020); Muyanga and others (n 6).
[24] Muyanga and others (n 6).
[25] ibid 4, 11.

for shipment by a rural wholesaler, and purchased by an urban wholesaler or processor.'[26] The approach towards market since the 1960s has not changed much. Smallholder farmers were referred to as 'target marketers'.[27] Such as expression meant that smallholder farmers were seen to participate in markets 'sporadically to acquire a specific amount of cash income for a specific expenditure.'[28] In Malawi, there are two major ways in which smallholder farmers have sold their agricultural commodities.[29] Firstly, smallholder farmers have sold informally to any willing buyer at any place. Secondly, since the early colonial times there have been agricultural markets are generated or/and sustained by the state for smallholder farmers typically governed by state marketing boards.[30] New forms of agricultural markets governed by private/public means have made an appearance in most African countries since the 1980s.[31] The latter are regarded as formal markets with a very high degree of regulation and are the basis of the research question in thesis. There is a reluctance by the majority of smallholder farmers to participate in these markets, not only in Malawi but in most African countries.[32] Research by the International Food Policy Institute in Malawi has found that only 'a few pockets of farmers sold maize to' formal agricultural markets.[33] It was stated that '[t]here was a widespread perception that [agricultural formal markets] work in favor of private traders, large scale farmers, well-connected businessmen' among smallholder farmers.[34]

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[26] Marcel Fafchamps, *Market Institutions in Sub-Saharan Africa: Theory and Evidence* (MIT press 2004) 10.
[27] Paul Bohannan and George Dalton (eds), *Markets in Africa: Eight Subsistence Economies in Transition* (Northwestern University Press 1962) 7.
[28] ibid.
[29] Nicholas J Sitko and TS Jayne, 'Exploitative Briefcase Businessmen, Parasites, and Other Myths and Legends: Assembly Traders and the Performance of Maize Markets in Eastern and Southern Africa' (2014) 54 World Development 56.
[30] Clement Ng'ong'ola, 'Malawi's Agricultural Economy and the Evolution of Legislation on the Production and Marketing of Peasant Economic Crops' (1986) 12 Journal of Southern African Studies 240.
[31] Peter Robbins, *Commodity Exchanges and Smallholders in Africa* (International Institute for Environment and Development 2011); MC Canfield, Amy J Cohen and Michael Fakhri, 'Agriculture, Law, and the State' in M Valverde and others (eds), *Routledge Handbook of Law and Society* (Routledge 2021).
[32] Olutosin A Otekunrin, Siaka Momoh and Idris A Ayinde, 'Smallholder Farmers' Market Participation: Concepts and Methodological Approach from Sub-Saharan Africa' (2019) 7 Current Agriculture Research Journal 139; Shadreck Zhou, Isaac J Minde and Bruce Mtigwe, 'Smallholder Agricultural Commercialization for Income Growth and Poverty Alleviation in Southern Africa: A Review' (2013) 8 African Journal of Agricultural Research 2599.
[33] Dennis O Ochieng, Rosemary Botha and Bob Baulch, 'Structure, Conduct and Performance of Maize Markets in Malawi' (International Food Policy Research Institute 2019) Malawi Strategy Support Programme, Working Paper 29 19.
[34] ibid 21.

Small-scale farmers have had limited access to formal agricultural markets in Malawi since their introduction around 2005 and may continue to face challenges to doing so within a reasonable time frame.[35] In the vignette, smallholder farmers like Martha have the apparent means to participate in formal markets but do not readily participate while Mary may or may not participate depending on several economic and social factors. Policy makers have tended to think, inspired by economic theory-based advice, about smallholder farmers as capable of economically rational actions in that they may have a 'stable set of preferences' and make choices on a course of actions that 'maximizes utility'.[36] However, actual efforts to actually build inclusive formal markets on the basis of the economic assumptions have resulted in the exclusion of the majority of small-scale farmers for whom such markets have been said to be beneficial.[37] What is not clearly spelt out in these economic approaches are their normative aspects that are based on the 'logic of neoclassical economics' such as rational economic action.[38]

In Africa in general and Malawi in particular, law and policy of agricultural markets is often framed through the lens of economic theory particularly the tradition of New Institutional Economics.[39] Mainstream economic approaches involve the privileging of 'market' versus 'state' solutions; and an abstract vision of all humans as 'rational utility maximisers.'[40] Such economic approaches fail to 'incorporate the social' by understanding legal and economic life

[35] Jack Thunde and Bob Baulch, *Who Uses and Who Benefits from Warehouse Receipt Systems? An Examination of Contract Level Transactions on the Agricultural Commodity Exchange for Africa, 2011–2018* (Intl Food Policy Res Inst 2020); Brent Edelman and others, 'Strengthening Storage, Credit, and Food Security Linkages: The Role and Potential Impact of Warehouse Receipt Systems in Malawi' (International Food Policy Research Institute 2015); Gideon Onumah, 'Implementing Warehouse Receipt Systems in Africa Potential And Challenges' (2010).

[36] Lauren B Edelman, 'Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality' (2004) 38 Law & Society Review 181.

[37] Dennis O Ochieng, Rosemary Botha and Bob Baulch, *Market Information and Access to Structured Markets by Small Farmers and Traders: Evidence from an Action Research Experiment in Central Malawi*, vol 33 (Intl Food Policy Res Inst 2020); Jack Thunde and Bob Baulch, 'Who Uses and Who Benefits from Warehouse Receipt Systems?'

[38] Richard Swedberg, 'The Case for an Economic Sociology of Law' (2003) 32 Theory and society 1.

[39] M Kherallah and JF Kirsten, 'The New Institutional Economics: Applications for Agricultural Policy Research in Developing Countries' (2002) 41 Agrekon 110; Johann Kirsten and others, *Institutional Economics Perspectives on African Agricultural Development* (Intl Food Policy Res Inst 2009).

[40] Neil J Smelser and Richard Swedberg, 'Introducing Economic Sociology' in Neil J Smelser and Richard Swedberg (eds), *The handbook of economic sociology* (Princeton University Press 2005).

as part of wider social life.[41] So they miss the fact that, for example, there may be a range of 'economic and non-economic' factors that determine whether smallholder farmers, like other economic actors, choose to participate in, or are excluded from, formal markets.[42] These nuances only become visible when we consider the roles of law in economic life 'in an empirical and sociological manner' with a view to revealing law's underlying 'moral meaning, values and interests.'[43] And it is only once these nuances are visible that then can we go on to excavate the normative and conceptual implications of how economic systems or regimes are constituted.[44]

1.2 Research questions

The main research question for thesis is: -

What role does and can law play in the participation of smallholder farmers in agricultural formal markets?

There are three related sub questions. These are: -

1. What roles does law actually play in the participation of smallholder farmers in agricultural formal markets?

2. What roles does law have the potential to play in supporting small scale farmers to access agricultural formal markets in Malawi?

3. What is preventing us from understanding the actual and potential roles of law in the participation of small-scale farmers in formal agricultural markets in Malawi?

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[41] Kerry Rittich, 'The Future of Law And Development: Second Generation Reforms and the Incorporation Of The Social' in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development A Critical Appraisal* (Cambridge University Press 2006).
[42] Erika Kraemer-Mbula and Sacha Wunsch-Vincent, *The Informal Economy in Developing Nations* (Cambridge University Press 2016).
[43] Richard Swedberg, 'The Case for an Economic Sociology of Law' (2003) 32 Theory and Society 1, 2.
[44] Amanda Perry-Kessaris, 'Reading the Story of Law and Embeddedness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law' (2011) 62 N. Ir. Legal Q. 401.

1.3 Methodology and methods.

This section sets out the methodology and methods adopted to answer the research questions relating to the impact that law does and could have on the participation of smallholder farmers in agricultural formal markets. In this thesis the reference to 'could' refers to missed opportunities for improvement in supporting participation of smallholder farmers in agricultural markets. Formal markets, including their legal dimensions, are constituted by and for economic (inter)actions of various actors, including smallholder farmers. Therefore, an investigation of their participation in them requires an examination of 'both participants [smallholder farmers] and the object of inquiry [markets].'[45] The constitution of markets involves both legal and economic aspects, and these 'may be considered as independent systems with distinct rationalities (and specific scientific disciplines in charge of their 'rationalization')'.[46] However it can be argued that 'they are, at the same time, dependent on each other's functioning within one and the same socio-economic/socio-legal regime.'[47] This entanglement of law, economy and social life calls for economic sociology of law as the appropriate methodology.[48]

Section 1.3.1 sets out the methodology and methods developed in the thesis for the specific purpose of investigating law in the economic lives of smallholder farmers in a way that takes account not only of the perspectives of dominant approaches, but also of the perspectives of farmers themselves—that is, how they understand their world, or their 'interpretative construction' of their world. The approach introduced in this section will be explored in much more detail in Chapter 4.[49] Section 1.3.2 looks at the importance of documents as data which is full of meaning. Section 1.3.3 sets out how documents as data when analysed empirically and normatively, can reveal how the role of law in economic life is seen by dominant economic approaches. Section 1.3.4 sets out how documents key to the constitution of agricultural markets were selected and analysed for the thesis.

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[45] JDB Ibembe, 'Rule of Law in Africa: The Relevance of an Interpretivist Sociological Approach' (2020) 1 KIU Interdisciplinary Journal of Humanities and Social Sciences 45, 46.
[46] Sabine Frerichs, 'The Legal Constitution of Market Society: Probing the Economic Sociology of Law' (2009) 10 Economic Sociology_the European Electronic Newsletter 20, 22.
[47] ibid.
[48] ibid.
[49] Kerry E Howell, *An Introduction to the Philosophy of Methodology* (SAGE Publications 2012) 90.

1.3.1 Economic sociology of law ('ESL') methodology and method

To investigate the lives of smallholder farmers at the intersection of law, economy and society requires carefully tailored components: analytical '*concepts* and *relationships*' to 'organise the field of study' [Emphasis in original];[50] empirical '*facts* and *methods*' that will reveal the realities of markets, as well as dominant understandings of them [Emphasis in original];[51] and an attention to normativity—that is, what '*values* and *interests*' guide market actors, and how those relate to values and interests which the dominant approach 'foregrounds or privileges' [Emphasis in original].[52] More specifically, to understand the (lack of) participation of farmers in formal markets, and to find ways of encouraging that participation, there is need to consider the 'intersection of current ideas' among, for example, farmers, other market participants, state actors, scholars and policy makers; and how these ideas shape the legal thinking and practice.[53]

The thesis addresses these challenges by adopting a sociological approach. Socio-legal approaches 'map and evaluate law's role in social interactions' while 'clarify[ing] the contexts in which decisions about regulation must be made.'[54] They offer a broader perspective on law, one that embraces legal pluralism by recognising that '[l]aw, in some sense, may flourish in social sites and settings where lawyers or police never venture.'[55] They recognise that 'we are actively mak[ing] law, even when no formal legal agent is involved;'[56] and that law may be approached 'as a field of experience' which 'is to be understood as an aspect of social relationships in general, as wholly concerned with the coexistence of individuals in social groups'.[57] In these ways sociolegal approaches emphasize 'the need for ambitious theory for

[50] Amanda Perry-Kessaris, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013) 4.
[51] ibid.
[52] ibid.
[53] David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 4.
[54] Amanda Perry-Kessaris, *Global Business, Local Law: The Indian Legal System as a Communal Resource in Foreign Investment Relations* (Routledge 2016) 5; Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing 2006) 5.
[55] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 54) 1.
[56] Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998) 20.
[57] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 54) 55.

structure broadening understandings of experience, and also detailed empirical research to reveal the diversity of local contexts of legal life.'[58]

The thesis methodology is informed by scholarship which adopts a 'sociological analysis of the role of law in economic life', and does so in 'an empirical … manner.'[59] Such an approach is deemed essential because the law and the economy do 'not exist in a vacuum, sealed off from the social relationships, historical patterns of behaviour, power relations, and physical environments of which they are a part.'[60] The thesis uses the term Economic Sociology of Law (ESL)to capture this kind of approach, but it should be noted that some of the authors referred to in the thesis, such as Bourdieu, might not self-describe in this way.[61] ESL emerged as a direct response to the dominant law and economics approaches.[62] The limits of law and economics approaches are discussed in Chapter 2. It 'challenges the central assumptions of doctrinal law and' mainstream economics and provides a 'lens for structuring sociologically oriented empirical inquiry at the interface of' law, economy, and society.[63] Economic sociology of law's 'centrality of a sociological starting point of lens' must be acknowledged, therefore it will be set out in detail in Chapter 4 after considering sociolegal scholarship in Chapter 3.[64]

ESL 'is more of a state of mind than a fixed methodology - there is a great deal of diversity in approaches and foci' which allows exploration of variations in the role of law in the economic life of actors in a global south country.[65] The variety of ESL includes 'an extensive array of sociological lenses or tools to choose from' such as *inter alia*, 'socio-legal communal networks

[58] Roger Cotterrell, *The Sociology of Law: An Introduction* (2nd edn, Butterworths 1992) v.
[59] Swedberg, 'The Case for an Economic Sociology of Law' (n 43).
[60] Christopher Cramer, John Sender and Arkebe Oqubay, *African Economic Development: Evidence, Theory, Policy* (Oxford University Press 2020) 5; Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017).
[61] Richard Swedberg, 'Bourdieu's Contribution to Economic Sociology' in Peter Hedström and Björn Wittrock (eds), *Frontiers of Sociology*, vol II (Brill 2009); Richard Swedberg, 'The Economic Sociologies of Pierre Bourdieu' (2011) 5 Cultural Sociology 67; Grivas Muchineripi Kayange, *Capitalism and Freedom in African Political Philosophy* (Palgrave Macmillan 2020).
[62] Mark Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness' (1985) 91 American Journal of Sociology 481; Swedberg, 'The Case for an Economic Sociology of Law' (n 43); Sabine Frerichs, 'Re-Embedding Neo-Liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law' in Christian Joerges and Josef Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets.* (Hart Publishing 2011).
[63] Clare Williams, *An Economic Sociology of Law Reimagined: Beyond Embeddedness* (Routledge 2022) 148.
[64] ibid 34.
[65] Clare Fisher Williams, 'What Can ESL Offer to The Data Collector? Describing, Defining, Designing and Deploying an Alternative ESL Approach' (2014) 65 N. Ir. Legal Q. 345, 348.

lens' or 'constructivist theories' each offering 'a different point of departure and focus.'[66] ESL methodology 'can be extended as a project demands, functioning magpie-like to "borrow" useful aspects from different theoretical lenses, traditions, or disciplines, encouraging the researcher to look beyond the boundaries of their field.'[67]

A distinctive feature of ESL is the scalar analysis of social life on four mutually constitutive levels: action, interaction, regimes, and rationalities (worldviews), which will be subject to detailed analysis in Chapter 4. The purpose is 'to highlight the dynamism of scale and its consequent role in generating legal complexity [and] legal plurality' usually lost sight of by dominant approaches.[68] A further distinctive feature of ESL methods is the ability to 'highligh[t] not only social relations but also interests.'[69] Furthermore, an ESL methodology encourages reference to policy documents, to understand how in practice markets are constituted. It also encourages attention to literature documenting the historical evolution of law and economy because 'the way we understand the past has implications for the social theories we develop to deal with the situations we live with today.'[70] Each of these distinctive features have been deployed in this thesis including the question of how ESL could be made relevant to Malawi, considering that it is a global south country that reflects features of a postcolonial society. Chapter 4 will address these points in detail.

1.3.2 Researching using documents

Documents are normally thought of 'in somewhat unidimensional forms – as fixed and static texts', but 'often express their contents – ideas, arguments, narratives or whatever – in multi-modal forms.' [71] This approach has expanded sociological methods to include 'legal design' approaches.[72] It has been argued that documents should not only be understood to refer to text on it, because the documentary nature of an item 'is [not] intrinsic to their existence, nor on the intentions of their makers, but on factors and processes that lay beyond their

[66] ibid.
[67] Williams, *An Economic Sociology of Law Reimagined* (n 63) 35.
[68] Davies (n 60) 90.
[69] Swedberg, 'The Case for an Economic Sociology of Law' (n 43) 2.
[70] Gurminder Bhambra, *Rethinking Modernity: Postcolonialism and the Sociological Imagination* (Springer 2007) 11.
[71] Lindsay Prior, *Using Documents in Social Research* (SAGE Publications 2003) 18.
[72] Amanda Perry-Kessaris, *Doing Sociolegal Research in Design Mode* (Routledge 2021).

boundaries.'[73]Documents should also 'cover a wide range of items including paintings, tapestries [sic], monuments, diaries, shopping lists, stage plays, adverts, rail tickets, film, photographs, videos, engineering drawings, the content of human tissue archives and World Wide Web (WWW)' depending on their social context. [74] The 'emergence of documentation' can be said to 'engage and involve creators (agents, writers, publishers, publicists and so on), users (readers, or receivers) and settings.'[75] Documents of various kinds can be useful for sociological approaches to law and economy for several reasons. Firstly, they can be 'approached in terms of their content' because 'the language contained in the document [represents] a medium of thought and action.' Secondly, the documents are 'produced by humankind in socially organized circumstances.'[76]

Documents are 'artefacts that are created for a particular purpose, crafted according to social convention to serve a function of sorts.' [77] In that sense then documents 'are "social facts", in that they are produced, shared, and used in socially organized ways.'[78] Qualitative social research using documents 'consists of analysing various types of documents including books, newspaper articles, academic journal articles, and institutional reports' with a 'focus on how people interpret their experiences and construct the world. These types of studies are often designed to explore latent meaning in the data.'[79] Documentary research has also been used in quantitative approaches although the focus is on 'us[ing] numbers and statistics to make sense of data' through 'measurements that facilitate comparison and statistical aggregation of data.'[80] The sociological approach to law 'holds out the best prospect of overcoming the prisons of our limited disciplinary modes of thought about legal phenomena and about the societies in which they exist.'[81]

[73] Prior (n 71) 16.
[74] ibid.
[75] ibid.
[76] ibid 17.
[77] Amanda Coffey, 'Analysing Documents' in Uwe Flick (ed), *The SAGE Handbook of Qualitative Data Analysis* (Sage London, UK, Thousand Oaks, CA, New Dehli, India, and Singapore 2014) 369.
[78] ibid.
[79] Hani Morgan, 'Conducting a Qualitative Document Analysis.' (2022) 27 Qualitative Report 64–65.
[80] ibid 65.
[81] Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford University Press 1995) 72.

Documents sometimes are presented and viewed as 'windows onto social and organization realities.'[82] However, in social research, it has been argued that 'documents have a distinctive ontological status, in that they form a separate reality, a 'documentary reality' and should not, without more, be taken to be 'transparent representations of an underlying organizational or social reality.'[83] Therefore documents are no more than texts prepared in specific contexts for specific purposes with specific motives.[84] Documents proffering advice on policy should be viewed as such. For example, state law in Malawi is seen as important for social and economic change with a dedicated government agency, the Malawi Law Commission with the mandate to 'review the Laws of Malawi with a view to the systematic development and reform of the law.' The expression 'Laws of Malawi' refers to the collection of state laws. Chapter 11 will recommend how the almost exclusive focus on documents in law reform approaches by the Malawi Law Commission could be improved to better reflect social life.

The use of 'literature as data' has emerged due to the vast literature produced annually in various social science and other fields of study. Literature for this purpose ' is broadly defined here, incorporating traditional academic literature, but also popular literature, particularly journalistic accounts, and published reports and proceedings by investigative bodies and commissions.'[85] It has been suggested that the use of literature as data has to be systematic meaning that 'aspects of the method are in need of greater explication if its potential is to be realized.'[86]Explicating the use of literature as data is the methods involved in using this kind of data. These involve 'scoping the literature [and] sampling the literature.'[87] Using literature as data involves scoping the literature and purposive sampling of the literature so scoped. Purposive sampling is 'non-probabilistic sampling that involves strategically selecting information rich units.'[88]

[82] Tom Clark and others, *Bryman's Social Research Methods* (Oxford University Press 2021) 514.
[83] ibid.
[84] Clark and others (n 82).
[85] Vivian B Martin, 'Using Popular and Academic Literature as Data for Formal Grounded Theory' in Antony Bryant and Kathy Charmaz (eds), *The Sage Handbook of Current Developments in Grounded Theory* (SAGE Publications 2019) 228.
[86] Martin (n 85).
[87] ibid 223.
[88] Clark and others (n 82) 377.

1.3.3 ESL documentary method

ESL can analytically, empirically and normatively 'explai[n] and asse[ss]' certain key documents that are at the center of the legal constitution of formal agricultural markets in order to determine '[t]he extent to which [those] documents reflect reality'--a reality which is 'scripted according to various kinds of convention, with a particular purpose in mind'—about agricultural markets, and actors that make up those market, including and their 'social relations but also their interests.'[89] The aim is to achieve 'validity and understanding', and where possible, to be able to suggest alternative ways of thinking and practice.[90]

There are several sources of important data considered for understanding the market participation of smallholder farmers. One source was the Malawi government's documents. The World Bank has recently produced and commissioned extensive research on smallholder farmers in agricultural markets in Malawi and elsewhere.[91] Next was the Institute of Development Studies of the University of Sussex, implementing a project called 'Agricultural Policy Research in Africa' ('APRA') funded by the UK Government through UK Aid.[92] Another institution on agricultural research in Malawi is the Washington-based International Food Policy Research Institute ('IFPRI') which started carrying out research on Malawian agriculture in 1990s. According to its website IFPRI 'provides research-based policy solutions to sustainably reduce poverty and end hunger and malnutrition in developing countries'; it was set up as 'a research center of CGIAR', the Consortium of International Agricultural Research Center 'the world's largest agricultural innovation network.'[93] IFPRI set up the Malawi Strategy Support Program in 2008. The Michigan State University's Food Security Group ('FSG') is behind a recently established organization called MwAPATA Institute which according to its website claims to be 'an independent agricultural policy think tank in Malawi' which 'is engaging the Government of Malawi, private sector, and civil society stakeholders in applied

[89] Coffey (n 77) 369; Swedberg, 'The Case for an Economic Sociology of Law' (n 43) 2.
[90] Howell (n 49) 26.
[91] T Benson and B Edelman, 'Policies for Accelerating Growth in Agriculture and Agribusiness in Malawi' [2016] Malawi Country Economic Memorandum background paper, World Bank.; Richard Record, Praveen Kumar and Priscilla Kandoole, *From Falling Behind To Catching Up: A Country Economic Memorandum for Malawi* (The World Bank 2017); World Bank Group, *Malawi Systematic Country Diagnostic* (World Bank 2018) <https://elibrary.worldbank.org/doi/abs/10.1596/31131> accessed 30 July 2020.
[92] Institute of Development Studies, 'The Agricultural Policy Research in Africa Brochure: Malawi'.
[93] 'Home | IFPRI : International Food Policy Research Institute' <https://www.ifpri.org/> accessed 20 February 2023.

policy analysis, policy outreach, capacity building, and policy coordination.'[94] Another international organization advising the Malawi government and producing considerable literature on smallholder agriculture is the Alliance for Green Revolution in Africa ('AGRA').[95]

The ESL approach was applied to undertake an empirical case study of a formal market, namely Malawi's Agricultural Commodity Exchange('ACE').

1.3.4 Data collection and analysis

After an initial review of literature, I identified several key organisations and their reports, then a second round of analysis indicated that periodization offered a productive way forward. Periodisation refers to the several successive period of the history of Malawi which I separate by political or economic events of importance to the economy. These included those produced by the Malawi government, the World Bank, the International Food Policy Research in Malawi, and the International Development Studies based at the University of Sussex; and Michigan State University's Food Security Group ('FSG') through its MwAPATA Institute in Malawi. They are published as part of their research dissemination. Additional Google Scholar searches were carried out on the sampled documents to find out how and where they have been cited to expand the data collected akin to the 'snowball sampling.'[96]

The Malawi based Agricultural Commodity Exchange for Africa is a case study of formal markets in Malawi. Reports and studies on the participation of smallholder farmers in the Agricultural Commodity Exchange were requested through the chief executive officer, after expressly communicating the purpose of my research. These were company policies, strategies, and anonymized customer satisfaction surveys. The chief executive officer would be in a position to authoritatively be able to decide which documents can be shared for research purposes and which cannot. I simply used the chief executive officer as a filter; however, I made the final decision as a researcher.

[94] MwAPATA, 'MwAPATA Institute' (*MwAPATA Institute*) <https://www.mwapata.mw/about> accessed 25 May 2023.
[95] 'AGRA – Alliance for a Green Revolution in Africa' <https://agra.org/> accessed 11 August 2020.
[96] Clark and others (n 82) 384.

The literature on agricultural markets is vast and ranges from reports, public documents, and documents of international actors with interests in agricultural markets and smallholder farmers in Malawi and Africa. The approach involved firstly a broad selection of all relevant materials and secondly a zooming in on texts in chronological order with most coming from the previous five decades.

I adopted 'a more systematic analysis of qualitative research' in using secondary data for research.[97] I was guided by key terms from my research topic and questions in 'strategically selecting information rich units of cases (that is those likely to provide a lot of relevant information) with direct reference to the aims of [my research.'[98] The research design could be said to be 'primarily observational, seeking to understand some elements of how documents are active agents' in structuring diverse (inter)actions in agricultural markets.[99]

This involved 'a systematic procedure for reviewing or evaluating documents' gathered during data collection.[100] Systematically studied (analytically, empirically and normatively) '[d]ocuments provide a mechanism and vehicle for understanding and making sense of social and organization practices.'[101] The systematic procedure involved two rounds of analysis within an ESL conceptual framework.

Round 1: This focused on 'text', 'context', 'subtext'.[102] This was analogous to preparatory work for an interview, or the early phases of grounded theory.[103] I extracted from the text brief insights about the contexts of the text itself (for example description of terminology and methods used), the context in which it was written and disseminated, and the subtext, that is, its moral or normative undertones or implications, including notable absences (what it does

[97] Tim Rapley and Gethin Rees, 'Collecting Documents as Data' in Uwe Flick (ed), *The SAGE Handbook of Qualitative Data Collection* (SAGE Publications 2018) 386.
[98] Clark and others (n 82) 377.
[99] Rapley and Rees (n 98) 379.
[100] Glenn A Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9 Qualitative Research Journal 27.
[101] Coffey (n 77).
[102] Sabine Frerichs, 'Studying Law, Economy, and Society: A Short History of Socio-Legal Thinking' (University of Helsinki 2012) Helsinki Legal Studies Research Paper 19.
[103] Joost F Wolfswinkel, Elfi Furtmueller and Celeste PM Wilderom, 'Using Grounded Theory as A Method for Rigorously Reviewing Literature' (2013) 22 European Journal of Information Systems 45.

not say). In recording my results, I simply noted bullet point answers only. I repeated this exercise for multiple purposively sampled texts.

Round 2: Drawing on the insights generated, I developed a set of questions that I asked of all the texts in your sample in manner like an interview. This was analogous to an interview. As has been suggested I employed 'other sources of data [documents not included in the sample] regarding the [reality represented by the sampled documents] and the contexts within which the documents are generated.'[104]

The study did not raise ethical issues requiring approval because it did not involve human subjects or privacy issues, and most of the documents used are public documents. However, '[r]esearch ethics needs constant reflection' for any researcher, so it was an issue that was always present in designing and implementing my research.[105]

1.4 Thesis structure

The thesis is broadly divided into three parts to answer the research questions. Chapters 2-4 focus on more abstract, theoretical research in response to the research questions. Chapters 5-10 address the more concrete and empirical responses to the research questions Chapter 11 concludes with answering the research questions.

Chapter 2 focuses on law and economics as the dominant approach taken by academics and policymakers to the challenges posed by the lack of participation by smallholder farmers in agricultural markets in countries such as Malawi and in Africa more generally. This chapter demonstrates why economic approaches need to be supplemented by other approaches when studying relationships between law and economic life (production, exchange, and distribution). It will point out the analytical, normative, and empirical limits of economic approaches in understanding markets in places like Malawi. In addition, it critiques a variant of mainstream economics known as New Institutional Economics ('NIE') which has become the dominant approach within mainstream economics in agricultural markets in Malawi and

[104] Clark and others (n 82) 515.
[105] Katrin Tiidenberg, 'Ethics in Digital Research' in Uwe Flick (ed), *The SAGE handbook of qualitative data collection* (Sage 2018).

Africa.[106] The chapter focuses on the limitations pointed out by the World Bank's World Development Report as to how economic models and core assumptions of economics such as rational utility maximising actors of mainstream economics 'take little account of' social life; thereby limiting 'the efficacy of law.'[107] It argues that economic approaches to law could be improved, as suggested by World Bank's own research, by recovering culture as social life that it lost in developing universal and abstract approach to analysis, empirical and normative of markets.

Chapter 3 starts with another observation from another recent World Bank's World Development Report, namely that doctrinal law 'is but one of the many rule systems that order behaviour' in a society.[108] It argues that the plurality of legal orders relative to doctrinal law is a pervasive feature of all societies but that postcolonial societies like Malawi where 'the disjunction between the officially established unity of the legal system and the sociological plurality and fragmentation of legal practice is probably more visible there than in any other region of the developing world.'[109] Santos[110] has recently published a book which develops this idea to suggest that challenges such as the non-participation of smallholder farmers in formal markets are a result of doctrinal approaches ignoring or suppressing the sociological plurality of the global south among the its poor and marginalised such as smallholder farmers.[111] This chapter provides a critique of the sociology of the state suggested by Weber which has become a dominant approach legal thinking and practices. I look at the emerging concept of 'customary living law' as a possible pluralist approach to agricultural markets.[112]

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[106] Johann Kirsten and others, *Institutional Economics Perspectives on African Agricultural Development* (Intl Food Policy Res Inst 2009); Fafchamps (n 26).
[107] World Bank, *Mind, Society and Behavior: World Development Report 2015* (World Bank 2015) 53–55.
[108] World Bank, *World Development Report: Governance and Law. 2017* (World BankGroup 2017) 13.
[109] Boaventura de Sousa Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique' (2006) 40 Law & Society Review 39, 40.
[110] Allegations of professional impropriety have been reported against Professor Boaventura de Sousa Santos and it is unknown if or how far they relate to his publications. The Latin American Council of Social Sciences has suspended all activities relating to Professor Santos on the basis of these allegations pending investigations as reported by the online version of the Spanish newspaper La Vanguardia based in Barcelona (https://www.lavanguardia.com/vida/20230416/8899124/consejo-latinoamericano-suspende-sociologo-luso-acusado-acoso-sexual.html) accessed 16th June 2023
[111] Boaventura de Sousa Santos, *Law and the Epistemologies of the South* (Cambridge University Press 2023).
[112] Anthony C Diala, 'The Concept of Living Customary Law: A Critique' (2017) 49 The Journal of Legal Pluralism and Unofficial Law 143; Rita Ozoemena, 'Living Customary Law: A Truly Transformative Tool?' (2014) 6 Constitutional Court Review 147.

This chapter is concluding that there is need to search for a pluralist approach that would integrate law, economy, and society suggested by ESL approaches.

Chapter 4 explores the 'promise of economic sociology of law' as an alternative methodological approach to understanding and organizing the limited participations of smallholder farmers in formal markets. It is also about finding ways of encouraging the participation of smallholder farmers in formal markets. This chapter sets out an analytical, normative, and empirical framework for the integration of economic and sociolegal approaches law. It seeks to be a modest contribution to 'a sociology of law built from the new epistemic non-Eurocentric premises based on the values of *Ubuntu*.[113] This might produce a framework with which to look at agricultural markets to adequately understand and perhaps to shift the legal thinking and practice around participation or non-participation of other market actors such as smallholder farmers. It proposes that interdisciplinary approaches are key to organizing and making or organizing inclusive markets. The ESL's way of approaching law 'to include not only legal text (law on the books) but also legal context' which includes 'legal (inter)actions (commonly referred to as law in action) and legal rationalities (commonly referred to as legal consciousness).'[114] Legal rationalities exist at the 'meta-level' of social life as 'modes of reasoning' that 'are mutually constitutive of (inter)actions and of regimes…'[115] A reformulated *Ubuntu* as a rationality can result in the legal thinking and practice of inclusive markets. Drawing the different strands of ESL discussed above and the suggested ubuntu inspired rationality to propose what pathways for agricultural inclusive market regimes.

Chapter 5 acts as a bridge between the relatively abstract preceding chapters and the more empirically grounded chapters that follow. It draws on the preceding chapters to introduce a modified ESL approach to inform the empirical chapters of key actors and the context of their (inter)actions, regimes, and rationalities. Chapter 5 also explains why chapters 6 to 9 adopt the historical approach of periodisation. The periodisation is combined with an ESL-inspired scalar analysis (interactions, regimes, rationalities).

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[113] de Sousa Santos (n 112) xv.
[114] Amanda Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (2015) 11 Annual Review of Law and Social Science 57, 61.
[115] ibid 60.

Chapter 6 covers the period of colonial rule in Malawi. It was period that witnessed a central authority in the form of a colonial government imposed over diverse social groups with different social and political arrangements. The smallholder farmer was constituted in this period and introduced to what the chapter refers to as the 'profit motive' of agricultural production. The smallholder farmers were encouraged/compelled to grow enough crops over their needs to sell in order to be able to pay taxes and other outgoings in a place where the use of cash was limited at the onset of colonial rule. Regimes of taxation, land, and transport were central to the legal constitution of agricultural markets and the smallholder farmer in it. The colonial government was regularly subject to the interests of the British government in London which may have affected the path of the development of agricultural markets.

Chapter 7 covers the two decades of the postcolonial government. The chapter addresses the empirical question of how a rationality emerged through the inter(actions) of international and local actors to constitute the market regimes of this period. Mainstream economics attributes the emergence of regimes mostly to the rent seeking behaviour of local (Malawian) actors. The other related insight is the hybrid nature of the postcolonial state with necessary consequences for legal pluralism and how it attempted to be 'the prime collective instrument for achieving rapid rates of growth' without the required 'structural transformation' among poor smallholder farmers.[116] It joins those who call for modification of the predominant view that the postcolonial African state 'has always been autonomous and operates according to a particular state logic.'[117] This could be regarded as a key step in the understanding and explaining aspects of law in economic life in postcolonial societies like Malawi.

Chapter 8 covers the two decades from 1981 to the end of the 20th century. The first decade of this period was marked by a severe economic crisis which compelled the Malawian government to request the assistance of the IMF and World Bank. It was the World Bank that was mostly involved through application of a law and economics approach to agricultural

[116] Thandika Mkandawire, 'From Maladjusted States to Democratic Developmental States in Africa' in Omano Edigheji (ed), *Constructing a democratic developmental state in South Africa: Potentials and challenges* (HSRC Press 2010) 60.

[117] Gift Wasambo Kayira, *The State and the Legacies of British Colonial Development in Malawi: Confronting Poverty 1939-1983* (Lexington Books 2023).

markets in Malawi as part of the economy-wide reforms. This period marked the beginning of what the thesis refers to as 'shared sovereignty' in the making of agricultural markets between the World Bank and the Malawi government (the 'Washington Consensus'). Under the Washington Consensus Agricultural markets were required by the World Bank to be subject to the unreserved application of law and economic ostensibly to encourage smallholder farmers to grow the main cash crop, tobacco. The World Bank demanded unregulated agricultural markets in Malawi as their condition for financial assistance in the form of structural adjustment loans. The period ended with the failure of unregulated markets to develop, compelling the World Bank to revisit its role of pushing for unregulated agricultural markets.

Chapter 9 covers the period 2000 to the present. It is characterised by what the World Bank claimed to be a change in approach commonly known as the 'Post-Washington Consensus' era. A modified ESL lens demonstrates that the changes by the World Bank allowed it to reduce its role in the making of agricultural markets at the level of regimes, but its rationality remained market-centric. Events of the period have challenged the rationality several times through some regimes of the period such as that relating to subsidised farming inputs for smallholder farmers from the Malawi government which the IMF and World Bank 'fiercely opposed' on dogmatic basis of the market-centric rationality.

Chapter 10 analyses a case study of the Agricultural Commodity Exchange for Africa ('ACE') as a formal market. ACE started in the early 2000s as a regime of agricultural markets as one would find in the West. It was beset by problems that compelled it to adapt its rationality and regime to encourage the participation of smallholder farmers after noting their non-participation after close to decade of operations In Malawi.[118] ACE presents a natural 'single experiment' for smallholder participation in formal agricultural markets.[119] Attempts have been made to explain this lack of participation mainly from the approaches of mainstream

[118] Paul Cronjaeger, 'A Situation Analysis and Needs Assessment for the Development of an ACE Rural Vision and Strategy' (Agricultural Commodity Exchange for Africa (ACE) 2015) Briefing Paper.
[119] Robert K Yin, *Case Study Research and Applications* (6th edn, Sage publications 2018) 49.

economics without adequate explanation.[120] This thesis suggests that such inadequacy is as result of the abstract nature of economics and reluctance to change its rationality. It argues that a change of rationality is possible where an actor is willing to embrace *Ubuntu* as part of its rationality.

Chapter 11 concludes with responses to the research questions, a summary of the contribution of this thesis, and some suggestions for ways forward.

1.5 Original contribution

This thesis makes original contributions to conceptual, theoretical, and empirical dimensions of legal thinking and practice.

It shows that ESL-driven approaches can be made relevant by considering ways in which local value systems can be integrated across all three dimensions to encourage legal thinking and practice that is locally relevant. Specifically, it shows how the ideas of Cotterrell, Frerichs, Bourdieu and others gathered under the bespoke framework of ESL can be enhanced with insights from postcolonial theory to make a revised ESL relevant for Malawi and perhaps Africa. The issues of relevance are very significant because the legal thinking and practice of dominant approaches rarely pay attention to the local context.

In addition to contributing to knowledge about Malawi smallholder farmers, and about thinking and practice of policy makers, the thesis also contributes to knowledge about the benefits and risks of applying an ESL-driven approach and offers new insights into how ESL-driven methodologies can be made more relevant to African contexts. Its findings may help to guide scholars who are calling for middle-range approaches to study unique economic phenomena at the intersection of law and economy in Africa.

Empirically, the thesis applies the scalar analysis that is common to ESL studies to reveal how rationalities (worldviews) play a role in exclusion in the law and economy, by enabling some

[120] Paul Thangata, Innocent Kwagala and Malcolm Blackie, 'Warehouse Receipts System in Malawi: Baseline Study' (Malawi Ministry of Trade and Industry; The International Finance Corporation 2017); Edelman and others (n 35).

interactions in while excluding others.[121] And it goes further to offer new insights into how ESL-driven investigations can be applied to empirical realities such as hybrid economic phenomena, including informal economic activity, that prevail in Malawi and elsewhere in Africa. The study also suggests how ESL approaches could be adapted to study the different aspects of agricultural markets of the global south from production and sales of agricultural commodities 'are best understood as legal regimes' in which actors such as smallholder farmers and others participate sometimes for different or/and competing purposes.[122] Empirically, it suggests conditions for the emergence and support of markets as economic regimes and the competing interests imbricated in them. It thereby confronts dominant law and economics view that suggest that markets are natural.

Conceptually, the thesis reveals that the search for 'African legal theory in the context of contemporary problems of war, crimes against humanity, the misery of poverty, hunger, disease and the crises of the environment, among many other pressing problems' need not involve reinventing the wheel or reimagining African pre-colonial past.[123] ESL driven approaches have been effective in drawing attention to 'the social dimension of economic life'.[124] But these efforts have been driven by scholars adopting Western perspectives.[125] This thesis contributes to the efforts by African scholars searching for ways of finding a 'connection between legal theory and practical contemporary problems' of Africa 'in the relationship between legal theory, legal philosophy and sociology of law.'[126] The thesis proposes how 'the promise of the African philosophical, cultural and social experience and understanding of law in relation to contemporary problems' can and could be integrated in legal thinking and practice.[127]

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[121] Frerichs, 'The Legal Constitution of Market Society: Probing the Economic Sociology of Law' (n 46).
[122] Clair Gammage, *North-South Regional Trade Agreements as Legal Regimes: A Critical Assessment of the Eu-Sadc Economic Partnership Agreement* (Edward Elgar Publishing 2017) 2.
[123] Oche Onazi (ed), *African Legal Theory and Contemporary Problems: Critical Essays* (Springer Science & Business Media 2014) 1.
[124] Mark Granovetter and Richard Swedberg, *The Sociology of Economic Life* (3rd edn, Westview Press 2011) viii.
[125] Lauren B Edelman and Robin Stryker, 'A Sociological Approach to Law and the Economy' in Neil J Smelser and Richard Swedberg (eds), *The Handbook of Economic Sociology* (Princeton University Press 2005); Frerichs, 'The Legal Constitution of Market Society: Probing the Economic Sociology of Law' (n 46); Frerichs, 'Studying Law, Economy, and Society: A Short History of Socio-Legal Thinking' (n 103).
[126] Oche Onazi (ed), *African Legal Theory and Contemporary Problems: Critical Essays* (Springer Science & Business Media 2014) 2.
[127] Onazi (n 124) 1.

Normatively, the thesis contributes to policy and legal practice in law reform in Malawi especially by addressing the 'disconnectedness' of legal reform from social practice.[128] ESL provides a lens through which it is possible to capture much of the social reality of economic life from the perspective of smallholder farmers; contributing to interdisciplinary approaches that analyse 'economic and legal life [as] part of social life.'[129] The thesis goes further to demonstrates that such conceptualisations can be made more normatively inclusive by incorporating local values systems such as *Ubuntu*.

[128] Brian Z Tamanaha, 'The Primacy of Society and the Failures of Law and Development' (2011) 44 Cornell Int'l LJ 209.
[129] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 115).

2 The limits of law and economics approaches

This chapter seeks to demonstrate why economic approaches need to be supplemented by other approaches when studying relationships between law and economic life (production, exchange, and distribution of goods and services). It will point out the analytical, normative, and empirical limits of economic approaches in understanding agricultural markets in places like Malawi. It will also critique a variant of mainstream economics known as New Institutional Economics ('NIE') because it is part of mainstream economics approaches to which chapter 4 (economic sociology of law) will be directly responding to.[1] NIE accepts the basic neoclassical core assumptions but claims that they are insufficient to explain, inter alia, markets other than perfect markets.[2] NIE has become 'the weapon[..] of choice for the knights of' smallholder agricultural markets in Africa.[3] The mainstream economic approach has at its core the analytical (concepts), the normative (values and interests) and the empirical (facts) of 'maximizing behaviour, market equilibrium and stable preferences' in order 'to describe, measure and judge an ever-wider range of social life.'[4] While acknowledging the usefulness of economic approaches, this chapter seeks to demonstrate the important limits that of economic approaches in that thinking. It will suggest how postcolonial approaches and others can enrich law and economics approaches by bringing in back aspects of wider social life.[5]

This chapter is arranged as follows. Section 2.1 set out the economic approach that includes analytical aspects of utility maximising. Section 2.2 analyses law and economics as an approach to law. Section 2.3 will set out the dimensions and limits of the market in law and economics. Section 2.4 will critique NIE which the preferred approach when analysing

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[1] Geoffrey M Hodgson, 'Evolutionary and Institutional Economics as the New Mainstream?' (2007) 4 Evolutionary and Institutional Economics Review 7; Mark Granovetter, *Society and Economy* (Harvard University Press 2017).

[2] Douglass C North, 'The New Institutional Economics and Third World Development' in Janet; Lewis Colin Harriss John; Hunter (ed), *The new institutional economics and third world development* (Taylor & Francis 1995).

[3] Amanda Perry-Kessaris, 'Prepare Your Indicators: Economics Imperialism on the Shores of Law and Development' (2011) 7 International Journal of Law in Context 401, 402; Johann Kirsten and others, *Institutional Economics Perspectives on African Agricultural Development* (Intl Food Policy Res Inst 2009); Andrew Dorward, Jonathan Kydd and Colin Poulton, *Smallholder Cash Crop Production under Market Liberalisation: A New Institutional Economics Perspective* (CAB International 1998); M Kherallah and JF Kirsten, 'The New Institutional Economics: Applications for Agricultural Policy Research in Developing Countries' (2002) 41 Agrekon 110.

[4] Gary S Becker, *The Economic Approach to Human Behavior* (University of Chicago press 1976) 5; Perry-Kessaris, 'Prepare Your Indicators' (n 3).

[5] S Charusheela and Eiman Zein-Elabdin (eds), *Postcolonialism Meets Economics* (Routledge 2004).

agricultural markets. Section 2.5 explores how the law and economics approach is applied in Africa. Section 2.6 demonstrates how mainstream economics can apply in local context by recovering culture. Section 2.6 concludes.

2.1 The economic approach

This section sets out what it means to take an economic approach to law and why it matters for this thesis. The arguments is that mainstream economics has become a preferred approach to the 'practice and inquiry focused on law as a means, end, obstacle or irrelevance to improvements' for legal thinking and making of agricultural markets.[6] In this thesis I focus on 'Chicago law and economics tradition' because of the powerful influence it has exerted over the US based institutions leading legally driven projects and research in countries like Malawi most visibly since the 1980s to the present.

Malawi like most countries in sub–Saharan Africa has had an ongoing partnership with Bretton Woods institutions such as the World Bank and the International Monetary Fund ('IMF') since independence in the 1960s. This relationship has resulted in a constant flow of ideas of mainstream economic thinking such as mainstream economics views about markets and how individuals make choices. This has resulted in law and economics approaches informed by these views being the dominant approaches in government making policies and laws about and international research institutions studying markets while alternative ways of looking at markets remain less well known or less commonly applied.[7]This perpetrates what has been termed 'economic imperialism.'[8] However, a growing number of observers and scholars note that mainstream economics and its variants 'ought to complement, not crowd out, other approaches'; these are scholars from social sciences and other economists described by mainstream economists as 'heterodox.'[9]

International financial institutions such as the World Bank and others have urged the use of state or formal law as a tool to drive pro-poor inclusive development in most of the so-called

[6] Perry-Kessaris, 'Prepare Your Indicators' (n 3).
[7] Charles AE Goodhart, 'Economics and the Law: Too Much One-Way Traffic' (1997) 60 Mod. L. Rev. 1.
[8] Roberto Marchionatti and Mario Cedrini, *Economics as Social Science: Economics Imperialism and the Challenge of Interdisciplinarity* (Routledge 2016).
[9] Perry-Kessaris, 'Prepare Your Indicators' (n 3) 417.

'developing economies' since the 1960s. As a result, the law and economics approach has become a dominant approach in legal thinking and practice around formal agricultural markets. Law and economics relies on the conceptual framework of mainstream economics.[10] Like other approaches to law, its purpose may be about 'predicting what effect particular legal rules will have, explaining why particular legal rules exist, deciding what legal rules should exist.'[11] It is of interest to this thesis because its substantive, analytical and empirical focus including its avowed normative orientation in policy and law does much to undermine alternative approaches.

There are criticisms against the major assumptions of law and economics which require it to be supplemented by other approaches for the investigation of the non-participation of smallholder farmers in formal agricultural markets. Some criteria of law-and-economics such as rational choice, the universal capacity of individuals to make choices in ways that that maximise their utility; efficiency, gaols of legal rules as wealth maximisation; have been challenged because they tend to be empirically inaccurate.[12] The central actor-*homo economicus*; a rational economic actor who is calculative in pursuing self-interest – is nowhere near the universal actor she is portrayed to be. However, attempts have been made within the discipline, by new institutional approaches, to relax some of the key assumptions by bringing institutions and sometimes 'culture' back into mainstream economics.[13] Such approaches may only be marginally successful because of their reluctance to challenge the core neoclassical assumptions of mainstream economics of maximising behaviour, market equilibrium and stable preferences. Consequently, the attempts by new institutional approaches 'to explain the existence of political, legal, or social' have been limited.'[14]

[10] Robert Cooter and Thomas Ulen, *Law and Economics* (6th edn, Pearson Education 2014).
[11] David D Friedman, *Law's Order: What Economics Has to Do with Law and Why It Matters* (Princeton University Press 2000) 15.
[12] Russell B Korobkin and Thomas S Ulen, 'Law and Behavioral Science: Removing The Rationality Assumption from Law and Economics' (2000) 88 Calif. L. Rev. 1051; Chris William Sanchirico, 'Deconstructing the New Efficiency Rationale' (2000) 86 Cornell L. Rev. 1003.
[13] Eiman O Zein-Elabdin, 'Economics, Postcolonial Theory and the Problem of Culture: Institutional Analysis and Hybridity' (2009) 33 Cambridge Journal of Economics 1153.
[14] Geoffrey M Hodgson, 'Evolutionary and Institutional Economics as the New Mainstream?' (2007) 4 Evolutionary and Institutional Economics Review 7, 12.

Mainstream economics does provide useful insights but it's under-socialised nature imposes limitations whose implications for policy and law are sometimes not adequately understood. Economics has made useful contributions to our understanding of poverty through randomised control trials including specifically 'understanding economic lives of the poor.'[15] Sometimes, mainstream economics has portrayed this partial perspective as the whole perspective on social life especially with the backing of international institutions such as the World Bank and the International Monetary Fund. Further, research on transaction costs as discussed below suggests how regulation may be set out but does not provide a comprehensive perspective towards regulation.[16]

2.2 The law and economics approach

These sections set out the formalist approach of law and economics and critically evaluates key components such as the rational economic actor or *homo economicus* around whom law and economics builds one of its important assumptions: that efficiency is and ought to be the key objective of economic actions, interaction, regimes, and rationalities. This section traces some law and economics principles in the Chicago law and economics tradition. Out of the several economic approaches to law the focus will be on the Chicago law and economics approach for its explicit commitment to individual utility maximising behaviour 'in their non-market as well as market behaviour' and their response 'to price incentives in non-market as well as market behavior'; as it drives the analytical, empirical, and normative agenda of law.[17]

The 'Chicago law and economics tradition' involves the 'application of the theories and empirical methods of economics to the central institutions of the legal system' in shaping and structuring market exchange.[18] One of its major proponents, Posner, wrote in 1998 in the World Bank Observer that developing countries for prosperity need to adopt 'substantive and

[15] Abhijit V Banerjee, Abhijit Banerjee and Esther Duflo, *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (Penguin 2012) x.
[16] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, USA 1992).
[17] Steven G Medema and Nicholas Mercuro, *Economics and the Law: From Posner to Postmodernism and Beyond* (2nd edn, Princeton University Press 2006) 102.
[18] Richard A Posner, 'Economic Approach to Law' (1975) 53 Tex. L. Rev. 757, 759.

procedurally efficient rules of contract and property rather than on creating a first-class judiciary or an extensive system of civil liberties.'[19]

The relationship between the disciplines of law and economics has overwhelmingly been a flow of microeconomic concepts, relationships, values and interests into law.[20] Posner also noted that some ways of thinking 'assume the fragility of markets and the robustness of government'; law and economics of which Ronald Coase played major role in its founding and Posner in its dissemination at Chicago believed 'that careful observation of markets and government discloses the robustness of markets and the fragility of government.'[21] According to Posner, individuals respond to price changes in a way that maximises their utility. Posner goes so far as to state that 'there is a growing, and cumulatively rather persuasive, body of evidence supporting the proposition that the usual economic relations continue to hold in the formally noneconomic markets of the legal system.'[22] Posner lauded Gary Becker for his methodological contributions to law and economics by suggesting that 'the model of rational choice can be applied to all social behavior.'[23] In the Chicago tradition of law and economics this has resulted in viewing legal rules as prices; 'consumers will consume less of a good as price rises.'[24] This may lead to viewing legal action in highly abstracted terms also known as legal formalism.

The law and economics approach to law has been praised for its formalism which, its supporters claim, makes it more scientific.[25]

> Formalism consists in analysing one sphere or aspect of social relations abstracted from its broader social context, and then taking that part for the whole; and applying analyses based on such abstractions to all aspects of human activity and social life, without regard to the social context within which they have some validity.[26]

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[19] Richard A Posner, 'Creating a Legal Framework for Economic Development' (1998) 13 The World Bank Research Observer 1, 9.
[20] David Campbell and Sol Picciotto, 'Exploring the Interaction Between Law and Economics: The Limits of Formalism' (1998) 18 Legal Studies 249.
[21] Richard A Posner, 'Ronald Coase and Methodology' (1993) 7 Journal of Economic Perspectives 195; Ronald H Coase, 'Law and Economics at Chicago' (1993) 36 The Journal of Law and Economics 239.
[22] Posner, 'Economic Approach to Law' (n 18) 763.
[23] Richard A Posner, 'Gary Becker's Contributions to Law and Economics' (1993) 22 The Journal of Legal Studies 211, 213.
[24] Medema and Mercuro (n 17) 104.
[25] Richard A Posner, 'The New Institutional Economics Meets Law and Economics' [1993] Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift für die gesamte Staatswissenschaft 73.
[26] Campbell and Picciotto (n 20) 250.

In this formalist approach, 'legal formalism views state law as a system of fixed and determinable rules and assumes that they are instruments which directly and immediately govern all social behaviour.'[27] In this approach law is taken 'as a kind of pure calculus unrelated to any idea of social relations.'[28]

The most important objection in the context of this thesis is that the relationship between law and economics, despite the name, has not been an interdisciplinary collaboration in studying law in economic life but rather an analytical, empirical, and normative 'colonisation of law by economics' because the models that economists use are not always relevant/appropriate/accurate, and their impact on legal thinking and practice of law has sometimes resulted in socially undesirable outcomes.[29]

Mainstream economics conceptualises economic life as consisting of individual rationality maximisers who know their preferences and are able through participation in markets, to make choices that maximise their welfare/happiness/satisfaction subject to their budgetary constraints. As Becker puts it preferences 'refer to underlying objects of choice that are produced' by each rational economic actor; 'the assumption of stable preferences provides a stable foundation for generating predictions about responses to various changes.'[30]

The World Bank's *World Development Report 2015: Mind, Society and Behavior* while noting that relying on this stylised understanding of individuals 'can be powerful and useful', the approach has limitations in real life especially in 'developing countries' because individuals are subject to 'social influences on [their] behavior.'[31] These social influences may shape how people think and act in several ways. Firstly, people tend to decide based on mindsets that are socially generated; something the report calls 'thinking automatically.'[32] Secondly, individuals think and act in anticipation or reactively to how others might act which the reports describe as 'thinking socially.' Thirdly, individuals in social groups may have 'common perspectives'

[27] ibid.
[28] Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing 2006) 57.
[29] Campbell and Picciotto (n 20).
[30] Becker (n 4) 5.
[31] World Bank, *Mind, Society and Behavior: World Development Report 2015* (World Bank 2015) 3.
[32] ibid.

towards 'the world around them and [in self] understanding.'[33] After considering these issues about social life the report concludes that individuals are 'not purely selfish and wealth maximizing actors, as many economic models and policies assume.'[34] In a telling observation, the report noted that '[l]aws that are greatly at odds with existing social norms are unlikely to induce desired social changes.'[35]

There are limits to the application of the rational economic actors and its indiscriminate deployment as a tool of analysis in law and economics conceals the fact that economic actors 'are the product of collective and individual history.'[36] The utility maximising actor may be capturing some legal actors. But not all legal actors are always calculating or engaged in 'purely instrumental' actions. Some pursue the 'non-economic alongside economic goals'[37]; and all are socially constituted, through 'a long collective history, endlessly reproduced in individual histories.'[38]

Efficiency is also a 'grounding characteristic of the Chicago law and economics' in that it is suggested that 'legal decision-making and evaluation of legal rules should be grounded in economic efficiency.'[39] Mainstream economics places an emphasis on efficiency as an explanation of, and a normatively valid motivation for many aspects of human behaviour. Efficiency is what economics looks for to explain, predict and justify behaviour. It seems the Chicago tradition of law and economics looks favourably on what is known as 'Kaldor-Hicks efficiency or wealth maximization; a legal change is efficiency enhancing if the gains to the winners exceed the losses to the losers or alternatively stated, if the wealth of society (as measured by willingness to pay) is increased.'[40]

[33] ibid.
[34] ibid 42.
[35] ibid 53.
[36] Pierre Bourdieu, *The Social Structures of the Economy* (Polity 2005) 211.
[37] Andrew TF Lang, 'The Legal Construction of Economic Rationalities?' (2013) 40 Journal of Law and Society 155, 161.
[38] Pierre Bourdieu, *The Social Structures of the Economy* (Polity 2005) 5.
[39] Medema and Mercuro (n 17) 105.
[40] ibid.

Efficiency is determined 'by reference to the satisfaction of people's preferences.'[41] Law and economics approaches assume 'that human behavior can be understood as the result of people's rational choices to maximize their utility or satisfy their preferences.' The implications that law and economics take is that 'a single standard – utility, or efficiency, or welfare – provides correct policy prescriptions as well as explanations and understandings of practices, and that *considerations such as justice and fairness have no independent weight'* (Emphasis supplied).[42]

Kaplow and Shavell suggested that 'legal rules should be selected entirely with respect to their effects on the well-being of individuals in society.'[43] In their view this, as opposed to considering potentially conflicting values such as fairness, is a more appropriate way to achieve efficiency in law and economics. Their argument was seen by one reviewer as attempting to 'restrict value judgments about equity to a single, sharply defined place in policy analysis: the choice of an appropriate social welfare function.'[44] Others viewed their book which had continued 'to receive lavish praise and little criticism' as 'a dangerous development in the study of law and economics, lulling mainstream practitioners into a false sense of security regarding the normative status of their current method of analysis.'[45] The proposed approach relied on a method of calculating efficiency in economics that involved 'the difficulty of defining and measuring utility' by 'assigning quantitative values to utility levels.'[46]

But neither every individual nor every society takes efficiency as the end of economic activities. Schumacher made the point that economics could and should be people-centred instead of treating persons as means.[47] He accused mainstream economists of 'metaphysical blindness assuming that theirs is a science of absolute and invariable truths without any

[41] Alan Devlin, *Fundamental Principles of Law and Economics* (Routledge 2014) 32.
[42] Mark Tunick, 'Efficiency, Practices, and the Moral Point of View: Limits of Economic Interpretations of Law' in Mark D White (ed), *Theoretical Foundations of Law and Economics* (Cambridge University Press 2009) 76.
[43] Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Harvard University Press 2002) 3–4; Mark White, 'Preaching to the Choir: A Response to Kaplow And Shavell's Fairness versus Welfare' (2004) 16 Review of Political Economy 507.
[44] Daniel A Farber, 'What (If Anything) Can Economics Say about Equity?' (2002) 101 Mich. L. Rev. 1791, 1792.
[45] White (n 43) 507–508.
[46] Farber (n 44) 1793.
[47] Ernst F Schumacher, *Small Is Beautiful: Economics as If People Mattered* (Sphere Books 1973).

presuppositions.'[48] Using the central idea in mainstream economics of labour, he notes that there is almost 'universal agreement' about the importance of human labour in production.[49] In mainstream economics, for the employer labour 'is simply an item of cost to be reduced to a minimum if it cannot be eliminated altogether' while from the perspective of the employee 'to work is to make a sacrifice of one's leisure and comfort, and wages are a kind of compensation for the sacrifice.'[50] In Buddhist economics however, 'the function of work would be threefold; to give a man [sic] a chance to utilise and develop his faculties; to enable him to overcome his ego-centredness by joining other people in a common task; and to bring forth goods and services needed for a becoming existence.'[51]

Others have wondered whether economic efficiency should be the primary objective of social life.[52] Fineman asks, 'Should social goods, such as education, or social responsibilities, such as those related to the criminal justice system, be measured only in terms of efficiency? Economic measures may be important but are they the only bottom-line – the ultimate bottom-line?'[53] Fineman would likely respond that efficiency in the economic analysis of law risks limited understanding since it requires quantification of utility which may be a challenge when it comes to considering societal

> values such as equality or justice [that] are largely unquantifiable, which may explain why they are not typically addressed in neo-classical economics, nor often considered an integral part of the normative system that governs the market and other economic institutions.[54]

2.3 The market in mainstream economics

This section analyses an important pillar in law and economics which has mostly remained a 'black box' assumed than analysed but a very powerful 'metaphor.'[55] Metaphors as figures of speech are not only used by individuals but can 'craft and deploy us' through the analytical

[48] ibid 44.
[49] ibid 44–45.
[50] ibid 45.
[51] ibid.
[52] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale JL & Feminism 1.
[53] ibid 7.
[54] ibid 8.
[55] Roger Cotterrell, 'Rethinking "Embeddedness": Law, Economy, Community' in Diamond Ashiagbor, Prabha Kotiswaran and Amanda Perry-Kessaris (eds), *Towards an Economic Sociology of Law* (Wiley-Blackwell 2013) 52.

and normative prescriptions that they carry.[56] This section will analyse how economic approaches have universalised the idea of markets and in so doing have taken markets analytically, empirically and/or normatively out of social life. The market as a separate phenomenon in law and economics is held as the most important and natural guarantee of human freedom for the rational economic actors and therefore seen as incompatible with any regulatory actions by state actors.[57] The section will also bring in a critique of the idea of markets by Polanyi.[58] For mainstream economics, one of 'the most powerful and retentive ideas in contemporary discourse and consciousness is the idea of the market as an independent entity, something with its own logic, its own laws and its own requirements.'[59] The presentation of markets is 'without politics, power, or history' and involves an 'utterly rational world, made even more abstract with the passing of time by the increasing use of mathematical tools'.[60]

These circumstances were achieved by economics through 'desocialising' markets by playing down the role of wider social life and overemphasising the assumptions relating to the role of the 'atomistic' rational individual in it.[61] These process of desocialisation allowed mainstream economics to develop '*normative* commitment' to markets and simultaneously apply the idea of markets to behaviour, both economic and non-economic.[62] Through these processes, mainstream economics could be redefined 'to embrace non-market relations' by subjecting these relations to mathematisation and quantification.[63]

Polanyi's ideas confronted this central idea or 'truth claim' by stating that 'the economic system [including exchange] was historically set to be a function of social organisation - later

[56] Clare Williams, *An Economic Sociology of Law Reimagined: Beyond Embeddedness* (Routledge 2022) 7.
[57] FA Hayek, *Law, Legislation, and Liberty* (Routledge Classics 2013).
[58] Karl Polanyi, *The Great Transformation* (Beacon Press 1944); Karl Polanyi, 'The Economy as Instituted Process' in Mark Granovetter and Richard Swedberg (eds), *The Sociology of Economic Life* (3rd edn, Routledge 2011).
[59] Kerry Rittich, 'Making Natural Markets: Flexibility as Labour Market Truth' (2014) 65 N. Ir. Legal Q. 323.
[60] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 1995) 65.
[61] William A Jackson, *Markets: Perspectives from Economic and Social Theory* (Routledge 2019).
[62] Perry-Kessaris, 'Prepare Your Indicators' (n 3) 407; Jackson (n 61) 12.
[63] Ben Fine and Dimitris Milonakis, *From Economics Imperialism to Freakonomics: The Shifting Boundaries Between Economics and Other Social Sciences* (Routledge 2009) 31; Perry-Kessaris, 'Prepare Your Indicators' (n 3).

that remained intact until the rise of the market economy in the nineteenth century, which reversed the relationship between economy and society [in Europe].'[64] That this challenge hit home is shown by a dedicated article by Douglass North, a Nobel Laureate in economics, attempting to address 'the Polanyian market challenge'.[65] Polanyi started off from the idea that economic (inter)actions are 'always embedded because all actors are engaged in diverse types of social action';[66] or to use the language of Cotterrell economic (inter)actions involve at the same time 'multiple types of social action'.[67] Polanyi noted that 'markets per se' should be distinguished from 'price making markets'; the former can be found in most societies where exchange takes place but the latter are a creature of mainstream economic theory from the empirical conditions of the Industrial Revolution.[68] This suggests a key distinction between non-capitalist market economy and capitalist market economy sometimes overlooked by law and economics approaches.

Mainstream economics achieved the hegemony of the idea of the markets through what Fine and Milonakis have termed 'triple reductionism'.[69] The reduction firstly involved a focus on the rational economic actor with stable preferences 'as the key analytical building block' or the unit of analysis; these individuals could be aggregated and taken to be the market for say normative purposes, among other purposes.[70] Secondly, the economy was 'reduced' and equated with the market; thus the economy was 'confined to market supply and demand' reducing non-economic factors and the wider social context to irrelevance.[71] Thirdly, the rational individual and the market were analysed for any purpose 'based on principles that have no attachment to history other than in their application.'[72]

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[64] Alexander Ebner, 'Transnational Markets and the Polanyi Problem' in Christian Joerges and Josef Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart Publishing 2011) 21.
[65] Douglass C North, 'Markets and Other Allocation Systems in History: The Challenge of Karl Polanyi' (1977) 6 Journal of European Economic History 703.
[66] Amanda Perry-Kessaris, 'Reading the Story of Law and Embeddesness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law' (2011) 62 N. Ir. Legal Q. 401, 403.
[67] ibid 404.
[68] George Dalton, 'Economic Theory and Primitive Society' [1961] American Anthropologist 1; Polanyi, 'The Economy as Instituted Process' (n 58).
[69] Fine and Milonakis (n 63) 3.
[70] Dimitris Milonakis and Ben Fine, *From Political Economy to Economics: Method, the Social and the Historical in the Evolution of Economic Theory* (Routledge 2009) 3.
[71] Fine and Milonakis (n 63) 3.
[72] ibid.

According to mainstream economics, it seems there are only price-making markets with forces of demand and supply determining the price; anything else seems to be regarded as market failure calling for correction. This position in mainstream economics has left the more critical economists to inquire 'what markets are, how they have originated, why they endure, how they operate in practice, why they may be diverse and how they relate to the rest of the economy.'[73] Mainstream economists in their writings, advice and policies tend to restrict the role of the state or government in an economy 'to enable markets to be competitive or' require government or the state to supply services that markets cannot provide known as 'public goods'; it views any other role suspiciously or as abnormal.[74]

Mainstream economics has a set of 'standard assumptions' about the role of the state which start from the position that as a general position there is 'no justification for intervention [by the state] on efficiency grounds'; however if any assumption does not hold true then the state may intervene through any of the measures available to it to correct efficiency failures and probably not anything else.[75] In this scenario, some of the assumptions are that 'economic agents must be price-takers.'[76] Price-taking suggests 'a large number of individuals and firms, with no entry barriers in any market'. The assumption can fail—'for example, in the presence of monopoly [single or dominant sellers], monopsony [single or dominant buyers, or oligopoly [limited number of concerted suppliers].'[77] This approach suggests that 'a large number of individuals and firms' means the market is competitive. However, Ben Fine states that this is 'not only wrong but fundamentally misconceived' because, among other reasons, 'competition is extremely complex in light of the variety of factors that it incorporates, including price and quantity.'[78]

Some scholars have suggested that the state or public authorities are necessary for the economy, to create markets.[79] This demonstrates that markets are created and shaped by

[73] Jackson (n 61) 13.
[74] Iagê Miola and Sol Picciotto, 'On the Sociology of Law in Economic Relations' (2022) 31 Social & Legal Studies 139, 141.
[75] Nicholas Barr, *Economics of the Welfare State* (Stanford University Press 1998) 78.
[76] ibid 79.
[77] ibid.
[78] Ben Fine, *Microeconomics: A Critical Companion* (Pluto Press 2016) 66.
[79] Ha-Joon Chang, *Globalisation, Economic Development & the Role of the State* (Zed Books 2003).

social action, interaction, regimes (including law) and relationalities. Polanyi demonstrated how markets in the 19th century Western Europe were the result of various interventions by government that supported the creation of markets by legally deeming nature to be land with all rights and interests in it, human effort as labour and precious metals as money.[80]

In this role, it has been suggested, one can argue for 'a targeted, proactive, *entrepreneurial* state one able to take risks and create a highly networked system of actors that harness the best of private sector' (Emphasis in original).[81] The state can and could support markets, directly or indirectly, by supporting or creating systems that are necessary for economic activity 'ones that bring together a diverse group of stakeholders.'[82] Rather than just fixing 'markets failures', the state needs to play a role 'in fixing system failures.'[83] This argument demonstrates the necessity of the state in intervening to coordinate, collaborate and cooperate with non-state systems.[84] Markets are 'embedded within political and social structures.'[85] The crossing of the economy and law may result in 'legal procedures, norms, and concepts [working] together to shape economic actors and institutions, and that economic structures, norms, and rituals shape the law.'[86]

One argument sometimes presented in mainstream economics for restricting the role of the state in markets is what is termed as 'rent-seeking' behaviour by public actors. It has been said that 'there is no unanimous consensus on how to define and describe rent-seeking' and the term can be applied to several economic activities.[87] Out of the various 'rents' discussed in mainstream economics, it has been suggested that perhaps 'monopoly rents' comes close to the kind of 'bad rents' associated with illegitimate actions.[88] Monopoly rents are defined

[80] Polanyi, *The Great Transformation* (n 58).
[81] Mariana Mazzucato, *The Entrepreneurial State* (Penguin 2018) 27.
[82] ibid 46.
[83] ibid.
[84] Mazzucato (n 81); Lucia Pradella, 'Book Review: The Entrepreneurial State by Mariana Mazzucato: A Critical Engagement' (2017) 21 Competition & Change 61.
[85] Fred Block and Peter Evans, 'State and Economy' in Neil J Smelser and Richard Swedberg (eds), *The Handbook of Economic Sociology* (Princeton university press 2005).
[86] Lauren B Edelman and Robin Stryker, 'A Sociological Approach to Law and the Economy' in Neil J Smelser and Richard Swedberg (eds), *The Handbook of Economic Sociology* (Princeton University Press 2005) 231.
[87] Pius Fischer, *Rent-Seeking, Institutions and Reforms In Africa: Theory and Empirical Evidence for Tanzania* (Springer Science & Business Media 2007) 21.
[88] ibid 25.

as benefits 'from any kind of artificial restriction on potential competition' which unlike profits made in the course of normal business, 'artificial rents usually undermine the efficiency-increasing impact of market forces and may even make price incentives irrelevant in the allocation of resources.'[89] Further to this, 'individuals and interest groups typically spend resources to create and capture these rents.'[90] They are frowned upon by mainstream economics because they 'prevent a competitive market outcome.'[91] From the above attempt of defining rent-seeking, it seems that 'rent seeking is both ubiquitous and inevitable' because of 'the presence of (or potential for) rights that leads to rent-seeking behavior.'[92] One criticism of the mainstream economics approach to rent seeking is that it fails to present a 'systematically integrated' approach that connects 'the social, political, and economic spheres of human society'.[93] The mainstream economics approach may see 'the economic system very clearly, but does not systematically recognize its connections to the surrounding social and political systems.'[94] Further, rent seeking may take place because 'formal rules and controls exist, through manipulation of their application for private gain.'[95] These uses of informality is 'no[t] random, but reflect the character of the specific social and economic order in which they occur.'[96] These unexplored aspects demonstrate the limits of law and economics approaches that fail to take into account wider social life systematically. Additionally, there is further critique to markets.

Polanyi suggests that price making markets are only available where economic life is almost delinked from the social and natural environment and livelihoods.[97] Methods of mainstream economics may be suitable in instances where an economy is organised through particular social, political, and historical processes for conditions to allow price making markets. Outside

[89] ibid.
[90] ibid.
[91] ibid.
[92] Steven G Medema, 'Another Look at the Problem of Rent Seeking' (1991) 25 Journal of Economic Issues 1049, 1061.
[93] Jerry Evensky, 'An Expansion of the Neoclassical Horizon in Economics: The Rent–Seeking Research Program Brings in the Nuances of Social and Political Control' (1988) 47 American Journal of Economics and Sociology 223.
[94] ibid 224.
[95] Lauren A Benton, Manuel Castells and Alejandro Portes, 'Conclusion: The Policy Implications of Informality' in Lauren Benton, Manuel Castells and Alejandro Portes (eds), *The Informal Economy: Studies in Advanced and Less Developed Countries* (JHU Press 1989) 299.
[96] Benton, Castells and Portes (n 95).
[97] Polanyi, 'The Economy as Instituted Process' (n 58).

these conditions 'price-making markets economic analysis loses most of its relevance' analytically, empirically, and normatively.[98]

The most important feature of price-making markets in an economy is 'interdependence' of the various (inter)actions and systems. In this interdependence 'all material livelihood is derived from selling something through the market mechanism; resource and labour ingredients of production are organised for purchase and sale as are produced material items; market prices rearrange labour and resource uses.'[99] Thus, the different sectors that form an economy are brought together 'in a mutually dependent fashion' through exchange where self-interested actors respond to price signals in 'efficient' allocation of resources.[100] It therefore follows that for the working of such an economy 'each must sell something of market value to acquire the material means of existence.'[101]

Economic inter(actions) are part of wider social life in societies where the market is not the 'dominant form of organisation' of social life. [102] The problem with NIE is that it seeks to explain non-market exchanges as market exchanges which allows it to bring in issues of transactional costs.[103] NIE is only able to explain non-market exchanges by treating some 'nonmarket phenomena *as if* they are markets'; 'as if all social institutions are explicable only in terms of their constraining or enabling effect on 'markets' (Emphasis in original).[104]

One of the major criticisms against mainstream economics is its inability to address the argument by Polanyi that exchange or allocation can and has taken place in other economies without 'economizing behaviour', 'self-interested' or 'a profit motive' but through socially motivated action such as 'reciprocity' or 'distribution.'[105] Polanyi went further to note that 'markets have only dominated resource allocation for a brief span in history centring on the

[98] ibid 6.
[99] Dalton (n 68) 2.
[100] ibid 2, 6.
[101] ibid 2.
[102] George Dalton, 'Traditional Production in Primitive African Economies' (1962) 76 The Quarterly Journal of Economics 360.
[103] Matthijs Krul, *The New Institutionalist Economic History of Douglass C. North: A Critical Interpretation* (Springer 2018) 73.
[104] ibid 94.
[105] North, 'Markets and Other Allocation Systems in History' (n 65).

nineteenth century Western World.'[106] Sociologically informed approaches can address these matters much more satisfactorily.

2.4 New Institutional Economics

This section will critically analyse some aspects of NIE including whether it is any different from mainstream approaches. Some of the concepts critiqued in this section are 'bounded rationality', 'transactions costs' and 'property rights.' It seems New Institutional Economics('NIE') did not signify a 'break fundamentally from neoclassical economics' but retained the essence of mainstream economic approaches such 'maximising behaviour, market equilibrium and stable preferences.'[107] It emerged with relatively unified assumptions about its place in relation to neoclassical economic theory. In the second annual conference of NIE scholars Williamson noted that NIE ought to encourage mathematisation central to 'formalization' and noted with satisfaction in the mid-1980s that such efforts were already taking place.[108] Similarly, the upholding of strong links with neoclassical economics was lauded by North who noted that NIE in its 'theoretical framework should be capable of integrating neo-classical theory with an analysis of the way institutions modify the choice set available to human beings.'[109] The first keynote address to the first NIE conference was delivered by Coase after noting that there was some dissatisfaction with neoclassical economic theory proceeded to say that 'nothing is perfect and we cannot abandon an old theory in favor of a new one merely because the has defects but because we believe the new to be better.'[110] NIE therefore is unlikely to overcome the lack of 'history, sociality and realism in orthodox economic theory' as pointed by others such as Polanyi and others.[111] Institutions have been defined as 'humanly devised constraints that shape human interaction'; this definition attempted to provide mainstream economics with a universal explanation of social, economic and political

[106] ibid.
[107] Fine and Milonakis (n 63) 81.
[108] Oliver E Williamson, 'Reflections on the New Institutional Economics' [1985] Zeitschrift für die gesamte Staatswissenschaft/Journal of Institutional and Theoretical Economics 187, 193.
[109] Douglass C North, 'The New Institutional Economics' (1986) 142 Journal of Institutional and Theoretical Economics (jite)/Zeitschrift für die gesamte Staatswissenschaft 230.
[110] Ronald H Coase, 'The New Institutional Economics' [1984] ZEITSCHRIFT für die gesamte Staatswissenschaft/Journal of Institutional and Theoretical Economics 229.
[111] Daniel Ankarloo, 'Using Karl Polanyi as a Stepping Stone for a Critique of the New Institutionalist Orthodoxy', *CRIC Workshop:"Polanyian Perspectives on Instituted Economic Processes: Development and Transformation"* (The University of Manchester 2002).

variation in economies.[112] It also carefully distanced itself from the Old Institutional Economics ('OIE') which was seen as 'anti-theoretical' and therefore not scientific enough.[113] Posner believed that NIE is not against theorising in law and economics and has many overlaps with it, although NIE has focused more on 'transaction costs' than 'price theory'; however he cautiously welcomed NIE as a new tool in law and economics.[114]

One of the major proponents of the NIE approach, Douglass North, a Nobel Laureate in economics, wrote;

> in contrast to the many earlier attempts to overturn or replace neo-classical theory, the new institutional economics builds on, modifies and extends neo-classical theory to permit it to come to grips and deal with an entire range of issues heretofore beyond its ken.[115]

The less than impressive results in developing countries in the 1980s to 1990s of mainstream economic theory in reform programmes suggested adjusting but not abandoning the methodology of mainstream economics by adopting New Institutional Economics (NIE) approaches. This was done under the World Bank's battle cry that 'institutions matter'; in other words there is nothing wrong with core assumptions of economic theory but everything wrong with 'developing economies' because they didn't have institutions such as well-defined formal laws on Western style private property rights or channels for market information or legal restrictions on government's interreference with markets.[116] One of its main normative approaches has been to transplant those legal institutions that were believed to have the potential to reduce what were deemed to 'transactional costs' from Western economies to economies like Malawi.[117]

Initially NIE seemed to promise to bridge the gap between abstract mainstream economics and empirically informed sociological approaches to law and the economy. NIE seems to have

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[112] Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990) 3.
[113] Ronald Coase, 'The New Institutional Economics' (1998) 88 The American Economic Review 72, 72.
[114] Posner, 'The New Institutional Economics Meets Law and Economics' (n 25).
[115] North, 'The New Institutional Economics and Third World Development' (n 2) 17.
[116] Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Profile Books 2013).
[117] Kirsten and others (n 3).

failed to bridge economics with other disciplines such as economic sociology and therefore confirming its positions as a variant of mainstream economics. Nee and Swedberg were able to write in 2005 that

> [w]hen economic sociology appeared on the academic scene in the mid-1980s its interactions with New Institutional Economics were soon plentiful as well as productive. Especially the ideas of Oliver Williamson and Douglass North were often discussed and found useful.[118]

The continued 'the interactions between new institutional economists and economic sociologists began to become less frequent and productive.'[119] NIE has its aspects which come under the word 'institutions' such as bounded rationality, transactions costs and property rights, among others in its bid to relax what North called the 'unrealistic assumptions' of mainstream economics.

One aspect for which NIE lauded itself was the concept of bounded rationality as a relaxation of the rational choice individual with full information.[120] Throwing in his weight, North sought to modify the position in mainstream economics by acknowledging that 'information is incomplete and there is limited mental capacity by which to process information. Human beings, in consequence, impose constraints on human interaction in order to structure exchange.'[121]

Mainstream economics reduced analytically, empirically and/or normatively, economic and legal (inter)actions mostly to incentive and response as their basic approach; the only acceptable limitations are imposed by availability of information for the otherwise rational actors.[122] This approach is 'fundamental to law and economics.'[123] This is an instance of the relaxation of mainstream economics by NIE; attempts by law-and-economics 'to predict how

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[118] Victor Nee and Richard Swedberg, 'Economic Sociology and New Institutional Economics' in Cluade Menard and Mary M Shirley (eds), *Handbook of New Institutional Economics.* (Springer 2005) 789.
[119] Nee and Swedberg (n 118).
[120] D North, *Institutions and Institutional Change and Economic Performance* (Cambridge University Press 1991) 22–24.
[121] Douglass C North, 'The New Institutional Economics and Third World Development' in John Harris, Janet Hunter and Colin M Lewis (eds), *The New Institutional Economics and Third World Development* (Routledge 1995) 17–18.
[122] George A Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' in Peter Diamond and Michael Rothschild (eds), *Uncertainty in Economics* (Elsevier 1978).
[123] Devlin (n 41) 34.

people will react to a change in the law' were then required to take into account limited information available to rational actors.[124]

The approach owes is clearest pronouncements to Herbert Simon, a Nobel Laureate in economics. According to Herbert Simon, bounded rationality

> is simply the idea that the choices people make are determined not only by some consistent overall goal and the properties of the external world, but also by the knowledge that decision makers do and don't have of the world, their ability or inability to evoke that knowledge when it is relevant, to work out the consequences of their actions, to conjure up possible courses of action, to cope with uncertainty (including uncertainty deriving from the possible responses of other actors), and to adjudicate among their many competing wants.[125]

According to Herbert Simon individuals can be seen as 'rational agents' relying 'heavily on memory to recognise situations and find appropriate strategies' to (inter)act.[126] Bounded rationality makes no room for how people actually think. However, views by Bourdieu, a sociologist at the College de France, are much more in line with actual thinking. Bourdieu directly challenged bounded rationality.[127] Bourdieu observed that '[r]eason (or rationality) is "bounded" not only, as Herbert Simon believes, because the human mind is generically bounded (there is nothing new in that idea), but because it is socially structured and determined, and, as a consequence, limited' by context and individual or collective history.[128]

Bounded rationality focuses on informational aspects in (inter)actions but there is much more that could be critiqued about it.[129] This assumption seems unrealistic because individual choices are hardly atomistic even if adequate information is provided. An individual's welfare may be closely bound up with that of another individual in multiple ways.[130]

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[124] Sharon Zukin and Paul DiMaggio, *Structures of Capital: The Social Organization of the Economy*, vol 36 (Cambridge University Press Cambridge 1990) 4.
[125] Herbert A Simon, 'Bounded Rationality in Social Science: Today and Tomorrow' (2000) 1 Mind & Society 25.
[126] Francois Collet, 'Does Habitus Matter? A Comparative Review of Bourdieu's Habitus And Simon's Bounded Rationality with Some Implications for Economic Sociology' (2009) 27 Sociological Theory 419.
[127] Bourdieu (n 36).
[128] ibid 211.
[129] Sharon Zukin and Paul DiMaggio, *Structures of Capital: The Social Organization of the Economy* (Cambridge University Press Cambridge 1990) 4–5.
[130] Amanda Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (2015) 11 Annual Review of Law and Social Science 57; Cotterrell (n 28).

One of the tools of analysis for NIE are transaction costs which has been described as 'the main theoretical achievement of NIE.'[131] The concept of transaction costs originated with Coase.[132] He observed that market exchanges 'entail a set of search, information and bargaining costs.'[133] Building on this observation, Coase was able to say that defining property rights is important for reducing transaction costs in markets and it is 'the critical underpinning of successful modern economies involved in the complex contracting necessary for modern economic growth.'[134] Coase observed that (1) if transaction costs were zero then humans would bargain their way to efficient bargains around property rights and responsibilities. However, crucially (2) since transaction costs are never zero, we need legal systems to support property rights. Most economists forget his point that transaction costs are never zero and that forgetting allows them to continue promoting limited roles for state intervention.[135] Coase also stated that institutions (firms) are formed when to do so will reduce transaction costs—e.g. we shift from being a sole trader to creating a firm (bringing various actors we need for our business 'in-house') when to do so means we waste less on search, information and bargaining costs.[136] North then used transactions costs as 'a catchall phrase to be used as an explanatory tool in almost any historical or theoretical context' which seems beyond the original intended use by the originator of the concept.[137] However, transaction costs are seen to be more relevant in economies where economic life highly depends on the markets rather than otherwise.[138]

Building on Coase's theory that humans would bargain their way to efficient bargains around property rights if transaction costs were zero, one of North's suggested ways of improving mainstream economics was through the suggestion that 'an efficient system of property rights' was important for economic growth.[139] In his view capitalism was possible in England

[131] Ankarloo (n 111) 3.
[132] Coase RH, 'The Nature of the Firm' (1937) 4 Economica 386; Ronald H Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1.
[133] Aric Rindfleisch, 'Transaction Cost Theory: Past, Present and Future' (2020) 10 AMS Review 85, 87.
[134] North, *Institutions and Institutional Change and Economic Performance* (n 120) 35.
[135] Coase, 'The Problem of Social Cost' (n 132).
[136] RH (n 132).
[137] Dimitris Milonakis and Ben Fine, 'Douglass North's Remaking of Economic History: A Critical Appraisal' (2007) 39 Review of Radical Political Economics 27.
[138] Krul (n 103) 74–76.
[139] Julio Faundez, 'Douglass North's Theory of Institutions: Lessons for Law and Development' (2016) 8 Hague Journal on the Rule of Law 373.

after 'property rights became more secure after the Glorious Revolution' in the 17th century.[140] This was possible because, he further suggested, 'the state [was] able to make a credible commitment that it will respect them.'[141] This 'credible commitment' implies that the state was 'to exercise its powers in accordance with predetermined rules or with rules fashioned by the parties as they work out an understanding to accommodate respective interests.'[142] So according to North once a state sets out efficient property rights, the market would do the rest; as long as it is kept out of the property market. North's ubiquitous use of transaction costs been criticised as a 'purely arbitrary, deductively imposed theoretical construct, one that rather serves the purpose of making the market benchmark relevant theoretically than explaining institutional variation. '[143]

In a similar vein, De Soto proposed 'formalisation' of title to land in developing countries.[144] It was surmised that formalisation of title could be carried out by initial registration by government and thereafter 'the market [would] function properly by allowing the poor to accumulate wealth.'[145] The view became very popular with international development institutions and led to considerable efforts and resources dedicated to this process.[146]

Several criticisms can be directed at the views by North and De Soto on property rights in NIE. Firstly, North has been accused of tying economic efficiency to formalistic definitions of property which overlook 'the fact that property rights are social relations' which may involve issues requiring 'a wider analysis of property rights from socio-economic perspectives such as social inequality and income distribution.'[147] Some conflicts in developing countries are attributable to inequitable distribution of land; issues relating to land rights involve serious contests of which competing values and interests should be accorded primacy.[148] It has been

[140] ibid 380.
[141] ibid 381.
[142] ibid.
[143] Krul (n 103) 77.
[144] Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West And Fails Everywhere Else* (Civitas Books 2000).
[145] Rashmi Dyal-Chand, 'Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights' (2007) 39 Rutgers LJ 59, 62.
[146] Dyal-Chand (n 145).
[147] Faundez (n 139) 383.
[148] Terra Lawson-Remer, 'Security of Property Rights for Whom?' (2014) 42 Oxford Development Studies 319.

suggested that property rights might involve a 'multiverse of interests' that are not easily reconcilable on purely economic basis.[149]

Secondly, Faundez raises concerns with North's apparent attribution of property rights in England to the aftermath of the Glorious Revolution. He notes that 'the security of property rights does not take into account the massive transfer of land in Scotland from clans to powerful landlords, the displacement of Irish landlords by English settlers, or the restricted rights of peasants in England' around the time.[150] Faundez points out that North seems to start with the end point of property rights and goes back in history, selectively referring to what supports his position. Faundez continues that what came out of the Glorious Revolution was a strong Parliament which was able to create conditions for 'economic prosperity' than 'security of property rights'; in fact, there was 'an increase in the scale of expropriations [of private property] that gave Parliament the required flexibility to take advantage of new economic opportunities.'[151]

While it has been noted that 'the expansion of the ownership society to include the poor does produce many of the benefits de Soto claims' the unresolved challenge is that 'much of the wealth accruing from poor people's participation in these markets goes to [other] market participants other than the poor as a result 'there is no clear connection between property formalization and greater social welfare.'[152]

According to Duncan Kennedy 'formality has often been treated as a kind of cure-all elixir, capable at once of restraining bureaucratic discretion and creating markets.'[153] Kennedy noted that the push for formalisation implied reducing plural regimes for property when existing plural orders governing property 'can sometimes be a good thing, opening space for alternative modes of economic organization and offering opportunities for private ordering to

[149] Chikosa M Silungwe, *Law, Land Reform and Responsibilisation: A Perspective from Malawi's Land Question* (Pretoria University Law Press (PULP) 2015) 123.
[150] Faundez (n 139) 379.
[151] ibid 380.
[152] Dyal-Chand (n 145) 62.
[153] David Kennedy, 'Some Caution about Property Rights as a Recipe for Economic Development' (2011) 1 Accounting, Economics, and Law 43.

develop practices which can cross jurisdictions.'[154] He continues that the reduction of the plural orders governing property suggests that progress 'requires the unification of national economic life, often the reverse has been true – growth has arisen in a particular place and circumstance and been transferred elsewhere through complex and dynamic social and economic processes rather than common rules.'[155]

2.5 Law and economics in agricultural markets in Africa

One area where economics has caricatured an understanding of law relates to the study of African economies.[156] Mainstream economics has selectively modelled aspects of African economies in a manner that is 'fundamentally ahistorical' and acultural.[157] This approach has presented economic models as 'law-like statements' in a normative agenda resulting in misdiagnosis and mis prescription of solutions to economic problems.[158] An instance is the World Bank inspired reforms from the 1980s in agricultural markets in Malawi under the name of the 'Washington Consensus' empirically set out in chapter 8 of this thesis. As Rodrik has observed these reforms 'skated over deep institutional underpinnings of a market economy, without which none of the market-oriented reforms could reliably deliver on their intended benefits.'[159] The origins Western institutions was overlooked especially the social aspects.[160]

Smallholder farmers in African markets have displayed (inter)actions that are different from the rational utility maximiser of law and economics and were referred to as 'target marketers'.[161] As noted in the World Bank's WDR 2015, '[t]here is variation in mental models across societies, including different perceptions of the way the world works.'[162] Others have argued that 'other forms of rationality' may be more important for smallholder farmers in 'taking decisions' such as 'risk avoidance and minimising risk' other than 'profit

[154] ibid 44.
[155] ibid 45.
[156] Morten Jerven, *Africa: Why Economists Get It Wrong* (Zed Books 2015).
[157] ibid 3.
[158] ibid 131.
[159] Dani Rodrik, *Economics Rules: The Rights and Wrongs of the Dismal Science* (WW Norton & Company 2015) 161.
[160] Geoffrey Schneider and Berhanu Nega, 'Limits of the New Institutional Economics Approach to African Development' (2016) 50 Journal of Economic Issues 435.
[161] Paul Bohannan and George Dalton (eds), *Markets in Africa: Eight Subsistence Economies in Transition* (Northwestern University Press 1962) 7.
[162] World Bank (n 31) 62.

maximisation.'[163] It has been suggested that when discussing smallholder farmers there is need for a 'less prejudiced analyses' because rational action should be understood in terms of smallholders 'own situation and in terms of the way they perceive the options available to them.'[164] These views inform the different approaches that should be adopted in considering any form of market participation by smallholder farmers. For small-scale farmers, 'market sales are not the dominant source of material livelihood.'[165] As target marketers, smallholder farmers only engage in market or purely instrumental (inter)actions 'sporadically to acquire a specific amount of cash for specific expenditure.'[166] This seems to reflect the distinction drawn by Polanyi noted above that 'markets per se' should be distinguished from 'price making markets'; the former can be found in most societies where exchange takes place but the latter are a creature of mainstream economic theory from the conditions of the Industrial Revolution.[167] Although the patterns of smallholders as target marketers were noted in the 1960s, recent market studies have confirmed this behaviour among smallholder farmers that their market (inter)actions are just a part of their wider social life. Economic approaches have noted that Malawi's agricultural markets are 'weak markets that constrain commercial production.'[168] The explanation provided by economic approaches is that the sporadic (inter)actions are because 'there are limited incentives for farmers to produce maize for sale because, due to weak markets and unpredictable government interventions in those markets.'[169] If the markets are looked at from the perspective of wider social life including their history, it would perhaps be realised that the challenge has been present notwithstanding the claims of economic approaches that the unpredictable interventions by government are disrupting economic responses to incentives. As chapter 8 will demonstrate that free market reforms in the 1980s in Malawi failed because 'a large number of smallholder farmers who remained subsistence' despite the removal of every conceivable government

[163] John Martinussen, *Society, State And Market: A Guide to Competing Theories of Development* (Zed Books, Fenwood Books, HSRC Publihsers 1997) 155.
[164] ibid.
[165] Bohannan and Dalton (n 161) 7.
[166] ibid.
[167] Dalton (n 68); Polanyi, 'The Economy as Instituted Process' (n 58).
[168] Todd Benson, *Disentangling Food Security from Subsistence Agriculture in Malawi* (Intl Food Policy Res Inst 2021) 43.
[169] ibid 113–114.

intervention in agricultural markets.[170] These observations seem to confirm the view that economic theory should acknowledge its partial perspective of economies rather than attempt to be 'an all purpose explanation of the phenomena it studies.'[171] One way in which law and economics could be useful to offer explanations that reflect the reality of places like Malawi is for economists to try 'to comprehend the complex imbrication of different cultural and economic phenomena on their own terms, [than] attempt to fit them' within the standard mainstream approaches.[172]

2.6 Recovering culture in economics.

The World Bank's WDR 2015 noted that: -

> *Behind every policy lie assumptions about why people behave the way they do*. A policy that subsidizes fertilizer, for example, assumes that farmers find the price too high; that they can easily learn about price reductions once a subsidy is enacted; that they would benefit from using fertilizer and are aware of those benefits; that they are willing to invest some of their own money today and accept the associated risk to get payoffs at the end of the farming cycle; and that they have time to go purchase the product. *But assumptions may often be incorrect, and solutions based on the wrong assumptions can lead to ineffective policies* [Emphasis supplied].[173]

It has been suggested that there is need for an 'alternative to the purely instrumental understanding of the market.'[174] Postcolonial approaches refer to 'political, anti-colonial sensibilities and a suite of theoretical approaches that seek to disrupt and contest hegemonic Western ways of knowing, writing and seeing the world.'[175] Postcolonial approaches are 'yet to engage more than a small circle of economists' largely because of the way mainstream economics treats variations of social life in different societies.[176] Mainstream economics has presumed 'the ontological precedence of modern European societies as the basis for its theory ' and the ideal against which life outside the 'Western industrial world' is examined for analytical and normative purposes.[177] Postcolonial approaches can suggest 'key concepts that

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[170] Jane Harrigan, *From Dictatorship to Democracy: Economic Policy in Malawi 1964-2000* (Ashgate Publishing/Routeledge Revivals 2018 2001) 106.
[171] Rodrik (n 159) 144.
[172] Zein-Elabdin, 'Economics, Postcolonial Theory and the Problem of Culture' (n 13) 1163.
[173] World Bank (n 31) 192.
[174] Viviana A Zelizer, *Economic Lives: How Culture Shapes the Economy* (Princeton University Press 2013) 375.
[175] Jane Pollard, Cheryl McEwan and Alex Hughes, 'Introduction' in Jane Pollard, Cheryl McEwan and Alex Highes (eds), *Postcolonial Economies* (Zed Books 2011) 1–2.
[176] Zein-Elabdin, 'Economics, Postcolonial Theory and the Problem of Culture' (n 13).
[177] Eiman O Zein-Elabdin and S Charusheela, 'Introduction: Economics and Postcolonial Thought' in Eiman O Zein-Elabdin and S Charusheela (eds), *Postcolonialism meets economics* (Routledge 2004) 2.

provide potentially rich applications in the realm of the economy.'[178] Postcolonial approaches can and could allow 'a historical, ontological, and epistemological revision' of mainstream economics in what has been termed a 'counter disciplinary approach' with the aim of achieving fairness and inclusion than 'academic/intellectual interest alone'[179] This can open up law and economics to a 'process for achieving an integrative synthesis' with other concepts and normative approaches in a way that makes it more inclusive.[180]

Mainstream economics has since the 1970s decades 'acquired a strong colonial impulse' not only over social sciences but also as 'the frame for public policy that has shaped the lives of millions [if not billions]' in a way that is 'epistemologically comfortable with the notion of colonialism and imperial domination.'[181] Its power to achieve its position comes from its ability of '*making itself true*' when it is presented as the undisputable truth, that is 'prescriptions find their way with incredible force to the domestic policy tables of all countries worldwide' usually through its very powerful agents, the World Bank and the IMF [emphasis original].[182]

Mainstream economics seems to segment aspects of wider social life into compartments such as culture as to what 'shapes economic action.'[183] Postcolonial approaches have extensively investigated culture. Approaches that are calling for recovering of culture in economics have suggested that culture may be said to be one of the ways of 'understanding the interplay between the economy and noneconomic factors in the modern world.'[184] The numerous definitions of culture strongly suggest that it is probably an economics abbreviation for wider social life.[185] Culture for the purposes of this thesis includes 'clusters of social phenomena (patterns of thought and belief, patterns of action or interaction, characteristic institutions) coexisting in certain social environments.'[186] Some economics scholars looking at how the

[178] ibid 8.
[179] ibid 10.
[180] Julie Thompson Klein, *Interdisciplinarity: History, Theory, and Practice* (Wayne state university press 1990) 188.
[181] Zein-Elabdin and Charusheela (n 177) 1–2.
[182] Pierre Bourdieu, *Acts of Resistance: Against the New Myths of Our Time* (Richard Nice tr, Polity Press 1998) 95; Zein-Elabdin and Charusheela (n 177) 2.
[183] Eiman O Zein-Elabdin, *Economics, Culture and Development* (Routledge 2017) 2.
[184] Zelizer (n 174) 365.
[185] Zein-Elabdin, *Economics, Culture and Development* (n 183) 206–211.
[186] Cotterrell (n 28) 88.

'different paradigms and philosophical tradition' in economics approach culture, have suggested that it 'refers to broadly -but unevenly- shared sensibilities, habits, and lifeways of a society or group, a social frame of reference that shapes economic action and knowledge.'[187] Economic approaches suggest that culture is separate from the economy and go on to suggest that 'culture has to do with the mental and symbolic, while economy signifies tangible subsistence, provisioning, resource management, and accumulation.'[188] This 'pervasive dichotomy' in economics has been one source of divisions between what is termed as 'orthodox' economics representing the mainstream approach and 'heterodox' representing an approach almost rejecting this dichotomy.[189] Mainstream approaches, through separating the economy from culture, were able from the beginning to present key concepts such as the rational economic person removed from wider social life.[190] In its development as a discipline, it has been suggested, economics has engaged in a process of '*double erasure*' of culture [Emphasis in original].[191] The double erasure is achieved by 'erasure of certain cultures by theorising them as inferior' *and* 'erasure, hiding from sight, the work of cultural hegemony.'[192] The argument is that mainstream economics is firstly 'culturally embedded in a deep rooted perception of the ontological superiority of modern Europeans' while, secondly, simultaneously presenting 'the economic itself – the materiality of life, habits of provisioning or accumulation' as 'extra cultural' thus disembodied from culture.'[193]

NIE has positioned itself as the correction of the excesses in mainstream economic approaches and the leading theoretical framework for agricultural markets.[194] However, by holding on to the scientised approaches of mainstream economics it continues to present a similar approach bifurcating culture and the economy. Culture is presented as 'an external force acting upon a pre-formed individual [rational] agency' such that 'cultural values and traditions are understood mainly as a general curb on "rational" individual self-seeking.'[195] This approach

[187] Zein-Elabdin, *Economics, Culture and Development* (n 183) 27–28.
[188] ibid 2.
[189] ibid.
[190] Zein-Elabdin, *Economics, Culture and Development* (n 183).
[191] Eiman O Zein-Elabdin, 'Articulating the Postcolonial (With Economics in Mind)' in Eiman O Zein-Elabdin and S Charusheela (eds), *Postcolonialism meets economics* (Routledge 2004) 28.
[192] ibid.
[193] ibid.
[194] Kherallah and Kirsten (n 3).
[195] Zein-Elabdin, *Economics, Culture and Development* (n 183) 92.

assures economic approaches that any incorporation of aspects of social life 'engenders no threat to the standard model of [the] individual'.[196] The NIE also 'draws a distinction`' between aspects of social life that enable economic rational utility maximising actions and those that don't, which enables it to select good or bad aspects of social life for mainstream economics.[197] The aim is to maintain 'a supra-cultural imperative normatively defined' by reference to the European experience.[198]

Postcolonial approaches may use the concept of 'economic hybridity' to challenge the erasure of culture by mainstream economics.[199] Mainstream economics 'instead of trying to comprehend the complex imbrication of different cultural and economic phenomena on their own terms, they attempt to fit them within a model of an individual choosing self in a knowable progressive historical journey'.[200] This dismissive approach beyond trying to quantify economic hybridity can be seen in the attitudes of the World Bank and IMF on informality.[201]

Postcolonial studies see the postcolonial cultures as 'more fractured and hybrid [than] standard definition would allow.'[202] Colonialism did not take with it the culture of the imperial society but only parts of it or aspects of it to the colonised territories. The imbrication of imperial culture and local cultures resulted in neither. The meeting did not result in the dominance of the imperial culture or aspects of local culture but what created 'an intervening space' or a 'Third Space' or a 'Culture In-between.'[203] The intervening spaces are sites of production of norms.[204] These places are 'convoluted socio-political environments' and

[196] ibid 93.
[197] ibid.
[198] ibid.
[199] Zein-Elabdin, 'Economics, Postcolonial Theory and the Problem of Culture' (n 13).
[200] ibid 1163.
[201] Franziska Ohnsorge and Shu Yu (eds), *The Long Shadow of Informality: Challenges and Policies* (World Bank Publications 2021); Corinne Deléchat and Leandro Medina (eds), *The Global Informal Workforce* (International Monetary Fund 2021).
[202] Stephen Fay and Liam Haydon, *An Analysis of Homi K. Bhabha's The Location of Culture* (Macat Library 2017) 35; Homi K Bhabha, *The Location of Culture* (Routledge 1994).
[203] Homi K Bhabha, 'Culture's In-Between' in Stuart Hall and Paul Du Guy (eds), *Questions of Cultural Identity* (SAGE Publications 1996); Homi Bhabha, 'In-between Cultures' (2013) 30 New Perspectives Quarterly 107.
[204] Chikosa Mozesi Silungwe, 'On "African" Legal Theory: A Possibility, an Impossibility or Mere Conundrum?' in Oche Onazi (ed), *African Legal Theory and Contemporary Problems* (Springer 2014).

subject to a 'diversity of influence that underlies the 'culture in-between' '.[205]The 'culture in-between thesis' could be used as a descriptor of 'hybrid' colonial and post-colonial economic activity involving ('deep cultural mixing') in economic life.[206]

The resulting hybrid is neither 'premodern' or 'post-modern' but probably somewhere in-between.[207] For mainstream economics, 'economic hybridity' should suggest 'an epistemological transformation' which illuminates the erased cultures; allowing 'these narratives to participate in the global construction of meaning and terms of being and search for answers to current challenges by taking seriously some of their social ethics currently erased by' mainstream economics.[208] It has been argued that some of the persistent 'hybrid patterns in Africa today reveals[sic] situations of economic mixing in deep, multiple ways' such as the coexistence of markets transactions (trading) alongside gift exchange(taking place within communities).[209]At the same time these transactions are not only motivated by self-interest but are a form of the expression of 'solidarity' as a 'the dominant form of social insurance.'[210]

2.6 Conclusion

The major limitation for this thesis is that law and economics approaches in investigating the research questions may tell 'the story of social life (analytically) through an economic lens [that] will necessarily focus (normatively) on economic values and interests' to the exclusion of wider social life .[211] In a similar vein, the WDR 2015 noted that most 'economic policy relies on a model of behavior that takes little account of human sociality' which it defines as 'the tendency of people to be concerned with and associate with each other.'[212] Although 'shortcomings of markets and ways in which policy intervention can make things better' may occupy economists in private, when it comes to 'public debates' advocating free markets is

[205] ibid 29.
[206] Bhabha, *The Location of Culture* (n 202); Fay and Haydon (n 202).
[207] Bhabha, *The Location of Culture* (n 202); Fay and Haydon (n 202).
[208] Zein-Elabdin, 'Economics, Postcolonial Theory and the Problem of Culture' (n 13) 1161.
[209] ibid 1161–1163.
[210] Marcel Fafchamps, *Market Institutions in Sub-Saharan Africa: Theory and Evidence* (MIT press 2004) 8–9.
[211] Perry-Kessaris, 'Reading the Story of Law and Embeddesness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law' (n 66) 407.
[212] World Bank (n 31) 55, 6.

'almost a professional obligation.'[213] Economists 'wield power beyond the classroom' to influence public action in wider social life mostly because 'their discipline has scientific pretensions' and 'their models provide narratives that lode easily in popular consciousness'. This chapter, however, attempted to demonstrate to the limitations on legal thinking about inclusive markets of law and economics approaches.

The mainstream economics approach to markets discussed was achieved through a 'triple reduction' resulting 'in the most powerful and retentive ideas in contemporary discourse and consciousness' that has 'own logic, its own laws and its own requirements.'[214] Mainstream economics has extended its 'the application of [the] analytical frameworks' of the market to law and economics.[215] For mainstream economics its focus is on the economic, leaving out anything uneconomic; for these approaches, 'something is uneconomic when it fails to earn an adequate profit in terms of money.'[216] This matters because 'a group or an individual within society, may decide to hang on onto an activity for *non-economic reasons*, social, aesthetic, moral or political…'; which means a law and economics perspective would only offer a limited perspective [Emphasis in original].[217] The result is that for that activity, law and economics provides a '*fragmentary judgement*' because 'out of a large number of aspects which in real life have to be seen and judged together before a decision can be taken, economics supplies only one – whether a thing yields a money profit *to those who undertake it* or not [Emphasis in original].[218]

Approaches that examine foundational concepts of law and economics such as rational utility maximising can suggest ways of making law and economics more inclusive beyond its narrow outlook of 'maximizing behavior, market equilibrium and stable preferences.'[219] The rational utility maximising behaviour has been critiqued as 'a very particular form of ethnocentrism, which assumes the guise of universalism, can lead us to credit economic agents universally

[213] Rodrik (n 159) 170.
[214] Fine and Milonakis (n 63) 3; Rittich (n 59).
[215] Perry-Kessaris, 'Reading the Story of Law and Embeddesness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law' (n 66) 406.
[216] Schumacher (n 47) 35.
[217] ibid.
[218] ibid.
[219] Gary S Becker, *The Economic Approach to Human Behavior* (University of C hicago press 1976) 5.

with the aptitude for rational economic behaviour, thereby making disappear the question of the economic and cultural conditions.'[220] It represents what may be referred to as 'triumphant ethnocentrism'.[221] Rational action is relative because 'economic behaviour socially recognized as rational is the product of certain economic and social conditions', in other words what is rational is context specific.[222] For these reasons, chapter 4 will suggest *Ubuntu* as an important African cultural experience to include in the thinking and practice of formal agricultural markets. Law and economics needs to transcend its narrow disciplinary boundaries if it is to be inclusive through among other ways, exploring interdisciplinary measures. Sociological approaches are considered in the next chapter.

[220] Bourdieu (n 36) 5.
[221] ibid 226.
[222] ibid 211.

3 The promise of socio-legal approaches

The previous chapter set out the limitations of the economic analysis of law because of its narrow vision especially its disregard of the complexities of social life. The chapter also demonstrated the limits of economic analysis in postcolonial contexts especially the need to consider wider social life in place of abstract approaches of economic approaches. This thesis proposes that the different approaches such as law and economics or sociolegal approaches need to complement than exclude each other. However, the relationship between law and economics on the one hand and socio-legal studies on the other, has been described as 'uneasy' or outright hostile.[1] This uneasiness or hostility seems to have come about as a result of attempts by some economists such as Becker and others under the Chicago law and economics tradition, to subject all social phenomena including law predominantly, to the 'economic approach' as seen in the previous chapter; precluding any complementary or alternative approaches to understanding law.[2] However, it has been stated that '[l]egal relations [should] not [be], however, solely economic relations nor relations whose content and significance are necessarily explicable in exclusively economic terms.'[3] Sociological approaches can be 'comprehensive' and it's through that extensiveness they can approach 'both law as a mechanism of social regulation and law as a profession or as a special field of knowledge and practice [as] objects of study…'[4]

Therefore, this chapter defines and distinguishes between sociolegal approaches and some sociological approaches that could be relevant in legal thinking and practice in the making of agricultural markets. The aim is to lay a foundation for the next chapter on how to approach the role of law in economic life.

[1] Richard Craven, 'Socio-Legal Studies and Economics' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019).
[2] ibid.
[3] Roger Cotterrell, *The Sociology of Law: An Introduction* (2nd edn, Butterworths 1992) 5.
[4] ibid.

Sociological approaches to law are 'interdisciplinary' and can assist in 'hunting' and identifying how and why state law can privilege certain actors and viewpoints thereby excluding some actors and including others.[5]

The most poignant observation on adequacy of state law to explain social life as comprehensively as possible was also made by the World Bank in its annual World Development Report 2017, *Governance and Law*, focusing on developing countries such as Malawi it was noted:

> As everyday experience makes clear, however, the mere existence of formal laws by no means leads to their intended effects. In many developing countries, the laws on the books are just that; they remain unimplemented, or they are selectively implemented, or sometimes they are impossible to implement.[6]

And it may be added that state law also perpetrates economic exclusion of some actors or perpetrate inequalities by compelling marginalised actors to organise economic activities 'against or parallel to the state.'[7]

The sociological approach also addresses what the World Bank's World Development Report noted, namely that

> [i]n all societies, state law is but one of the many rule systems that order behaviour and these rule systems include customary and religious law, cultural and social norms, functional normative systems (rule systems, developed for the common pursuit of particular aims such as sports…and universities) and economic transactional systems.[8]

These 'the rule systems that order behaviour' span wider social life. Sociological approaches may offer some clarity of the diversity presented by the rule systems that order social life and 'which helps explain why ineffective policies persist, why effective policies are often not adopted or implemented, and why unorthodox institutional arrangements may nevertheless generate positive outcomes.'[9] As the World Bank noted, these concerns have wider relevance

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[5] Amanda Perry-Kessaris, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013) 10.
[6] World Bank, *World Development Report: Governance and Law. 2017* (World BankGroup 2017) 83.
[7] Boaventura de Sousa Santos, *Law and the Epistemologies of the South* (Cambridge University Press 2023) xiii.
[8] World Bank (n 6) 84.
[9] ibid 43.

because 'effective development policy and project implementation have taken centre stage in developing countries due to unsatisfactory outcomes of policy reforms in most countries.'[10] In the context of Malawi, it also sets out the basis of the recommendations that will be made in Chapter 11 about '*Why do development agencies*[in Malawi] *persist with approaches that are routinely acknowledged as problematic? What would it take to do better*?' [Emphasis in original].[11]

This chapter also considers the influence of Ehrlich in suggesting that sociological approaches to law can explain how law as a social phenomenon works in real life to explain the 'plurality of social practices and experiences' of the marginalised actors.[12] This thesis takes the view that sociological studies of law should accommodate diverse 'clusters and approaches within it'; and include those who come to sociological studies of law 'motivated to affect policy and social change'; and should also be allowed 'to cross disciplinary boundaries, to expand and mix mindsets, and to combine methods and theories.'[13] This thesis takes this approach seriously; it even looks at how an emerging trend among African scholars to talk about 'customary living law' in the realisation that formal law or the law of the state 'is a secondary, rather than a primary locus of social regulation'.[14]

This chapter is arranged as follows. Section 3.1 defines what a sociological approach might look like from the perspective of this thesis. In addition, it explains why taking a sociological approach to law is important for this thesis. Section 3.2 suggests how the economic approaches set out and analysed in chapter 2 might be integrated with sociological approaches. Section 3.4 recognises the over looming influence of formal law and the role of the state that uses formal law for its purposes. Formal law is a necessary extension of the modern state as set out by Weber. This section also develops a postcolonial critique of the Weberian concept of state and its implications for formal law. Section 3.4 introduces the

[10] MK Hussein, 'The Challenges Facing Development Policy and Projects Implementation in Malawi' (International Conference on Public Administration and Development … 2018).
[11] Katherine Bridges and Michael Woolcock, 'How (Not) to Fix Problems That Matter: Assessing and Responding to Malawi's History of Institutional Reform' (World Bank 2017) 8289.
[12] de Sousa Santos (n 7) xv.
[13] Naomi Creutzfeldt, 'Traditions of Studying the Social and the Legal: A Short Introduction to the Institutional and Intellectual Development of Socio-Legal Studies' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge 2019) 10.
[14] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020) 132.

concept of living law conceived by Ehrlich. The concept has inspired some African scholars to develop the concept of 'customary living law'. Section 3.5 concludes and anticipates the next chapter.

3.1 What are sociological approaches to law?

Others have situated sociological approaches to law 'within an intellectual and institutional context' as a special area of sociology; such approaches systematically study law as a social phenomenon.[15] This means 'drawing (analytically) on the concepts and relationships and (empirically) on the facts and methods of social sciences and sometimes humanities.'[16] The challenge with these approaches to sociological study is that they may encourage a 'division of labour' where those studying law look at 'law as doctrine – norms, rules, principles, concepts and the modes of their interpretation and validation' while those applying approaches from social sciences are 'solely concerned with a fundamentally different study: that of behaviour, its causes and consequences.'[17] As regards the law as a subdiscipline of sociology, this confining of sociological approaches of law to the discipline of sociology would lose socio-legal scholarship's 'many different theoretical schools, methodologies and intellectual perspectives.'[18] This way of studying law and society results in a situation where sociological approaches 'contribute little to the understanding of legal ideas, abstracted from their effects on specific actions.'[19] Law, by its nature, is 'an intellectually vulnerable, open discourse, liable to invasion by many kinds of ideas, including sociological ones'; this vulnerability is most obvious by the invasion of law by economic ideas.[20] It is only 'political fiat', the political authority of the state, that gives law a semblance of stability; in those instances where the state can impose its legal outlook.[21] This is more visible in 'the decisions of certain official legal interpreters, puts an end to argument, determines which interpretive concepts prevail, asserts favoured normative judgments as superior to all competing ones, and guarantees normative closure by the threat of official coercion.'[22] This approach to the

[15] Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press 2008) 4.
[16] Perry-Kessaris, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?' (n 5) 10.
[17] Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing 2006) 45.
[18] Jiří Přibáň (ed), *Research Handbook on the Sociology of Law* (Edward Elgar Publishing 2020) 2.
[19] ibid.
[20] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 53.
[21] ibid.
[22] ibid.

study of law and society leaves lawyers and their law 'condemned to a professional state of intellectual tunnel-vision and moral and political impotence.'[23]

Cotterrell has proposed that sociological approaches to law should not 'imply adherence to the distinct methods, theories or outlook of the academic discipline called sociology.'[24] The approach requires that sociological scholarship should engage 'traditional legal scholarship' in order to 'reshape it in ways that renewed its vital engagement with the currents of change in society that social scientists studied.'[25] Sociological approaches should resist any 'temptation to seek status by building disciplinary walls' even if it may feel 'overshadowed by powerful, competing knowledge-fields.'[26] Cotterrell argues that 'sociolegal scholarship needs more theory addressing the nature of contemporary law' and also 'needs theory to map and organize the sociolegal realm.'[27] He suggests that legal ideas themselves should be studied sociologically such as a threefold study of law as a social phenomenon, that is (1) 'law is an entirely social phenomenon' which 'as a field of experience is to be understood as an aspect of social relationships in general, as wholly concerned with the coexistence of individuals in social groups'; (2) 'the social phenomena of law must be understood empirically (through detailed examination of variation and continuity in actual historical patterns of social coexistence, rather than in relation to idealized or abstractly imagined social conditions)'; and (3) 'they must be understood systematically, rather than anecdotally or impressionistically: the aim is to broaden understanding from the specific to the general.'[28] This means 'drawing (analytically) on the concepts and relationships and (empirically) on the facts and methods of social sciences and sometimes humanities.'[29] This approach finds that its intellectual 'integrity depends on both an increased sensitivity to its intellectual foundations in classic writings and a sustained effort to develop new sociolegal theory'.[30] Sociological approaches were central to the study of society especially the rise of modernity in Europe in the works of Max Weber and Emile Durkheim. Law occupied a central place of analysis for Weber and Durkheim in

[23] Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies' (2002) 29 Journal of Law and Society 632, 633.
[24] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 54.
[25] Cotterrell, 'Subverting Orthodoxy, Making Law Central' (n 23) 634.
[26] ibid 635.
[27] ibid 636.
[28] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 55.
[29] Perry-Kessaris, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?' (n 5) 10.
[30] Cotterrell, 'Subverting Orthodoxy, Making Law Central' (n 23) 635.

developing their social theory about Western societies. For Weber, 'law was a central focus of his sociological theories, the linchpin in his explanation for processes of social change and modernization' and Durkheim 'argued that law had become the embodiment of the collective conscience in an age of interdependence and reciprocity.'[31] Weber was trying to understand how Western modernity came about. Durkheim noted that 'law displaced the traditional role of religion, providing the grounds for a new civic ethic.'[32] Legal theorists such as Cotterrell have sought to build their sociological approaches to law based on these social theorists.[33]

Sociological approaches to law should encourage among scholars 'the need for ambitious theory to structure broadening understandings of experience, and also detailed empirical researches to reveal the diversity of and complexity of local context of legal life'.[34] However, it is useful to keep in mind two probable approaches which I shall bear in mind in my sociological approaches to law. Firstly, there is the approach that studies law's 'wider historical and social environment, and to competing and overlapping disciplines and practices, and has little difficulty in showing how legal actors often have little grasp of the factors which shape the 'inputs' and 'outcomes' of their decisions'.[35] Secondly, there is the perspective that while acknowledging the historical and social context of law, 'seeks to improve the quality of decision-making in terms which can be used by legal actors' by understanding law and its concepts in a sociological manner.[36]

Sociologically informed approaches to law can and could 'excavate the many forms of exclusion by state-based law: in so far as this law expects normative singularity, and society delivers diversity'; overemphasis on doctrinal approaches overlooks the fact that sometimes

[31] Susan S Silbey, 'Everyday Life and the Constitution of Legality' in Mark D Jacobs and Nancy Weiss Hanrahan (eds), *The Blackwell Companion to the Sociology of Culture* (Balackwell Publishing 2005) 333.
[32] ibid.
[33] Roger Cotterrell, 'A Legal Concept of Community' (1997) 12 Canadian Journal of Law and Society/La Revue Canadienne Droit et Société 75; Roger Cotterrell, 'Justice, Dignity, Torture, Headscarves: Can Durkheim's Sociology Clarify Legal Values?' (2011) 20 Social & Legal Studies 3.
[34] Cotterrell, *The Sociology of Law* (n 3) v.
[35] David Nelken, 'Blind Insights? The Limits of a Reflexive Sociology of Law' (1998) 25 Journal of Law and Society 407, 408.
[36] ibid.

'there is a mismatch between the normative expectations of state law and the endless plurality of social life.'[37]

3.2 Integration of 'law and economics approaches' with 'sociological approaches to law'.

The absence of integration between the two approaches may result in law and economics approaches being 'unable (or unwilling) to see' aspects of the social context such as inequality or exclusion while sociological approaches may labour under over-socialised legal explanations of social behaviour.[38] The two approaches, law and economics and sociological approaches, also risk engaging in unfruitful shouting contests because most of the engagements between the approaches may involve talking 'past one another rather than engaging in dialogue.'[39] To move beyond these 'polemics', it has been suggested by scholars such as Zelizer that sociological approaches should move 'beyond cataloging complaints' since most disciplines have made 'the theoretical case against conventional economic models'.[40] She suggests an approach taken in this thesis that turning these complaints 'into a working dialogue [that] will contribute to the specification of theoretical and empirical guidelines for a better understanding' such as defining 'the market as one among many different possible social arrangements.'[41]

The normative potential of economic approaches is seen in the policy realm where, 'concepts of law and justice are increasingly *defined* in economic terms and understood through the lens of market efficiency' as set out in the previous chapter [Emphasis in original].[42] This has been much clearer in so called developing countries as they seek to improve their economies by attracting foreign direct investment through regulatory reform usually on the advice of such institutions as the World Bank.[43] Sociological approaches to law have 'important, if largely

[37] Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017) 6.
[38] Nelken (n 35).
[39] Lauren B Edelman, 'Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality' (2004) 38 Law & Society Review 181, 182.
[40] Viviana A Zelizer, *Economic Lives: How Culture Shapes the Economy* (Princeton University Press 2013) 365.
[41] ibid 365–366.
[42] Edelman (n 39) 182.
[43] Amanda Perry-Kessaris, *Global Business, Local Law: The Indian Legal System as a Communal Resource in Foreign Investment Relations* (Routledge 2016).

unexplored, implications for the nexus of market rationality and justice.'[44] This is relevant and important for so called developing countries with over half a century of economics-based 'advice' on aspects of legally driven projects from Bretton Woods institutions which often times have disappointing or socially unexpected outcomes such as increased informality, that is economic practices outside the purview of state regulation.

One way of integrating would be for law and economics to 'provid[e] a starting-point analysis' so that 'social research methods can then elaborate on its accuracy and the appropriateness of approaching behaviour from solely the economics perspective.'[45] Sociological approaches to law provide wider perspectives because they are cognisant of the variety of law's 'social realities constructed from different vantage points' such as a lawyer's or a layperson's viewpoints.[46] This is something that economic approaches could benefit from. Economic approaches seem to have built a wall around themselves through 'mainstream economics' reliance on mathematisation.[47] It has been suggested that in the absence of the requisite knowledge of the empirical methods of economics based on mathematics 'there are other avenues, such as economic sociology, which provides an alternative' and perhaps a 'more attractive approach to understanding how markets operate' in actual empirical contexts.[48]

The tendency among policy makers, their local and international advisors is to understand law as limited to the law of the state. Sociological approaches to law 'emerged to challenge the supremacy of [state] doctrinal law.'[49]

3.3 State law approaches

This section sets out the place of legal doctrine in legal thinking and practice. State law readily identifies itself with 'positivism'; which 'is a philosophical position which asserts that scientific knowledge derives from observation of the data of experience and not from speculation that

[44] Edelman (n 39) 182.
[45] Craven (n 1) 182.
[46] Cotterrell, *The Sociology of Law* (n 3) 3.
[47] Craven (n 1) 183; Amanda Perry-Kessaris, 'Prepare Your Indicators: Economics Imperialism on the Shores of Law and Development' (2011) 7 International Journal of Law in Context 401.
[48] Craven (n 1) 183.
[49] Fiona Cownie and Anthony Bradney, 'Socio-Legal Studies: A Challenge to the Doctrinal Approach' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 41.

seeks to "look behind" observed facts for ultimate causes, meaning or essences.'[50] Law can only be known, positivism asserts, by looking at written rules 'specifying how subjects ought to behave.'[51] 'This positivist view is the lawyers' viewpoint that 'informs much legal scholarship' and perspective about law.[52] The role of the state in legal thinking will be critiqued from a postcolonial approach which will take the analysis further to law in postcolonial societies. Doctrinal approaches to law are reminiscent of HLA Hart's concept of law which I refer to in this section as representing 'traditional legal theory.'[53]

State legal doctrine is considered by some as typifying 'a distinctly legal approach to research' for example the approach of the Malawi Law Commission'.[54] Legal doctrine or doctrinal approaches to law comprise the study of 'concepts and principles of all types — cases, statutes, and rules' that exist as 'part of a larger system of law.'[55] The cases, statutes and rules collectively referred to as 'technical legal rules' have claims of 'neutrality and objectivity.'[56] State law is the official legal system of the state through which the political authority of the state is exercised.[57] However, this approach probably represents the 'claustrophobic world of legal scholarship' with its 'focus on technicality as an end in itself' and remains largely 'unconcerned with fundamental questions about law's nature, sources, and consequences as a social phenomenon or about its moral groundings.'[58]

Failure of state law to explain social changes poses challenges for doctrinal approaches especially when law in ineffective to influence changes in behaviour. Where law fails to influence changes in behaviour does not mean that people stop their activities. It may mean that people are conducting themselves based on some social order invisible to doctrinal

[50] Cotterrell, *The Sociology of Law* (n 3) 9.
[51] ibid 8.
[52] ibid 9.
[53] Davies (n 37) 30.
[54] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Mandy Burton and Dawn Watkins (eds), *Research methods in law* (2nd edn, Routledge 2018).
[55] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L. Rev. 83.
[56] Margaret Thornton, 'Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same' (1998) 36 Osgoode Hall LJ 369.
[57] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17).
[58] Cotterrell, 'Subverting Orthodoxy, Making Law Central' (n 23) 633.

approaches.[59] In some cases, such challenges result in unintended effects such as exclusion of sections of the population from intended effects of state law or privileging of some groups at the expense of others. This results in a failure to bring about planned changes in economic life.

It has been argued that legal thinking that revolves around state law 'presumes many of the answers to its own questions.'[60] For instances, these approaches do not adequately explain 'how normativity is produced and reproduced at different scales and by different legal actors, of what the boundaries of 'law' are in any given context, of how divergent scales of law interact, of how knowledge about the law is constructed, of the relationship between law and the human subject.'[61] The section will isolate the legal thinking of HLA Hart who claimed to be writing an 'essay in descriptive sociology' suggesting that laws should be 'understood by Hart only in terms of their social functions or potential social effects.'[62]

Margaret Davies notes that traditional legal theory adopted a 'modernist–positivist concept of law… that at once defined and limited law to the state' and excluded alternative conceptions and practices that might otherwise have been known as 'legal' by unduly focusing on the expert view of law as the concept of law for most purposes.[63] HLA Hart is one of the writers associated with traditional legal theory with his view that there ought to be some authority for there to be law. Davies calls this approach 'restricted legal theory' 'methodological statism' or 'monovocal perspective of legal theory'.[64] Although this approach has the advantage of adding 'solidity to the paradigm of legal positivism that is widely practised and has proven efficiencies' it has some draw backs.[65] Davies sees state law or formal law as restricted because, among other things, 'it suppresses diversity of adding interpretations and of subjects, and downgrades or ignores non-state law.'[66] Davies sums up the position of doctrinal approaches as follows:

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[59] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17).
[60] Davies (n 37) 22.
[61] ibid 25.
[62] Roger BM Cotterrell, *The Politics Of Jurisprudence: A Critical Introduction to Legal Philosophy* (2nd edn, Oxford University Press 2003) 90; HLA Hart, *The Concept of Law* (2nd edn, OUP Oxford 1994) vi.
[63] Davies (n 37) 110.
[64] ibid 23, 109, 110.
[65] ibid 23.
[66] Davies (n 37).

> it looks mainly at the *law of the nation-state* (while occasionally attending to the contested legal nature of international law), it constructs its theory from the perspective of an *insider to this law* but who is nonetheless regarded as capable of making objective pronouncements about it, and it takes a decidedly *Western philosophical approach* to the analysis of law (Emphasis in original).[67]

Traditional legal theory, associated with what has been termed 'conventional positivism', 'found it impossible to even conceive of law separately' from the state or at least a central authority.[68] Law in social life was reduced to a single perspective; that all law emanates from a central authority. Even in modern Western societies and for postcolonial societies since the start of the colonial experience many forms 'can no longer be assess[ed]' solely on the basis of 'whether [they] can be incorporated into state law, [or] seen as an extension of state law, or authorised or controlled by state law'.[69] The idea of a central authority from 'a *philosophical* standpoint, the primary aim seems often to be to conceptualise it in general or universal terms so as to specify an essence that is always present whenever the concept is correctly invoked' [Emphasis original].[70] On the other hand, 'a *sociological* approach is likely to see authority as a matter of practice and experience, especially the practices and experiences of those making, accepting or rejecting authority claims' [Emphasis in original].[71] In postcolonial societies especially considering the fact of sociological pluralism inherent in the postcolonial state an 'open idea of law, embodying flexible but resilient values of justice and security (or order) and adaptable to guiding social purposes and cultural assumptions of the time' seems more appropriate.[72]

Traditional legal theory epitomised by the likes of HLA Hart has been the inspiration of most dominant positivist approaches to law. Although Hart's theory 'does not … explicitly identify law with the law of the nation state' his theory is irreconcilable with 'a pluralistic conception of law' that I intend to pursue in this thesis.[73] However, Hart's theory despite its importance in legal doctrine, also has a number of setbacks for the study of the law in economic life

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[67] ibid 23.
[68] Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Routledge 2016) 2.
[69] Roger Cotterrell, 'Do Lawyers Need a Theory of Legal Pluralism?' in Roger Cotterrell and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017) 27.
[70] ibid 29.
[71] ibid.
[72] ibid 33.
[73] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 37.

because it has not adequately responded to the persistent empirical findings of sociologically informed scholarship about the diversity of social life.[74]

3.3.1 Legal consciousness

Legal consciousness is how 'people experience, understand and act in relation to law.'[75] Another aspect advanced by Hart' s legal theory is that it observes '*from the external point of view* what participants do and what meaning they attribute to their practices *from the internal point of view*' (Emphasis in original).[76] For Hart this distinction is central to his concept of law which he uses 'the internal point of view' of the official to explain the existence or non-existence of law. Hart believed law as applied by 'lawyers, judges and other legal officials must, however, take an insider's view of at least those rules that regulate their own conduct within the legal system'.[77] Some scholars have suggested that Hart's internal points of view 'is the practical attitude of rule acceptance' regardless of the moral meaning the rules may hold for the officials, individuals, or their groups.[78]

Hart's view has been very influential in legal thinking to the extent that it has 'narrowed meaningful debate about the concept of law.'[79] It has been this that has led to narrowing of legal perspectives through 'a threefold reduction in its knowers: the knower must be an *expert* and not a layperson, he is an expert in *state* law and nothing else, and he is *abstract* not materially situated or socio-politically engaged ...'[80] Hart's approach could also be criticised that it presents the legal official or some kind of *homo juridicus* who is '[l]iberated from the complex and messy social and affective ties that blight real humans.'[81] Scholars have noted that this is a 'highly inadequate to represent the complex reality of official motivations.'[82] Cotterrell casts doubt on the usefulness of the internal/external distinction for a sociological

[74] Lynette J Chua and David M Engel, 'Legal Consciousness Reconsidered' (2019) 15 Annual Review of Law and Social Science 335.
[75] ibid 336.
[76] Melissaris (n 68) 8.
[77] Cotterrell, *The Politics of Jurisprudence* (n 62) 90.
[78] Scott J Shapiro, 'What Is the Internal Point of View' (2006) 75 Fordham L. Rev. 1157.
[79] Davies (n 37) 110.
[80] ibid 111.
[81] Clare Williams, *An Economic Sociology of Law Reimagined: Beyond Embeddedness* (Routledge 2022) 12; Alain Supiot, *Homo Juridicus: On the Anthropological Function of the Law* (Saskia Brown tr, Verso Books 2007).
[82] Cotterrell, *The Politics of Jurisprudence* (n 62) 96.

understanding of law.[83] He argues that sociologically informed approaches to law should 'reject the familiar dichotomy between internal and external views of law, or between insider and outsider perspectives.'[84] Hart's approach he continues, perpetuates the idea that law 'is radically autonomous, self-reproducing or self-validating ' as 'an intellectual discipline, a professional practice, a discourse, a normative or communicative system, or a field of knowledge or experience.'[85] The internal/external distinction could also be said to be a view that promotes 'a professional self-image in terms of a special kind of reasoning and understanding' unique to lawyer expert's doctrinal method.[86] In addition, the Hartian approach to law 'tends to regard any form of power as external to law, it suppresses diversity of interpretations and of subjects, and downgrades or ignores non-state law.'[87] A sociologically informed legal theory needs to see 'power as an element in social relationships' that should not be excluded or be opposed but left open for further analysis as necessary.[88] Social relations 'like all relations, involve power, and can be brutal and unpleasant.'[89]

Attempts to bridge 'the chasm' between positivist approaches and insights from other disciplines when looking at law have resulted on the one hand in viewpoints that 'see the individual subject's ideas, intentions and motivations as critical variables in shaping the legal world.'[90] On the other hand there are 'structural theories [that] emphasize the power of society and material constraints in shaping the law as well as the behavior and beliefs of persons.'[91] Perhaps what should be the focus is how 'legality (as a structural component of society) is constituted through everyday negotiated transactions.'[92] With this approach one may 'seek the multiple and diverse signs of law's presence, which may often include imperfect reproductions of doctrinal commands.'[93]

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[83] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17).
[84] ibid 59.
[85] Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford University Press 1995) 91.
[86] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 59.
[87] Davies (n 37) 23.
[88] Cotterrell, *Law's Community* (n 85) 330.
[89] Amanda Perry-Kessaris, 'Reading the Story of Law and Embeddesness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law' (2011) 62 N. Ir. Legal Q. 401, 404.
[90] Silbey (n 31) 333.
[91] ibid.
[92] ibid.
[93] ibid.

3.3.2 The state and law

Weberian approaches to the European state are 'intimately related with his sociology of law' because, according to Weber, the rise in the state centric legal perspective was a result of the dominance of the state's 'legal structure, legal consciousness and legal outlook' in the economy and probably wider social life.[94] He defined the state as an entity that could claim 'the monopoly of the legitimate use of physical force.'[95] Weber did not envisage a state as coming out of the blue but as an entity that gradually emerged out of a complex socio-historical process in respect of which he noted; 'the state has only in modern times reached its full development.'[96] He further noted that 'primary formal characteristics of the state' include 'an administrative and legal order' as a result of which it is able to claim 'binding authority' over its citizens.[97] The administrative order, made up of public officials 'governed by formal procedures' gradually dominated.[98] Weber was aware that the state emerged out of specific social and historical conditions in Europe within a process whereby public officials gradually were able to 'insist, coercively, on the prevalence for many purposes of [the state's] legal vision and legal controls.'[99] Others have also noted this emergence of state centric law as a gradual process of the dominance of the administrative order in England.[100]

With this context probably in mind and considering that the Weberian definition puts too much emphasis on physical force an argument can be made that the state is not only limited by 'territorial boundaries' but also by 'social boundaries between the state' that is 'its public actors and agencies' and 'those subject to its rules.'[101] Bourdieu suggested that a state is that 'which successfully claims the monopoly of the legitimate use of physical and symbolic violence over a definite territory and over the totality of the corresponding population.'[102]

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[94] Deflem (n 15) 43; Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 75.
[95] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 75.
[96] Max Weber, *The Theory of Social and Economic Organization* (AM Henderson and Talcott Parsons trs, Free Press 1947) 156.
[97] ibid.
[98] Deflem (n 15) 43.
[99] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 75.
[100] Harry W Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press 1985).
[101] Joel S Migdal, *State in Society: Studying How States And Societies Transform and Constitute One Another* (Cambridge University Press 2001) 17.
[102] Pierre Bourdieu, 'Rethinking the State: Genesis and Structure of the Bureaucratic Field' (1994) 12 Sociological Theory 1, 3.

Symbolic aspects were inserted as 'an explanation of how the social order is constituted in the first place and why the dominated submit so easily to state domination.'[103] State law is imbricated with these symbolic aspects. There is a connection that can be explained sociologically, Bourdieu suggests, between the state and the 'social world' it governs.[104] This social world is a result of a legal perspective through the unconscious agreement between state categories and the social order, mental structures and social structures' to which individuals adhere.[105] Legal consciousness and related mindsets may partly explain the role and importance of symbolic aspects for ability of the state to share and eventually dominate with its 'legal structure, legal consciousness and legal outlook' with its citizens.[106] One of the key institutions in the formation of this legality and the mindset required, writes Bourdieu, is the formal education system, 'creating a social consensus and societal common sense.'[107] A similar view could say that a state 'presupposes and depends on relationships of community between its citizens.'[108]

For this reason, state law 'gains its strongest relationship with community through its support of the various types of collective involvement or interaction as these are combined in actual empirical contexts.'[109] While sociological approaches may not

> solve problems of pluralistic regulation in complex societies, [they offer] a more flexible and sophisticated framework for conceptualizing those problems' particularly 'in the context of jurisdictions whose reach can no longer be adequately portrayed in traditional sociological terms of (political) "society" and traditional legal terms of state sovereignty.[110]

Some scholars suggest that what today is regarded as the state is a distinctively Western European phenomena, where it developed organically and diffused from there to other parts

[103] Steven Loyal and Steven Loyal, *Bourdieu's Theory of the State* (Palgrave Macmillan 2017) 68–69.
[104] Bourdieu (n 102).
[105] Loyal and Loyal (n 103) 70.
[106] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 75.
[107] Loyal and Loyal (n 103) 72.
[108] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 76.
[109] ibid.
[110] ibid 77.

of the world.[111] It has been suggested that two types of change may occur over the course of a society. In the first, 'change can be the result of an invention that occurred *within* a community', which is called change by 'independent invention' or change 'can be a result of a process in which the idea or its material effect (such as a tool, an art style, etc.) came *into* the community, having originated in some other community, in some other part of the landscape' which is termed 'diffusion' (Emphasis in original).[112] The state came to African societies through diffusion in the 'European project' during colonialism.[113]

The introduction of the state in colonised territories 'was not only more sudden and systematic but also less far-reaching.'[114] While one may detect some similarities between 'African and European political systems' these probably are a result of 'cultural influences transmitted through colonial administrations.'[115] It has been argued that Weberian-like 'bureaucracies set up by colonial powers were designed mainly for the purposes of colonial rule and did not permit the development of centralized political systems capable of controlling highly segmented peripheries'.[116] Therefore 'the graft of Western structures onto native stock was artificial; but even these hybrids were prevented from developing naturally by colonial powers.'[117] The state was transplanted onto these territories 'in an abstract and formal sense' and remained 'no more than an imported artifact'.[118]

Sociological approaches to law need 'to develop an approach to investigate how public authority actually works' in the postcolonial nation state.[119] In Europe, some suggest the mutually constitutive nature of the state and the nation.[120] Others suggest that law and ideas

[111] Bertrand Badie and Pierre Birnbaum, *The Sociology of the State* (University of Chicago Press 1983); James Morris Blaut, *The Colonizer's Model of The World: Geographical Diffusionism and Eurocentric History* (Guilford Press 1993).
[112] Blaut (n 111) 11.
[113] Mahmood Mamdani, *Neither Settler Nor Native: The Making And Unmaking of Permanent Minorities* (Harvard University Press 2020) 10.
[114] Badie and Birnbaum (n 111) 98.
[115] ibid.
[116] ibid.
[117] ibid.
[118] ibid 99.
[119] Christian Lund, 'Twilight Institutions: An Introduction' (2006) 37 Development and Change 673.
[120] Charles Tilly, 'States and Nationalism in Europe 1492-1992' [1994] Theory and society 131.

were key to the process of the 'invention of the modern nation-state' .[121] All these views seem to support the view that in Europe, the state was 'present at its own making' which emphasizes 'the processual aspects of the formation of public authority, and in particular how it takes place in day-to-day social encounters.'[122] The existence of legal pluralism in the administrative law of England in the nineteenth century has been documented.[123] Going back further in history, Tamanaha has demonstrated that 'mid-to-late medieval period was characterised by a remarkable jumble of different sorts of law and institutions, occupying the same space, sometimes conflicting, sometimes complementary, and typically lacking any overarching hierarchy or organisation.'[124] He continues that by the 17th and 18th centuries '[s]tate law became the pre-eminent form of law' such that 'the establishment of the state system was a shift in views of the role of the government and of law - in effect altering the dominant character and orientation of law.'[125] Complex social and historical processes resulted in the 'monopolisation of law by states in Western Europe reduced legal pluralism at home just as a new wave of legal pluralism was being produced elsewhere through colonisation.'[126]

A nation has been said to be an 'imagined community.'[127] This approach reflects the idea that nations or nationalism as a common identity reflecting the convergence of social relations of members around tradition 'united by the accidents of geography or language, for others a focus of convergent interests of citizens, for yet others a symbol of shared beliefs or a repository of shared values, or an object of veneration and patriotic affection.'[128] Some scholars pointed out that 'when submitted to sophisticated sociological analysis' Anderson's imagined community seems inadequate for the postcolonial nation state.[129] The argument is based on 'the evidence of anti-colonial nationalism' where nationalism in places such as 'Asia

[121] Gurminder Bhambra, *Rethinking Modernity: Postcolonialism and the Sociological Imagination* (Springer 2007) 106; Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso books 2006); Jason Xidias, *An Analysis of Benedict Anderson's Imagined Communities* (CRC Press 2017).
[122] Lund (n 119).
[123] Arthurs (n 100).
[124] Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Sydney L. Rev. 375, 377.
[125] ibid 381.
[126] ibid.
[127] Anderson (n 121).
[128] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 76.
[129] Partha Chatterjee, 'Whose Imagined Community?' (1991) 20 Millennium 521.

and Africa are posited not on identity, but rather on *difference*' with the view of nationalism 'propagated by the modern West' [Emphasis in original].[130] This narrative of nationalism in postcolonial societies has been entrenched by presentation of history that usually identifies a specific moment when nationalism became identifiable.[131] Darian-Smith observed that 'colonies emerged overtime as intricately entangled hybrid societies incorporating European and non-European laws, values and sensibilities.'[132] Against this background, she argues that due to this 'intrinsic legal hybridity, it becomes clear why the [formally] decolonised countries of the post-1945 era could not entirely' act in accordance with 'their Euro-American colonial legacies' relating to state law.[133] In other words, law in former British territories varies sometimes considerably from English law introduced by the colonial state.[134]

This hybrid state has also been described as 'the heterogenous state.'[135] The postcolonial state as a 'heterogenous state' is different from the Westphalian or Weberian state.[136] . In these circumstances, the state apparatus may result in 'styles of state legality' which overlap and interpenetrate in socially complex ways with formal state law.[137] Further, the ability of the heterogenous state to dominate economic life with 'with its legal structure, legal consciousness and legal outlook' is limited depending on the interests of the actors behind the different microstates within the state.[138] This way of thinking about the state and law allows one to look beyond 'formal institutions' of the state.[139] It has been suggested that the state could be defined as a social and physical space 'of power marked by the use and threat of violence and shaped by *(1) the image of a coherent, controlling organization in a territory,*

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[130] ibid.
[131] Robert I Rotberg, 'African Nationalism: Concept or Confusion?' (1966) 4 The Journal of modern African studies 33; Robert I Rotberg, 'The Rise of African Nationalism: The Case of East and Central Africa' (1962) 15 World Politics 75; Chatterjee (n 129).
[132] Eve Darian-Smith, 'Postcolonial Theories of Law' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (2nd edn, Hart Publishing 2013) 255.
[133] ibid.
[134] Franz von Benda-Beckmann, *Legal Pluralism in Malawi: Historical Development 1858-1970 and Emerging Issues*, vol 24 (Kachere Series 2007).
[135] Boaventura de Sousa Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique' (2006) 40 Law & Society Review 39, 44.
[136] Gift Wasambo Kayira, 'Limits to State Power in Post-Independence Development in Malawi, 1964-1983' in Kenneth Ross and Wapulumuka O Mulwafu (eds), *Politics, Christianity and Society in Malawi, Essays in Honour of John McCracken* (Mzuni Press 2020).
[137] de Sousa Santos (n 135) 44.
[138] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 75.
[139] Colin Danby, 'Post-Keynesianism without Modernity' (2009) 33 Cambridge Journal of Economics 1119, 1128.

which is a representation of the people bounded by that territory, and (2) the actual practices of its multiple parts [Emphasis in original] '[140] The image of the state is 'that of the modern state that has its origins in the fifteenth through seventeenth centuries in northwest Europe and came to encompass the entire globe in the last half of the twentieth century.'[141] In these circumstances one 'can easily lose sight of practices have tended to be diverse' especially in the global south which calls to the need 'to theorize about arenas of competing sets of rules, other than to cast these in the negative, as failures or weak states or even as non-states.'[142]

3.3.4 Legal pluralism in postcolonial nation-states

This section addresses a problem unique to the formerly colonised territories which are now states through theoretical approaches selected for their different approaches to post-colonial societies and their general fit with the sociological approaches adopted by this thesis. Some recent studies in legal pluralism in Mozambique, Malawi's neighbour in southern Africa, with a colonial history, have noted that research on

> legal pluralism in Africa have largely been confined to the study of so-called informal, non-state and customary institutions, leaving the state and its official institutions out of detailed empirical analysis. Often the state is treated as a homogeneous system coexisting in parallel with other systems. Stereotypes of legal systems, and binary oppositions between 'the state' and 'the non-state' have obscured understandings of empirical reality, where it is hard to separate where the state begins and where it ends.[143]

Such approaches that promote stereotypes of legal systems to legal pluralism maintain an uncritical colonial perspective where the state is 'conceived as representing a unified system following a European legal tradition.'[144] Some scholars have noted how the 'African colonial state in mature form' was no more than an appendage of 'the occupying metropolitan nation' giving perhaps an impression that it was a state in the Weberian sense.[145] The disappearance of the colonial scaffolding at independence revealed ~~a~~ state in postcolonial Africa as a 'heterogenous state' engulfed in 'sociological pluralism'.[146]

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[140] Migdal (n 101) 16.
[141] ibid.
[142] ibid 15.
[143] Helene Maria Kyed, 'Review Artlce: Legal Pluralism in Post-War Mozambique' (2013) 39 Journal of Southern African Studies 989, 990.
[144] Kyed (n 143).
[145] Crawford Young, *The Postcolonial State in Africa: Fifty Years Of Independence, 1960–2010* (University of Wisconsin Pres 2012) 35.
[146] de Sousa Santos (n 135).

State legal doctrine in postcolonial states came about from imperial states through 'exportation of legal institutions, norms, and rules' including social, economic, and political systems.[147] The full import of this exportation and import on post-colonial economies is yet to be adequately addressed in the legal scholarship.[148] It has been argued that the essence of the Euro-American legacies manifested in globalisation as a 'new pluralism [that] represents a shift from the centrality of the state as the source of legal ordering' and that 'the current situation can be seen as a new imperialism, only now it is based on a regime of sovereign nations rather than the political control of empire.'[149] In this new imperialism of sovereign nations 'operates through institutions that claim to embody the community of nations, especially the International Monetary Fund and the World Bank.'[150]

Doctrinal approaches seem disinterested in legalities (daily interactions and practices) expressed in social rules or social life by intrinsic legal hybridity or in the Third Space or culture in-between through 'privileging the historical context of European modernity and its patterns of unfolding in different world regions.'[151] Third Space has been used by postcolonial scholars to described how social and economic life introduced by colonial conquest did not completely erase precolonial social life but produced a 'partial nature of culture'.[152] Social life including economic did not remain unchanged or transformed into the coloniser's social life; it involved the colonised's social life being found in the 'intervening space' or 'in-between' [153] This situation has been acknowledged by both the World Bank and IMF.[154] One possible result may be that the formal economic activity is affected by and affects informal economic activities as

[147] Mohamed Sesay, *Domination Through Law: The Internationalization of Legal Norms in Postcolonial Africa* (Rowman & Littlefield Publishers 2021) 1.
[148] Eiman O Zein-Elabdin, 'Economics, Postcolonial Theory and the Problem of Culture: Institutional Analysis and Hybridity' (2009) 33 Cambridge Journal of Economics 1153.
[149] Sally Engle Merry, 'Colonial and Postcolonial Law' in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishing 2004) 578.
[150] ibid.
[151] Zein-Elabdin (n 148) 1154.
[152] Homi K Bhabha, 'Culture's In-Between' in Stuart Hall and Paul Du Guy (eds), *Questions of Cultural Identity* (SAGE Publications 1996) 54.
[153] Homi Bhabha, 'In-between Cultures' (2013) 30 New Perspectives Quarterly 107.
[154] Franziska Ohnsorge and Shu Yu (eds), *The Long Shadow of Informality: Challenges and Policies* (World Bank Publications 2021); Corinne Deléchat and Leandro Medina (eds), *The Global Informal Workforce* (International Monetary Fund 2021).

'they redefine each other's concepts and practices, although not with equal power and influence.'[155]

The idea of 'mimicry' suggested by Homi Bhabha provides a possible explanation of how formal economic activity defines informal activity .[156] Mimicry in the context of postcolonial theory refers to the 'opportunistic pattern of behavior' by the colonised where the colonised 'copies the person in power [the coloniser], because [the colonised] hopes to have access to that same power [that the coloniser has to] oneself.'[157] In the process of 'copying the master, one has to intentionally suppress one's own cultural identity' though in many situations the 'colonial subjects are left so confused by their cultural encounter with a dominant foreign culture that there may not be a clear preexisting identity to suppress.'[158]

While mimicry may be disparaged among the colonised, it is 'sometimes unintentionally subversive' or 'empowering.'[159] A relevant instance where this comes out is 'the copying of "western" concepts of justice, freedom, and the rule of law.' Informal economic activity may be an imitation of instrumental (means-ends) basis of formal actions involving complex social processes which cannot be adequately explained in positivistic terms only. Similarly, formal economic activity may learn from informal economic activity through the process of 'reverse mimicry, which in the colonial context was often referred to as "going native."' Reverse mimicry involves instances where 'mimicry could also be reversed, especially since there are so many examples, in the history of British colonialism especially, of British subjects who either disguised themselves as Indians or Africans or fantasized of doing so.'[160]

The importation of laws and economic systems did not come to an end with independence of former colonies. it seems to be present in the 'postcolonial continuities' of global thinking about law often led by international financial institutions such as the World Bank and

[155] Merry (n 149) 570.
[156] Homi K Bhabha, *The Location of Culture* (Routledge 1994).
[157] Amardeep Singh, 'Mimicry and Hybridity in Plain English' (*Blog*, 2009) <https://www.lehigh.edu/~amsp/2009/05/mimicry-and-hybridity-in-plain-english.html> accessed 9 June 2023.
[158] ibid 1–2.
[159] ibid 2.
[160] ibid 3.

International Monetary Fund.[161] The view that state law has instrumental use in economic life continues to persistent and be given impetus by mainstream economic thinking that has dominated law, notwithstanding the limits and legacies of the colonial experience.[162] Several ideas have been proposed on how the Westphalian state and its law becomes entangled with other places.

State law sometimes is presented as a unified perspective towards social life. However, behind state legal doctrine is the assumption of 'governmental power or imposed authority, on the one hand, and negotiated understandings based on shared reason and evolved principle, on the other.'[163] 'Shared understandings' that underpin any systems of law require 'stronger foundations than those provided in the normal fora of interpretation of state law by legal officials whose ultimate authority is guaranteed only by the state's coercive power.'[164]

This assumption is connected to the assumptions about 'capabilities of states' such as state capacity to '*regulate* social relationships' (Emphasis in original).[165] Overlooking shared understandings about social life might have consequences for state law; 'state law might be relevant only as irritation, not as meaningful regulation, to ethnic and cultural groups holding different beliefs or ideas.'[166] As Cotterrell argues, law that does 'not resonate in the experience or consciousness of those it purports to regulate is not law in society, hardly law at all.'[167]

African countries such as Malawi were 'forced into the Eurocentric Westphalian world order ill-fitted to [their] diverse political realities and interests.'[168] From the onset of colonialism, governments faced enormous challenges of regulation in most areas of social life including economic life. In countries like Malawi the preponderance of doctrinal approaches to law in

[161] Juliet Thondhlana and others, 'Exploring the Internationalization of Zimbabwe's Higher Education Institutions through a Decolonial Lens: Postcolonial Continuities and Disruptions' (2021) 25 Journal of studies in international education 228.
[162] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 2018).
[163] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 33.
[164] ibid 34.
[165] Joel S Migdal, *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World* (Princeton University Press 1988) 4.
[166] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 34.
[167] ibid.
[168] Tamale (n 14) 4.

formal agricultural marketing was and has been persistently a contested issue when considering the smallholder farmer.[169] One challenge was 'a racialized system of law, in which different legal systems are used for racially distinguished populations' including different economic arrangements.[170]

The presence of different groups with different shared understandings suggests that even for state law there is only a partial perspective of law which seeks to depend on the coercive power of the state although there may be attempts that seek to have its 'legal perspectives dominate in practice at the expense of others.'[171] A sociological approach recognises not only lawyers' law but also these other legal perspectives. One possible approach was that suggested by Ehrlich.[172]

3.4 Living law

This section sets out looking at law in a way by highlighting Ehrlich's concept of living law, which was posed as an alternative to formalistic, state-centric conceptions of what law is and how it works. Living law is defined in 'contradistinction to that [law] which is enforced in the courts and other tribunals' as 'the law which dominates life itself though it has not been posited' in formal enactments such as statutes or regulations.[173] When cast in a 'contemporary statement,' it may be said living law is 'the net effect of collective readings, practices, discourses, and intersubjective relationships that subsist in social practice as well as in the semi-controlled environment of formal law.'[174] Ehrlich has been described as 'the Bentham of legal sociology' just as Jeremey Bentham is given a pride of place in legal positivism in legal theory.[175] Ehrlich's sociological approaches to law have been described by Cotterrell as 'the foundation of all subsequent thinking' in sociological approaches to law.[176] Cotterrell particularly notes that the approach by Ehrlich was 'an act of *constructive subversion* – a

[169] Clement Ng'ong'ola, 'Malawi's Agricultural Economy and the Evolution of Legislation on the Production and Marketing of Peasant Economic Crops' (1986) 12 Journal of Southern African Studies 240.
[170] Merry (n 149) 569.
[171] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 68.
[172] Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter L Moll tr, Routledge 2017).
[173] ibid 493.
[174] Davies (n 37) 117.
[175] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 34.
[176] Roger Cotterrell, 'From Living Law to Global Legal Pluralism: Rethinking Traditions from a Century of Western Socio-Legal Studies' <https://ssrn.com/abstract=2764802> accessed 12 August 2022.

challenge to the state's omniscience in regulatory matters and, in particular, to that of jurists serving the state' (Emphasis in original).[177] Ehrlich's constructive subversion had limited influence in the West because it was assumed that 'state law was substantially integrated with national socio-economic and cultural conditions' or that 'legal-political development and socio-economic development followed broadly parallel path[s].'[178] The same might not be the case in postcolonial as empirical studies have called into question the fit between law and national socio-economic or cultural conditions.[179]

3.4.1 Living law

Ehrlich's sociological approaches highlighted the problem of 'a potentially serious divorce between state law and social norms, or between politics and culture.'[180] This section suggests that living law approaches are and should be the heart of sociological approaches to law in postcolonial societies. It will also be argued that living law enriched with Cotterrell's sociological approaches to law can provide a reconceptualisation of customary law to make it applicable to diverse social experiences including economic life.[181] This would address the doubts about custom or cultural life being important to regulating economic activities as will be argued about *Ubuntu* in the next chapter.

Ehrlich called attention to the problem that might exist where 'state law could be incompatible with the cultural expectations and experience of the populations it sought to regulate, and that this situation posed the risk of state law being ineffective, irrelevant, oppressive or unpredictable in its operation.'[182] He noted that state law seemed to have limited coercion unlike 'legal norms that had arisen in society.'[183] This situation has implications for law's enforcement unless the state can dominate with its legal perspective or outlook.[184] He cautioned the use of coercion as the only means to make law effective by advising that 'state

[177] ibid 3.
[178] ibid.
[179] World Bank (n 6).
[180] Cotterrell, 'From Living Law to Global Legal Pluralism' (n 176) 3.
[181] Paul Brietzke, 'Law And Rural Development in Africa with Emphasis on Malawi' (1973) 5 Zambia Law Journal 1.
[182] Cotterrell, 'From Living Law to Global Legal Pluralism' (n 176) 3.
[183] Ehrlich (n 172) 366.
[184] ibid 367.

law must therefore continually take the social forces into account.'[185] Ehrlich seemed to believe that the most effective social norms developed in social groups that he termed 'social associations.'[186] A social association was defined as a 'plurality of human beings who, in their relations with one another, recognise certain rules of conduct as binding, and, generally at least, actually regulate their conduct according them.'[187] Ehrlich termed the rules that actually governed social life 'living law.'[188] Ehrlich argued for the view that 'law is far wider in scope than norms created and applied by state institutions.'[189]

One of the criticisms against Ehrlich's work is that his 'definition of law remains one of the weakest and less convincing parts of his work.'[190] Most of the criticisms seems to revolve around this view and emerged from the beginning Ehrlich wrote for his *magnus opus: Fundamental Principles of the Sociology of Law*.[191] The criticism is redolent of the Ehrlich/Kelsen debate that reflected the different starting points for sociological approaches by the former and philosophical approaches by the latter.[192] Ehrlich seems to suggest, the argument goes, that it is 'the intensity of the negative feelings about behaviour that offends members of a community-especially a feeling of indignation, which allows one to differentiate law from other kinds of social norms.'[193] Others have observed that this criticism could potentially be the result of the 'methodological innovation' that underlies the way Ehrlich presents his argument in a bid to make the point that state law is not the only law.[194] Consequently, one could say this may 'leave room for multiple interpretations and

[185] ibid 373.
[186] ibid 34.
[187] ibid 39.
[188] ibid 81.
[189] Cotterrell, *The Sociology of Law* (n 3) 27.
[190] Michel Coutu, 'Book Review: Living Law: Reconsidering Eugen Ehrlich, by Marc Hertogh (Ed)' (2009) 47 Osgoode Hall Law Journal4 587; Mikhail Antonov, 'Eugen Ehrlich and Leon Petrażycki: Are Emotions a Viable Criterion to Distinguish Between Law and Morality?' [2018] Russian Legal Realism 127.
[191] Mikhail Antonov, 'History of Schism: The Debates Between Hans Kelsen and Eugen Ehrlich' (2011) 5 ICL Journal 5; Marieke J Hopman, 'Wait, What Are We Fighting About?–Kelsen, Ehrlich and the Reconciliation of Normative Jurisprudence and Sociology of Law' (2022) 54 Legal Pluralism and Critical Social Analysis 155.
[192] Hopman (n 191); Antonov (n 191).
[193] Coutu (n 190).
[194] Marc Hertogh, 'From "Men of Files" to "Men of the Senses": A Brief Characterisation of Eugen Ehrlich's Sociology of Law' in Marc Hertogh (ed), *Living Law: Reconsidering Eugen Ehrlich* (Bloomsbury Publishing 2009) 5.

misunderstandings.'[195] However, Cotterrell comes in to state that perhaps a better reading of the intentions of Ehrlich was that his

> was mainly a concern with the variety of types of law and their interactions, and with the fact that lawyers typically only recognise some of these types (legal propositions, state law and official norms for deciding disputes) and so fail to appreciate the great social significance of other types (the many varieties of living law).

3.4.2 The sociological reconceptualisation of customary law

This may be one of the most important questions in societies such as Malawi, perhaps most of sub-Saharan Africa, where the research and experience point to a 'disjunction between the officially established unity of the legal system and the sociological plurality and fragmentation of legal practice.'[196] Living law is a useful approach to theorising the 'enormous practical visibility of legal pluralism in the African legal space.'[197] This approach has been adopted to explain the concept of 'living customary law' in Africa as a way of determining legally inclusive approaches.[198] It has been suggested that it is suited to address 'people's contemporary needs' in Africa and should be 'situated within the social context.'[199] Living law can provide ways of analysing the so called 'customary law' to recognise that it was/is not 'a remnant of a precolonial and unchanging past' but as 'the product of complex intersections of precolonial African politics, missionary law, [colonial] law as understood by early [colonial] administrators and creative efforts of emerging African elites to shape the law to changing political and economic conditions.'[200]

The following quote is one suggestion of how living customary law is said to emerge;

> First, a practice or normative behaviour arises in response to socio-economic changes. Such emergent behaviour is usually guided by the internal aspects or foundational value (s) of existing custom(s). Second, as the practice spreads, it acquires a sense of obligation, which gives it the character of law.[201]

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[195] ibid 6.
[196] de Sousa Santos (n 135) 40.
[197] Berihun A Gebeye, 'Decoding Legal Pluralism in Africa' (2017) 49 The Journal of Legal Pluralism and Unofficial Law 228.
[198] Anthony C Diala, 'The Concept of Living Customary Law: A Critique' (2017) 49 The Journal of Legal Pluralism and Unofficial Law 143; Rita Ozoemena, 'Living Customary Law: A Truly Transformative Tool?' (2014) 6 Constitutional Court Review 147; Fatima Osman, 'The Ascertainment of Living Customary Law: An Analysis of The South African Constitutional Court's Jurisprudence' (2019) 51 The Journal of Legal Pluralism and Unofficial Law 98.
[199] Diala (n 198) 159.
[200] Sally Engle Merry, 'Reviewed Work(s):Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia by Martin Chanock' (1988) 11 APLA Newsletter 3, 3; Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985).
[201] Diala (n 198) 158.

Living customary law is used in opposition to the colonial ossification of local customs which was more of 'colonialists truncated traditional justice' and went further and 'maintained control over the courts' interpretation of customary law.'[202] The ossified customs are what is referred to as ' "official customary law" "state customary law" "lawyers' customary law" and "colonial customary law." '[203]

The concept of living customary law is said to be 'situated within the social context of normative behaviour' and seems to proceed from an inadequate conceptualisation of legal pluralism.[204] It has also been argued that the expression customary law obscures the 'sociological plurality' inherent in former colonies due to 'the multiplicity of unofficial legal ordering.'[205] The existence of customary law has been critiqued as no more than a means of colonial social control and a product of various interests.[206] In postcolonial societies in Africa the importance of formal law in the lives of ordinary people is sometimes overestimated. The formal legal system or written formal law 'is a secondary, rather than a primary locus of social regulation.'[207] There is a recognition that such approaches must extricate themselves from legal positivism if they are to be useful in explaining the wide empirical variety of social life in Africa.[208] Positivism is defined as 'as rule-centred observation of facts' in the same group as traditional legal theory, where these rules emanate from a centralised authority.[209] The approaches could be improved in the light of the wealth of empirical evidence through systematisation of the substance of what is studied, how it is studied to include analytically concepts and their relationships plus empirically facts and methods; most importantly normative aspects included in values and interest.[210] This is one possible way in which Western concepts and theories can be adapted to Africa as the starting point for an 'African legal theory which … can help shed light on how African concepts of law and philosophy have

[202] Tamale (n 14) 130.
[203] ibid 141.
[204] Diala (n 198) 159.
[205] de Sousa Santos (n 135) 40.
[206] Chanock (n 200); Mamdani (n 162).
[207] Tamale (n 14) 132.
[208] Diala (n 198).
[209] ibid 149.
[210] Perry-Kessaris, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?' (n 5) 5.

intermingled, transformed or taken up new forms or how entirely new concepts have emerged or simply how old concepts have lost their significance.'[211]

The locus of customs ceased to be social interactions and practices to become the 'central state, officials of the local state (chiefs), and a range of non-state interests.'[212] The colonial state 'extended [customary law] to previously autonomous social entities such as the household, clans and gender associations.'[213] Arguably these aspects led to custom ceasing to be a living law and becoming a 'tamed' customary law which the postcolonial state wholly embraced.[214] The label 'custom' is excess baggage. Firstly, because it remains explored, and it means whatever the writer intends it to mean without making the meaning explicit. It condenses all kinds of approaches. Further, is seems to suggest its application in narrowly to traditional communities by location or ethnic connections. In law and economy, it does not cover economic activities extending beyond one's community and secondly carries colonial connotations. It has been argued that 'there is a need to revisit Africa's legal systems and to reboot the mindset around which they were constructed' in way that ensures that state customary law is 'stripped of its colonial roots.' [215] Without discussing the details of this excess baggage, mention can be made of what has been termed 'the domain of custom'.[216] It has been critiqued as 'more of an expression of power relations in colonial society than recognition and tolerance of any multicultural diversity'; as local chiefs for the first time were backed by the authority of the state than the community in which they lived.[217] The existence of legal pluralism involved the former as a 'modern, imported law of the coloniser' and 'a patchwork of customs and practices considered customary, their single shared feature being some association with the colonised', the latter also known in law as the native.[218] The word 'native was not used to mean an indigenous person who life had historically been governed by the customary law in question, but as a blanket racial category.'[219]

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[211] Oche Onazi (ed), *African Legal Theory and Contemporary Problems: Critical Essays* (Springer Science & Business Media 2014) 4–5.
[212] Mamdani (n 162) 110.
[213] Tamale (n 14) 138.
[214] Benda-Beckmann (n 134).
[215] Tamale (n 14) 140.
[216] Mamdani (n 162) 110.
[217] ibid 111.
[218] ibid.
[219] ibid.

It is important to realise the colonial origins of the dependence of customary law on state law more explicitly during the colonial era through colonial power and explicit exploitation of 'ethnic identity.'[220] After independence making its existence much depended on the whims of the official legal system disguised as rules of evidence while courts are only required to take judicial notice of actions of public officials.[221] Many African jurisdictions require customary law to be proved as a fact from colonial times.[222] This is part of the critique that investigates law exclusively in terms of state centric approaches to argue 'that communities and individuals are also creators and enforcers of the law.'[223] This has resulted in situations where African legal professionals (lawyers or judges) with the best intentions fail to 'see beyond statutory law reform' in critical evaluation of legal problems and developing solutions.[224] This results in what has been described as 'a singular shame and a perplexing fact that African sources of law form a negligible part of the continent's formal law in the twenty-first century' and the 'well-documented fact that the formal legal system is only marginal to the experience of day-to-day justice of' ordinary Africans such as smallholder farmers.[225] These powerful statements about Africa need to be analysed further and be developed systematically and empirically. It is suggested that Cotterrell's sociolegal theory provides a way to systematise living customary law, analytically, empirically, and normatively. It could also provide clarity on how customary living law has 'been performing [the] scaffolding role' between formal law and custom in the heterogenous state.[226]

3.5 Conclusion

This chapter set out the different sociological approaches. It has been demonstrated that sociolegal approaches were developed to supplement doctrinal or formal law approaches. Where the 'unity of the legal system' cannot be assumed then sociological approaches to law can and could offer explanations analytically and normatively at a 'general level of abstraction' to Africa's contemporary social and economic problems. Sociological approaches should not

[220] ibid 110.
[221] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 17) 75.
[222] Jan C Bekker and IA Van der Merwe, 'Proof and Ascertainment of Customary Law' (2011) 26 Southern African Public Law 115.
[223] Tamale (n 14) 133.
[224] ibid 134.
[225] ibid 135, 139.
[226] Gebeye (n 197) 230.

focus on law that is a 'dematerialised and dephysicalised' but law should be studied in society, in 'material locations as performed in and by subjects who are both recipients of law and conveyors of it.'[227]

This chapter has established that sociological plurality is a feature of the postcolonial state. It became very pronounced on independence because the colonial state provided a semblance of order and the colonial state's continued imperial links with the colonial powers. The severing of the linkages through self-government and formal independence exposed 'a disjunction between the officially established unity of the legal system and the sociological plurality and fragmentation of legal practice'.[228] The implications are the sociolegal pluralism emanating from 'multiple microstates existing inside the same state.'[229] One area where 'stateness' expresses itself is sovereignty described by other scholars, perhaps uncritically, as 'the juridical sword of the modern state and jealously guarded property of the African polity.'[230] Some empirical research in Africa has found indications of 'shared sovereignty' with 'foreign agents'.[231] The shared sovereignty is emanating from 'global pressures that have created legal and institutional plurality'; which is more evident in 'pressures from the international financial agencies and so-called donor countries, which fall very specifically into the economic area.'[232] Although the scholars writing about Africa recognise that despite law being an exclusive domain of the state in Africa 'some degree of legal pluralism may subsist';[233] this seems to be an understatement because in Africa 'sociological plurality and fragmentation of legal practice is probably more visible there than in any other region of the developing world.'[234]

The next chapter will set out sociologically, an analytical, empirical, and normative framework that might achieve a integration of economic approaches and sociological approaches under the label of economic sociology of law.

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[227] Davies (n 37) 30.
[228] de Sousa Santos (n 135) 40.
[229] ibid 44.
[230] Young (n 145) 37.
[231] de Sousa Santos (n 135) 51.
[232] ibid.
[233] Young (n 145) 40.
[234] de Sousa Santos (n 135) 40.

4 The promise of economic sociology of law

The previous chapter suggested that the integration of sociolegal and economic approaches might be a more fruitful lens with which to look at agricultural markets to adequately explain the participation or non-participation of other actors in formal markets, actors such as smallholder farmers. Darian Smith, set out in the previous chapter, argues that most formerly colonised societies are legally 'intricately entangled hybrid societies'; colonialism did not result in a transformation into societies with a Western outlook.[1] Neither did these societies remain the way they were before colonisation; as Homi Bhabha suggests they are centres of 'cultures in-between' that is social life that reflects a liminality (a state of transition).[2] These 'cultures in-between' display 'patterns of thought and belief, patterns of action or interaction, characteristic institutions' such as the African value system of *Ubuntu,* embodying communitarian as well individual aspects of social (inter)actions.[3] The previous chapter argued that one aspect of this liminality is pluralism in law and economy; sometimes worsened by strict law and economics approaches.

This chapter sets out an analytical, normative, and empirical framework for the integration of economic and sociolegal approaches law in economic sociology of law ('ESL'). ESL emphasizes 'the interconnectedness that characterizes the intersections between economic and legal aspects of social life, and ought to characterize the ways in which we think about those intersections.'[4] To that end ESL adopts 'sociological scalar analysis which explores social life on four mutually constitutive levels: action, interaction, regimes, and rationalities (worldviews).'[5] As part of wider social life '*economic life* consists of social relations that centre on production, exchange, distribution and consumption, *legal life* consists of social relations that are

[1] Eve Darian-Smith, 'Postcolonial Theories of Law' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (2nd edn, Hart Publishing 2013) 255.
[2] Homi K Bhabha, 'Culture's In-Between' in Stuart Hall and Paul Du Guy (eds), *Questions of Cultural Identity* (SAGE Publications 1996).
[3] Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing 2006) 88; James Ogude (ed), 'Ubuntu and the Reconstitution of Community' (Indiana University Press 2019).
[4] Amanda Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (2015) 11 Annual Review of Law and Social Science 57.
[5] ibid; Sabine Frerichs, 'Re-Embedding Neo-Liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law' in Christian Joerges and Josef Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets.* (Hart Publishing 2011).

expressed in, or in relation to, law' [Emphasis supplied].[6] Furthermore, 'legal and economic life shape and are shaped by each other, as well as by the wider social, and more-than-human, world.'[7]

The chapter seeks to be a contribution to 'a sociology of law built from the new epistemic non-Eurocentric premises' based on the values of *Ubuntu*.[8] This might produce a framework with which to look at agricultural markets to adequately understand and perhaps to shift the legal thinking and practice around participation or non-participation of other market actors such as smallholder farmers. It proposes that integration is key to conceptualising and making or organising inclusive markets. Law may both influence and be influenced by the 'very actors whose interactions the law seeks to constitute, facilitate and regulate.'[9] This chapter also responds to calls to use ESL approaches to expose 'how law succeeds, and fails, in supporting a broad range of actors, each with different motivations – financial, political, social' in agricultural markets.[10] ESL provides a much needed 'interdisciplinary alternative' to study law in economic activities.[11] It considers that the nature of ESL and suggests ways in which it can and should be made more relevant in thinking about more inclusive pathways in Malawi's agricultural market regimes. The approach crosses the comfort zone of boundaries of law in ways that go beyond the boundaries of the dominant state law, or law and economics approaches; something which is necessary to understand the non-participation of smallholder farmers in formal markets.[12] This approach is likely to ensure 'progress in understanding the complexity of social life [which requires] the breakdown of boundaries between intellectual disciplines.'[13]

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[6] Amanda Perry-Kessaris, 'Making the "Constitutive Idea" Empirically, Conceptually and Normatively Available through Sociolegal Design' (2023) 2.
[7] ibid.
[8] Boaventura de Sousa Santos, *Law and the Epistemologies of the South* (Cambridge University Press 2023) xv.
[9] Lauren B Edelman and Robin Stryker, 'A Sociological Approach to Law and the Economy' in Neil J Smelser and Richard Swedberg (eds), *The Handbook of Economic Sociology* (Princeton University Press 2005) 535.
[10] Amanda Perry-Kessaris, *Global Business, Local Law: The Indian Legal System as a Communal Resource in Foreign Investment Relations* (Routledge 2016) 150.
[11] Amanda Perry-Kessaris, 'The Case for a Visualized Economic Sociology of Legal Development' (2014) 67 Current Legal Problems 169, 175.
[12] Amanda Perry-Kessaris, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013).
[13] Roger Cotterrell, *The Sociology of Law: An Introduction* (2nd edn, Butterworths 1992) 4.

This chapter is arranged as follows. Section 4.1 sets out the ESL approach. Section 4.2 proposes how the ESL approach may be revised to apply to a non-Western context. Section 4.3 proposes how local values such as *Ubuntu* may be incorporated in ESL approaches. Section 4.4 concludes.

4.1 What is Economic Sociology of Law?

Economic sociology of law ('ESL') is the 'sociological analysis of law in economic life.'[14] ESL involves 'shared understandings of how and why one might use sociologically-inspired approaches (analytical, empirical, and normative) to investigate relationships between legal and economic phenomena'.[15] In ESL, law is not restricted to formal law as the law of the state but also 'includes both state-promulgated formal rules and law-related ideas, ideals, principles, and rituals that permeate society.'[16] ESL attempts to examine law beyond what is expressly included in 'state law ' to also encompass 'so called private legal systems…or forms of social order or social interaction in diverse groups, institutions or associations.'[17] In this regard, law includes 'the behavior of legal actors, and legal institutions' and 'the understanding, experiences and meanings by individuals.'[18] This expansive view of law realises that the 'vast majority of legal action takes place far from the courtroom and with only the most tangential (if any) reference to formal law.'[19] Similarly, Darian-Smith has argued that 'all law-however defined-is constituted through its cultural and social environment and imparted with meaning by the people who experience and engage with it.'[20]

Other ESL approaches proceed on the basis of 'embeddedness' of legal and economic life in wider social life.[21] These 'embeddedness' ESL approaches have been criticised because firstly, 'the concept is internally incoherent' to address law and the economy as social phenomena

[14] Richard Swedberg, 'The Case for an Economic Sociology of Law' (2003) 32 Theory and Society 1.
[15] Diamond Ashiagbor, Prabha Kotiswaran and Amanda Perry-Kessaris (eds), *Towards an Economic Sociology of Law* (Wiley-Blackwell 2013) 1.
[16] Edelman and Stryker (n 9) 530.
[17] Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford University Press 1995) 33.
[18] Edelman and Stryker (n 9) 530.
[19] ibid.
[20] Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge University Press 2013) 39.
[21] Mark Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness' (1985) 91 American Journal of Sociology 481.

and secondly, 'it perpetuates the metaphorical fiction of the ontologically separate law, economy, and society' when ESL should seek to investigate law and economy in wider social life analytically, empirically and normatively.[22] ESL is an approach that analytically, empirically and normatively looks at 'the *multiple social mechanisms or processes* through which legal and economic action and institutions become part of *an interconnected causal dynamic*' (Emphasis in original).[23] This thesis proceeds on 'the observations that the economy and the law are mutually constitutive, and that both are in turn mutually constitutive of wider social life.'[24] In the following sections I will set out an ESL scalar approach that considers (inter)actions, regimes and values or rationalities ; this sociologically scalar approach is taken as a way 'for clear thinking and communicating about social life.'[25] Regimes may be defined above as 'constellation' of Cotterrell's communal networks discussed below representing social interactions;[26] or they 'may be generated primarily from the bottom up' for example informal economic activity and/or 'they may be generated primarily from existing regimes,' such as formal marketing regimes.[27] These regimes may embody values or interests which are discussed below as rationalities. The levels of social life are 'mutually constitutive' and 'interconnected.'[28]

Cotterrell draws from social theory to argue that that regulation of social life can be studied 'in the hierarchy of normative structure from values through norms, through collectives, to roles'.[29] In this scalar 'normative structure' of social life 'lower levels of the hierarchy have to reflect changing social experience more directly than the higher levels.'[30] Further, Cotterrell argues '[a]t the base of the structural hierarchy, role must accurately reflect the pressure of day to day life in the community, at home at work' at individual level.[31] This individual role is seen as 'changing rapidly' unlike norms higher up in the hierarchy such as formal law

[22] Clare Williams, *An Economic Sociology of Law Reimagined: Beyond Embeddedness* (Routledge 2022) 148.
[23] Edelman and Stryker (n 9).
[24] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 4).
[25] ibid 59.
[26] Frerichs, 'Re-Embedding Neo-Liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law' (n 5) 68.
[27] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 4) 61.
[28] ibid 59.
[29] Cotterrell, *The Sociology of Law* (n 13) 83.
[30] ibid.
[31] ibid.

governing specific economic activity such as exchange; this change is even slower for related underlying values.[32] Norms are also influenced by the individual roles 'moving upwards through the hierarchy, [which] creates pressures for change' while state law would attempt to regulate individual role in a downward movement which if effective 'promotes stability'; if law is responsive to social life.[33] A similar approach has been suggested by Frerichs in relation to the role of law in economic life. The sociological scalar approaches to regulation of social life become more analytically, empirically, and normatively applicable to social life in Cotterrell's 'legal concept of community' or 'communal networks.'[34]

One area where formal law needs to be supplemented is values or rationalities, the meta-level of social life. Formal law claims neutrality and objectivity as was argued in the last chapter but fails to 'overcome the limitations of partial perspectives through systematic collection, analysis and interpretation of the empirical data of experience.'[35] State law and policies tend to be 'most heavily associated with regimes', oftentimes overlooking the values that inform the regimes.[36] It seeks to serve 'practical ends' although ultimately it needs to see 'the wider social environment it purports to regulate'; if it to efficaciously do so.[37] Sociological approaches enable formal law to be aware of 'value choices' it seeks to promote that avoid them.[38] Rationalities may throw light on how law may become an irrelevance when it fails to 'resonate in the experience or consciousness of those it purports to regulate.'[39] The meta-level of social life, rationalities, as the 'land of value and interests' will be analysed below. Thus, ESL approaches 'allow a normative advance – the location of sites of domination and, conversely of resistance which form the moral subtext' of law.

[32] ibid.
[33] ibid 84.
[34] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3).
[35] Cotterrell, *The Sociology of Law* (n 13) 4.
[36] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 4) 61.
[37] Cotterrell, *The Sociology of Law* (n 13) 3, 6.
[38] ibid 6.
[39] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3) 34.

Sociological analysis of law dovetails fairly well with the ESL approach by proposed by Frerichs in investigating law, economy, and society.[4041] While Frerichs has explained and greatly clarified the components of ESL, she was doing so based on the works on Weber, Polanyi and Granovetter.[42] Cotterrell's legal concept of community will be adopted to clarify further the sociological analysis of law as part of wider social life, to explore the how '[e]conomic and legal life become entangled where the creation, destruction, use, abuse, or avoidance of rules affects, and/or is affected by, the production, distribution, and/or exchange of goods and services.'[43] Cotterrell's approaches enable the clarification of law 'from different social realities constructed from different vantage points' with some having 'more depth, more explanatory power than others.'[44]

4.1.1 Micro-level econo-legal actions

This thesis adopts the term 'econo-legal' instead of the perhaps unwieldly mouthful of a term, 'econo-socio-legal' for the purpose of reminding myself of 'the interconnectedness that characterizes the intersections between economic and legal aspects of social life, and ought to characterize the ways in which we think about those intersections.'[45]

In the foreword to his work on sociology of law, Ehrlich stated that 'the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.'[46] The statement has made quite some impression on scholars such as Karl Llewelyn and Roger Cotterrell.[47] As Cotterrell notes, law is 'not only structures recognisable objectively in positivistic terms as autonomous social phenomena' but what 'exists in the

[40] Sabine Frerichs, 'Studying Law, Economy, and Society: A Short History of Socio-Legal Thinking' (University of Helsinki 2012) Helsinki Legal Studies Research Paper 19; Frerichs, 'Re-Embedding Neo-Liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law' (n 5); Sabine Frerichs, 'The Legal Constitution of Market Society: Probing the Economic Sociology of Law' (2009) 10 Economic Sociology_the European Electronic Newsletter 20.

[41] Frerichs, 'Re-Embedding Neo-Liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law' (n 5); Granovetter (n 21).

[42] Sabine Frerichs, 'The Rule of the Market: Economic Constitutionalism Understood Sociologically' in Paul Blokker and Chris Thornhill (eds), *Sociological Constitutionalism* (Cambridge University Press 2017); Frerichs, 'Re-Embedding Neo-Liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law' (n 5).

[43] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 4).

[44] Cotterrell, *The Sociology of Law* (n 13) 3.

[45] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 4) 58.

[46] Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter L Moll tr, Routledge 2017) lix.

[47] R Cotterrell, 'Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies' in Marc Hertog (ed), *Living Law: Reconsidering Eugen Ehrlich* (Bloomsbury Publishing 2008).

subjective experience of individual actors.'[48] This micro-sociological approach suggests an understanding that

> Motivation is not a matter of reducing sociological explanations to psychological ones but of recognising that social phenomenon – laws, political institutions, social norms, economic systems-do not merely act *externally* on individuals but are themselves also the result of and the embodiment of social interaction (Emphasis in original).[49]

With this approach 'the positivist identification of law as something "acting upon" society or existing autonomously cannot be maintained' but becomes 'the label given to a certain aspect of society, a certain field of human interaction.'[50] Cotterrell's legal concept of community or communal lens is discussed below to emphasise the mutually constitutive nature of law and economy as part of social life; this aspect has been underemphasized by dominant approaches to legal thinking and practice.[51] Cotterrell's legal concept of community can talk about 'social life (analytically) through an economic lens' and ' focus (normatively) on economic values and interests' to provide a fuller picture of empirical reality.[52]

Studying social life as a unit of analysis starts at 'the microanalytical level'; this is where 'the discussion centres around the concept of actors' with individuals as 'interactive and intersubjective entities'.[53] Individual action according to Weber 'may consist of positive intervention or passively acquiescing in [a] situation' with respect to which 'the acting individual attaches subjective meaning.'[54] Inter(actions) are rarely oriented by a single motivation in social life.[55] Microlevel analysis enable us to see 'how law might be *reinterpreted*, and so reimagined and reshaped, when understood in a broader sociological perspective' (Emphasis in original).[56]

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[48] Cotterrell, *The Sociology of Law* (n 13) 145.
[49] ibid.
[50] ibid 146.
[51] Roger Cotterrell, 'Rethinking "Embeddedness": Law, Economy, Community' in Diamond Ashiagbor, Prabha Kotiswaran and Amanda Perry-Kessaris (eds), *Towards an Economic Sociology of Law* (Wiley-Blackwell 2013).
[52] Amanda Perry-Kessaris, 'Reading the Story of Law and Embeddesness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law' (2011) 62 N. Ir. Legal Q. 401, 407.
[53] Frerichs, 'The Legal Constitution of Market Society: Probing the Economic Sociology of Law' (n 40).
[54] Max Weber, *The Theory of Social and Economic Organization,* (AM Henderson and Talcott Parsons trs, Free Press 1947) 88.
[55] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3) 69.
[56] ibid 59.

According to Weber, viewed as ideal types, (inter)actions may be motivated or oriented either instrumentally, traditionally, affectively or by belief.[57] As 'ideal types they do not indicate actual, empirically identifiable' actions and in social life 'may be combined in an infinity of ways.'[58] Weber was looking at 'actions that we deliberately or consciously take in relation to and directed towards other people.'[59] He suggests that such action is a way 'for the successful attainment of the actor's own *rationally* chosen ends' (Emphasis supplied).[60] According to Weber, calculation in achieving ends determines whether action is rational, but I would suggest that Weber is unduly restrictive because he only focused on 'the end, the means and secondary results' of (inter)actions.[61] Weber's approach needs supplementing by Bourdieu's social theory of how (inter)actions are motivated to expand an understanding of legal change and future economic and legal (inter)actions through his concept of 'habitus, which was developed as part of an attempt to account for the practices of men and women who found themselves thrown into a strange and foreign economic cosmos imported and imposed by colonialism, with cultural equipment and dispositions.'[62] Habitus was defined as a 'disposition [that] orients and organizes the economic [inter(actions)] of daily life—purchases, saving, and credit—and also political representations, whether resigned or revolutionary'.[63] I appropriate this expression to describe 'legal mindsets' for my revised ESL to demonstrates how law and economics may exclude certain actors from econo-legal (inter)actions, for example participation in formal agricultural markets may demand specific legal mindsets not held by smallholder farmers.

There is what Cotterell sees as 'fundamental orientations of all individual social action' that are 'irreducible' and 'give essential meaning to interactions between individuals.'[64] These approaches to (inter)actions challenge the almost stimulus-reaction or the instrumental view

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[57] Max Weber, *The Theory of Social and Economic Organization* (AM Henderson and Talcott Parsons trs, Free Press 1947).
[58] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3) 69.
[59] Ian Craib, *Classical Social Theory: An Introduction the Thought of Marx, Weber, Durkheim, and Simmel* (Oxford University Press 1997) 46.
[60] ibid.
[61] Weber (n 57) 177.
[62] Pierre Bourdieu, *The Social Structures of the Economy* (Polity 2005) 2.
[63] Pierre Bourdieu, *Algeria 1960: The Disenchantment of the World, The Sense of Honour, The Kabyle House 0r The World Reversed* (Richard Nice tr, Cambridge University Press 1979) vii–viii.
[64] Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing, Ltd 2006) 69.

of action in law and economics.[65] The sociological approaches view the social motivation or conditioned and limited spontaneity as a 'screen' (socially constructed) between 'stimulus and reaction' responsible for 'enormous saving on calculation' concerning (inter)actions.[66]

4.1.2 Meso- and macro-level (inter)actions

This section analyses Cotterrell's sociological approach of 'communal network' or 'legal concept of community' as the preferred approach for this thesis to build the conceptual and theoretical framework of approaching law, economy, and society. The section adopts communal networks because it critically analyses the role of trust and can be taken at macro sociological level as regimes.

Communal networks involve the meso-sociological level of social life. This analysis enables us to extend the empirical basis of social action. These interactions are also motivated by 'Weber's four sets of values and interests' that motivate (inter)actions.[67] The interactions of 'the four abstract types of collective involvement may be combined in an infinity of ways.'[68] Collective involvement may be fleeting or seen 'objectively, [acquire] some degree of *stable, sustained interaction*' and from a subjective point of view a '*sense of attachment'* that is 'to others or to something beyond the individual; a degree of mutual concern and involvement' (Emphasis in original).[69] Cotterell calls this collective involvement 'communal networks.' Communal networks may be based on infinite combinations of values and interests characterised by 'convergence of interests', relatively 'stable interactions' and a 'high degree of trust' which may build over time.[70] Communal networks are always 'co-existing, overlapping and interpenetrating' in social life.[71] They are always forming and coming apart. This suggests that for continued (inter)actions market structures may need to provide 'building blocks... for strong [rather than] weak, organised [rather than] diffuse' interactions.[72]

[65] Bourdieu, *The Social Structures of the Economy* (n 62).
[66] ibid 212–213.
[67] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 4) 60.
[68] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3) 69.
[69] ibid 70.
[70] ibid 74.
[71] ibid 38.
[72] ibid 68.

In this context, law however defined, works to enable participation of all or most actors if it 'expresses, in the form of contracts, institutions and so on, the trust that holds actors together; law draws actors in further by ensuring their participation in social life; and law coordinates the differences that hold actors – and different networks of community – apart.'[73] Communal networks offer 'a more flexible and sophisticated framework for conceptualizing' problems of trust; which is perhaps an important aspect of economic relations.[74] Every communal network in all their different combinations 'has its own legal needs, and demands its own legal structure, legal consciousness and legal outlook' for building trust.[75] Trust 'is the basic element of the idea of community as a web of understandings about social relations' and it is 'the common building blocks of the four ideal types of collective involvement' referred to earlier as the ideal types of communal networks.[76] Analysing communal networks demonstrates how 'trust assumes different typical forms and is expressed in different typical ways.'[77] Mutual interpersonal trust is perhaps the foundation of impersonal systems of trust which is one of the central aspects of formal markets.[78] The absence of maintenance of trust or its support may lead to disintegration of confidence in markets and eventually loss of trust.

Mainstream economics seems to lack a theoretical lens through which to study the nature, role, and reasons for trust in economic relations. At best economics looks at trust as a device that relates to transactions costs.[79] A communal lens can demonstrate how trust evolves and under what conditions from interpersonal trust to impersonal systems of trust which forms sometimes taken for granted aspects of the economy.[80] A communal lens exposes how a 'a high degree of *trust*, which, in general, can only be securely built over time, with the accumulated experience of past interactions [which] encourages future interaction and provides the motivation to engage in relatively free, uncalculated relations with others'

[73] Amanda Perry-Kessaris, 'Discovering the Econo-Socio-Legal through a Communal Lens' in Richard Noble and David Schiff (eds), *Law, Society and Community* (Routledge 2014) 149.
[74] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3) 75.
[75] ibid.
[76] ibid 73.
[77] ibid 74.
[78] Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford University Press 1995) 330.
[79] Micah B Masuku, 'The Role of Trust in Contract Enforcement: An Analysis of Smallholder Farmers and Sugar Millers in Swaziland' in Johann F Kirsten and others (eds), *Institutional economics perspectives on african agricultural development* (Institute for Food Policy Research 2009).
[80] Anthony Giddens, *The Consequences of Modernity* (Stanford University Press 1991).

[Emphasis in original].[81] This high degree of trust is an essential component of all (agricultural) markets.[82] Trust is also necessary to 'generate and safeguard all forms of social capital that 'set a path towards the development of impersonal system characteristics' of trust in formal agricultural markets.[83] Impersonal trust systems are founded on 'interpersonal mutual trust' which increases confidence in modern economic systems for example electronic market transactions.[84]Impersonal trust is 'trust in abstract systems [that] does not presuppose any encounters at all with the individuals or groups "responsible" for them.'[85] In some cases, human agents may be responsible for providing '*access points* of abstract systems' but their role as points of human interaction is limited (Emphasis in original).[86]

'Generalised media of communication' are the basis for 'impersonal systems of trust' in a socially complex world such of impersonal markets for example stock exchanges in world financial centres, that is markets where personal characteristics do not influence (inter)actions.[87] Law may rely on economic devices with certain characteristics to work 'as a decentralizing mechanism for the formation of a complex economic system' similar to that of money in an economy.[88] This is only possible if the legal device can be demonstrated as possessing 'the possibilities it promises'.[89] Interpersonal mutual trust is thereby converted into 'system trust'.[90] What is required for the emergence of impersonal trust for formal agricultural markets is that it should replace 'through one all-inclusive act the countless individual, difficult demonstrations of trust which would be necessary to provide a sure foundation for life' in formal markets.[91]

'Representation' of the 'trustworthiness' of impersonal systems of trust may connect system trust or trust in abstract mechanisms for example in an ATM, with interpersonal trust. The

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[81] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3) 73.
[82] Marcel Fafchamps, *Market Institutions in Sub-Saharan Africa: Theory and Evidence* (MIT press 2004).
[83] Roger Cotterrell, 'Trusting in Law: Legal and Moral Concepts of Trust' (1993) 46 Current Legal Problems 75, 91.
[84] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3) 74.
[85] Anthony Giddens, *The Consequences of Modernity* (Stanford university press 1991) 83.
[86] Giddens (n 80) 83.
[87] Niklas Luhmann, *Trust and Power* (Christian Morgner and Michael King trs, Polity Press 2017) 53.
[88] ibid 55.
[89] ibid.
[90] ibid.
[91] ibid 55–56.

representativeness takes places in 'multiple and complex dimensions.'[92] The process of creating impersonal systems of trust presupposes interpersonal trust.[93] Trust such as interpersonal mutual trust helps reduce the complexity in the social world in which decisions have to be made and actions based on them to manageable and tolerable levels.[94] The withholding of trust in communal networks results in considerably reduced actions because increased interpersonal mutual trust is an important basis for interaction even for impersonal systems of trust.[95]

As Cotterrell suggests '[l]aw that does not resonate in the experience or consciousness of those it purports to regulate is not law in society, hardly law at all.'[96] The situation does not result in 'a legal vacuum' because 'people find law - that is, meaningful social rules enforced by collective sanctions.'[97] Therefore actors will spontaneously create their own law to support the kind of (inter)actions that may be preferred. An example may be informal economic activities despite international and domestic efforts to reduce informality through formal law.

Most of Cotterrell's sociological approach seems to be directed at carving out space for studying sociological approaches that scholars in sociolegal approaches had somehow kept out of engagement with central ideas in law.[98] He argued that sociological study of law must be legal analysis 'rather than merely juxtaposing, its studies with other kinds of legal analysis.'[99] By this Cotterrell meant that law itself must be subject to 'sociological inquiry' rather than earlier approaches 'by proponents of legal sociology [who] accepted the myth of an inevitable division of labour' between 'lawyers' debates on doctrine'; and what the legal sociologists claimed was 'real knowledge about law as a social phenomenon' that was to be

[92] Frens Kroeger, 'Facework: Creating Trust in Systems, Institutions and Organisations' (2017) 41 Cambridge Journal of Economics 487, 508.
[93] Frens Kroeger, 'Facework: Creating Trust in Systems, Institutions and Organisations' (2017) 41 Cambridge Journal of Economics 487, 507.
[94] Luhmann (n 87) 33.
[95] Luhmann (n 87).
[96] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3) 34.
[97] ibid 35.
[98] Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies' (2002) 29 Journal of Law and Society 632.
[99] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3) 46.

'gained only by observing patterns of judicial, administrative or policing activity, lawyers' work and organization, or citizens' disputing behaviour.'[100]

Cotterrell emphasized that communal networks or the law and community approach 'is not related to, even necessarily sympathetic to communitarian ideas in political and legal philosophy.'[101] Communal networks analysis based on Weberian analysis of social life can address the 'key failing of economic analysis' by emphasizing 'the complex interplay, in market networks, of instrumental (economic) relations with relations based on affect (emotional allegiances or rejections), traditions (for instance customary practices existing in shared work environments and beliefs or ultimate values.'[102] Cotterrell proposes how the communal lens might help the study of instrumental relations in general and economic communal networks in particular. Although economic communal networks may rely on state law for support Cotterrell notes that 'the market takes law's intervention strictly on its own terms, for its own purposes'.[103] This view suggests the way in which interactions in economic communal networks may support or obstruct or reinterpret state law. Cotterrell further explains that 'economic networks of community shape their 'internal' self-regulation: as simultaneously entirely parasitic on and yet also significantly autonomous of state legal controls…'[104] This should not be surprising because, Cotterell argues state law regulation of communal networks, some of which are not entirely economic. This means that nature of economic communal networks is such that they interpenetrate or overlap or co-exist with non-economic communal networks, regulating themselves through stable (inter)actions. This suggests that it is not possible to isolate economic life from wider social life. One consequence is that the regulator of economic communal networks should assess and analyse the communal networks' 'internally' generated governance structures as well as the problems of harmonizing and stabilizing relations between [communal] networks.'[105]

[100] ibid.
[101] Roger Cotterrell, *Living Law: Studies in Legal and Social Theory* (Routledge 2016) 17.
[102] Cotterrell, 'Rethinking "Embeddedness"' (n 51) 56.
[103] ibid 59.
[104] ibid.
[105] ibid 57.

At the macro-level of social life regimes involve 'the totality of interrelations in a given' communal network or empirically similar communal networks which are 'complex and complementary institutional constellations that connect and integrate relatively automatous spheres of action.'[106] Traditional legal theory such as that by HLA Hart is 'most heavily associated with regimes.'[107] Such traditional legal theory seeks to impose the concept of law that assumes society to be a blank slate waiting to be regulated preferably by some central authority bringing in regimes.[108] Often times these regimes may compete or conflict with social regimes formed by a constellation of communal networks. The challenge is for the state to assume its political authority to assert its law. But as discussed in the previous chapter this is a tall order for postcolonial states. Sociological analysis reveals that 'everyone lives by law of some kind.'[109] Social regimes are as pervasive as social action. The World Bank research seems to have become interested in these views and publishing in 2017 stated, '[i]n all societies, state law is but one of the many rule systems that order' social life including those in economic life.[110]

4.1.3 Meta-level of social life

Rationalities include 'abstract, epistemic categories' in social life that organize our perception and evaluation of reality.'[111] Weber came up with the concept of 'rationality' in order 'to examine regularity and patterns of action' not only in Europe but 'at all societal and civilisational levels.'[112] These are 'idealized; each type of rationality is mutually constitutive of others; and multiple often competing rationalities are often in operation' in any econo-legal (inter)actions, communal network, regime .[113] Rationalities exist at the 'meta-level' of social life as 'modes of reasoning' that 'are mutually constitutive of (inter)actions and of regimes...'[114] Rationalities provide an 'actor's mental models as well as her perception and

[106] Sabine Frerichs, 'Re-Embedding Neo-Liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law.' in Christian Joerges and Josef Falke (eds), *Karl Polanyi, globalisation and the potential of law in transnational markets* (Hart Publishing 2011) 68.
[107] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 4) 61.
[108] Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017).
[109] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3) 34.
[110] World Bank, *World Development Report: Governance and Law* (World Bank Group 2017) 88.
[111] Frerichs, 'Re-Embedding Neo-Liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law' (n 5) 68.
[112] Stephen Kalberg, 'Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History' (1980) 85 American journal of sociology 1145, 1147, 1148.
[113] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 4) 61.
[114] ibid 60.

understanding of' regimes and (inter)actions as a kind of 'self-monitoring' in a kind of 'bidirectional dialogue.'[115]

The 'typology' of rationalities 'sifted out of Weber's writings' include 'practical, theoretical, substantive, and formal' rationalities.[116] The differences in rationalities may be attributable to 'the relative sophistication of means available to master daily problems.'[117] Practical rationality examines the given circumstances of everyday life and works out the 'the most expedient means of dealing with the difficulties they present' while theoretical 'rationality' involves increasing 'mastery of reality through increasingly precise abstract concepts.'[118] What is known as informal economic actions, whose core activities is 'doing and using' (inter)actions is a typical example of the possible dominance of practical rationality in a regime.[119] Substantive rationality 'directly orders action into patterns...not on the basis of purely means-end calculation of solutions to routine problems but in relation to past, present and potential' values.[120] The assumed values may be a 'cluster of values that vary in comprehensiveness, internal consistency, and content.'[121] A form of 'rationality' that was limited to Europe is 'formal rationality' and it is associated with the European Industrial Revolution 'most significantly the economic, legal and scientific spheres', 'dominated by bureaucracy' and 'means-end rational calculation by reference back to universally applied rules, laws and regulations.'[122] Arguably it might have had a key role in the making of modernity in Europe.[123]

Weber narrowed down the emergence of formal law as a guide for social econo-legal (inter)actions in social processes in what has been called 'rationalization'.[124] According to Weber, the process of rationalization in different societies as 'the general unfolding of

[115] Williams (n 22) 54–55.
[116] Stephen Kalberg, 'Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History' (1980) 85 American Journal of Sociology 1145, 1148.
[117] ibid 1152.
[118] ibid.
[119] Erika Kraemer-Mbula and Sacha Wunsch-Vincent, *The Informal Economy in Developing Nations* (Cambridge University Press 2016).
[120] Kalberg (n 118) 1155.
[121] ibid.
[122] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 4) 61.
[123] Weber (n 57).
[124] Kalberg (n 118).

civilizations ' takes place at different rates and in different forms in societies.[125] In relation to law, it has been argued how in Europe only a gradual process led to the dominance of state law in the process of rationalization in the eighteen centiry from the pluralism of earlier periods.[126]

When massive importation of laws and economic systems were made in colonised territories like Malawi, the imports included rationalities. These colonised places were not without rationalities. This inevitably led to some conflict between the local values and the values brought in through the imported regimes; the conflicts sometimes manifested in (inter)actions. The power of the colonising state often suppressed these conflicts. The conflicts with the end of colonialism manifested themselves and are persistent features of the postcolonial state in the form of sociological plurality.[127] The challenge of the revised ESL approach for the global south is to disentangle the regimes and values in this sociological plurality. As set out in the previous chapter, there is a lack of unity of law in postcolonial societies with a proliferation of social regimes alongside formal regimes. There are even instances where social regimes seem to overwhelm formal law regimes for examples the persistence and expanding regimes of economic activity referred to as informality which have been acknowledged by the World Bank and IMF.[128]

4.2 Making economic sociology of law more relevant for Malawi.

While the ESL framework was developed as response of the dominance of economic approaches in the West, there is need for caution before applying it to other parts of the world such as the global south where different rationalities are more dominant. It has been suggested that 'the emancipatory transformations of the world may follow grammars and scripts other than those developed by Western-centric critical theory, and such diversity

[125] ibid 1150.
[126] Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Sydney L. Rev. 375.
[127] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 2018).
[128] Franziska Ohnsorge and Shu Yu (eds), *The Long Shadow of Informality: Challenges and Policies* (World Bank Publications 2021); Corinne Deléchat and Leandro Medina (eds), *The Global Informal Workforce* (International Monetary Fund 2021).

should be valorized.'[129] The same could probably be said about inclusion/exclusion of social/economic regimes and their associated rationalities. This section proposes how ESL may be made more relevant to agricultural markets in Malawi and perhaps Africa. The relevance can be at the level of legal thinking and practice in the making of markets, namely, rationalities and regimes concerning markets. This thesis proceeds by keeping in mind as stated above that rationalities are 'mutually constitutive of others' and 'multiple often competing rationalities are often in operation' in any given regime.[130] It is suggested that public or private actors formulating macrolevel regimes should consciously support metalevel rationalities that would make sense to local context in Malawi.

Formal rationality expressed in concepts of the rational utility maximising economic actor and language of efficiency, is the dominant way of thinking about economic relations in mainstream economics as set out in chapter 2. However, such dominance might only find expression in mindsets that have some ability for (inter)actions with the present and are able to generate 'a probable future' in the present.[131] However, formal rationality underpins 'rational-purpose' (inter)actions and formal top-down regimes, which are the outcome of social, political, and economic regimes of the Industrial Revolution and the Enlightenment in Europe.[132] Formal rationality has permeated global regimes and has enormous impact on national and transnational economic regimes.[133] Other societies outside of Europe developed differently, something that Max Weber acknowledges in his work on the economy and society.[134] In these societies, regimes that depend for their working on a particular worldview such as formal rationality may need to be adapted to the rationalities that are dominant in those societies if they are to work as intended.

Where people are expected to embrace thinking involving a great deal of formal rationality there is need for some care because formal rationality is not a natural world view.[135] It has

[129] Boaventura de Sousa Santos (ed), *Epistemologies of the South: Justice against Epistemicide* (Routledge 2015) viii.
[130] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 4) 60.
[131] Bourdieu, *The Social Structures of the Economy* (n 62) 212.
[132] Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press 2008); Gurminder Bhambra, *Rethinking Modernity: Postcolonialism and the Sociological Imagination* (Springer 2007).
[133] Perry-Kessaris, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?' (n 12).
[134] Kalberg (n 118).
[135] Ernst F Schumacher, *Small Is Beautiful: Economics as If People Mattered* (Sphere Books 1973).

better prospects of working in regimes that can command impersonal systems of trust which itself only gradually evolves from interpersonal mutual trust. In economies with a high degree of market dependence, activities such as savings and credit tend to be taken for granted as part of social life because individuals regard impersonal systems of trust as reliable.[136] The activities are only possible because of a high degree of control in the present that actors have; the actors can make the future probable or more likely in the present. As Cotterrell would say trust and certainty/stable relations are mutually reinforcing or that trust is probably the cause and the effect of stable relations/certainty.[137]

The control of the present is also manifested in the trust that these actors have in regimes that form the almost invisible basis of law in economic life built over time. As Cotterell notes 'there is a risk of underestimating the extent to which impersonal systems of confidence are underpinned by and, in a sense, modelled on idealized relations of mutual interpersonal trust'.[138] This may be because economic approaches tend to overlook how the process 'of displacement of interpersonal trust as a feature of contemporary life, in favour of confidence in impersonal systems of communication' has taken place over centuries.[139] Further explanation may be gleaned from the work of Bourdieu on habitus (mindsets or legal consciousness).[140] For the purposes of this thesis, it best explains the conditions for the (im)possibility of econo-legal future (inter)actions.

The most stable interactions are formed by actors with specific socially constituted dispositions or mindsets towards regimes. For every econo-legal (inter)actions, there has to be match between dispositions which Bourdieu refers to as 'habitus' as earlier referred to in relation to econo-legal action on the micro-level of social life.[141] If there is a 'mismatch' it is likely to be 'discover[ed] that access to the most elementary economic behaviours' such as savings and credit according to a Western societies 'is in no way axiomatic and that the soc called "rational" economic agent is a product of quite particular historical conditions' socially

[136] Anthony Giddens, *The Consequences of Modernity* (Stanford university press 1991).
[137] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3).
[138] ibid 74.
[139] ibid.
[140] Bourdieu, *Algeria 1960* (n 63).
[141] Pierre Bourdieu, 'Making the Economic Habitus: Algerian Workers Revisited' (2000) 1 Ethnography 17, 18.

constituted.[142] This led Bourdieu to argue that 'economic logic is not independent of the logic of social relations.'[143] Specific mindset enables dispositions towards a type of economic life available to actors. In capitalist societies or market societies mindsets enable (inter)actions with regimes that constitute such apparently mundane things as financial planning that may include banking, savings, pensions, and insurance.[144] On the other hand in non-capitalist societies, a mindset can be compatible with life without such mundane capitalist activities as impersonal exchange in the markets.[145] Attempts to universalise actors such as the rational economic actor or homo economicus cause so many challenges because these aspects of social life are overlooked.

One of the defining moments in individual action and motivating mindsets is when there is change in the regimes and (inter)actions in which the mindsets were acquired and sustained. The idea of legal mindset or legal consciousness has the most explanatory value when one asks 'what uncertainties and miseries people feel when their habitus [or mindset] is overtaken by rapid change in objective structure' of social life such as that those brought by new regimes.[146] Bourdieu noticed this among Algerian smallholder farmers steeped in traditional or habitual ways of life.[147] Through colonialism, Western capitalist market behaviours were imposed in a non-capitalist society 'causing two forms of economic organisation, normally separated by a gap of several centuries and making contradictory demands of contradictory demands on their participants.'[148] To provide an current example, the coronavirus lockdowns and accompanying senseless stockpiling of mundane things such as toilet paper is a case in point.[149] The uncertainty that came with it appeared to present mindsets with a 'future indefinite' in which anything could happen including remained cut off from all amenities of life; the future became suddenly 'uncertain and uncontrollable.'[150] What these people

[142] ibid.
[143] ibid 20.
[144] Bourdieu, *Algeria 1960* (n 63).
[145] ibid.
[146] Bourdieu, 'Making the Economic Habitus' (n 143).
[147] Pierre Bourdieu and Abdelmalek Sayad, *The Uprooting: The Crisis of Traditional Agriculture in Algeria* (Paul A Silverstein ed, Susan Emanuel tr, Polity Press 2020).
[148] Bourdieu, 'Making the Economic Habitus' (n 143) 18.
[149] Jon Stratton, 'Coronavirus, the Great Toilet Paper Panic and Civilisation' (2021) 165 Thesis Eleven 145.
[150] Pierre Bourdieu and Abdelmalek Sayad, *The Uprooting. The Crisis of Traditional Agriculture in Algeria.* (Paul A Silverstein ed, Susan Emanuel tr, Polity Press 2020) 6.

experienced for a short period of time is a constant occurrence within market structures which have been forcibly imposed whether through colonialism or market centric approaches of dominant law and economics.

The mismatch between legal mindsets and new regimes is referred to in Bourdieusian terminology as 'the hysteresis effect.'[151] Hysteresis relates to legal consciousness resulting in an 'inability to process and evaluate historical but also individual crises according to previously formed categories of perception, appreciation, and comprehension that are linked to one's social origins.'[152] The socially constituted legal mindset or legal consciousness is overcome by narrowing the range of interactions open to actors. Similarly, it has also been said on legal mindsets that 'our mental models are continually affirmed or challenged through feedback loops; the reflexive monitoring of our own' legal mindsets and (inter)actions in regimes.[153] Where (inter)actions are challenged actors may be reduced to (inter)actions based on practical rationality, which mainstream economics may deem irrational.

The hysteresis effect results in formidable challenges for actors whose (inter)actions are motivated predominantly by substantive rationalities such as tradition when new economic regimes are imposed, and related specific economic (inter)actions required usually by state action or formal law.[154] It may explain why and how legal regimes may lead to exclusion of participants with mindsets that are unable to interact based on the demands of regimes or how actors engage in (inter)actions whose constellations may result in regimes such as informality. It may also be a possible explanation for the World Bank's questions on 'Why are carefully designed, sensible policies too often not adopted or implemented? When they are, why do they often fail to generate development outcomes such as security, growth, and equity? And why do some bad policies endure?'.[155] This may also suggest fruitful avenues for ESL study of phenomena such as the qualitative aspects of informal regimes in economies, their endurance and persistence despite changes inspired by economic approaches.[156]

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[151] Pierre Bourdieu, *Outline of a Theory of Practice* (Richard Nice tr, Cambridge University Press 1977) 78.
[152] Eva Barlösius, 'Pierre Bourdieu: Transformation Societies and the Middle Class' (2014) 2 Middle East-Topics & Arguments 37, 38.
[153] Williams (n 22) 137.
[154] Barlösius (n 154).
[155] World Bank (n 111) 43.
[156] Ohnsorge and Yu (n 130).

Social groups in societies with mixed or nascent capitalism whose economic regimes are underpinned largely by substantive rationality feel 'totally overwhelmed by a world which denies them any realizable future, they can only accede to a "future indefinite'' leading them to romanticize a long-gone era.[157] Their subjective sense of law or legal mindset inclines them to see the future as 'uncertain and uncontrollable.'[158] The situation tends to be exacerbated when the economic life is violently affected by the 'disappearance of a whole set of guarantees which were formerly provided' by regimes and traditional communal networks.[159]

One of the aims of legal change is to direct future action or to shape how the future is looked at. For persons deeply steeped in predominantly traditional communal networks that are part of their lives, what is important is 'the direct satisfaction of immediate needs' than calculative actions towards the future.[160] For example economic approaches are at a loss for explanations for smallholder farmers' poor responses to price incentives or generally their 'irrational' conduct. Another explanation may be that views of the future are shaped by 'material conditions of existence' of the actors since they determine the capability of the actors to think of 'determinate dispositions toward the future.'[161] In other words, the ability of social actors to determine and think about their future depends on 'sufficient control over [the] present to undertake to reappropriate the futures' presented to them.[162] This strongly suggests actions in economic life may only be possible where material conditions are ' first secured in order then to focus its activities consciously on the future.'[163]

It seems at the level of rationality most econo-legal regimes take for granted the formal rationality required of actors for their (inter)actions. As Weber demonstrated formal rationality was the result the specific political, economic and scientific context of Europe dominated by a 'bureaucracy' that aimed 'to do nothing more than calculate the most precise and efficient means for the resolution of problems by ordering them under universal and

[157] Bourdieu, *Algeria 1960* (n 63) 69.
[158] Bourdieu and Sayad (n 149) 6.
[159] Bourdieu, *Algeria 1960* (n 63) 69.
[160] Bourdieu and Sayad (n 149) 7.
[161] Bourdieu, *Algeria 1960* (n 63) vii.
[162] ibid viii.
[163] Barlösius (n 154) 38.

abstract regulations.'[164] Sociological approaches can and could analyse empirically and normatively how certain regimes are 'destructive for African societies because the [rationality]' that lies behind them assumes the 'inferiority' or backwardness of extant regimes and underlying substantive rationalities.[165] While ESL goes a long way addressing the what was described as 'the ceremonial adequacy' of mainstream economics, such as its misrepresentation of social actors as the rational utility maximising actor or how real markets work, more can be done to make it more relevant to other parts of the world. Social phenomena may be unique to African economies. There may be econo-legal activities that mainstream economics classifies as 'the lawless, the a-legal, the non-legal, even the legal or illegal according to unofficially recognised law.'[166] These econo-legal regimes are made up of 'a vast set of discarded experiences, made invisible' by dominant approaches which a revised ESL approach can and could address.[167] The starting point to address issues such as economic hybridity is the ESL recognition that 'multiple, often competing, rationalities are often in operation in any given' econo-legal (inter) and regimes.[168] The next section will propose the ways in which other worldviews may be included.

4.3 The role of *Ubuntu* as a meta-level value.

This section seeks to explore the 'notion of *Ubuntu* as a potential guiding principle and basis for the reinvigoration of African notions of social justice' and inclusion.[169] It is one way of achieving an 'epistemological break' and considering the 'perspective of the excluded'.[170] It seeks to present a reformulated version of *Ubuntu* which persists within 'all the Bantu peoples inside and outside of South Africa' in places like Malawi. Other have characterised *Ubuntu* as an 'African traditional ideology of justice and fairness based on the philosophies of humanness, communitarianism, solidarity and interdependence.'[171] An example of Ubuntu is in transitional justice where the emphasis is on building society through reconciliation; it has proved useful in restorative justice regimes such as South Africa's Truth and Reconciliation

[164] Kalberg (n 118) 1158.
[165] Eiman O Zein-Elabdin, 'The Question of Development in Africa: A Conversation for Propitious Change' (1998) 11 African Philosophy 113, 116.
[166] de Sousa Santos (n 131) 120.
[167] ibid.
[168] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 4) 61.
[169] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020) 141.
[170] de Sousa Santos (n 131) viii–ix.
[171] Tamale (n 171) xv.

Commission.[172]. It can provide an alternative world view in ESL than the self-interestedness of *homo economicus* on economic orthodoxy.[173]

Ubuntu ('the African idea of humanness in social action') can provide 'moral cohesion' as a normative value to form the basis of 'mutual interpersonal trust' on which 'communal relations depend on' and ultimately may provide inclusivity, stability, and longevity to regimes. This may be achieved by an integration of economic and sociological approaches to law in ESL in a way that considers both economic and non-economic bases of economic regimes. *Ubuntu* has been described as 'originally considered a Xhosa term [south African ethnic group], and many scholars see it as common to the *Bantu* languages of Eastern and Southern Africa, as is evidenced by the existence of the suffixes -*ntu* (for *ub-untu*), -*thu* (for *uMun-thu*), and -*nhu* for *hu-nhu*).'[174] It has however been argued that it is 'a misunderstanding [to claim] that the philosophy of Ubuntu is exclusive to Bantu-speaking Africans' as many 'African cultures have a variant' of the word in some form.[175] This is because 'the noun *ntu* among Bantu-speakers simply means human, which is quite distinct from the ontological concept of Ubuntu that connotes deep, soul-force attachment to community and is a worldview understood beyond Bantu-speakers in most of Africa.'[176] The linguistic expression in other languages of Southern Africa depict the word *ubuntu* as follows 'Shona in Zimbabwe, the term is *unhu*; in Malawi in *Chichewa* and *Tumbuk*a, it is called *uMunthu*; Kenya and Tanzanian *Kiswahili,* it is *utu*; in Democratic Republic of Congo, it is called *bomoto*; and in Mozambique, in *shiTsong*a, it is referred to *vumuntu*.'[177] The concept of *ubuntu* has different linguistic expressions in various languages belonging to the *Bantu* family of Southern and Eastern African languages but perhaps consistent associated values and meaning.[178] In South Africa, it is expressly

[172] Dirk J Louw, 'The African Concept of Ubuntu and Restorative Justice' in Marelize Schoeman (ed), *Reconstructing Restorative Justice Philosophy* (Ashgate Publishing 2013).
[173] Drucilla Cornell, 'UBuntu, Pluralism and the Responsibility of Legal Academics to the New South Africa' (2009) 20 Law and Critique 43.
[174] Evanson Z Sambala, Sara Cooper and Lenore Manderson, 'Ubuntu as a Framework for Ethical Decision Making in Africa: Responding to Epidemics' (2020) 30 Ethics & Behavior 1, 4.
[175] Tamale (n 171) 222.
[176] ibid 223.
[177] Evanson Z Sambala, Sara Cooper and Lenore Manderson, 'Ubuntu as a Framework for Ethical Decision Making in Africa: Responding to Epidemics' (2020) 30 Ethics & Behavior 1, 4.
[178] WMJ van Binsbergen, 'Ubuntu and the Globalisation of Southern African Thought and Society' (2001) 15 Quest: An African Journal of Philosophy 53; Margaret Arminel Bryan, *The Bantu Languages of Africa: Handbook of African Languages* (Routledge 2017).

recognised in the Constitution of 1996 as an embodiment of the Afrocentric view of human dignity.[179]

Thaddeus Metz, professor of philosophy at the University of Pretoria in South Africa, notes that in the West 'Hobbesian egoism or Kantian respect for persons' seems to suggest the core of Western moral philosophy.[180] Perhaps it is also some kind of beacon that guides Eurocentric econo-legal action. Metz suggests that *Ubuntu* is 'the most justified normative theory of right action' for Afrocentric actions and its 'African pedigree is the requirement to produce harmony and to reduce discord, where harmony is a matter of identity and solidarity.'[181] I would suggest that a reformulated *Ubuntu* is a suitable evaluation of econo-legal rationalities when applying the revised ESL approaches.

As Cotterrell states 'social life in any stable and rewarding sense is impossible without' relations of community.[182] Although he is very much committed to pluralism and openness to and respect for other approaches to law, what is rewarding to Cotterrell comes from ~~and~~ writing about a Western perspective. *Ubuntu* can facilitate a 'partnership of knowledge systems' about social life between formal and substantive rationality by addressing the tension between the Western and other perspectives on social life.[183]

Ubuntu-inspired approaches may help resolve law 's disconnectedness with societies in the so called developing world.[184] The prominence of *Ubuntu* in Africa has its origins in the search for conceptualisation of the African society that nationalists were hoping would establish the philosophical and political basis of independent African countries after the Second World War

[179] Justice Yvonne Mokgoro, 'Ubuntu and the Law in South Africa' (1998) 1 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad.
[180] Thaddeus Metz, 'Toward an African Moral Theory (Revised Edition)' in Isaac E Ukpokolo (ed), *Themes, issues and problems in African philosophy* (Springer 2017).
[181] ibid 118.
[182] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3) 162.
[183] Bagele Chilisa, *Indigenous Research Methodologies* (2nd edn, SAGE Publications 2020).
[184] Brian Z Tamanaha, 'The Primacy of Society and the Failures of Law and Development' (2011) 44 Cornell Int'l LJ 209; Brian Z Tamanaha, 'The Rule of Law and Legal Pluralism In Development' (2011) 3 Hague Journal on the Rule of Law 1.

by African nationalist political leaders such as Kwame Nkrumah and Julius Nyerere.[185] Their motivation was how to promote inclusive economic growth while simultaneously engaging in nation building against the background of 'the tension between European and African conceptions of the person.'[186]

Ubuntu was presented as standing for the African view that 'personhood is attained through complex processes of exchange and engagement as people interact and communicate with those around them and with the totality of their environment.'[187] This conceptualisation was seen as potentially conflicting with 'the understanding of the individual dominant in European thought that sees the individual as a free and intentional agent.'[188] The latter conceptualisation seemed to suggest that the individual was autonomous and rational while African philosophy seemed to insist that becoming a person requires interaction with others that transforms biological entities or humans into persons.[189] Economically rational action is context specific because it is 'the product of certain economic and social conditions' such that cannot be econo-legal action 'cannot predicted on the basis of knowledge of [a] situation alone.'[190]

Grivas Kayange, a reader in Philosophy at the University of Malawi, has argued for a reformulation of *Ubuntu* using Aristotelian approaches to suggest both individual and community aspects of *Ubuntu*.[191] This reformulated *Ubuntu* as argued below has characteristics of 'transformative theory' that may even 'misdescribe the present or overemphasize qualities in order to bring about some transformative potential in the present.'[192] In addition, as reformulated, *Ubuntu* can promote ways of thinking about law that are 'more just, more flexible and more attentive to diversity.'[193]

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[185] Kwame Nkrumah, *Consciencism: Philosophy and Ideology for Decolonization and Development with Particular Reference to the African Revolution* (Heinemann 1964); Julius K Nyerere, *The Basis of African Socialism* (Oxford University Press 1966).
[186] James Ogude (ed), *Ubuntu and Personhood* (Africa World Press 2018) 5.
[187] ibid 3.
[188] ibid 2.
[189] ibid.
[190] Bourdieu, *The Social Structures of the Economy* (n 62) 211–212.
[191] Grivas Muchineripi Kayange, 'Restoration of Ubuntu as an Autocentric Virtue-Phronesis Theory' (2020) 39 South African Journal of Philosophy 1.
[192] Davies (n 108) 18.
[193] ibid 19.

Reformulated *Ubuntu*-inspired approaches can provide what Weber called 'radical perspectivism' towards these systems.[194] Radical perspectivism is a 'rationalization process' that can enable meso-level interactions of a particular type depending on a person's 'implied or stated, conscious or unconscious, preference for certain values and the systematization of his or her actions to conform to these values.'[195] Although Chikosa Mozesi Silungwe, a Malawian legal scholar, has doubted *Ubuntu* as a social norm because of the sometimes imprecise language in which it is often cast, he seems to agree that most authors have treated it as a 'world view', 'a philosophy of life', or 'as the social value of *human dignity*' (emphasis original).[196] Social norms are rules of conduct at the macro-level of social life while a worldviews are what inspires the rule of conduct and tend to be abstract. Seen as such *Ubuntu* can be adopted as a rationality.

Ubuntu cannot easily be defined probably since it 'cannot be reduced either to ontology, epistemology, or an ethical value system; that is if one even wanted to speak in this regard in the terms of Western philosophy; ubuntu is all three.'[197] It is something ethereal, a cluster of values or normative values that manifest themselves on all levels of social life. *Ubuntu* as a normative value can make an inclusive and '*open* society in so far as it celebrates the universal *and* the particular, sameness *and* difference, agreement *and* disagreement, tradition *and* innovation, continuity *and* change, religious belief *and* discursive rationality' (emphasis original).[198] *Ubuntu* has been described as 'taking plurality seriously.'[199]

What is the place of values in sociological approaches to law? As Cotterrell noted 'socio-legal scholars may be uneasy with a moral focus'; drawing from Durkheim, Cotterrell suggests that the uneasiness may be misplaced because sociological approaches 'can reveal empirically and theoretically the social structures and conditions in which moral ideas become meaningful for

[194] Kalberg (n 118) 1155.
[195] ibid 1156.
[196] Chikosa Mozesi Silungwe, 'On "African" Legal Theory: A Possibility, an Impossibility or Mere Conundrum?' in Oche Onazi (ed), *African Legal Theory and Contemporary Problems* (Springer 2014) 27–28.
[197] Drucilla Cornell and Karin Van Marle, 'Ubuntu Feminism: Tentative Reflections' (2015) 36 Verbum et Ecclesia 1, 2.
[198] Dirk J Louw, 'Rethiking Ubuntu' in James Ogude (ed), *Ubuntu and ahe Reconstitution of Community* (Indiana University Press 2019) 126.
[199] ibid 120.

people in particular times and places, in which moral arguments become more urgent.'[200] It has been suggested that 'philosophy and legal sociology are co-workers in the common enterprise of legal explanation.'[201] African philosophy, the natural locus of *Ubuntu*, is sometimes controversial for reasons that appear 'to be epistemological, particularly because of the obvious long-standing methodological question about the disciplinary parameters of African philosophy.'[202] Although it may be argued that the approaches 'rely heavily on Western influenced methods, the advantage it offers, however, is that it allows us' to bring Western legal theory closer to the African lived experienced.[203]

Kayange argues through analytical philosophy and empirical research for a reformulation of *Ubuntu* not as an abstract concept but as an idea rooted in the African experience which can be found in African languages and social practices.[204] He takes the empirically based analytical approach to avoid some conceptualisations of *Ubuntu* that may be viewed as 'an idealized view of Africa's past.'[205] Some scholars of *Ubuntu* have suggested that we need 'innovative reconstructions' of *Ubuntu* because 'it is impossible to restore the so called original version of Ubuntu' of precolonial Africa.[206] The empirical approach to Ubuntu also provides an epistemic basis for *Ubuntu* so that it is can be included in 'modern epistemological disputes between scientific and non-scientific forms of truth.'[207] There is also need for caution in treating *Ubuntu* as 'ethos in the roots of most Indigenous African social structures which thrived on the principles of communitarianism and solidarity.'[208] The African colonial experience resulted in a cultural mixing of indigenous institutions with imported or imposed institutions such that a search for pure 'Indigenous African social structures' may be no more than an illusory search for a glorious communal past.[209] The colonial experience subjected the 'colonizer and

[200] Cotterrell, 'Rethinking "Embeddedness"' (n 51) 53.
[201] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 3) 29.
[202] Oche Onazi (ed), *African Legal Theory and Contemporary Problems: Critical Essays* (Springer Science & Business Media 2014) 3.
[203] ibid 4.
[204] Grivas Muchineripi Kayange, *Meaning and Truth in African Philosophy: Doing African Philosophy with Language*, (Springer 2018).
[205] Tamale (n 171) 225.
[206] Louw (n 200) 126.
[207] de Sousa Santos (n 131) 119.
[208] Tamale (n 171) 221.
[209] ibid.

colonized' to cultural changes 'so that the experience of colonization change[d] them both.'[210] For this among other reasons, it has been argued that 'attempts at achieving an authentic African identity in terms of plenitude, regarding culture as pure and unalloyed, seems untenable.'[211] Arguably the indigenous conception of *Ubuntu* has sometimes been 'distorted by metaphysical and ethical preconceived views in most of the communitarian ideologists.'[212] This approach 'encourages a dogmatic conclusion that the [African] people are communitarian in nature' incapable of any form of impersonal econo-legal (inter)actions.[213] Conceptualisation of *Ubuntu* in exclusively communitarian terms ignores 'the ordinary language approach to meaning', and mostly depends 'on ideological interpretations of the African people' perhaps in pursuit of some form of 'Pan-Africanism.'[214] It might therefore be argued that 'communitarian interpretation of this concept has misrepresented the Sub-Saharan Africa's ethical/political theory by crippling any form of individualistic interpretation of this philosophy.'[215]

In the light of these arguments, Kayange seeks a 'comprehensive theory of *Ubuntu*' by looking at its '(a) academic use in various literatures, (b) ordinary language use through dictionaries, and (c) characteristics that are associated with a person with ubuntu, such as wisdom' in social life.[216] His detailed empirical analysis on *Ubuntu* is published in his work on analytical philosophy.[217] Subsequently he suggests that *Ubuntu* 'can be theorized as a socio-economic and political theory that represents the African experience.'[218] Kayange, in tracing the meaning of *Ubuntu* in the literature, demonstrates that it 'may be characterised in three categories.'[219] Firstly, it focuses on 'human quality, state of being human, philanthropy, etc';

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[210] Stephen Fay and Liam Haydon, *An Analysis of Homi K. Bhabha's The Location of Culture* (Macat Library 2017) 16.
[211] Fetson Kalua, 'Homi Bhabha's Third Space and African Identity' (2009) 21 Journal of African cultural studies 23, 29–30.
[212] Kayange, *Meaning and Truth in African Philosophy* (n 206) 120.
[213] ibid.
[214] ibid 122.
[215] ibid 123.
[216] Grivas Muchineripi Kayange, *Capitalism and Freedom in African Political Philosophy* (Palgrave Macmillan 2020) 258.
[217] Grivas Muchineripi Kayange, *Meaning and Truth in African Philosophy: Doing African Philosophy with Language*, (Springer 2018) 117–140.
[218] Grivas Muchineripi Kayange, *Capitalism and Freedom in African Political Philosophy* (Palgrave Macmillan 2020) 249.
[219] Kayange, *Capitalism and Freedom in African Political Philosophy* (n 218) 258.

secondly the focus is 'on virtue—mainly the state or disposition of being moral or the qualities of a good person'; and the thirdly, it refers to the individual 'meanings of ubuntu such as personality, personhood, and a person's own human nature.[220] Any of the meanings of *Ubuntu* in the literature 'suggest that the concept of ubuntu is complex and may lead to different theoretical perspectives '.[221] In everyday language in Malawi, Kayange established empirically that *Ubuntu* seemed to suggest the primacy of the virtue of 'patience' in a person and other personal attributes such as 'humility, responsibility (toward the self and others), perseverance, foresight, respect, discretion, honesty, prudence, cooperation, luck, pride, self-control, care, and determination.'[222] This analysis demonstrates that in every day life 'figurative expressions are used to promote both community-oriented virtues/values and individual-oriented virtues/values as important attributes' of *Ubuntu*.[223] Kayange also established that if 'one probes further into ubuntu as referring to a good person in the African traditional context, it becomes clear that this happens through a process of becoming.'[224] The social process of becoming 'entails the discovery and practice of virtues as a particular situation demands.'[225] In this way, Kayange observed 'the African traditional society puts value in learning how to become good through personal experience and through education (such as through initiation).'[226]

Kayange believes the presentation of *Ubuntu* as 'radical communitarianism' may be 'a generalization and a misrepresentation of African thought and experience.'[227] His main argument is based 'on the idea that apart from communitarian elements, private property and individual freedom, which are individualist elements and relevant for capitalism are also accommodated in the traditional setting.'[228] He believes *Ubuntu* on this analysis should not be the 'totalitarian communalism' or 'radical communalism', subordination of the individual to community; presenting it as such may be incorrectly seen as representing 'the African

[220] ibid.
[221] ibid 259.
[222] ibid 259–260.
[223] ibid 260.
[224] ibid.
[225] ibid.
[226] ibid.
[227] ibid 249, 250ff.
[228] ibid 249.

experience' as against individual freedom and choice.[229] He reformulates *Ubuntu* 'as a virtue theory that targets human wellbeing (individual and community well-being) through the practice of self-regarding and other-regarding virtues.'[230] *Ubuntu*, in this reformulated conception, Kayange suggests, aims at 'agreement, consensus, or group cohesion' in social life as 'respect for others and oneself' including dissenting voices by taking 'plurality seriously.'[231]

Ubuntu inspired approache*s* have the potential to address inequality among actors which is attributable to what may be termed as 'idea gaps' (knowledge of market standards or formal markets for example) and 'object gaps' (material endowments, land for example). Idea gaps confirms other studies that have demonstrated how the lack of 'critical pieces of information' puts certain interactions beyond smallholder farmers.[232] Both idea gaps and object gaps are include in the Bourdieu's 'social capital'.[233] Object gaps relate to how 'material conditions of existence' of the actors may determine the capability of the actors to think of 'determinate dispositions toward the future'. Their approach to markets is unlikely to be like those of the 'rational economic actor' of mainstream economics. As emerging studies demonstrate their action may be 'irrational' from an economic point of view; for example, for a smallholder farmer household food security is paramount to any expected profit maximization that may be anticipated from markets participation as advanced in mainstream economics.[234]

After reformulating *ubuntu*, Kayange concludes that 'the reconceptualized ubuntu is a more general theory that takes into consideration the way human subjects live and interpret reality, as opposed to neoliberal capitalism and socialism which tend toward dogmatism.'[235] In communal networks and associated regimes necessarily involving power, (inter)actions should

[229] ibid 252–253.
[230] ibid 261.
[231] Chilisa (n 185) 234–235.
[232] Abhijit V Banerjee, Abhijit Banerjee and Esther Duflo, *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (Penguin 2012) 268.
[233] Bourdieu, *The Social Structures of the Economy* (n 62).
[234] Sidney Madsen, 'Farm-Level Pathways To Food Security: Beyond Missing Markets and Irrational Peasants' (2022) 39 Agriculture and Human Values 135.
[235] Kayange, *Capitalism and Freedom in African Political Philosophy* (n 218) 264.

not 'be brutal and unpleasant' to other actors.[236] The need for a social minimum as a precondition for econo-legal (inter)action is the foundations of inclusive regimes.[237] As if almost anticipating this view Perry-Kessaris building on Cotterrell states that law plays three roles in relation to community: it expresses the values that hold communities together, coordinates conflicting values and interests within and between communities, and encourages widespread participation in social life.[238]

4.4 Conclusion

Chapter 2 suggested that economic approaches need to be integrated with sociological approaches through economic sociology of law. This chapter has demonstrated that ESL holds the promise of suggesting how legal thinking and practice may be made more inclusive. It goes beyond formal rules to recognise that 'rules are mutually constitutive of the (inter)actions by which they are created, destroyed, used, abused, and avoided, as well as of the rationalities' that underlie them.[239]

A reformulated *ubuntu* can result in the legal thinking and practice of inclusive markets. Drawing the different strands of ESL discussed above and the suggested *ubuntu* inspired rationality to propose what pathways for agricultural inclusive market regimes. ESL approaches can anticipate and accommodate different worldviews from a diverse range of actors, and different motivations for (inter)actions in regimes, as well as any resulting need for adjustment in African contexts such as that of Malawi more appreciatively. This would involve encouraging 'compliance with law and a broad set of principles, ideas, rituals and norms that may evolve out of law.'[240] Regimes may both influence and be influenced by the 'very actors whose interactions the law seeks to constitute, facilitate and regulate.'[241] The law influences and is influenced by the actors, resulting in a 'facilitative legal environment', a

[236] Perry-Kessaris, 'Reading the Story of Law and Embeddesness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law' (n 52) 404.
[237] Toomas Kotkas and others (eds), *Specifying and Securing a Social Minimum in the Battle Against Poverty* (Bloomsbury Publishing 2019); Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist* (Chelsea Green Publishing 2017).
[238] Perry-Kessaris, *Global Business, Local Law* (n 10).
[239] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 4) 61.
[240] Edelman and Stryker (n 9) 532.
[241] ibid 535.

'regulatory legal environment' and a 'constitutive legal environment.'[242] Normative (inter)actions and regimes are constituted and constitute the market in these three ways.

Ubuntu-inspired approaches may help resolve law's disconnectedness with societies in the so-called developing world.[243] This thesis adopts a reformulated and empirically grounded approach to *Ubuntu* advanced by Kayange that 'takes into consideration the way human subjects live and interpret reality' in order to anticipate and accommodate different worldviews of the diverse range of actors, and different motivations for meso-level (inter)actions or regimes, as well as any resulting need for adjustment in African contexts such as that of Malawi.[244] Such approaches may lead one to a more expansive understanding of capital and the role it can play in enabling instrumental interactions, the importance of facilitative tools for market (exchange) relations; regulatory aspects of the context that shape the experiences and understandings of the actors in the formal market such as smallholder farmers and market services providers; and constitutive role of the legal environment shaping how smallholder farmers perceive their actions in relation to the other econo-legal actors.

The next chapter will present how a revised ESL approach can be applied empirically to understand and explain the inclusion or exclusion of smallholder farmers in agricultural markets in Malawi. It serves the purpose of transitioning from these relatively abstract chapters to the more empirically grounded chapters in the rest of the thesis.

[242] ibid 535–542.
[243] Tamanaha, 'The Primacy of Society and the Failures of Law and Development' (n 186); Tamanaha, 'The Rule of Law and Legal Pluralism In Development' (n 186).
[244] Kayange, *Capitalism and Freedom in African Political Philosophy* (n 218) 264.

5 Applying the (revised) economic sociology of law approach to smallholder markets in Malawi.

The purpose of this chapter is to provide a bridge between Part 1, which set out the rationale for, and key characteristics of, the Economic Sociology of Law (ESL) approach adopted in the thesis (Chapters 1-5); and Part 2, which applies the ESL approach to produce a chronological account of the evolution of agricultural markets in Malawi (Chapters 6 to 9). Specifically, this chapter, firstly, highlights the national and international (inter)actions, formal and informal regimes, and underlying rationalities that constitute agricultural markets in Malawi; whilst simultaneously pointing out values and interests, perceptions and expectations that inspire and are depicted in these social relations. Secondly, it highlights empirical evidence on the limitations of the dominant economic approaches to agricultural markets that were highlighted at an abstract level in Chapter 2.

The chronological approach adopted in these empirical chapters involves 'the idea of periodization', in which periods are approximations of years.[1] It is important to note that there is no suggestion that 'any new period cancels out the previous ones.'[2] Indeed, the previous period may manifest itself in complex ways in subsequent periods. This phenomenon can be understood through the concept of 'palimpsest' which is 'used to refer to situations in which the same archaeological layers comprise objects and residues from very different periods and times and very often not accessible for exact dating.' Similarly, in the context of the economic lives of law, we can expect to see rationalities (worldviews) that developed in one period continuing to underlie interactions and regimes in subsequent periods. For example, in the specific context of postcolonial societies we sometimes see a change in legal regime but without the anticipated transformation on the role of law in economic life. It is arguably a feature of hybrid postcolonial societies that changes 'coexist[…] with continuities, blending explicit and self-proclaimed ruptures with unspoken continuities and so giving rise to very complex legal and institutional constellations and hybridizations.'[3]

[1] A Gangatharan, 'The Problem of Periodization in History', *Proceedings of the Indian History Congress* (Indian History Congress 2008) <http://www.jstor.org/stable/44147249> accessed 7 August 2023.
[2] Boaventura de Sousa Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique' (2006) 40 Law & Society Review 39, 47.
[3] de Sousa Santos (n 2) 48.

5.1 Key actors in the chronological approach

This thesis is concerned with how formal markets exclude smallscale farmers and how the other actors in the market can make the markets more inclusive. The approach to law adopted in this thesis offers 'a means of rethinking law's relation to the diversity of social groupings and networks of shared understanding that characterize contemporary social life' in Malawi perhaps other postcolonial states.[4] It does so through offering 'a more flexible and sophisticated framework for conceptualizing' law in the heterogenous state which 'can no longer be adequately portrayed in traditional sociological terms of (political) 'society' and traditional legal terms of state sovereignty.'[5] The approach through its 'pluralistic vision of law also emphasizes the inevitable inadequacy' on the dominant economic approaches and 'state law in this role and the social significance of legal expressions of community other than those offered by state law.'[6]

Legal thinking and practice in agricultural markets is the result of (inter)actions at the local, national, and international levels. The key actors that interact to legally constitute agricultural markets may play a role in the inclusion/exclusion of smallholder farmers from formal agricultural markets. At the local level legal thinking and practice is demonstrated in the (inter)actions of smallholder farmers and other actors in the agricultural markets. At the national level the state is the primary but not dominant actor with other actors playing a role depending on the social environment of the various chronological eras set out in the chapters. The shifting patterns of international legal thought and practice have had an impact on agricultural markets in Malawi since the nineteenth century.[7] In all periods, large-scale commercial farmers were relatively free to directly sell their cash crops on international markets.[8]

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[4] Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing 2006) 76.
[5] ibid.
[6] ibid.
[7] Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000' in Alvaro Santos and David M Trubek (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006).
[8] Martin Prowse, 'A History of Tobacco Production and Marketing in Malawi, 1890–2010' (2013) 7 Journal of Eastern African Studies 691.

The most intrusive patterns of legal thought and practice manifested themselves firstly during the era of European colonisation, which is 1891-1961.[9] This era saw the attempted introduction of agricultural markets as part of a capitalist economy. The colonial state from early colonial times (1890-1940) took an interest in formalising the repeated interactions of smallholder farmers with markets through marketing boards.[10] In the late colonial period (after the second world war) the state directed into the wider economy the surplus that it made through the marketing board through buying from small-scale farmers and reselling on international markets directly or indirectly. From the early postcolonial period 1961-1980 the colonial linkages between smallholder farmers and the economy intensified by deliberate state (inter)actions.[11] The imbrications between the state and smallholder farmers in agriculture became more apparent with land topping the list.[12]

The second period is heralded by independence and the postcolonial state in 1961 to 1980. Some analyses of law and political economy in Malawi and perhaps Africa for this period is undergirded by the assumption of 'political model' depicting the state as a Hobbesian 'Leviathan'.[13] These approaches overlook the fact that the African state is not Westphalian but rather a colonial imposition primarily for purposes of law and order.[14] One feature of the postcolonial state is the 'disjunction between the officially established unity of the legal system' with one distinctive feature being 'sociological plurality' of regimes.[15] How the state actually works in places like Malawi has an impact on legal thinking and practice.

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[9] John McCracken, *A History of Malawi, 1859-1966* (James Currey 2012).
[10] Clement Ng'ong'ola, 'Malawi's Agricultural Economy and the Evolution of Legislation on the Production and Marketing of Peasant Economic Crops' (1986) 12 Journal of Southern African Studies 240.
[11] Bryson Nkhoma, 'Walking in the Footprints of the Colonial Masters: Agricultural Development and Peasant Food Production In Malawi, 1961-1994' (2019) 44 Southern Journal for Contemporary History 114.
[12] Clement Ng'ong'ola, 'Colonial Law and the Inception of a Dual Land System in Nyasaland' [1985] Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America 283; JAK Kandaŵire, 'Thangata In Pre-Colonial Ond Colonial Systems of Land Tenure in Southern Malaŵi With Special Reference to Chingale' (1977) 47 Africa 185; David McMaster, 'Review: Thangata: Forced Labour or Reciprocal Assistance? By JA Kamchitete Kandaŵire. Zomba: Research and Publications Committee, University of Malaŵi1979. vi, 161 p., Plates, Maps, Bibl., Index.' (1981) 51 Africa 798.
[13] Guy Mhone, 'The Political Economy of Malawi: An Overview' in Guy Mhone (ed), *Malawi at the Crossroads: The Post-Colonial Political Economy* (SAPES Books 1992) 4–6.
[14] Shankar N Acharya, 'Perspectives and Problems of Development in Sub-Saharan Africa' (1981) 9 World Development 109.
[15] de Sousa Santos (n 2) 40.

The critical period for current Malawi's agricultural markets is 1961 to 1980. Once delinked from Britain ('the metropole') through formal independence, the Malawian postcolonial state has shown itself to be what Darian Smith calls 'an entangled hybrid' or as Santos terms it, 'heterogenous', with implications for ESL that are important for agricultural markets as this thesis demonstrates.[16] Mainstream economic thought, led by the World Bank, sees this hybridity through a lens which deems the neoliberal Westphalian nationalist state as the ideal state model. Thus, this hybridity is characterised as 'poor governance' and institutional weakness.[17] ESL can make some contributions grounded primarily in how most African states have challenges in dominating their respective societies with their 'own legal structure, legal consciousness and legal outlook' and can suggest ways of living with the challenges due the hybrid or heterogenous nature of the state.[18] The heterogenous or hybrid nature leads to 'sociologic plurality' which can overwhelm even formal regimes.[19]

The succeeding period from 1981 is characterised by what may be termed as 'shared sovereignty'.[20] For various reasons in the 1980s, Malawi like most commodity exporting countries, faced an economic crisis that compelled it to seek the assistance of Bretton Woods institutions, the World Bank and IMF.[21] The state was required to effect economy wide reforms known as 'structural adjustment' conceived by the World Bank and the IMF seeking to promote smallholder farmers commercialisation through de-socialised markets with price as the only regulatory mechanism for all aspects of agricultural markets.[22] The major drawback of the legal thinking and practice since the 1980s is the 'little [to no] attempt to move beyond that nation and interrogate how' and why legal thinking and practice driven by external actors can lead to negative consequences for some actors such as exclusion of the most smallholder

[16] Eve Darian-Smith, 'Postcolonial Theories of Law' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (2nd edn, Hart Publishing 2013).
[17] World Bank, *Governance and Development* (The World Bank 1992) 9.
[18] Cotterrell (n 5) 75.
[19] de Sousa Santos (n 2) 40.
[20] ibid 51.
[21] Thandika Mkandawire, 'Economic Crisis in Malawi' in Jerker Carlsson (ed) (Scandinavian Institute of African Studies 1983).
[22] World Bank, *World Development Report 2008: Agriculture for Development* (The World Bank 2007); A Haroon Akram-Lodhi, '(Re) Imagining Agrarian Relations? The World Development Report 2008: Agriculture for Development' (2008) 39 Development and Change 1145.

farmers from agricultural markets.[23] After the less than satisfactory results of World Bank inspired reforms, several other international actors have inundated that policy space in Malawi with the assumption that agricultural research could lead to better outcomes.[24]

It is argued that this was possible due to the nature of the postcolonial state. The most prominent international actor sharing sovereignty and impacting on social life with its rationality is the World Bank. It has since remained in that position, attempting to introduce regimes and change rationalities with the support of various 'foreign agents.'[25]

Almost all interactions of the international actors seem in some way related to the views of the World Bank on and about agricultural markets in Malawi. This thesis argues that the World Bank and other international actors bring specific rationalities in their policy advice which is sometimes incompatible with local expectations among smallholder farmers. The World Bank usually publishes on the Malawian economy regularly through publications such as the *Malawi Economic Monitor*: a bi-annual evaluation of Malawi's economic policies that comes with policy 'advice.' Sometimes, the World Bank issues more detailed analysis and policy advice on the Malawian economy in the form of *Country Economic Memorandums, Country Partnership Frameworks* or *Systematic Country Diagnostics*.[26]Country Economic Memorandum and Country Partnership Frameworks are published every five years and is 'a key growth diagnostic prepared by the World Bank to analyze drivers of growth in the long term' for countries especially developing countries while Systematic Country Diagnostics tend to provide more detailed advice on drivers of growth.

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[23] Gift Wasambo Kayira, *The State and the Legacies of British Colonial Development in Malawi: Confronting Poverty 1939-1983* (Lexington Books 2023) 13.
[24] Arega D Alene, 'Productivity Growth and the Effects of R&D in African Agriculture' (2010) 41 Agricultural Economics 223.
[25] de Sousa Santos (n 2) 51.
[26] Richard Record, Praveen Kumar and Priscilla Kandoole, *From Falling Behind To Catching Up: A Country Economic Memorandum for Malawi* (The World Bank 2017); World Bank Group, *Malawi Systematic Country Diagnostic* (World Bank 2018) <https://elibrary.worldbank.org/doi/abs/10.1596/31131> accessed 30 July 2020; World Bank, 'Country Partnership Framework for Malawi For the Period 2021-2025' (World Bank 2021) 154505-MW.

Malawi seems to be required to 'download' this legal thinking from the World Bank's policy advice: advice which is based on mainstream economics, and also usually claims to be based on robust analytical frameworks and methods -- while conveniently omitting to state that this may not be the only perspective on drivers of growth in the long term The World Bank has recently been joined by many other research institutions on hand to proffer advice on agricultural markets in Malawi resulting in entrenching economic approaches as the dominant approaches. The ideas reflect a law and economics approach as if attempts are being made that the Malawian economy should be governed economic orthodoxies developed by the Bretton Woods institutions. The disagreements between the World Bank, scholars based at Western universities such as the Michigan State University, research centres such as the International Food Policy Research Institute on the one hand and the Malawi government on the other has been whether the market should be 'the dominant principle of organisation' on all aspects of the participation of smallholder farmers in agricultural markets.[27] The disagreements in legal thinking are sometimes openly manifested in issues such as the best way for Malawi to achieve food security.[28]

The World Bank has several supporters in its legal thinking. These include the United States Aid for International Development Agency ('USAID') that has been in Malawi for some time, the Alliance for Green Revolution ('AGRA'), the International Food Policy Research Institute ('IFPRI') headquartered in Washington DC, the Institute of Development Studies ('IDS') based at the University of Sussex and the Michigan State University's Food Security Group, which is behind a recently established organisation called the MwAPATA Institute.[29] A

[27] Sabine Frerichs, 'Re-Embedding Neo-Liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law' in Christian Joerges and Josef Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets.* (Hart Publishing 2011) 77.

[28] Department of Disaster Preparedness, 'National Resilience Strategy (2018 – 2030) Breaking the Cycle of Food Insecurity in Malawi' (Malawi Government); Todd Benson, *Disentangling Food Security from Subsistence Agriculture in Malawi* (Intl Food Policy Res Inst 2021).

[29] The USAID is an independent agency of the U.S. federal government that is primarily responsible for administering civilian foreign aid and development assistance; AGRA claims to be a farmer-centered, African-led, and partnerships-driven institution that is transforming Africa's smallholder farming from a solitary struggle to survive to businesses that thrive; IFPRI is an international agricultural research center founded in

common feature of the various institutions working to 'advise'[30] the Malawi government is that the framing of the research is decidedly monodisciplinary starting from the Eurocentric assumptions of mainstream economics on framing their research for agricultural markets advice to the Malawi government.[31] Underneath this advice is the belief 'in equating westernization with progress 'including the idea that Western society 'as distinguished from earlier agrarian societies and as unique within the contemporary world order.'[32]

5.2 Rationalities

As discussed in Chapter 4 rationalities include 'abstract, epistemic categories located in the 'deep' structure/culture of society that organize our perceptions and evaluations of reality' including 'objectified concepts and dichotomies.'[33]As was discussed rationalities include patter of interactions including practical rationality, substantive rationality, theoretical rationality, and formal rationality. Practical rationality examines the given circumstances of everyday life and works out 'the most expedient means of dealing with the difficulties they present' while theoretical rationality involves increasing 'mastery of reality through increasingly precise abstract concepts.'[34] Practical rationality found expression in different ways such as the approaches that the colonial government (1891-1960) had to settle for after the failure of settler plantations to kickstart capitalist agriculture in Malawi.[35] Similarly approaches adopted by the postcolonial state (1961-1980) reflected some aspects of practical rationality as discussed below. Theoretical rationality is displayed by the framing of agricultural markets in purely economic terms. Formal rationality has characterised the

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1975 to improve the understanding of national agricultural and food policies to promote the adoption of innovations in agricultural technology; IDS claims to help to improve the understanding of complex issues and support the creation and implementation of new approaches that can tackle long-standing injustices.

[30] Despite the good intentions of these institutions, their framing of agricultural market problems perpetrates the mono-perspective (economic orthodoxy) view towards the development challenges of Malawi to the exclusion of advice that can be provided by other perspectives.

[31] 'Malawi Strategy Support Program | IFPRI : International Food Policy Research Institute' <https://www.ifpri.org/program/malawi-strategy-support-program> accessed 20 February 2023; MwAPATA (*MwAPATA Institute*) <https://www.mwapata.mw/about> accessed 25 May 2023; Institute of Development Studies, 'The Agricultural Policy Research in Africa Brochure: Malawi'.

[32] Gurminder Bhambra, *Rethinking Modernity: Postcolonialism and the Sociological Imagination* (Springer 2007) 1–2.

[33] Sabine Frerichs, 'The Legal Constitution of Market Society: Probing the Economic Sociology of Law' (2009) 10 Economic Sociology_the European Electronic Newsletter 20.

[34] Stephen Kalberg, 'Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History' (1980) 85 American Journal of Sociology 1145, 1152.

[35] Leroy Vail, 'Peasants, Migrants and Plantations: A Study of the Growth Of Malawi's Economy' (1984) 11 Journal of Social Science (Malawi) 1.

agricultural markets approaches advanced by the World Bank since 1981. And formal rationality is rule-based involving 'means-end rational calculation by reference back to universally applied rules, laws and regulations.'[36] As discussed in Chapter 4 substantive rationality may have aspects of 'means-end' solutions to problems but is also informed by ''past, present and potential' values.[37] The assumed values may be a 'cluster of values that vary in comprehensiveness, internal consistency, and content.'[38] This thesis proposes adopting a practical rationality that includes 'Ubuntu' as the overarching directing principle for market governance for smallholder farmers as discussed in chapter 4.

To capture reality, one must understand the rationalities that have directed or been the basis of both regimes emerging from smallholder farmers, interactions and those underlying state sponsored or supported regimes.[39] This thesis views underlying rationalities in regimes as one way in which actors seek to alter regimes, ultimately engineering social life.[40] Agricultural regimes may exclude smallholder farmers through the rationalities they advance. Changing rationalities underlying regimes affects trust. It has been argued that information especially in matters of 'edu-regulation' (measures to improve understanding of capitalist markets) discussed in chapter 4 'must come from a credible source' if it is to increase trustworthiness.[41] There are 'huge costs' associated with lost credibility including non-participation.[42] Mundane aspects of wider social life taken for granted can have an impact on how smallholder farmers decide on whether to participate or not in agricultural markets. This requires a much broader (wider social life) understanding of their perspective because certain econo-legal (inter)actions especially 'where benefits are usually reaped in the future' are (inter)actions that are not available to them.[43]

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[36] Kalberg (n 35) 1158.
[37] ibid 1155.
[38] ibid.
[39] Amanda Perry-Kessaris, 'Anemos-Ity, Apatheia, Enthousiasmos: An Economic Sociology of Law and Wind Farm Development in Cyprus' in Diamond Ashiagbor, Prabha Kotiswaran and Amanda Perry-Kessaris (eds), *Towards an Economic Sociology of Law* (John Wiley & Sons 2013).
[40] Graham Harrison, *Neoliberal Africa: The Impact of Global Social Engineering* (Zed Books Ltd 2013).
[41] Abhijit V Banerjee, Abhijit Banerjee and Esther Duflo, *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (Penguin 2012) 268.
[42] ibid.
[43] ibid 269.

Smallholder farmers' (inter)actions have tended to be guided since colonial times by the need to achieve food security.[44] Maize is the main food crop. There is a saying in Malawi that translates as 'maize is life'.[45] Small-scale farmers seem unwilling to completely rely on the market for their food requirements as suggested by economic approaches. In colonial times and the early postcolonial period up to 1980, this regime was left to regulate itself except for prices in the sales regime.[46] The government always set the minimum price for which maize could be bought.

The World Bank and its supporters advised on establishing or supporting agricultural market regimes 'which privilege economic values and interests, usually claiming this to be for the good of all types of social action, including other instrumental action, and also affective, belief-based and traditional actions.'[47]One such recurrent issue related to the approach to food security. The World Bank and other international research and policy centres have 'advised' that food security is best addressed through market centric approaches.[48] The Government believes it ought to assume responsibility for ensuring food security rather than trusting the market to address the food security.[49] It feels justified especially when markets have failed to address food security in times of climate-induced food shortages.[50] As it will be demonstrated in Chapter 9, the contested approaches how a conflict between rationalities. The World Bank and its supporters seem to suggest that the public actors in Malawi should 'think of *society as*

[44] Bryson Nkhoma, 'African Agricultural Production, Food Trade, and the State in Southern Malawi, 1859-1940.' (2022) 55 International Journal of African Historical Studies; Ben Kaluwa and Wycliffe Chilowa, 'Malawi: Food Marketing Liberalisation and Household Food Security: Preliminary Results from Baseline Surveys' in Mandivamba Rukuni and JB Mycoff (eds), *Market Reforms, Research Policies And SADCC Food Security* (UZ/MSU Food Security Research in Southern Africa Project, Department of … 1991); Benson Kandoole, Ben Kaluwa and Steven Buccola, 'Market Liberalization and Food Security in Malawi' in Mandivamba Rukuni and Richard H Bernstein (eds), *Proceedings of the Third Annual Conference in Food Policy Research in Souther Africa* (University of Zimbabwe/University of Michigan Food Security Project 1988).
[45] Stuart Kent and John Magrath, *Making Maize Markets Work for All in Southern Africa* (Oxfam 2016).
[46] Jane Harrigan, 'Malawi: The Impact of Pricing Policy on Smallholder Agriculture, 1971-88' (1988) 6 Development Policy Review 415.
[47] Amanda Perry-Kessaris, 'Reading the Story of Law and Embeddesness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law' (2011) 62 N. Ir. Legal Q. 401, 405.
[48] Benson (n 29).
[49] Department of Disaster Preparedness (n 29).
[50] William Attwell, '"When We Have Nothing We All Eat Grass": Debt, Donor Dependence and the Food Crisis in Malawi, 2001 to 2003' (2013) 31 Journal of Contemporary African Studies 564; Frank Ellis and Elizabeth Manda, 'Seasonal Food Crises and Policy Responses: A Narrative Account of Three Food Security Crises in Malawi' (2012) 40 World Development 1407.

economy' or adopt an approach that sees the '*economy before society*' and 'takes economy for society' [emphasis supplied].[51] Public actors in the Malawi government tend to see the economic regimes as part of 'the social system, and whatever principle of behavior [that] predominate[s] in the economy' agricultural markets should be 'compatible with' society.[52]

Food security has been defined by the Malawi Government as achieved when individuals 'have physical, social, and economic access to sufficient, safe, and nutritious food (and water) to meet their dietary needs and food preferences for an active and healthy life' and it has 'pillars of food security [which] include availability, access, utilization, and stability.'[53] The approach does not see a major role for market-based approaches to achieving food security.

To illustrate an instance of contested rationalities in food security, the Malawi government set up an agency to act as a strategic grain reserves agency in 1999, the National Food Reserves Agency, to take over the food security functions of the state agricultural marketing board, ADMARC.[54] In around the year 2000, the World Bank or IMF apparently advised the Malawi government that it didn't have to store so much grain as it could always procure the same from markets in case of need. The results of the famine were so devastating among smallholder farmers that the actual nature of the advice provided remains uncertain. Due to weather patterns and other factors in Malawi, there was a food shortage in 2002 which led the Malawi government to becoming completely helpless as the market was unable to meet demand.[55]

International institutions such as USAID, in a contemporaneous report, managed to direct the blame for the fiasco back to the Malawi government, by suggesting that the government was encouraging economically irrational (inter)actions in agricultural markets by supporting

[51] Perry-Kessaris, 'Reading the Story of Law and Embeddesness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law' (n 48) 405.
[52] Karl Polanyi, *The Great Transformation* (Beacon Press 2001) 71.
[53] Malawi Government, 'Agriculture Sector Food and Nutrition Strategy (2020-2024)' xii.
[54] 'National Food Reserve Agency' <https://www.nframw.com/about> accessed 13 August 2020.
[55] Kwesi Owusu and Francis Ng'ambi, 'Structural Damage: The Causes and Consequences of Malawi's Food Crisis' (World Development Movement 2002); L Rubey, 'Malawi's Food Crisis: Causes and Solutions' <https://agris.fao.org/agris-search/search.do?recordID=GB2013203818> accessed 13 August 2020.

subsistence farming and failing to remove any state involvement, direct or indirect, in agricultural markets.[56] The USAID report also noted the reluctance of the Malawi government 'to continue the privatization process until there is evidence that the private sector has the capacity to respond, while the private sector is unwilling to respond as long as parastatal actions create an uncertain environment for investment.'[57] On the other hand a report from the World Development Movement suggested that 'there is another cause' for the food crisis 'which has been even more significant – inappropriate policies of donor agencies, led by the International Monetary Fund (IMF)' including 'the IMF's dogmatic opposition to Government support for parastatals to ensure food security.'[58] The conflicting approaches continue to define the Malawi government's approach to agricultural markets and the advice of those aligned with the World Bank towards agricultural markets.[59]

5.3 Regimes in agricultural markets

As discussed in Chapter 4 regimes include the totality of interrelations in a given society and those put in place by the state action. Social regimes are complex institutional constellations that connect– and thus integrate – different spheres of action'.[60] Regimes may also be set up by public actors in Malawi as has been the case from colonial times.[61] Regimes have also been public-private since 'the 1980s and 1990s, [when] powerful states, international organizations, and agribusiness corporations used these international institutions to reconfigure' agricultural markets in countries like Malawi.[62] Since the 2000s there have also been regimes privately regulating 'through new voluntary or contractual codes of conduct, third-party certification schemes, and other forms of non-state private standards.'[63] The latter have been central to establishing formal markets and a specific case study of the Agricultural Commodity Exchange ('ACE') will be discussed in chapter 9. The case will illustrate how regimes can become inclusive.

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[56] Rubey (n 56).
[57] ibid 3.
[58] Owusu and Ng'ambi (n 56).
[59] Department of Disaster Preparedness (n 29); Benson (n 29).
[60] Sabine Frerichs, 'The Legal Constitution of Market Society: Probing the Economic Sociology of Law' (2009) 10 Economic Sociology_the European Electronic Newsletter 20.
[61] Ng'ong'ola (n 11).
[62] MC Canfield, Amy J Cohen and Michael Fakhri, 'Agriculture, Law, and the State' in M Valverde and others (eds), *Routledge Handbook of Law and Society* (Routledge 2021) 70.
[63] ibid 71.

Agricultural markets could be explained from an economic point of view as a response to the challenges that come about as societies are less reliant on subsistence farming as a major way to support livelihoods and there is an increase in reliance on agricultural markets to provide various needs that are not produced by oneself.

An ideal situation would be where annually;

> exactly one fifty-second part of the yearly crop were produced each week, marketed each week, and consumed each week, and the quantity and quality were always the same, and the demand remained constant, and the price remained the same, and if each buyer paid cash.[64]

Real life is confounded with challenges associated with production, sales and consumption of crops resulting from 'the supply of the crop [which] fluctuates widely from year to year'; 'quality changes likewise', which may make farm produce sometimes 'wholly unmerchantable', that is cannot be sold.[65] Further means of sustaining livelihoods always attract the attention of states attempting to find ways of regulating the challenges to serve various political objectives. Scholars seek to understand these challenges in relation to other markets such as markets for products not related to agriculture. The approaches taken by the farmers, the state or scholars to agricultural markets have both 'positive and normative dimensions' with the result that empirical studies have concluded that commodity markets 'are complex, characterized by many alternative and competing channels.'[66] ESL can be integrated with economic approaches to unravel this complexity.

An ESL perspective suggests that analytically and empirically agricultural markets should be seen as part of wider social life and not merely at the process of exchange of commodities and cash. It is a process from production to the ultimate consumers, who include the farmers themselves, in which various actions, interactions and regimes are in place. This results in a complex interplay and interconnected regimes making up the market. These market regimes

[64] James E Boyle, 'Marketing of Agricultural Products' (1921) 11 The American Economic Review 207, 207–208.
[65] ibid 208.
[66] Frerichs (n 28) 74; TS Jayne, Julius Mangisoni and Nicholas Sitko, 'Social Analysis of Malawi's Maize Marketing Reforms' (World Bank/Michigan State University 2008) 38.

are within broader social relations.[67] Where these social relations are stable, they may sometimes 'become resources in market participants capacity to act.'[68] Stable interactions lead to actors developing 'expectations about appropriate behaviour and scripts for the performance of roles.'[69]

It has been suggested that there are a several regimes involved in marketing agricultural commodities, namely, production, transportation, storage, credit and 'merchandising' or cash sales - and the management of risks in each of these functions.[70] Agricultural marketing regimes can be 'generated primarily from the bottom up' such as the ways in which smallholder farmers interact with buyers of their commodities.[71] Regimes may also be 'generated primarily from existing regimes, as in the case of state legal institutions' such as state policies and other actions by public actors.[72] (Inter)actions by different actors such as smallholder farmers or the state in regimes may be influenced by and influence economic and non-economic communal networks of varying quality and depth, with actors motivated by different sometimes conflicting interests and values, with different expectations and perceptions.[73] The state or public actors are key in this process.

The ESL approach in this thesis supports the view that 'the state and the economy are not analytically autonomous realms but are mutually constituting.'[74] Mainstream economic approaches have assumed that 'the state and the economy are separate analytic spheres' as such 'only a self-regulating autonomous market can produce optimal results' because 'the laws of the market are no different from the biological self-regulatory organisms of nature' an approach that has been termed 'social naturalism', central to law and economics thinking

[67] Mitchel Y Abolafia, 'Markets as Cultures: An Ethnographic Approach' in Michel Callon (ed), *Laws of the Market* (Blackwell Publishers 1998).
[68] ibid.
[69] ibid 70.
[70] Boyle (n 65) 208.
[71] Amanda Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (2015) 11 Annual Review of Law and Social Science 57, 61.
[72] ibid.
[73] Roger Cotterrell, 'Rethinking "Embeddedness": Law, Economy, Community' in Diamond Ashiagbor, Prabha Kotiswaran and Amanda Perry-Kessaris (eds), *Towards an Economic Sociology of Law* (Wiley-Blackwell 2013).
[74] Fred Block and Peter Evans, 'State and Economy' in Neil J Smelser and Richard Swedberg (eds), *The Handbook of Economic Sociology* (Princeton university press 2005).

about markets.[75] The self-regulating market has been described as is 'an ideology founded on three assumptions—that power resides exclusively in the state, that political power is a chronic threat to freedom and commerce, and that the economic sphere does not entail the exercise of power.'[76] Social naturalism does not view nature and society '[as] exhibit[ing] the same kinds of regularities' but 'insists that society is governed by those natural laws rather than by institutional rules and social rationalities' such that the social and natural worlds are one and the same and are subject to the same laws and exigencies.'[77] Through the process of de-socialising and erasure as discussed in chapter 2 and equating the market with the economy, law and economics concludes that the self-regulating market is inevitable and should be 'regulated by its own natural laws… without a meddlesome government.'[78]

These empirical chapters demonstrate that 'the state and the economy should be seen as mutually constituting sphere of activity – neither of which can function without the other.'[79] Towards the late 1990s through experience with reforms the World Bank ultimately recognised this position.[80]

The state in Malawi from colonial times established and supported state agricultural marketing boards as the primary means of governing the regime marketing of smallholder farmers markets, focusing on production and sales.[81] An ESL approach will also offer insights on a long-standing trend since the 1980s to describe problems relating to governance and agricultural markets as 'neopatrimonialism' or rent seeking behaviour by those in control of the state machinery. This thesis joins scholars who suggest that the expression neopatrimonialism 'is too blunt and too formulaic an instrument for understanding the great variety of African experiences and the contradictory interests, ideologies, and motivations of

[75] Fred Block and Margaret R Somers, *The Power of Market Fundamentalism: Karl Polanyi's Critique* (Harvard University Press 2014) 6.
[76] ibid 101.
[77] ibid.
[78] ibid 103.
[79] Block and Evans (n 75).
[80] World Bank, *World Development Report 1997: The State in a Changing World* (The World Bank 1997).
[81] Vail (n 36).

social actors.'[82] It has been argued that using neopatrimonialism to look at African states like Malawi 'has had the effect of flattening the African political and economic landscape- often rendering monochromatic the many colorful and varied characters who have taken the African political stage [for more than] half century' while simultaneously failing to unpack internal variations including 'the machinations of the many external actors who seek to exploit Africa in some form or other' with their ways of legal thinking and practice.[83] This thesis claims that scholarship on neopatrimonialism and the African state is inadequate and could consider the impact of hybridity of the postcolonial state a supplementary perspective.[84]

One of the key areas in Malawi of relevance to the mutually constitutive nature of the state and the economy is the inclusion of smallholder farmers in markets especially those markets directly or indirectly generated and sustained by public actors. In Malawi as the empirical chapters show 'the conditions for market[s] to emerge on [their] own are simply not there' as assumed by mainstream economics, which calls for the public or private actors to either 'support the market to provide necessary conditions or failing that' take direct steps to establish agricultural markets regimes in production, storage, and sales.[85]

The actions by different actors facilitate, regulate, and constitute regimes in agricultural markets in different ways; sometimes promoting/obstructing/excluding smallholder farmers from markets. Law and resources provided by the state marketing board in the postcolonial period shaped the experiences and understandings of smallholder farmers which is why similar approaches may increase the regularity of the small-scale farmers' interactions with markets.[86] The state through marketing boards played a key role in the ongoing process of constituting the smallholder farmer as a legal participant with specific roles in agricultural market regimes. The sudden steps by the World Bank to reduce the role of the state by reducing the activities of the state marketing board appears to have been retrogressive and

[82] Thandika Mkandawire, 'Neopatrimonialism and the Political Economy of Economic Performance in Africa: Critical Reflections' (2015) 67 World Politics 563, 602.
[83] ibid.
[84] Darian-Smith (n 17) 255.
[85] Banerjee, Banerjee and Duflo (n 42) 270.
[86] Paul Clearly and Kristian Moller, 'Structured Trade for Better Livelihoods ACE Trust Strategic Plan 2021-2026'.

the same can be said of the ongoing advice by international researchers, writing from an orthodox economic perspective and arguing for a limited role for public institutions[87]

Empirical studies around the 1980s noted the predominance of socially organised markets as opposed to purely instrumental exchanges based on the market principle and urged the development of an appropriate academic approach in countries like Malawi.[88] One form of such markets is the 'home market'; this is where 'customers may approach producers at their homes to purchase the goods that they require; or producers may search for customers in their homes'; then there is the 'ceremonial market' which takes place 'where people have gathered' for a cultural or other event; and the 'institutionalised market', 'whether single produce or multi produce', seasonal, that is for a limited time during the calendar year or 'operating throughout the year.'[89]

Empirical studies published in 2004 noted that in 'a typical Western country, grain is purchased from [large-scale] farmers by a large corporation (e.g., Cargill), processed in the corporation facilities, purchased by supermarkets and agro-businesses, and sold to consumers.'[90] On the other hand, 'in Africa, grain to be sold to retailers, and finally to micro-retailers, is first purchased from a myriad of small farmers by collecting agents, assembled for shipment by a rural wholesaler, and purchased by an urban wholesaler or processor.'[91] Despite these empirical findings, economists 'instead of trying to comprehend the complex imbrication of different cultural and economic phenomena on their own terms, they attempt to fit them' within the standard mainstream approaches.[92]

Mainstream economics see such markets as a characteristic relic of the past, an aspect of traditional society, outside modernity despite the persistence of evidence to the contrary.[93] It is a form of economic hybridity that a sociological lens can cast insights on. Smallholder

[87] T Benson and B Edelman, 'Policies for Accelerating Growth in Agriculture and Agribusiness in Malawi' [2016] Malawi Country Economic Memorandum background paper, World Bank.
[88] Chinyamata Chipeta, *Indigenous Economics: A Cultural Approach* (Exposition Press 1981).
[89] ibid 122–123.
[90] Marcel Fafchamps, *Market Institutions in Sub-Saharan Africa: Theory and Evidence* (MIT press 2004) 9.
[91] ibid 10.
[92] Eiman O Zein-Elabdin, 'Economics, Postcolonial Theory and the Problem of Culture: Institutional Analysis and Hybridity' (2009) 33 Cambridge Journal of Economics 1153, 1163.
[93] Jane I Guyer and Karen Tranberg Hansen, 'Markets in Africa in a New Era' (2001) 71 Africa 197.

farmers tend to act in ways that from the perspective of mainstream economics may seem irrational, although explicable from the perspective of ESL.[94] This does not seem to be a random occurrence but -a regular pattern of market (inter)actions where self-interest is not the predominant motive. In some cases, these instrumental interactions are constrained by traditional communal networks; which the smallholder farmers regard as equally important in their lives. This has implications for markets that are subject to more regulation of the various aspects such as production and sales of commodities.

Formality of agricultural markets or formal agricultural marketing is taken as within the reach of the state or its institutions or other private institutions in the governance of some or all of the regimes of the markets.[95] The involvement of the stat exists on a 'continuum between relatively high and relatively low level of the reach of official governance mechanism.'[96] The restriction to 'official governance' can lead to the partial view that only states or governments regulate markets.[97] In the search for markets after 2000, the National Association For Smallholder Farmers in Malawi sought to establish a formal market called ACE, following the prompting of international organisations such as the World Bank and USAID.[98] Commodity exchanges such as ACE represent an attempt to create a formalised approach to agricultural market regime and arguably a lucrative way to sell commodities, although often out of reach of smallholder farmers.[99] Trust is one of the challenges for smallholder farmer participation for which ESL may suggest ways of attaining it.[100] The nature of trust for commodity exchanges may be termed impersonal trust which is different from interpersonal trust but ultimately based on the latter.[101]

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[94] Sidney Madsen, 'Farm-Level Pathways To Food Security: Beyond Missing Markets and Irrational Peasants' (2022) 39 Agriculture and Human Values 135.
[95] Basudeb Guha-Khasnobis, Ravi Kanbur and Elinor Ostrom, 'Beyond Formality and Informality' in Basudeb Guha-Khasnobis, Ravi Kanbur and Elinor Ostrom (eds), *Linking the Formal and Informal Economy: Concepts and Policies* (Oxford University Oxford, UK 2006).
[96] ibid 7.
[97] Canfield, Cohen and Fakhri (n 63) 75.
[98] Ian Goggin, 'An Agricultural Commodity Exchange for Malawi?' (National Association of Smallholder Farmers in Malawi 2004).
[99] Paul Thangata, Innocent Kwagala and Malcolm Blackie, 'Warehouse Receipts System in Malawi: Baseline Study' (Malawi Ministry of Trade and Industry; The International Finance Corporation 2017).
[100] ibid.
[101] Niklas Luhmann, *Trust and Power* (Christian Morgner and Michael King trs, Polity Press 2017).

On this account, Malawi has had formal smallholder agricultural market regimes to different degrees for the most part of its history. The most visible form in colonial and postcolonial times has been regulation of the production of crops and pricing. Tobacco has been the mainstay of agricultural markets in colonial and post-colonial Malawi. It was subject to sustained regulation by the state on production and marketing.[102] From the 1940s, tobacco made major contributions to the state's economic wellbeing. The marketing patterns relating to tobacco were regulated by both formal law and actions of the state or its agencies. Regulation of markets was severely impaired by World Bank-inspired agricultural market reforms from the 1980s. Maize has assumed importance since the 2000s because it is the main source of food.[103] However, its marketing has been a source of disagreements between the Malawi government, on the one hand, and international development institutions such as the World Bank, on the other.[104] The latter supported by international research organisations such as IFPRI has pushed for a self-regulating market while the Malawi government has indicated that it has responsibility in ensuring that there is enough food through direct regulation of production and sales regimes in maize markets.[105] Research institutions such as the International Food Policy Research Institute ('IFPRI') have continued the mainstream economics argument that government regulation distorts markets.[106] The World Bank in its Country Partnership Framework (2021-2025) supports this view.[107]

ACE started as a commodity exchange as one would find in the USA or elsewhere in the West.[108] Commodity exchanges are an arrangement involving 'an open and organized marketplace where commodities are traded'.[109] A marketplace should not only be thought of

[102] Prowse (n 9).
[103] Ephraim Wadonda Chirwa, 'Fostering Private Food Marketing and Food Policies Aater Liberalization: The Case of Malawi' in Pekka Seppälä (ed), *Liberalized and Neglected? Food Marketing Policies in Eastern Africa.* (United Nations University, World Institute for Development Economic Research (UNU-WIDER) 1998).
[104] Milton Kutengule, Antonio Nucifora and Hassan Zaman, 'MALAWI: Agricultural Development and Marketing Corporation Reform' in Aline Coudouel, Anis A Dani and Stefano Paternostro (eds), *Poverty and Social Impact Analysis of Reforms* (World Bank 2006).
[105] Department of Disaster Preparedness (n 29).
[106] Brent Edelman and others, 'Have Market Policies Turned Malawi's Large-Scale Farmers into Subsistence Maize Producers?' (International Food Policy Research Institute (IFPRI) 2016).
[107] World Bank (n 27); Benson and Edelman (n 88).
[108] Robert Gibson-Jarvie, 'The London Metal Exchange' [1989] A Commodity Market. Cambridge, Woodhead-faulkn; Julius B Baer and Olin Glenn Saxon, *Commodity Exchanges and Futures Trading: Principles and Operating Methods* (Harper and Brothers, New York 1949).
[109] CTA and EAGC, *Structured Grain Trading Systems in Africa* (Technical Centre for Agricultural and Rural Cooperation/East African Grain Council 2013) 78.

as a physical location but also virtually. In this marketplace buying and selling 'is done in an organized way through a system of bids (to buy) and offers (to sell), governed by a set of rules.'[110] The idea was to provide 'a venue at which buyers and sellers are brought together to conduct business, normally through a group of registered brokers' in Malawi.[111]

In a feasibility study that led to the establishment of ACE, it was recommended that a successful framework for a commodity exchange 'must include acceptance by government that it shall not interfere in any way with normal market forces' because it might 'undermine the market fundamentals making it less attractive to other participants.'[112] The approach was focusing on the process of exchange to the exclusion of other regimes of markets. This view is supported by the reports' recommendation against linking sales to any 'storage facilities … for use by those persons utilising the exchange.'[113] This seems ill founded especially in the light of serious defaults which almost led to the collapse of ACE. The position was reviewed by a separate consultancy in 2011 and regulation of storage expressly adopted by ACE.[114]

Commodity exchanges were transplanted to several African countries and early on there were indications that the transplanted idea seemed not to work as well as expected.[115] The major oversight was to overlook the market and social practices of smallholder farmers as major agricultural commodity producers. This was confirmed by a critical review of commodity exchanges was carried out in 2013 in Africa covering Zambia, Kenya, Uganda, Malawi, and Ethiopia. The review sought 'to determine whether commodity exchanges have provided a positive impact on farmer marketing channels, and assisted in upgrading marketing institutions that support the smallholder community.'[116] The report contrasted commodity exchanges in the West with commodity exchanges in Africa. In the West, commodity exchanges were 'sophisticated market systems' established by farmers, traders, and banks to

[110] Goggin (n 99).
[111] ibid.
[112] ibid 36.
[113] ibid.
[114] John Kennedy, 'Report For ACE Malawi Concerning Business Development Model and Strategy' (Agricultural Commodity Exchange for Africa (ACE) 2011).
[115] Nicholas J Sitko and TS Jayne, 'Why Are African Commodity Exchanges Languishing? A Case Study of the Zambian Agricultural Commodity Exchange' (2012) 37 Food Policy 275.
[116] Peter Robins, *Commodity Exchanges and Smallholders in Africa* (International Institute for Environment and Development 2011) 3.

support and institutionalise interactions among farmers, banks, and traders.[117] Unsurprisingly, ACE experienced levels of defaults on contracts traded through its forum because it did not engage smallholder farmers.[118] The model of commodity exchanges did not have a sufficient appreciation of social practices relating to agricultural markets in Malawi.

From 2018, to increase confidence and trust by market participants, regulation of commodity exchanges was introduced.[119] A study by another group of economists believed that regulation by the state 'may encourage' rather than discourage market interactions by various actors.[120] ACE decided to start interactions with smallholder farmers as an important group of actors for the exchange but not without attracting criticism from mainstream economists that commodity exchanges 'cannot be expected to impose order on dysfunctional markets.'[121] The view was confirming the importance of understanding the social basis of markets. One of the obstacles to the participation of smallholder farmers was the issue of trust between the smallholder farmer and ACE, especially on the part of the former. ACE developed specific support intervention on the premise that 'increased interaction with producers throughout the entire growing season would increase trust and uptake of services.'[122] However, ACE found it necessary to develop very specific approaches to including smallholder farmers by engaging in a systematic way with all the regimes of agricultural markets and their underlying rationality such as increasing advisory services from production through to marketing, although arguably there is still room for improvement.[123] After the initial steps, the strategy

[117] ibid; Robert Gibson-Jarvie, *The London Metal Exchange: A Commodity Market* (3rd edn, Prentice-Hall 1988).
[118] Kennedy (n 115); Valeria Morua Hernandez, 'The Agricultural Commodity Exchange for Africa: Mapping the Progress of Structured Trade Systems in Malawi' (Agricultural Commodity Exchange for Africa (ACE) 2012) <https://bidvolumeonly.org/media/7618/The%20ACE%20Model%20Valeria%20Morua%20-%20Revised.pdf> accessed 28 August 2020.
[119] Malawi Financial Services (Regulation of Commodity Exchanges) Directive 2018 (Government Notice 25).
[120] Bob Baulch and others, 'Commodity Exchanges and Warehouse Receipts in Malawi' (International Food Policy Research Institute (IFPRI) 2018) MaSSP Working Paper 25 22.
[121] Thomas S Jayne and others, 'Agricultural Commodity Exchanges and the Development of Grain Markets and Trade in Africa: A Review of Recent Experience' (Indaba Agricultural Policy Research Institute (IAPRI) 2014) Working Paper 88 iv.
[122] Anne-Cécile Delwaide and Luke Coulson, 'A Case Study of the Chithumba Model: A Non-Traditional Finance Mechanism to Improve Access to Farm Inputs in Malawi' (Agronomy Technology Limited 2017) 4 <https://www.meda.org/document/a-case-study-of-the-chithumba-model-a-non-traditional-finance-mechanism-to-improve-access-to-farm-inputs-in-malawi/> accessed 27 June 2023.
[123] Paul Cronjaeger, 'A Situation Analysis and Needs Assessment for the Development of an ACE Rural Vision and Strategy' (Agricultural Commodity Exchange for Africa (ACE) 2015) Briefing Paper; Paul Cronjaeger and others, 'ACE Rural Strategy 2020' (Agricultural Commodity Exchange for Africa (ACE) 2016).

has been extended by ACE for more and better interactions between smallholder farmers and ACE.[124]

The analysis has shown the importance of the awareness of historical perspectives for agricultural markets because history has a lot to offer for interdisciplinary approaches, as the following section will explore.

5.4 Explaining the chronological approach

It has been said 'probed more deeply' history can and could shine 'a light on the dark underbelly and crevices of the present.'[125] Recalling, as set out in Chapter 3, Cotterrell's advice to approach the study of law as social phenomenon systematically, Cotterrell also went ono state that law as social phenomena must be studied empirically 'through detailed examination of *variation and continuity in actual historical patterns of social coexistence*, rather than in relation to idealized or abstractly imagined social conditions' [Emphasis supplied].[126] The familiar approach to the study of legal history is to take an internalist perspective that focuses on 'legal doctrine and its processes' leaving out the external, or context.[127] Cotterrell's approach as already discussed in Chapter 3 rejects 'the familiar dichotomy [within legal philosophy] between internal and external views of law or between insider and outsider perspectives.'[128] It is an approach with respect to which some scholars of critical legal history have recently stated that legal history 'requires both internal and external approaches' if one of the aims is to understand or explain change.[129] Such an approach demonstrates 'similarities and contrasts across time rather than space' and 'reveals that other ways of thinking and other solutions are possible by showing that other ways of thinking and other solutions were adopted or considered previously.'[130] A sociolegal approach to legal history 'unsettles the familiar strategies that we use to tame the past in order to normalize the present' by studying

[124] Clearly and Moller (n 87).
[125] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020).
[126] Cotterrell (n 5) 55.
[127] Philip Handler, 'Legal History' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2017) 104.
[128] Cotterrell (n 5) 59.
[129] Russell Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge 2021) 69.
[130] Russell Sandberg, 'Why the Past Is the Future' (*SLSA Blog*) <http://slsablog.co.uk/blog/blog-posts/why-the-past-is-the-future/> accessed 17 March 2023.

both the internal and external perspectives. [131] In other words, a critical study of legal history is a sociological approach that studies both law as approached by lawyers who 'want to recover a single authoritative meaning from a past act or practice', and the approach of historians who 'look for plural, contested, or ambiguous meanings.'[132]

The aim of such an approach is to 'unsettle and critique the notion that law is autonomous, objective and predictable' and promote the study of law systematically and empirically as part of wider social life.[133] Law is not a unified feature but 'fragmented and played out in multiple jurisdictions and forums' in which 'various groups seek to carve out political and legal space for themselves which both reflects and protects' their interests.[134] Change is not 'predetermined' but is constituted by actors with different interests, motivations, and opportunities.[135]

Sociologically informed approaches to 'legal history can provide 'insight into the mechanisms and dynamics of legal change.'[136] It has been suggested that 'a historical understanding can be anarchic rather than archaic' in the sense that 'the current law is not perfect and is not necessarily the finished product.'[137] Thus legal history demonstrates that 'every legal feature and every dividing line is a human construct that has been, and therefore could be designed differently.'[138] Throughout its history Malawi has been subject to agricultural market reforms and this history is full of lessons for any prospective reforms in ~~for~~ wider social life.[139] At an international level, the rationality of the global market economy has not always been dominant. At one time in the 1960s the World Bank had been holding discussions with Tanzania on its socialist approach of economic life known as 'villagization.'[140]

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[131] Robert W Gordon, 'Foreword: The Arrival of Critical Historicism' (1996) 49 Stan. L. Rev. 1023, 1024.
[132] ibid 1025.
[133] Sandberg (n 130) 65.
[134] John McLaren, 'The Legal Historian, Masochist or Missionary-A Canadian's Reflections' (1994) 5 Legal Educ. Rev. 67, 72.
[135] Sandberg (n 130) 64.
[136] Handler (n 128).
[137] Sandberg (n 131); Sandberg (n 130) 13.
[138] Sandberg (n 130) 17.
[139] Sandberg (n 131).
[140] Cheryl Payer, 'Tanzania and the World Bank' (1983) 5 Third World Quarterly 791.

The study of legal history needs to be critical or sociolegal and should not be 'the narrow doctrinal and institutional instruction and research which' is sometimes promoted focusing on legal texts and institutions in agricultural markets in Malawi at the expense of context and actors' interests and motivations for the legal change.[141] Chapters 6-9 chronologically trace the various factors that could be responsible for the evolution of contemporary agricultural markets. The different periods are chosen based on political and/or economic shifts, sometimes within Malawi or from outside or a combination of both; a sustained feature of the historical approach is the restriction of smallholder farmers to agricultural markets of their own. Throughout, close attention is paid to actors and their (inter)actions at the local, national, and international levels.

ESL needs to see 'the extent to which the guiding ideas, beliefs and values contained within, or otherwise attributed to or associated with', smallholder farmers in agricultural markets , 'have come to be constituted in their present but still developing form.'[142] This approach allows 'the significance and implications of current events to be more adequately understood than would otherwise be the case' for the purposes of understanding and explaining the role of law in the participation of smallholder farmers in agricultural markets.[143] Ultimately the emerging fuller picture of the role of law in the inclusion of smallholder farmers in agricultural markets in Malawi can open up empirically grounded normative approaches for their inclusion through interpersonal trust.

5.4 Conclusion

The socio-legal historical approach demonstrates the evolution of different regimes and underlying rationality of agricultural markets by different actors with the state as the central actor for this evolution. The regimes and underlying rationality appear to have directly impacted inclusion of smallholder farmers. The influence of international actors on regimes and rationalities which has increased since the 1980s also seem to affect inclusion of

[141] Andrew Comstock and others, 'A Critical Review of Malawi's Special Crops Act and Agriculture (General Purposes) Act'.
[142] Lorie Charlesworth, 'On Historical Contextualisation: Some Critical Socio-Legal Reflections' (2007) 1 Crimes & Misdemeanours 1, 8.
[143] ibid 9.

smallholder farmers in agricultural markets as seen in the following chapters. For example in chapter 6 the influence is that which existed in colonies by the British colonial office; Chapter 7 it's the influence of so-called developing countries that had become independent in a context that the former colonial power still attempted to exercise influence; chapter 8 include the most direct intrusion of a market-centric rationality in agricultural regimes; and chapter 9 is the current and take a direct approach to answering the research questions. It demonstrates how the continuing economic orthodoxy affects the inclusion of smallholder farmers in agricultural market.

6 The colonial state: 1891 to 1961

The period 1891 to 1961 marks colonial rule in Malawi. It was a period that witnessed a central authority in the form of a colonial government imposed over diverse social groups with various traditional political and economic regimes.[1] The territories of Malawi under various forms of political and economic arrangements were in 1891 proclaimed to be under British protection ('the protectorate') with the names in 1891 of 'British Central Africa', then in 1907 'Nyasaland' (meaning land adjacent to the lake) until 1964 after which it became the independent state of Malawi.[2]

The idea of a state based on Western conceptions of a state was an innovation in so far as it meant bringing together under single political control various ethnic groups with sometimes different customs, including in relation to leadership. The interests of British colonial officials was achieving social order by whatever means including the invention of customary law.[3] The state for countries like Malawi has been described as 'the strongest and lasting institutional bequest of colonialism'.[4] However, placing a society within the framework of a state brought in new challenges because it was not possible to 'convert [African societies] into nations constructed in the European image' of the nation state.[5] A key part of the limits of the idea of the state related to the application of law and order, a question that was partially addressed by the British government in the 1930s through acceptance of prevailing customs and related institutions in what is known as 'indirect rule', to serve colonial interests in ways 'which continued to influence patterns of rural government up to independence.'[6] Arguably this left a lasting legacy on the question of the state and its law.[7]

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[1] Harry W Langworthy, 'Chewa or Malawi Political Organization in the Precolonial Era' in Bridglal Pachai (ed), *The Early History of Malawi* (Longman 1972).
[2] John McCracken, *A History of Malawi, 1859-1966* (James Currey 2012).
[3] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 2018).
[4] Shankar N Acharya, 'Perspectives and Problems of Development in Sub-Saharan Africa' (1981) 9 World Development 109, 116.
[5] Mahmood Mamdani, *Neither Settler Nor Native: The Making And Unmaking of Permanent Minorities* (Harvard University Press 2020) 9.
[6] McCracken, *A History of Malawi, 1859-1966* (n 2) 215.
[7] Mamdani (n 3).

An ESL insight from this chapter is the central role of the state in creating different regimes that together constitute markets, ranging from production to sales of agricultural commodities. The state had a role in the legal constitution of markets especially 'the construction of supply, through the policy of the state… together with the nature of the means of production used [and] defining conditions of access to the market' in the agricultural economy of colonial Malawi; for commodity producing countries demand has mostly been assumed.[8] Further ESL insights relate to how different interests affected the legal constitution of agricultural markets and the resulting impact of markets on the lives of smallholder farmers. What is understood, within classical social theory, to be 'modernity' was unfolding in Europe - but also was a distinctly European project with political and economic regimes.[9] Inherent in the capitalist colonial economic regime was the 'market principle' the idea of the 'determination of prices by the forces of demand and supply', such that the 'economic system [is] controlled, regulated, and directed by market prices'.[10] The chapter will also demonstrate how the colonial state was actively involved the legal constitution of the smallholder farmers as market participants. Smallholder farmers, who were largely subsistence farmers were subject to changes 'which caused two forms of economic organisation, normally separated by a gap of several centuries and making contradictory demands of their participants, to coexist or to be telescoped under the eyes of the observer'.[11] The two forms of economic organisation or regimes were the traditional regime of smallholder farmers with limited market transactions and the new colonial economic regime which made extensive demands of the smallholder farmers for market (inter)actions.[12] This may be the beginning of 'economic hybridity' depicted by the co-existence of different economic regimes in the same social space

> of three major economic allocation mechanisms: gift exchange, markets and hierarchies. Gift exchange takes place within families and among friends and neighbours. Market transactions are driven by 'self-interest', presuming some gain

[8] Pierre Bourdieu, *The Social Structures of the Economy* (Polity 2005) 16.
[9] Gurminder Bhambra, *Rethinking Modernity: Postcolonialism and the Sociological Imagination* (Springer 2007).
[10] Paul Bohannan and George Dalton (eds), *Markets in Africa: Eight Subsistence Economies in Transition* (Northwestern University Press 1962); Karl Polanyi, *The Great Transformation* (Beacon Press 1944) 71.
[11] Pierre Bourdieu, 'Making the Economic Habitus: Algerian Workers Revisited' (2000) 1 Ethnography 17, 18.
[12] Megan Vaughan, 'Food Production and Family Labour in Southern Malawi: The Shire Highlands and Upper Shire Valley in the Early Colonial Period' (1982) 23 The Journal of African History 351.

> from trade. Hierarchies, such as banks and government agencies, are complex centralised organisations that rely on command and control.[13]

Mainstream economics predicts a stagist approach to the economy within broader modernisation theory. This 'universal framework' suggests that 'gift exchange' common in premodern societies should not be found alongside 'market exchange' of modern societies; a fact which only drives a coach and horses through cherished assumptions of mainstream economics when social life is removed as the context of economic activity. It has been argued that in some non-Western contexts the ideas of modernity may be 'resisted, hybridized with local forms, transformed or what have you; they have, in short, a cultural productivity, that needs to be better understood.'[14]

The state attempted through various measures to encourage markets to be as key as possible ('the profit motive') among largely smallholder farmers by introducing and implementing regimes of taxation, labour and land as discussed in detail below. This casts doubt on one of the key assumptions in mainstream economics that human beings have a natural propensity to pursue their selfish economic interests; this period confirms the ESL position that 'the most elementary economic behaviours' such as the utility maximising agent can be said to be 'a product of quite particular historical conditions.'[15]

During this period the colonial state acted more like an appendage of the United Kingdom government and it 'did not lose its metropolitan ties.'[16] This enabled the colonial state to begin to constitute regimes of the Malawian economy within the context of 'connections with the metropole.'[17] The government of colonial Malawi put together different regimes of a functioning national economy largely based on agriculture. The first two decades of colonial rule involved interactions that resulted in 'a fundamental reshaping of the country's economy along lines that are still familiar today.'[18] African agriculture started becoming important with

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[13] Eiman O Zein-Elabdin, 'Economics, Postcolonial Theory and the Problem of Culture: Institutional Analysis and Hybridity' (2009) 33 Cambridge Journal of Economics 1153, 1163.
[14] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 1995) 51.
[15] Bourdieu, 'Making the Economic Habitus' (n 11) 18.
[16] Gift Wasambo Kayira, *The State and the Legacies of British Colonial Development in Malawi: Confronting Poverty 1939-1983* (Lexington Books 2023) 17.
[17] ibid.
[18] McCracken, *A History of Malawi, 1859-1966* (n 2) 74.

the setting of up of the protectorate's first Department of Agriculture in 1910 with the mandate of regulating African smallholder agriculture within the agricultural economy of Nyasaland.[19]

This chapter is arranged as follows. Section 6.1 introduces the actors and their interests relevant for this discussion. Section 6.2 explains the interconnectedness of the regulation of land, labour, and transport plus their combined effect on the legal construction of smallholder agricultural markets. The colonial government applied English concepts of land relations with little regard for existing customs relating to land relations.[20] The scene was set for what still features to this day as the 'land question' in Malawi.[21]

6.1 Key actors in the legal constitution of colonial agricultural economy

In the capitalist agricultural economy, the actors that were central to the role of smallholder farmers in the agricultural economy were the British government with its imperial interests, the Nyasaland colonial government, the European settlers, and Africans who were also referred to the 'natives' or 'peasants.'[22] In colonial Malawi the population of settlers, which numbered no more than 2000, 'was divided occupationally between (in order of numerical significance) farmers, those in trade and commerce, government officials and missionaries.'[23] Countries like Malawi never had anything like a distinct merchant or business class in precolonial times, although the special interests of distinct social groups started to emerge after the imposition of the colonial economy.[24] Ultimately, it was the actors with relatively

[19] Bryson Nkhoma, 'State Power and African Agency: Peasants' Food Production in Early Colonial Malawi, 1891-1920' in Kenneth R Ross and Wapulumuka O Mulwafu (eds), *Politics, Christianity and Society in Malawi: Essays in Honour of John McCracken* (Mzuni Press 2020).
[20] BS Krishnamurthy, 'Economic Policy: Land and Labour in Nyasaland, 1890-1914' in Bridglal Pachai (ed), *The Early History of Malawi* (Longman London 1972).
[21] Richard M Mkandawire, 'The Land Question and Agrarian Change in Malawi' in Guy CZ Mhone (ed), *Malawi at the Crossroads: The Post-colonial Political Economy* (SAPES Books 1992); Chikosa M Silungwe, *Law, Land Reform and Responsibilisation: A Perspective from Malawi's Land Question* (Pretoria University Law Press (PULP) 2015).
[22] Leroy Vail, 'Peasants, Migrants and Plantations: A Study of the Growth Of Malawi's Economy' (1984) 11 Journal of Social Science (Malawi) 1.
[23] Robin Palmer, 'White Farmers in Malawi: Before and after the Depression' (1985) 84 African Affairs 211, 215.
[24] Vaughan (n 12).

more influence that usually prevailed in asserting their legal perspective of the constitution of agricultural markets.[25]

From the 1870s under what has been described as 'missionary imperialism', Scottish missionaries following the footsteps of Dr David Livingstone 'had frequently requested the appointment of a British consul in the area as a means of reinforcing the anti-slave trade campaign' in the area adjacent to Lake Malawi.[26] With the 'Scramble for Africa' set in motion by European imperial powers partitioning Africa among themselves, it was not doubted 'from the mid-1880s that the Malawi region would come under European colonial rule but the questions remained as to which European power would dominate and what form occupation would take.'[27]

The British government dragged its feet because the area was seen as having 'no financial or strategic value', however 'Livingstone's legacy and the work of the missions might have influenced attitudes in humanitarian circles in Britain.'[28] Eventually British imperial interests became strong enough to send Sir Harry Hamilton Johnston as the first British colonial representative in colonial Malawi who 'founded the protectorate, brought it under effective British control and saw an end to the slave trade and to land speculation.'[29] Missionaries acted as self-appointed spokespersons of native interests.[30]

For the purposes of this chapter, the focus is on settler farmers also known as planters who 'clamoured for the promotion of their interests and were able to amount virulent attacks' and greatly influence the actions of the colonial state directly or indirectly through the colonial office in London.[31] Their plantations or estates were sources of interactions that contributed to shaping agricultural market regimes. The absence of support from the colonial government left the settler farmers at the mercy of international commodity markets such that unlike

[25] John McCracken, 'Peasants, Planters and the Colonial State: The Case of Malawi, 1905-1940' (1982) 12 Journal of Eastern African Research & Development 21; Palmer, 'White Farmers in Malawi' (n 23).
[26] McCracken, *A History of Malawi, 1859-1966* (n 2) 50.
[27] ibid.
[28] ibid.
[29] Colin Baker, 'Nyasaland's Governors: A Baker's Dozen' (2001) 54 The Society of Malawi Journal 28, 31.
[30] McCracken, *A History of Malawi, 1859-1966* (n 2).
[31] Krishnamurthy (n 20) 384; Palmer, 'White Farmers in Malawi' (n 23).

settlers in other British colonies in Africa like Zimbabwe, the various plantations in colonial Malawi resulted in 'the consolidation of a few large and relatively well capitalised company estates run by expatriate managers.'[32]

The major imperial interests in the area were expressed by the Portuguese who annexed what is now Mozambique, Malawi's southern neighbour and seemed intent on annexing colonial Malawi. The Scottish missionaries did not also want to belong to territories under John Cecil Rhodes's British South Africa Company ' on the Western side of Malawi in what is now Zambia but was called Northern Rhodesia in colonial times.[33] Without much enthusiasm for what was taken for an 'economic basket case', the British government sent Johnston to Malawi who after several battles effected 'colonial conquest' of the unwilling groups in Malawi and ensured that the colonial state 'had begun to take administrative shape.'[34]

In pursuing an agricultural capitalist economy, Johnston and subsequent governors of the Nyasaland took several actions in the belief that 'the future lay in the plantation rather than, peasant economy.'[35] This period saw heavy regulation of African usually smallholder markets while leaving settler farmers almost untouched by any form of state regulation.[36] The reason seems to have been to align smallholder farming to settler plantations as far as possible. There was a distinction between European colonial law and African customary law implying different rights, privileges, and duties.[37]

When the protectorate was imposed on colonial Malawi, 'Johnston's administration decided that Nyasaland's economic future lay with a handful of European coffee planters who were already established in [southern Malawi] and that it was necessary to strengthen their

[32] Palmer, 'White Farmers in Malawi' (n 23) 214.
[33] Elias Mandala, 'Feeding and Fleecing The Native: How the Nyasaland Transport System Distorted A New Food Market, 1890s–1920s' (2006) 32 Journal of Southern African Studies 505, 507.
[34] ibid; McCracken, *A History of Malawi, 1859-1966* (n 2) 65.
[35] Robin H Palmer, 'Johnston and Jameson: A Comparative Study in the Imposition of Colonial Rule' in Bridglal Pachai (ed), *The Early History of Malawi* (Longman 1972) 312.
[36] Clement Ng'ong'ola, 'Malawi's Agricultural Economy and the Evolution of Legislation on the Production and Marketing of Peasant Economic Crops' (1986) 12 Journal of Southern African Studies 240.
[37] Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985).

position.'[38] The emphasis on the interests of settler farmers put the colonial government in a situation where it had to adjudicate whenever 'peasant and settler agricultural interests directly clashed' with the result that in most cases the peasants' or smallholder farmers' interests were subordinated to the interests of the European settler farmers who were also known as 'planters'.[39] The colonial state used 'land alienation, taxation and regulation of African agricultural markets' to govern the agricultural practices of the smallholder farmers which tended to favour the interests of settler farmers.[40]

Smallholder farmers were largely indigenous to Malawi although there was continued migration of certain tribal groups from Mozambique well into the twentieth century.[41] In the densely populated southern Malawi, the average area of African farms was 2 acres although 'small plots of a half to one acres' were not uncommon mostly used for subsistence farming.[42] The unit of production in agricultural markets by the time of the coming into being of British Central Africa 'was household based, using human labour exclusively rather than the labour of animals, and employing a limited range of agricultural implements.'[43]

6.2 The context

The rationality of the colonial government was influenced by the view of the British government, some members of which saw their role as supporting 'capitalist-oriented or market-based economies while others were in favour in merely improving' what was seen as a traditional way of life in the colonies.[44] Those advancing the view of advancing market-oriented agricultural economy tended to prevail in the legal constitution of economic life in colonial Malawi. These actions reflected what has been observed by some ESL scholars about the practices of British colonial administrators in promotion of capitalist enterprises that

[38] Vail, 'Peasants, Migrants and Plantations: A Study of the Growth Of Malawi's Economy' (n 22) 4.
[39] McCracken, *A History of Malawi, 1859-1966* (n 2) 91.
[40] Nkhoma (n 19).
[41] McCracken, *A History of Malawi, 1859-1966* (n 2).
[42] Krishnamurthy (n 20) 386.
[43] McCracken, *A History of Malawi, 1859-1966* (n 2) 13.
[44] Kayira (n 16) 27.

ensured that 'factors of productions' such as labour and land 'serve[d] the needs of capitalist enterprise'.[45]

There were times when there was disagreement between public officials in London and colonial officials in Malawi such that 'the colonial policy that evolved in [colonial Malawi] oscillated between these opposing poles, depending on individual interests or the specific historical forces acting on the empire at the time.'[46] It is therefore not surprising that during this period the rationality remained 'unpredictable and less deterministic' although largely within the broader capitalist framework.[47] The regimes inspired by this rationality included taxation, land, labour, and transport regimes in shaping the agricultural markets and role of smallholder farmers in them. A change came after 1940 when the colonial office in Britain 'committed to supporting dependencies through development grants.'[48]

Setting up a taxation regime was seen by Johnston as a tool for motivating the African to work on settler plantations for a wage to be able to pay taxes in a society where the use of cash was very limited, if not non-existent.[49] One of the uses of the taxation regime was to hasten the insertion of the smallholder farmer 'into the market economy.'[50] It was also a means of raising revenue for the colony to reduce dependence of grants from the British South Africa Company owned by the capitalist/imperialist, Cecil John Rhodes.[51] One of the first activities of Johnstone in establishing the colonial state apparatus was the question of revenue by local taxation and to eliminate altogether dependence on Cecil John Rhodes, whose commercial interests and imperial connections to the British government were well known to colonial administrators and perhaps not much liked.[52] Johnston had apparently witnessed Africans paying taxes in cash or kind to the Portuguese public official in southern Malawi border with

[45] Kerry Rittich, 'Historicising Labour in Development: Labour Market Formalisation through the Lens of British Colonial Administration' in Diamond Ashiagbor (ed), *Re-imagining labour law for development: Informal work in the Global North and South* (Bloomsbury Publishing 2019).
[46] Kayira (n 16) 27.
[47] ibid.
[48] ibid 28.
[49] McCracken, 'Peasants, Planters and the Colonial State' (n 25).
[50] Escobar (n 14) 157.
[51] McCracken, *A History of Malawi, 1859-1966* (n 2).
[52] Colin Baker, 'Tax Collection in Malawi: An Administrative History, 1891-1972' (1975) 8 The International Journal of African Historical Studies 40.

Portuguese Eastern Africa (now called Mozambique) and used the occasion to engage local chiefs in his own taxation plans for the colonial state.[53] Taxation was gradually imposed on Nyasaland, depending on various factors until the whole territory was subject to taxation by 1906.[54]

Land holding was and has always been a vexed issue since colonial times.[55] The issue that was never resolved was that the 'African and European concepts of landholding differed so widely' and the colonial public actors avoided 'the awkward question whether or not any African chief has the right to alienate his peoples' land.'[56] A dual land holding regime, governed by customs and (colonial) English law, developed in a pluralistic fashion largely determined by the interests that the colonial public actors were sympathetic to.[57]

The actions of the colonial state were 'to a large extent dictated [by the way in] which Harry Johnston investigated and settled land claims soon after the proclamation of a British protectorate over the country.'[58] Two areas where the settler farmers pushed their interests as far as they could were land and labour, both factors necessary for agricultural production. In the initial approach to resolving the two issues Johnston 'was in no mood to antagonize the settlers whose presence he valued' to lead commercial farming and believed Africans were likely to be no more than subsistence farmers.[59] With these motivations Johnston went about confirming land titles of settlers who had 'bought' land from chiefs without regard to 'the complaints of Africans [and their missionary supporters] about the rights of chiefs to sell land for he thought the question had gone too far ahead 'to adopt any other solution to the land issues'.[60] After which Johnston went ahead 'to confirm Africans in their existing holdings' seen as important to them 'for subsistence purposes.'[61]

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[53] ibid.
[54] ibid.
[55] David E Sahn and Jehan Arulpragasam, 'Development Through Dualism: Land Tenure, Policy and Poverty In Malawi.' <https://pdf.usaid.gov/pdf_docs/PNABI279.pdf> accessed 13 February 2023.
[56] Palmer, 'Johnston and Jameson' (n 35) 312.
[57] Clement Ng'ong'ola, 'Colonial Law and the Inception of a Dual Land System in Nyasaland' [1985] Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America 283.
[58] Clement Ng'ong'ola, 'The State, Settlers, and Indigenes in the Evolution of Land Law and Policy in Colonial Malawi' [1990] International Journal of African Historical Studies 27, 58.
[59] Krishnamurthy (n 20) 385.
[60] ibid.
[61] ibid.

Representatives of the British government concluded more than 80 treaties between 1885 and 1895 with Africa leaders which conferred land rights under English law on the British Crown.[62] From a formal law perspective 'it was assumed without debate that the chiefs were capable of conveying, and the government of acquiring, estates in fee simple and freeholds, rights which were hitherto unknown' in ethnic customs of precolonial Malawi.[63] Even from an English law point of view these land transfers have been described 'as ambiguous and probably ineffective for that purpose under English principles of conveyancing.'[64]

For the benefit Africans, the colonial government after some back and forth with the British government in London decided that 'lands which were not acquired by European settlers were [to be] converted *en masse* into Crown land' under various ethnic customs.[65] In later years Crown land came to be called Native Trust land. Land that had been acquired by European settlers had some African residents and these were 'deemed to be tenants' of the plantation/estate owners. The result of the land reforms was dual regimes of land holding; one under freehold or leasehold subject to English law as it applied to Nyasaland, the other customary title subject to the various customs that prevailed among ethnic groups of Nyasaland and the colonial state.

Land is a key factor in agricultural production; therefore, it can be claimed that Johnston set the different market paths for the settler farmers and Africans. The discussions of the exact status of African smallholder land holding demonstrates the importance of the matter. It was discussed whether Africans landholding would be best secured by the creation of 'Crown Land Reserves'.[66] This was considered by the successors of Johnston that it would have had the effect of confining settlers to previously confirmed land titles or any allocated land without room for further expansion of their plantations.[67] This was seen as 'a way of accommodating

[62] Ng'ong'ola, 'Colonial Law and the Inception of a Dual Land System in Nyasaland' (n 57) 284.
[63] ibid 284–285.
[64] ibid 285.
[65] ibid 300.
[66] Krishnamurthy (n 20).
[67] ibid 390.

African and European interests'.[68] It was thought by the British government in London that the problem was concentrated in southern Malawi and the approach was 'savouring of segregation'; however it remained unresolved for the colonial period.[69] Land had almost a direct impact on labour relations during the colonial period. Eventually African smallholder farmers remained with a rather nebulous form of land holding which the Nyasaland government could appropriate for the use of settlers or its own interests. Colonial land law was English land law with African smallholder farmers holding their land titles under custom which was no more than an 'appendage' to the colonial land regime.[70]

'Utterly essential' for agricultural production around this period was labour.[71] It was an important issue because there was almost no mechanisation of agricultural production and reliance on human labour was the accepted way of life. It became a contested issue because 'essential for the creation of a plantation sector were large numbers of exceedingly cheap labourers.'[72] Settlers offered very low wages to be able to attract enough labourers.[73] The issue of level of wages was a result of a tacit 'understanding' between settlers and the colonial government put as follows;

> A delicate balance was necessary: too high a tax would give rise to pressure to increase wages; if it was too low the incentive to earn money would be insufficient to ensure an adequate labor supply. For this reason, the Hut Tax Regulations of 1901 imposed a differential rate. Those Africans who worked for a European for a month were levied three shillings; others were required to pay six shillings a year.[74]

The problem of labour was compounded because many Africans to whom the settlers looked for labour had their own small farms to look after at the same time that the settlers would be looking for labour.[75] Most of the times when settlers required African labour during the rainy season the 'Africans were busy planting their food crops' and, in any event, 'the conditions of work were not attractive.'[76] This resulted in perennial demands by settlers that the colonial

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[68] ibid 380.
[69] ibid 390.
[70] Silungwe (n 21) 65.
[71] Vail, 'Peasants, Migrants and Plantations: A Study of the Growth Of Malawi's Economy' (n 22) 4.
[72] ibid.
[73] Krishnamurthy (n 20).
[74] Baker, 'Tax Collection in Malawi' (n 52) 49.
[75] Krishnamurthy (n 20).
[76] ibid 391.

government was not doing enough to ensure adequate supply of labour although the missionaries believed that low pay was the main cause of labour shortages.[77]

Colonial administrators generally required the settlers to leave the villages that existed at the time of the sale undisturbed but to demand rent for any subsequent settlements on their plantations.[78] This was more honoured on paper than in practice because all Africans on European-held plantations were regarded as tenants who should be paying rent as matter of English land law.[79] A practice emerged where the settler could demand Africans on the plantations to work for a certain number of days in lieu of payment of rent.[80] The settlers saw themselves as 'chiefs' who were entitled to demand labour services from the Africans on their farms or estates in a traditional practice known in vernacular as *thangata*, meaning to assist.[81] In colonial times *thangata* meant a 'system imposing labour in exchange for rent'.[82] It became a system of forced labour to which Africans residing on settler estates were subject. The settlers demanded labour and if Africans failed to provide it, they faced 'eviction or destruction of their crops.'[83] In the precolonial situation in village life, *thangata* was no more than a traditional reciprocal practice available for everyone as a means of 'reciprocal labour' arrangements.[84] In the colonial state, it 'assumed the crucial role in the moulding and manipulation of economic advantage and rural political power.' [85] It became a free resource for the settler as 'a colonial institution of economic production.'[86]

Some estates 'adopted rebate farming in lieu of direct labour' practices, a practice whereby 'planters issued seeds to settled Africans[87] so that they could grow cotton under the planters'

[77] Krishnamurthy (n 20).
[78] Vail, 'Peasants, Migrants and Plantations: A Study of the Growth Of Malawi's Economy' (n 22).
[79] Ng'ong'ola, 'Colonial Law and the Inception of a Dual Land System in Nyasaland' (n 57).
[80] Vail, 'Peasants, Migrants and Plantations: A Study of the Growth Of Malawi's Economy' (n 22) 4.
[81] JAK Kandaŵire, 'Thangata In Pre-Colonial Ond Colonial Systems of Land Tenure in Southern Malaŵi With Special Reference to Chingale' (1977) 47 Africa 185.
[82] McCracken, *A History of Malawi, 1859-1966* (n 2) xv.
[83] Krishnamurthy (n 20) 391.
[84] Kandaŵire (n 81).
[85] David McMaster, 'Review: Thangata: Forced Labour or Reciprocal Assistance? By JA Kamchitete Kandaŵire. Zomba: Research and Publications Committee, University of Malaŵi1979. vi, 161 p., Plates, Maps, Bibl., Index.' (1981) 51 Africa 798.
[86] Kandaŵire (n 81) 188.
[87]African who worked on one piece of land as opposed to the precolonial practice of 'shifting cultivation', that is a practice in which an area of ground is cleared of vegetation and cultivated for a few years and then abandoned for a new area until its fertility has been naturally restored.

supervision, and then sell their crops to the planters at very low prices.'[88] The Government moved in to adopt a law that supported the practice, it was a 'subtle way of getting the African to collaborate in the exploitation of his own labour for the benefit' of the settler.[89] Other estate owners decided on 'the virtual abandonment of *thangata'* in favour of paid tenancy, although most decided to become strict in enforcing their rights.[90] The colonial Southern Province of Malawi Provincial Commissioner wrote in 1943 'there were serious incidents on certain estates in Blantyre district owing to the refusal to leave by several hundreds of natives who had been served with notices to quit.'[91] It was not long before Africans refused to pay this labour tax in return for settlement on unused estate land for the reasons that one estate manager, V MacDonald, wrote to the colonial government that 'as Government does not charge rent on Native Trust land why should estate owners do so.'[92]

A settler farm manager, V MacDonald also wrote the following to the Southern Province Commissioner in 1945;

> Native Trust Land in this district is already heavily crowded and if a large number of natives on private estate are constantly to be threatened with ejection in this manner, it seems to be certain that it will only be a matter of some before some situation arises which it will be impossible peacefully to control. It is therefore strongly recommended that early consideration be given to amending the law so as to give natives on private estates more security in the tenure of their homes.[93]

The response of the colonial government was the appointment of a commission, one of the many throughout Malawian history, to suggest ways in which the land question in Nyasaland could be resolved.[94] This view reflected a certain indecisiveness on the part of the colonial government who faced with conflicting interests probably as a result of the legal pluralism at play between Africans and planters that could potentially lead to violent results.

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[88] Kandaŵire (n 81) 188.
[89] ibid.
[90] McCracken, *A History of Malawi, 1859-1966* (n 2) 305–306.
[91] ibid 306.
[92] ibid.
[93] ibid.
[94] ibid.

Another problem for settler farmers was availability of African labour although the colonial government acted to motivate Africans to become wage earners for the plantations.[95] From the early days of the protectorate, there had been labour migration from northern and central Malawi to southern Malawi where there was increased economic activity demanding labour on plantations or as porters.[96] The motivations for the migration varied across ethnic groups. For some, the imposition of the British protectorate had undermined the 'indigenous economy, for other warlike ethnic groups the coming of the British with superior military technology had resulted 'in the end of raiding' of weaker groups.[97] All this served the interests of the colonial government and settlers.

However, around the early 1900s, a noticeable trend of labour migrating to other countries was detected with thousands of individuals having 'crossed the border into' what is now Zambia and Zimbabwe in search of better conditions of employment in the mining industry and agriculture[98] Labour issues became a point of conflicting interests between the colonial government and British imperial interests. The British government in London was faced with a demand for labour in the mines of South Africa and was pressurised to make Nyasaland supply the needed labour. The government of colonial Malawi opposed this because it would directly affect the supply of labour to settler farms. The colonial government gave in after 'the collapse of the coffee-based plantation sector' and impressed upon the British government that in any arrangement 'Nyasaland [should benefit] financially.'[99] The deal that the Nyasaland government agreed with the British government was that the former would be paid '10 shillings per migrant' in what has been described as 'a useful supplement to its perilously low revenues'.[100] Other payments included 'the annual hut tax of six shillings a man as well as paying four shillings for the maintenance of each family.'[101]

[95] Vail, 'Peasants, Migrants and Plantations: A Study of the Growth Of Malawi's Economy' (n 22) 4.
[96] McCracken, *A History of Malawi, 1859-1966* (n 2) 84.
[97] ibid.
[98] ibid 85.
[99] ibid.
[100] ibid.
[101] ibid.

Around 1910, settler farmers renewed their pressure on the Nyasaland government to reverse its earlier policy and the governor at that time obliged by writing a memo to all government officials, part of which read, as quoted by McCracken,

> There are the most ample grounds for believing that the exodus of local natives from their own homes to South Africa is as seriously inimical to the interests of the emigrants themselves and of their families as to those of the Protectorate generally. It is therefore the settled intention of this Government to discourage such emigration by every just and lawful means in its power, and District Officers should lose no legitimate opportunity of giving effect to this policy.[102]

Subsequently the Nyasaland government attempted to crack down on labour migration including restricting activities of recruiting agencies.[103] The colonial government also led an 'energetic campaign 1,368 [returning] migrants were fined and 167 imprisoned for leaving Nyasaland without permission.'[104] The British government's colonial office thought the whole exercise by Sir William Manning was futile, as quoted by McCracken

> The truth is that Sir W. Manning is too late. The Nyasaland Government first encourages the natives to go ahead and get rich, and then hopes to be able to compel them to stay at home against their wills and the wishes of their former or future employers. It has set in motion a force which it cannot control without the help of those who have no interest in helping it to get control.

Malawi's neighbour almost covering the whole of the south has been Mozambique, which was under Portugal as the imperial power. For some time until the 1930s, Portugal had 'turned to the expedient of the chartered company to provide cheap administration and development for parts of Mozambique.'[105] In one of these companies, the control was under British private interests.

Another challenge of developing capitalist commercial agriculture that was immediately apparent to Johnston and his successors in the colonial government was reliable bulky transportation that would provide access to the Indian ocean through Mozambique, preferably westwards covering the 300 kilometres from southern Malawi to the ocean.[106] This

[102] ibid 86–87.
[103] ibid 87.
[104] ibid.
[105] Leroy Vail, 'Mozambique's Chartered Companies: The Rule of the Feeble' (1976) 17 The Journal of African History 389.
[106] McCracken, *A History of Malawi, 1859-1966* (n 2).

was the preferred route by Johnston.[107] On the other hand, others believed using the southern direction would allow the Nyasaland railways to connect with the Zambezi river, designated as an international waterway for which custom duties were not payable, although the idea was opposed by a leading company of Scottish origin carrying out business in Nyasaland.[108] Instead, some 700 kilometres of railway were constructed from Malawi southwards to the port of Beira in Mozambique. Colonial Malawi was saddled with a huge debt as a result this construction which 'rose three times faster than that of any territory in British Africa' and closed off any spending by the colonial government on agricultural markets[109]

In pursuing their interests in Malawi, the settler farmers had 'pressed for many years for the construction of a railway that would allow for the transport of goods without the use of large numbers of porters.'[110] They believed that such a railway 'would free tens of thousands of labourers for work on' on their plantations, 'thus guaranteeing their success'; simultaneously the Scottish missionaries added their voice arguing 'that the use of human porterage-especially women and children-was unsuitable for the conveyance of heavy goods' and inhumane.[111] In 1911, the British government in London opted for the southward route ostensibly 'to strengthen British interests' south of Nyasaland by supporting of the charter companies in Mozambique in which British citizens had controlling interests thus affecting 'Nyasaland profoundly.'[112] The decision was taken against express advice to the contrary resulting in a situation where 'imperial considerations outweighed economic good sense' for the benefit of colonial Malawi.[113] In one of the memos in the British foreign office it was stated (as quoted by Vail)

> On grounds of high policy it is very necessary that this country should lose no opportunity of strengthening its position in [Mozambique], and the construction and operation of this line, under what, in practice, will amount to British control, is an important step in that direction. It is known that American capital is beginning to interest itself in this region.[114]

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[107] Leroy Vail, 'The Making of an Imperial Slum: Nyasaland and Its Railways, 1895–1935' (1975) 16 The Journal of African History 89.
[108] ibid 91.
[109] Vail, 'The Making of an Imperial Slum' (n 107).
[110] ibid 91.
[111] ibid.
[112] ibid 98.
[113] ibid 99.
[114] ibid 102.

Further to this the British government 'established a precedent that was to haunt Nyasaland in later years, when they obliged the Nyasaland administration to guarantee the interest and debentures of the new Central African Railway (CAR).'[115] Although on paper the railway would be built by a private company, the British government 'compelled the Nyasaland government to 'guarantee', although in practice it meant paying, the interest at 6 per cent for £ 1,200,000 worth of debentures for twenty-five years', a sum translating to almost £94, 000, 000 *before interest* as today's equivalent.[116] A newspaper in Nyasaland seemed to capture the elements of the deal when it stated 'the agreement seems to us to be entirely one-sided and we thus see the extra- ordinary position that we are to be taxed to construct a railway in a foreign country and for the benefit of a foreign chartered company.'[117] When the Labour government came into power in Britain sometime between 1929-31 the loan was 'transferred to the imperial government, although some public actors in the British government still insisted that the guarantee obligations should be fulfilled through the loaning of interest-bearing loans to the Nyasaland government' which did not make much difference.[118]

As if this was not enough 'a decade later [the Nyasaland government] was not to have a say in the decision to build the Zambezi bridge' which would allow railways crossing over a river that lies between Malawi and Mozambique.[119] The real reason for the British government's interest in building the bridge was part of a policy to 'creat[e] employment in Britain, stipulating, however, that Nyasaland should not be saddled with any further debt charges.'[120] However, an arrangement was made to fund the bridge through a colonial development fund in the name of the Nyasaland government. This led others to write that the building of 'the bridge was as much a cure for Nyasaland's economic problems as a month in a tropical swamp would be a cure for malaria.'[121]

[115] ibid 98.
[116] ibid 102.
[117] ibid 103.
[118] ibid 109.
[119] ibid 108.
[120] ibid 108–109.
[121] ibid 109.

In the process, the British government 'subordinated Nyasaland's interests to what they viewed as higher interests, and the impact of this decision, made on the grounds of international *realpolitik*, was to have a profoundly disturbing impact upon the economy of Nyasaland for decades to come' [Emphasis in original].[122] The decisions rendered the attempts to develop commercial agriculture based on cash crops more challenging.

6.3 Regimes

The discussion in this section focuses on two crops grown for sale ('cash crops'), cotton and tobacco which were important in the legal making of agricultural markets in colonial Malawi, by attempting to instil the idea of agricultural production for the market among smallholders for sale. (Inter)actions relating to marketing of cash crops deserve a separate section because their 'role in expanding the market in African societies, cash-crop production during this period entailed economic changes of fundamental importance' specifically introduction of a market-based capitalist agricultural economy.[123]

6.3.1 Food versus cash crops regimes

Studies were and probably still have demonstrated that smallholder farmers in Malawi are primarily concerned with agricultural production for subsistence purposes.[124] When it comes to selling in markets they would only do so if they needed cash for any purpose.[125] The interactions with markets cannot be explained by purely economic factors as various social factors come into play including cultural factors such as the importance of maintaining traditional relationships than purely making a profit.[126] A key insight from this period on production of cash crops is how smallholder farmers were able to adapt to markets without a distinction between economic activities and social life suggesting that the most successful instrumental relations are ones taking as part of wider social life.[127] During this period the

[122] ibid 99.
[123] John Tosh, 'The Cash-Crop Revolution in Tropical Africa: An Agricultural Reappraisal' (1980) 79 African Affairs 79.
[124] Vaughan (n 12); Bryson Nkhoma, 'African Agricultural Production, Food Trade, and the State in Southern Malawi, 1859-1940.' (2022) 55 International Journal of African Historical Studies; Marcel Fafchamps, *Market Institutions in Sub-Saharan Africa: Theory and Evidence* (MIT press 2004).
[125] Sidney Madsen, 'Farm-Level Pathways To Food Security: Beyond Missing Markets and Irrational Peasants' (2022) 39 Agriculture and Human Values 135.
[126] ibid.
[127] Elias Mandala, 'Peasant Cotton Agriculture, Gender and Inter-Generational Relationships: The Lower Tchiri (Shire) Valley of Malawi, 1906-1940' (1982) 25 African Studies Review 27.

'institutionalised market' that is a physical place designated for the purchase of smallholder produce was quite successful.[128] Inclusive markets at this time accommodated smallholders' approaches towards sale of agricultural produce as 'target marketers'; that is marketing sporadically to acquire a specific amount of cash income for specific expenditure.'[129]

In the colonial period African smallholders could grow cash crops 'provided that the colonial state did not stack cards against them in the interest of white farming.'[130] Development of export trade of cash crops such as coffee, cotton, tobacco and tea in Malawi is seen as one of the major achievements of the colonial state; previously any cash crops would be grown by smallholder farmers for their own use or limited sales.[131] However, cash crop production by African smallholders in the era of export trade 'was intimately dependent on the relationship between that crop and the established complex food crops.'[132] This was the case because the smallholder farmers 'attached high priority to producing *all* their domestic food requirements' and would only grow anything for export crops in they had met their needs [Emphasis in original].[133]

Smallholder farmers in territories that became British Central Africa used to grow various food crops such as sorghum, beans, millet, pumpkins, cucumbers, cassava, and millet.[134] However, maize 'the most important of the so-called American crops probably because maize is thought to have originated in central America, high yielding but vulnerable to drought, which had been introduced from the east coast' became one of the most important food crops at the time of the imposition of the protectorate.[135] Settlers did not grow food crops and together with other commercial enterprises that thrived in Malawi after the imposition of the protectorate depended on smallholder farmers for food production to feed 'their workers' whenever they had to hire labour from afar, which was quite often.[136] For any food shortages or challenges in

[128] Chinyamata Chipeta, *Indigenous Economics: A Cultural Approach* (Exposition Press 1981) 122–123.
[129] Bohannan and Dalton (n 10) 7.
[130] Tosh (n 123) 81.
[131] CA Baker, 'Nyasaland, the History of Its Export Trade' (1962) 15 The Nyasaland Journal 7.
[132] Tosh (n 123) 80.
[133] ibid.
[134] McCracken, *A History of Malawi, 1859-1966* (n 2) 13.
[135] ibid.
[136] Mandala (n 33) 514.

procuring it, settler farmers blamed 'the government and the primitive transport system'.[137] It has been observed that after increased demand for food 'most growers supplied the new market by disposing of the food that their families needed to survive' with only a few producing any surplus beyond their need for the market.[138]

Food deficits were not a new phenomenon because the usual trend was that the smallholders with less 'material conditions of existence' such as land and labour 'suffered food shortages between November and February … before and after the arrival of Europeans, and both inside and outside the centres of European enterprise.'[139] However, the arrival of European enterprise in the protectorate led the less materially endowed African smallholder farmers to sell the little that they had following what everyone else was doing, ignoring the discipline of traditional 'channels of consumption' among them.[140] The traditional channels of consumption had ensured that even those with little food would make it last for as long as possible before the next harvest. Further, emergence of food markets demanding more interactions from smallholder farmers 'disrupted social survival strategies' such as the role of a community which would provide work in return for food for those without during the lean months of November to March.[141]

In this context, the economic mindsets that developed among African farmers was 'to produce all [their] subsistence needs' before considering production of anything else such as surplus for markets or cash crops.[142] Another aspect that influenced the mindsets towards foods production was that any decision to grow 'an inedible export crop' that might leave them in a position for a food deficit season was considered unimportant.[143] The option of planning to grow any surplus beyond their needs or any cash crops shaped by 'material conditions of existence' of the African farmers as they determined their capability to meet the demands.[144]

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[137] ibid 515.
[138] ibid 518.
[139] ibid 519.
[140] ibid.
[141] ibid.
[142] Tosh (n 123) 89.
[143] ibid.
[144] Pierre Bourdieu, *Algeria 1960: The Disenchantment of the World, The Sense of Honour, The Kabyle House 0r The World Reversed* (Richard Nice tr, Cambridge University Press 1979) vii.

The colonial government did its best to supress prices paid by traders to African smallholder farmers to the extent of adopting formal law in pursuance of its own and settler interests.[145] This policy perspective is shown in the proceedings of the Legislative Council in 1920, the colonial law-making body composed of officials, missionaries, and settlers where some sentiments were expressed as follows (as quoted by Ng'ongola);

> to allow the high maize prices to continue was not in the interests of the country as the native did not understand the reason for market fluctuations, and once taught to expect these high prices and finding that he could not obtain them for his maize he would quickly reduce his acreage and use his surplus for making beer. . .[146]

The passage led to one of the early pieces of legislation which made sure that smallholder farmers were not paid too much on the possible grounds that they were irrational. From colonial times, the state viewed small-scale farmers in agricultural markets through the colonial lens as irrational actors.[147]

Two cash crops that the colonial state allowed African farmers to grow were cotton and tobacco.[148] They were not allowed to grow coffee or tea.[149] It was probably thought by the colonial state that the natives didn't have the capacity to grow coffee or tea. However, smallholder farmers had been growing cotton and tobacco since precolonial days.

6.3.2 Cotton

Southern Malawi is distinctive because of the Shire river coming out of the southern tip of lake Malawi, an elongated lake of some 355 miles in a 'narrow country' of almost 530 miles long and never more than 100 miles wide; flowing through Shire Highland which stands above and seems to usher the Shire river into a valley before the river flows into Mozambique.[150] The Shire highlands were the preferred place for most settler estates with its commercial capital named Blantyre after Dr David Livingstone's birthplace in Scotland. Before colonialism this valley was known for growing cotton and a limited textile industry, with scholars referring

[145] Nkhoma (n 124).
[146] Ng'ong'ola, 'Malawi's Agricultural Economy and the Evolution of Legislation on the Production and Marketing of Peasant Economic Crops' (n 36) 245.
[147] RW Kettlewell, 'Agricultural Change in Nyasaland: 1945-1960' (1965) 5 Food Research Institute Studies 229.
[148] McCracken, 'Peasants, Planters and the Colonial State' (n 25).
[149] Robin Palmer, 'The Nyasaland Tea Industry in the Era of International Tea Restrictions, 1933-1950' (1985) 26 The Journal of African History 215.
[150] McCracken, *A History of Malawi, 1859-1966* (n 2) 8–9.

to a 'cotton weaving process of the Mang'anja in the lower Shire region [of southern Malawi] from the 16th century.'[151] Others have noted that 'production of cotton and of cotton cloth was still being undertaken sporadically in the Lower Shire Valley in the mid-1870s.'[152]

It is therefore not surprising that when coffee failed to take off on plantations of Shire highlands, the growing of cotton on plantations 'spilled over' to African smallholder farmers especially in the Shire valley. The major impetus for cotton cultivation came from the then UK based British Cotton Growers Association ('BCGA'), 'a quasi-governmental body with links to the Colonial office' formed in 1902.[153] The interest of the British government was to stimulate 'the production of raw materials in the tropical dependencies of Britain' to move away from the dependence on American cotton.[154] The interest came about when it was found out in the early 1900s that USA 'was now consuming more of its raw cotton than it had done in the past' leading to severe shortage of cotton for the British industry and threatening the Lancashire cotton mills.[155] However, support for African cotton came from a 'cotton expert', Samuel Simpson, sent by the British colonial office 'to advise settlers on cotton growing' who in the process exposed 'the myth of white supremacy' in commercial cotton farming widely held in the colonial Malawi government.[156] After arriving in Nyasaland and visiting settler cotton estates in 1905, the cotton expert believed the settler farmers were inept cotton farmers, and 'related the failure of the crop directly to the inefficiency of settlers anxious to make a quick killing out of the sudden rise in cotton prices and supported by over-generous loans from the BCGA.'[157] It seems the most important factor in the withdrawal of settlers farmers from cotton cultivation in favour of tobacco was the termination of cash advances from the BCGA.[158]

The cotton expert 'attacked the greed of unbriefed planters, fuelled by the BCGA's prodigal distribution of seed and cash advances, leading to ill-executed expansion' of cotton cultivation

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[151] Jennifer Ann Dawe, 'A History of Cotton-Growing in East And Central Africa: British Demand, African Supply' (PhD Thesis, University of Edinburgh 1993).
[152] McCracken, *A History of Malawi, 1859-1966* (n 2) 89.
[153] Vail, 'Peasants, Migrants and Plantations: A Study of the Growth Of Malawi's Economy' (n 22) 7.
[154] ibid.
[155] Steve Onyeiwu, 'Deceived by African Cotton: The British Cotton Growing Association and the Demise of the Lancashire Textile Industry' [2000] African economic history 89, 90.
[156] John McCracken, 'Experts and Expertise in Colonial Malawi' (1982) 81 African Affairs 101, 103.
[157] McCracken, *A History of Malawi, 1859-1966* (n 2) 90.
[158] Dawe (n 151) 275.

among settler farmers.'[159] In his report to the British colonial office he wrote (as quoted by Dawe),

> Coffee prices fell, crops failed, when suddenly tempted by the high price of cotton everyone rushed into big acreages under this product. It was a general belief that no experience was essential to its cultivation and as to the most suitable varieties for the different situations, that important point does not appear to have been considered at all…. All and sundry received large grants for putting in cotton and no discrimination as to the capabilities of the applicants appeared to have been practised. In a country like this at least 75 per cent of the planters have no experience of agricultural work whatever and would absolutely starve in most countries.[160]

His advice was that 'the BCGA should stop supplying settlers with loans and instead provide peasants with reliable seed and markets' although this 'was accepted only partially in colonial circles.'[161] The reluctance to accept the recommendation of the cotton expert was evident as late as 1914 when 'the [colonial] government actively discouraged peasant production of cotton in the Blantyre and Zomba districts, the main area of European production, on the grounds that' they really needed to supply labour to settler plantations than grow cotton.[162]

The British Cotton Growers Association ('BCGA') 'entered into a fixed price, ginning[163] and buying arrangement with the African Lakes Corporation' the latter being a Scottish trading company acting as its agent.[164] BCGA started supplying free seed to small scale farmers and setting up cotton ginneries 1906 and the colonial government supported 'government-approved markets.'[165] The result that in Lower Shire valley 'where the BCGA built a ginnery in 1910 and production in the Valley increased, from 134 tons of seed cotton in 1910 to 705 tons in 1913 out of a total of nearly 1,200 tons produced by peasants in Malawi.'[166]

In 1910 the first formal law intervention was introduced 'to bring order to the seed and marketing sectors.'[167] Formal law empowered 'the Director of Agriculture […] to approve all cotton seed issues to Africans and had the power to establish markets and levy fees, with

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[159] ibid 260.
[160] McCracken, *A History of Malawi, 1859-1966* (n 2) 90.
[161] McCracken, *A History of Malawi, 1859-1966* (n 2).
[162] ibid 91.
[163] Ginning is a process of separating cotton fibres from seeds.
[164] Dawe (n 151) 261.
[165] McCracken, *A History of Malawi, 1859-1966* (n 2) 90.
[166] ibid 91.
[167] Dawe (n 151) 268.

licensed buyers allowed to purchase native grown cotton...'[168] The law also introduced a ban on Africans 'from selling other than at fixed markets.'[169] It has been argued that ~~formal law~~ the colonial government used formal law to ensure low prices for smallholder farmers 'in order to discourage African labourers on settler estates from turning to independent agricultural production.'[170]

However, a high ranking colonial official was able to say in 1913 that '…if cotton is to be a permanent success in this Protectorate that end is much more likely to be achieved through the native cultivator than through the European planter.'[171] In 1914, the then British Governor of Nyasaland, George Smith, Governor from 1913 to 1923, 'appeared to accept that prosperity was tied to individual African production and not to coercing Africans to work for plantation-owners.'[172]

One key aspect of the success of the African smallholder cotton farmers was their ability to interact with their environment in a productive way and make the right choice about growing of crops, including the balance between food and cash crops.[173] Malawi lies in a climate zone where most activities in agricultural production tend to rely on annual rainfall, 'which [can be] inferior not only in quantity but also distribution.'[174] Because of this 'the farmer's choice of crops is limited to those with a short growing period' and the vagaries of 'any reduction or maldistribution of rainfall.'[175] In addition to this, for crops such as cotton there 'is very heavy peak demand on labour' with planting and other related activities.[176] All this called for 'a skilled understanding of the environment and an effective deployment of labour.'[177]

[168] ibid 269.
[169] ibid.
[170] Ng'ong'ola, 'Malawi's Agricultural Economy and the Evolution of Legislation on the Production and Marketing of Peasant Economic Crops' (n 36) 243.
[171] McCracken, *A History of Malawi, 1859-1966* (n 2) 91.
[172] Dawe (n 151) 276.
[173] McCracken, *A History of Malawi, 1859-1966* (n 2) 12.
[174] Tosh (n 123) 84.
[175] ibid.
[176] ibid 85.
[177] ibid.

The prosperity of the Shire valley for cotton cultivation depended on the water levels in Lake Malawi which for the 'first thirty five years of the twentieth century' had low water level allowing the valley to sustain wetlands thus creating the probability of river-fed gardens as well as outside these wetlands, rain-fed gardens.[178] In these circumstances, a three season agricultural system developed; the first depended on annual rainfall from the time of the first rains in November or December; the other two involved using the wetlands to growtwo consecutive crops during the dry season.[179] The result was the leading position of the Shire valley as for cotton production 'in colonial Nyasaland.'[180]

When it came to deployment of labour, these African smallholder farmers used traditional practices 'which guaranteed their control over youth labour' for increasing labour for agricultural production for the cotton market. [181] With the requirement for increased interactions, especially in agricultural production, elders 'quickly perceived how pre-existing' traditional practices might be 'be exploited under the new conditions wrought by the colonial economy.'[182] To maintain the stability of these customs 'the elders vigorously opposed any trend or program which conflicted with this goal'; 'resisted the emigration of boys to towns and missionary attempts to recruit children, particularly girls, into their schools'; in addition, 'initiation rituals, which instilled traditional values into the youth, received active encouragement.'[183] There were many other changes in social life resulting from these activities including where female-headed households 'could extend their domestic rights beyond the usual limits of tradition.'[184]

There was a decline of cotton growing after the 1930s due to two main reasons. Firstly, rising water levels in Lake Malawi 'permanently flooded large areas of the valley, greatly reducing the amount of land' for wetland farming and secondly, 'the effects in Malawi of the Great Depression' resulted in very low prices for cotton. On the water levels it has been written, 'The 1938-39 season was calamitous for agriculture in the Lower Shire Valley, especially in the most

[178] Mandala (n 127).
[179] ibid.
[180] ibid 28.
[181] ibid 30.
[182] ibid 33.
[183] ibid 30.
[184] ibid 32.

southern part, where the [wetlands] was vital to the economy. The rise of the Lake [Malawi] and subsequent flooding led to the loss of 60% of planting land…'[185]

It has also been observed that

> In the first two decades of the century, peasant cotton production in the Lower Shire Valley had competed with plantations and tenant growing schemes. For about ten years peasant production had triumphed. Then, the last few years of the 1930s witnessed a devastating collapse of cotton production and the struggle to resettle in drier parts or migrate to find work.[186]

However, cotton remained a smallholder farmer crop in Malawi which is a very different story from what happened in relation to the cultivation of tobacco.

6.3.3 Tobacco

Tobacco as a crop 'had been widely grown and consumed in the Malawi region prior to colonial rule' but its position as a cash crops was assured with the colonial state.[187] It was grown in southern Malawi settler plantations and became an important crop from the 1920s, allowing the settlers to leave the cultivation of cotton to African smallholder farmers.[188] In 1908 the Imperial Tobacco Company opened its factory in the main town in southern Malawi following which 'practically all Nyasaland [Malawi] tobacco was sold to manufacturers in Britain.'[189] However, due to 'exceptionally high freight charges' some settlers who were growing tobacco left tobacco production while others 'switched to tenant-production of fire-cured tobacco which was admitted to be more competitive.'[190]

The most important story of interactions occurred in central Malawi, which is the leading producer of tobacco to the present day.[191] The introduction in earnest of tobacco in central Malawi took place in the 1920s, when two British citizens, Arthur Falconer Barron and Roy W Wallace, 'obtained leasehold rights over 2,000 acres of land' near Lilongwe in central Malawi,

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[185] Dawe (n 151) 313.
[186] ibid 314.
[187] McCracken, *A History of Malawi, 1859-1966* (n 2) 92.
[188] Dawe (n 151).
[189] John McCracken, 'Planters, Peasants and the Colonial State: The Impact of the Native Tobacco Board in the Central Province of Malawi' (1983) 9 Journal of Southern African Studies 172, 173.
[190] ibid 174.
[191] Martin Prowse and Paul Grassin, *Tobacco, Transformation and Development Dilemmas from Central Africa* (Springer 2020).

the modern-day capital of Malawi.[192] Initial attempts by Barron to grow tobacco using direct waged labour were not very successful which led him to engage tenants 'to whom he distributed seedlings in exchange for the right to purchase their crop.'[193] Tobacco production thrived in central Malawi due to conducive ecological and soil conditions, a good part of central Malawi being a flood plain to the west of Lake Malawi.[194] Central Malawi was seen 'as a marginal area functioning in the early 1920s mainly as a labour reserve' for settler plantations in southern Malawi and other countries within the region.[195]

Tobacco production and selling in Malawi took two main stages before 1940.[196] Production of tobacco before the mid-1920s, 'was dominated by settler production on the enormous estates of the Shire Highlands [southern Malawi]'; these estates exported most of the tobacco 'to South Africa where it enjoyed duty-free status up to 1908.'[197] In the 1920 saw the emergence central Malawi as the main tobacco cultivation area, a situation the led to 'the remarkable expansion of peasant- grown tobacco on the Lilongwe plain was an outstanding example of the benign influence of the colonial state.'[198]

With the decline of the volumes of tobacco grown on settler estates, African smallholder farmers posed a serious challenge to the monopoly interests of large-scale settlers in the agricultural production of tobacco.[199] From around 1924, AF Barron [one of the first colonial settlers in central Malawi] worked closely with colonial government officials 'explaining the benefits of his scheme to prospective growers' resulting in increased production and sales of tobacco almost overwhelming the existing markets arrangements with supply.[200] In the circumstances, AF Barron supported by several government officials including the Provincial Commissioner for the Central Province demanded the right to buy all smallholder tobacco, a proposal which 'was rejected by the Governor, Bowring, [and] attention switched to the

[192] McCracken, 'Planters, Peasants and the Colonial State' (n 189) 175.
[193] John McCracken, 'Planters, Peasants and the Colonial State: The Impact of the Native Tobacco Board in the Central Province of Malawi' (1983) 9 Journal of Southern African Studies 172, 175.
[194] Prowse and Grassin (n 191).
[195] McCracken, 'Planters, Peasants and the Colonial State' (n 189).
[196] McCracken, 'Peasants, Planters and the Colonial State' (n 25).
[197] McCracken, 'Planters, Peasants and the Colonial State' (n 189) 173.
[198] McCracken, 'Planters, Peasants and the Colonial State' (n 189).
[199] ibid.
[200] ibid 176.

establishment of a parastatal organisation that could supervise productions [by smallholders] on Crown Land while protecting the interests of the European planter.'[201]

John McCracken, who was a professor of history at the University of Malawi before joining the University of Stirling in the 1980s, quotes a letter written by one of the European farm managers, W. Tait Bowie to E. E. Colville on 7 October 1924:-

> On the one hand, independent planters fear that a large development of peasant agriculturalists might affect the labour supply, and the control wanted, and the Legislation asked for is for the purpose of restricting peasant development. On the other hand, certain large owners, who are developing portions of their Estate by means of native peasant agriculturalists wish control for the object of securing to them the full benefit of the work they are doing.

As a result of the discussion of these competing settler grounds the colonial government introduced a law setting up the 'Native Tobacco Board' ('NTB') in 1926 to supervise and promote the interests of the settlers while ostensibly overseeing the quality of the tobacco produced by smallholders and promoting its marketing. The NTB was to govern small-scale farmers' tobacco production and sales and in particular to address 'the lack of regulation, poor leaf quality, overproduction and the inflationary effect of the marketing frenzy' that came with the introduction of flue-cured tobacco among small-scale farmers.[202] Smallholder African farmers by 1929 produced 63% of tobacco and became important economic actors although tightly regulated by state action.[203]

The NTB was not financed by the government but 'from a cess[204] of two shillings and sixpence per 100 lbs of tobacco sold, levied on the buyers, though in fact provided indirectly by the growers', the African smallholder farmer [in today's cash equivalent almost £6.50].[205] The composition of the NTB ensured that settler interests would be safeguarded which at times forced the colonial government's Director of Agriculture to act contrary to the interests of the smallholder farmers; some influential members included W. Tait Bowie, manager of the

[201] ibid 177–178.
[202] Martin Prowse, 'A History of Tobacco Production and Marketing in Malawi, 1890–2010' (2013) 7 Journal of Eastern African Studies 691, 695–696.
[203] Prowse (n 202).
[204] A tax
[205] McCracken, 'Planters, Peasants and the Colonial State' (n 189) 177.

company 'with the greatest experience of tenant production in the Southern Province'; A. F. Barron, 'the largest employer of tenants in the north'; and I. Conforzi, 'the second largest buyer of peasant-produced tobacco in Malawi' at the time.[206]

Through a series of amendments to the law setting up the NTB, 'the political leverage of estate owners, along with the ineptitude of the colonial administration, stymied the most prolific style of tobacco production seen' by African smallholder farmers in colonial Malawi.[207] Adding to this 'restrictive Board policies and falling prices during the depression eventually led to peasant protest and mini-riots at tobacco markets in 1937.'[208] This eventually compelled the colonial state to intervene resulting in 'the declaration of minimum prices before the marketing season, intervention by the Board in the purchase of peasant tobacco, and resale of the crop to exporters at public auctions.'[209] The interests of the colonial state are demonstrated by the merger of crop specific boards through a series of changes to formal laws that resulted in the 'Agricultural Production and Marketing Board' in 1955.[210] The purpose was to have 'one Board, with appropriate committees, one buying organization, one headquarters, and one stores organization for all African Produce whether cotton, tobacco or other crops.'[211] These are the origins of the state agricultural marketing board in Malawi.

The post-second world war approach to the economy in general and the agricultural based economy in particular is attributed in some measure to Sir Geoffrey Francis Taylor Colby, the 11th British Governor of Nyasaland, 1948 to 1956, whom others have called, the 'Development Governor.'[212] One historian described him as 'a man in a hurry, dynamic, determined, immensely hard working, and devoted to the Protectorate's advancement'.[213] Others saw him 'as a natural autocrat, very hard working, decisive in judgement and unwilling to countenance alternative views.'[214] Colby believed 'in the virtues of state intervention in

[206] ibid.
[207] Prowse (n 202) 696.
[208] Ng'ong'ola, 'Malawi's Agricultural Economy and the Evolution of Legislation on the Production and Marketing of Peasant Economic Crops' (n 36) 249.
[209] ibid.
[210] ibid 253.
[211] ibid.
[212] McCracken, *A History of Malawi, 1859-1966* (n 2) 242.
[213] Baker, 'Nyasaland's Governors' (n 29) 36.
[214] McCracken, *A History of Malawi, 1859-1966* (n 2) 242.

transforming economic structures.'[215] He is worth mentioning in this period because his approach 'was centered on "economic development" through the expansion of the smallholder dominated agricultural sector.'[216] He proceeded to make some changes in using smallholder farmers markets to bear the burden of generating funds for the economy of colonial Malawi; without any significant welfare benefit for them.

One of the areas that Colby turned his attention to was 'the extension of government control over the marketing of African cash crops.'[217] He found that during the war period smallholder farmers sold their tobacco grown on Native Trust Land 'to estate owners rather than to the Native Tobacco Board' and ended this emerging practice through an amendment to the tobacco law in 1948 're-establishing the legal monopoly of the NTB over the purchase of Trust Land Tobacco. [218] He also encouraged the introduction of the less demanding burley tobacco. After plucking the mature leaf, burley tobacco is air dried in barns before sale. Colby used the Agricultural Produce Marketing Board to keep the prices for tobacco paid to smallholders low when compared to prices offered to settlers at the country's tobacco auction markets to which small-scale farmers had not access. The Board would then sell the tobacco at this market and the difference was paid to the government.

Under Colby's administration of Central Malawi, there was an increase in the growing of tobacco which attracted a state response. The first stage 'involved the uncontrolled expansion in Trust Land production, which reached a peak in 1947' although the crop quality was poor in the absence of adequate agricultural advisory services.[219] In 1949 Malawi experienced a historic famine, 'the most severe since 1861-63' to which Colby made remarks that could have been of some use to the reforms carried out four decades later. He remarked:

> This would be serious enough if the adverse effect was on the tobacco crop alone but, in fact, these high prices paid to producers have had the effect of unbalancing the

[215] ibid.
[216] Wiseman Chijere Chirwa, 'Book Review: Development Governor: A Biography of Sir Geoffrey Colby' (1997) 30 The International Journal of African Historical Studies 487.
[217] McCracken, *A History of Malawi, 1859-1966* (n 2) 243.
[218] ibid.
[219] ibid 248.

> whole of our agricultural production. Indeed, if some remedial action is not taken, a serious shortage of food will result in a very short time.[220]

Colby was succeeded by Robert Armitage under whose governorship nationalist political organisation increasingly challenged colonial rule leading to self-government in 1961 and eventually independence.[221]

6.4 Conclusion

The period demonstrated how markets were constituted by the colonial state while paying attention to matters of food security and the different sometimes competing and conflicting interests behind this legal constitution of markets. The interests varied from local, national and international. Despite the efforts of public actors to constitute markets, the markets did not demonstrate 'the dominance of the market principle and the price mechanism integrating' all regimes of social life; markets remained peripheral to social life.[222] Some of the qualities of this peripherality are that 'from the point of view of the whole economy, market sales [did not become] the dominant source of material livelihood.'[223] The smallholder farmers were 'not engaged in producing for the market or selling in the market or those who were so engaged [were] only part-time marketers.'[224] The key feature of these markets were 'the minute quantities transacted.'[225] Therefore, most of the smallholder farmers were no more than 'target marketers' and they only regarded 'the market as important because it was the only place' where they could exchange their agricultural produce for money to pay taxes or buy other goods and services that they required.[226] Although these markets may operate on the basis of the market principle, 'they are affected by a variety of social factors that impinge of price making' such as traditional community relations or 'other status of buyers, traditional norms of just price.'[227] Further, these markets have a limited role in guiding production decisions that would otherwise be useful for rational economic actors, in other words, 'prices

[220] ibid.
[221] Baker, 'Nyasaland's Governors' (n 29).
[222] Bohannan and Dalton (n 10) 9.
[223] ibid 7.
[224] ibid.
[225] ibid.
[226] ibid.
[227] ibid 8.

made in peripheral markets do not perform the economy wide function of the price mechanism in' self-regulating markets.[228]

[228] ibid.

7 The postcolonial state: 1962 to 1980

The previous chapter looked at the period 1891 to 1961 explaining at how the state constituted agricultural markets and constituted smallholder farmers, as econo-legal participants, eventually setting up a state marketing board to govern smallholder markets. This chapter considers the period beginning in 1962 when African nationalists took over the running of government, eventually leading to formal independence in 1964; and 1980 when the Malawian economy came under the influence of the World Bank's legal thinking and practice, due to a crisis of the Malawian economy.[1]

This chapter also contributes to the call for modification of the view that the postcolonial African state 'has always been autonomous and operates according to a particular state logic.'[2] It is an important step in understanding and explaining aspects of law in economic life in postcolonial societies like Malawi. By analysing the state ESL approaches could clarify why the World Bank was surprised with the economic crisis in Malawi despite lauding it as largely a 'market oriented' economy albeit they claimed with some 'distortions.'[3] This chapter addresses the empirical question of how a rationality constituted by local and international contexts was central in the constitution of the market regimes of this period. The other related insight is the hybrid nature of the postcolonial state. As hybrid, the postcolonial state is the source of sociological pluralism which allows actors with control of the state to benefit sometimes at the expense of others in the state. The state in this period attempted to be 'the prime collective instrument for achieving rapid rates of growth' without the required 'structural transformation' among poor smallholder farmers.[4] Some scholars have suggested that 'weak institutions' and the promotion of personal interests by those controlling the state is one of the major challenges for economic progress in Malawi.[5] The chapter proposes a

[1] Thandika Mkandawire, 'Economic Crisis in Malawi' in Jerker Carlsson (ed) (Scandinavian Institute of African Studies 1983).
[2] Gift Wasambo Kayira, *The State and the Legacies of British Colonial Development in Malawi: Confronting Poverty 1939-1983* (Lexington Books 2023).
[3] Shankar N Acharya, 'Perspectives and Problems of Development in Sub-Saharan Africa' (1981) 9 World Development 109.
[4] Thandika Mkandawire, 'From Maladjusted States to Democratic Developmental States in Africa' in Omano Edigheji (ed), *Constructing a democratic developmental state in South Africa: Potentials and challenges* (HSRC Press 2010) 60.
[5] Dan Banik and Blessings Chinsinga (eds), *Political Transition and Inclusive Development in Malawi: The Democratic Dividend* (Routledge 2016).

revision of the weak institutions view and suggests that the situation is created by the sociological pluralism inherent in the postcolonial state. This may explain how the formal state institutions get repurposed or underutilised or unutilised and thereby appear weak relative to the original objectives of setting them up. The relationships between sociological pluralism and formal institutions are often overlooked by Weberian approaches looking at the postcolonial state. The pluralism exists in the state itself through 'multiple microstates existing inside the same state' promoting various interests.[6] Scholarship on the deleterious effect of patronage could be interpreted as being-about uncovering the empirical manifestations of the sociological pluralism of the hybrid postcolonial state.[7] These insights will also be taken up in Chapter 8 and 9 as suggesting the 'limits of neo-Weberian approaches' to conceptualising the postcolonial state.[8]

This period is distinctive because of the predominance of Dr Banda, a nationalist politician and first head of state and government of independent Malawi, and his inner circle. He dominated the political and economic life most especially in agricultural markets. Economists, including those at the World Bank studying these years, generally acknowledge that by standard economic measures such as per capita GDP growth, Malawi was doing very well as an economy largely dependent on agricultural markets compared within similarly positioned countries in other parts of Africa.[9] The only issue relates to whether agricultural markets were equitable for actors in small-scale farming.[10]

Just as with colonial agricultural markets, the two main 'regimes', smallholders, and estates, rested on 'land policy' to perpetuate a 'dualistic agricultural sector' with separate modes of

[6] Boaventura de Sousa Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique' (2006) 40 Law & Society Review 39, 44.
[7] Diana Cammack and Tim Kelsall, 'Neo-Patrimonialism, Institutions and Economic Growth: The Case of Malawi, 1964–2009' (2011) 42 IDS Bulletin 88.
[8] Philipp Lottholz and Nicolas Lemay-Hébert, 'Re-Reading Weber, Re-Conceptualizing State-Building: From Neo-Weberian to Post-Weberian Approaches to State, Legitimacy And State-Building' (2016) 29 Cambridge Review of International Affairs 1467, 1468.
[9] Acharya (n 3); Ravi Gulhati, *Malawi-Promising Reforms, Bad Luck* (The World Bank 1989); Kathryn Morton, *Aid and Dependence: British Aid to Malawi* (Routledge 1975); Jane Harrigan, 'U-Turns and Full Circles: Two Decades of Agricultural Reform in Malawi 1981–2000' (2003) 31 World Development 847.
[10] Jonathan Kydd and Robert Christiansen, 'Structural Change in Malawi Since Independence: Consequences of a Development Strategy Based on Large-Scale Agriculture' (1982) 10 World Development 355; Jane Harrigan, *From Dictatorship to Democracy: Economic Policy in Malawi 1964-2000* (Ashgate Publishing/Routeledge Revivals 2018 2001).

'production, marketing and pricing policy' reinforcing the separation yet simultaneously connecting these regimes to each other, to the Malawian economy and wider social life.[11] State pricing actions lay at the heart of legal constitution of the estate regime to accelerate economic growth and rid Malawi of any serious need for dependency on international aid. Pricing of smallholder output was the way of accessing smallholder market surpluses to finance the expansion of estate regimes.[12] The surplus was made by the state marketing board purchasing cash crop produce such as tobacco from smallholder farmers at prices below international commodity prices and reselling at international prices.[13] The state marketing board invested its profits in banking or entered into arrangements 'via a more circuitous route established by the complex relationship between corporate, financial an parastatal sectors of the Malawian economy.'[14] What was at work was both formal and informal law.

The chapter is structured as follows. Section 7.1 discusses the key actors that played a role in the legal constitution of economic life in this period. Section 7.2 addresses the nature of the postcolonial state which enabled the Dr Banda's practical rationality behind the legal making of making of markets in these decades. A central argument is to call for a critical analysis of law in the postcolonial constituted by 'formal and informal law making up the normative domain'.[15] Dr Banda's actions were possible because he could exploit the nature of the postcolonial state in Malawi as a heterogenous and sociologically pluralist as opposed to Westphalian states with limited pluralism. Section 7.3 demonstrates some continuity of the colonial regimes of agricultural markets, one for smallholder farmers and the others for plantations now called estates. The most important cash crop for this period was tobacco just like in the colonial period. Section 7.4 concludes with how the estate regime began to unravel due to factors internal and external to the Malawian economy.

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[11] David E Sahn and Jehan Arulpragasam, 'Development Through Dualism: Land Tenure, Policy and Poverty In Malawi.' 6 <https://pdf.usaid.gov/pdf_docs/PNABI279.pdf> accessed 13 February 2023.
[12] Robert Christensen, 'Financing Malawi's Development Strategy', *Malawi: An Alternative Pattern of Development* (University of Edinburgh, Centre for African Studies 1984).
[13] Jane Harrigan, 'Malawi: The Impact of Pricing Policy on Smallholder Agriculture, 1971-88' (1988) 6 Development Policy Review 415.
[14] Harrigan, *From Dictatorship to Democracy* (n 10) 35.
[15] Margaret Davies, 'Plural Pluralities of Law' in Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017).

7.1 Key actors

The key actors in this period with significant influence on the making of markets are the Malawi government personified by Dr Banda and his inner circle in the nationalist Malawi Congress Party ('MCP'), the British government as a former colonial power, the World Bank as an aid agency for newly independent countries, and smallholder farmers. However, Dr Banda's actions were shaped by and probably shaped international actors that regularly interacted with Malawi during this period. The former imperial power, the British government had considerable leverage because firstly it was the colonial authority which transferred *de facto* political power to Dr Banda's Malawi Congress Party in order to usher in self-government after the first elections based on universal adult suffrage in 1961 and because it had tacitly endorsed Dr Banda as the leader of independent Malawi.[16]

In the prevailing conditions both internationally and locally, it was relatively easy for people like Dr Banda and an inner circle in the MCP to shape the structure of an economy like Malawi and set up or support 'regimes' that reflected their interests and rationality. Several factors compelled Dr Banda to adopt the rationality he did in Malawi, faced with prevalent poverty of most people and the absence of natural resources for Malawi at this time; similar to the problem that faced Sir Harry Johnston in 1891 on the imposition of a colonial state.[17] The emergence of the rationality will be subject to extensive analysis in the next section, highlighting the social construction of the rationality. The motivation of Dr Banda seems to have been shaking off reliance on aid for decisions about Malawi. This seems to be supported by Dr Banda's confidence 'that once he had a plan, he would get money' to develop Malawi his way almost certainly with minimum international aid when the widespread economic poverty was drawn to his attention at the time of independence.[18] There was also the independent African ethos of 'experimentation' with various rationalities in newly independent African states, especially capitalism and socialism or variations/combinations thereof.

[16] Colin Baker, *Revolt of the Ministers: The Malawi Cabinet Crisis 1964-1965* (Bloomsbury Publishing 2001).
[17] Morton (n 9).
[18] ibid 17.

Smallholder farmers have always been a diverse group with different capacities for econo-legal (inter)actions. The Malawi government's policies in this period noted that smallholder farmers had 'different socio-economic characteristics' which suggested different (inter)actions in relation to 'different policies and strategies.'[19] Government policies at the time classified them as using the size of land for agricultural production at their disposal as follows, 'smallholders with less than 0.5 hectares', 'smallholders with between 0.5-1 hectare', and 'smallholders with more than 1 hectare'.[20] These classifications indicated to the government 'vulnerabilities as well as future potentials for increasing agricultural production and income.'[21] These were the key actors in the legal constitution of agricultural markets of the period whose 'regimes' were driven by a particular rationality.

7.2 The context

This section addresses the key question of why Dr Banda and his inner circle in MCP adopted the rationality they did. Unilateral pragmatic capitalism was the dominant rationality shaping agricultural markets in Malawi during this period. It was 'unilateral' in the sense that as political events turned out immediately before, around the time of independence or soon thereafter, Dr Banda had almost complete of major economic reforms, conceived with minimum consultation or disdain for advice before adoption or implementation. It was 'capitalist' in the sense that Dr Banda 'favoured a relatively open economy with a major role for domestic and foreign private capital and a stress on production for export'.[22] That the economy under Dr Banda was capitalist is acknowledged by the World Bank economists, who believed Malawi in the 1970s demonstrated 'a relatively greater reliance on markets especially international market forces for guiding investment and output allocation' and 'greater willingness to let the pace and character of industrialisation be governed by market forces.'[23] It was 'pragmatic' in the sense that Dr Banda disavowed any ideological affiliation with East or West, undertaking to act on practical rationality basis.[24] He claimed that the only relevant

[19] Malawi Government, 'Food and Nutrition Policy Statement: Supplement to the Statement of Development Policies' 8.
[20] ibid.
[21] ibid.
[22] Acharya (n 3).
[23] ibid 118.
[24] Kamuzu Hastings Banda, 'What Is Communism?'

consideration was 'the welfare of the people of Malawi'.[25] As Short observed in the early 1960s 'he several times stated that if the West refused to help Nyasaland, then he might be forced to look to the East.'[26]

It has been suggested that 'there is a direct and intimate connection between domestic requirements and the objectives and techniques of foreign policy in newly independent states', arising from 'promises and expectations of the pre-independence period and the capability of the immature political institutions and the developing economy to fulfil or deflect those expectations.'[27] International aid had some influence on the making of the pragmatic unilateral capitalist rationality of Dr Banda. Until the late 1970s, aid from Britain was a significant part of Malawi's budget.[28] It came both financially and through 'technical assistance' [foreign experts] motivated by the view that Malawi needed all the help she could get, since at independence in 1964 it was 'scarcely a viable state' which 'lacked domestic resources, human, physical or financial with which it might survive, let alone develop.'[29]

Dr Banda famously claimed to have had several dreams about the future Malawi while detained in present day Zimbabwe at a place called Gwelo by the colonial government during independence struggles in 1959. His dreams ('Gwelo dreams') were;

> to dissolve the Central African Federation, an assignment that he accomplished in 1963. Construction of the lake-shore road along Lake Malawi, and the Nacala railway link connecting land-locked Malawi to the Indian Ocean in Mozambique, and moving the capital from Zomba [in the south] to Lilongwe [in the centre], … [and] the construction of the new campus of the University of Malawi….[30]

In 1965, there had been criticism of 'Banda's ambitions concerning the new capital and Nacala projects' by both the British government and the World Bank.[31] The British Overseas Development Ministry ('ODM') oversaw the distribution of 'British financial support' to newly independent state such as Malawi. The ODM's expert visited Malawi to conduct a feasibility

[25] ibid 20.
[26] Philip Short, *Banda* (Routledge & Kegan Paul 1974) 173.
[27] Carolyn McMaster, *Malawi: Foreign Policy and Development* (St Martin's Press 1974) 2.
[28] Morton (n 9).
[29] ibid 164.
[30] Gift Wasambo Kayira, 'Limits to State Power in Post-Independence Development in Malawi, 1964-1983' in Kenneth Ross and Wapulumuka O Mulwafu (eds), *Politics, Christianity and Society in Malawi, Essays in Honour of John McCracken* (Mzuni Press 2020) 277.
[31] ibid.

study 'following the £11 million application Malawi had raised requesting financial support from' the British Government to move the colonial capital in Zomba in the southern region of Malawi to Lilongwe in central Malawi.[32]

An observation of the mission led by C. de N. Hill, formerly Permanent Secretary, Ministry of Finance in Tanzania, and at the time Deputy Bursar, Sussex University criticised the project in his report to ODM as follows , 'it would be economically and administratively absurd to build a new capital from scratch on a barren site eight miles outside the existing township of Lilongwe.'[33] Dr Banda believed that the project would result in a more even and fair distribution of development in Malawi.[34] Deep down Dr Banda was incensed by the report and publicly expressed his dismay in the strongest terms.[35] Dr Banda attempted to publicly justify moving the capital on instrumental grounds as follows [as quoted by Kayira]

> This scheme of moving the capital is worth carrying out even if we haven't got £20 million [today's equivalent is almost £350,000,000] …it will extend development, real development, practical development, not theoretical development of people sitting in the universities talking about census and statistics. Development of the common farmers in this country is needed.[36]

Banda's rail link Gwelo dream to connect Malawi to the Indian ocean was also rejected by the British Government and the World Bank compelling Banda to seek the assistance of 'the apartheid government in South Africa, a politically sensitive decision, at least as the British and other players saw it.'[37] Moving the capital from the south to the centre had symbolic meaning for Dr Banda, being of Chewa tribe from central Malawi.

It has been argued that traditional communal networks tend to have a strong hold through the sense of attachment that members may feel even if the related (inter)actions are long gone.[38] Other aspects in the constitution of the rationality came from personal traits of Dr

[32] ibid.
[33] ibid 278.
[34] ibid.
[35] ibid 277.
[36] ibid 278.
[37] Kayira (n 30).
[38] Roger Cotterrell, 'Justice, Dignity, Torture, Headscarves: Can Durkheim's Sociology Clarify Legal Values?' (2011) 20 Social & Legal Studies 3.

Banda. Dr Banda, as Prime Minister, had faced a political revolt of his most trusted ministers, some of whom led an armed rebellion against the state in southern Malawi.[39] It seemed justifiable for Dr Banda to feel strongly to move 'the capital to a safe base among his people' In central Malawi.[40] A tribe is associated with ethnicity that may be defined as 'an ideology according to which a given people are able to assert their identity, interests and loyalty on the basis of kinship, a common language, a shared history and world-view, usually in contradiction to other similarly defined groups.'[41] Tribal affiliation remained strong especially with colonial approaches of retaining regimes such as customary law, which applied by reference to precolonial ethnic groups.[42] On the basis of this, it has also been argued that the British 'did not merely resurrect Roman divide- and-rule practices but rather pioneered an altogether different form of statecraft based on the recasting of identities.'[43] The British differed from the approach of ancient Romans in that

> the Romans were content to rule peoples as they found them, but the British were not. In this sense nineteenth- century indirect rule turned out to be a far more ambitious project than direct rule had been: whereas direct rule aimed at civilizing elites, indirect rule looked to impose a native subjectivity on the entire local population.[44]

Ethnicity was used by the British colonial government to maintain law and order and formed the basis of customary law.[45] Customary law arguably played a role in this.[46] Some of the legacies of this approach for the postcolonial state have been considered elsewhere.[47] To be fair, the British may favourably be compared with other more devasting forms of divide-and-rule by other European powers whose tragic consequences have been there for all such as in the case of Rwanda.

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[39] Baker (n 16).
[40] Kayira (n 30) 280.
[41] Wiseman C Chirwa, 'Democracy, Ethnicity, and Regionalism: The Malawian Experience, 1992-1996' in Kenneth Ross and Kings M Phiri (eds), *Democratization in Malawi: A Stocktaking* (Luviri Press, Reprint 2020) 61.
[42] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 2018).
[43] Mahmood Mamdani, *Neither Settler Nor Native: The Making And Unmaking of Permanent Minorities* (Harvard University Press 2020) 12.
[44] ibid.
[45] Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985).
[46] Mamdani (n 42).
[47] ibid.

The 1960s was the time when newly independent African states were considering various rationalities to guide their respective approaches to respective economies not only at the level of 'regimes', but the thinking behind the regimes, just as Dr Banda was doing. Zambia on Malawi's Western border adopted 'humanism', a rationality that focused on persons' dignity and self-respect, driven and promoted by Kenneth Kaunda, the first president of independent Zambia.[48] Similarly, Malawi's northern neighbour, Tanzania experimented with a form of socialism 'variously referred to as *ujamaa* or villagization' which placed emphasis of rural enterprises.[49] These rationalities 'had an Afro-centric appeal and had an ambitious programme of social engineering and nationalization of industries' and they only differed because 'the economies of these countries were different hence the level of implementation of these ideologies were different; comparatively, Tanzania intensely implemented' their form of socialism.[50]

Earlier, before independence in 1964, Dr Banda presented a paper to a debating society in Malawi on capitalism versus communism, and its concomitant West and East divide, which seemed to be a hotly debated topic before independence in Malawi and other African states. After indicating that he favoured neither the West nor the East but would only do what was beneficial for the people of Malawi, he stated;

> To some of you, some of the things I do now may not seem to be in the best interest of the country. But remember this; we are on trial. The eyes of the world are on us. We will be independent in July. But our economy is a frail one. We have to win the confidence of the outside world. People must come here confident that there is a stable government and efficient administration. And it my job to see to it that this country has a stable government and efficient administration, whatever anyone may say or do.[51]

There were also domestic influences with Malawi which led Dr Banda to embrace pragmatic unilateral capitalism. Unilateral pragmatic capitalism was possible because as events unfolded in Malawi after 1961 Dr Banda did not have to use economic patronage because of the charismatic legitimacy he acquired among nationalists and citizen in directly challenging

[48] Happy M Kayuni, 'Malawi's Economic and Development Policy Choices from 1964 to 1980: An Epitome of "Pragmatic Unilateral Capitalism"' (2011) 20 Nordic Journal of African Studies 20, 114.
[49] ibid.
[50] ibid 115.
[51] Banda (n 24) 20.

British rule. This left him free to 'pursue his own vision of social and economic change' instead of placating those who had helped Malawi become independent as in other parts of Africa.[52] For reasons of space, the thesis only looks at two events; the political activities leading to independence, and the tacit encouragement of the colonial government in Nyasaland.

Dr Banda had left Malawi for America, after initial formal education by Scottish missionaries in Malawi, through South Africa to USA in the early decades of the 20th century and after training as a medical doctor in USA settled in medical practice in London.[53] He came to prominence when a proposal was made for a settler driven federation of Rhodesia and Nyasaland [colonial Malawi] in 1951 to which he voiced his public opposition through a written memorandum to the British colonial office.[54] The federation could have increased European settler influence and undermined prospects of African independence, in fact settler farmers were inclined in these years towards this view endorsed by fellow settler in Southern Rhodesia, the colonial name for modern Zimbabwe; this was also the time when apartheid was taking root in South Africa.[55]

One might say the African nationalists in Malawi and the development of political events almost coerced Dr Banda to return to colonial Malawi to take up political leadership of the Nyasaland African Congress (Malawi's first nationalist African political party), and to do so on almost dictatorial terms.[56] As Short wrote, 'it was Banda's courage in adversity which returned him to Nyasaland, just as it had taken him from it, almost half a century before.'[57] On his return and after a series of political events and his detention by the Nyasaland government, seemingly with the encouragement of the Federal government of Rhodesia and Nyasaland, Dr Banda seemed to have settled on providing political leadership subject to 'a dictatorial style of government' to which the more militant young nationalists seemed to be complicit despite committing 'themselves to working with Banda only in so far as he accepted their views.'[58]

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[52] Harrigan, *From Dictatorship to Democracy* (n 10) 32.
[53] John Pike, *Malawi: A Political and Economic History* (Pall Mall Press 1968) 115.
[54] ibid 114–115.
[55] Robin Palmer, 'White Farmers in Malawi: Before and after the Depression' (1985) 84 African Affairs 211.
[56] Short (n 26) 80–84.
[57] ibid 88.
[58] John McCracken, '"Setting the Record Straight"? Transition in Colonial Malawi' (2003) 29 Journal of Southern African Studies 791, 791–792.

The Nyasaland African Congress was almost decimated by detentions of its leadership including Dr Banda following a state of emergency in March 1959.[59] This led to tension at grassroots in Nyasaland due to what was felt as a vacuum in African political leadership.[60] One of the political leaders then recently released formed the MCP and made it very clear that it was simply a caretaker organisation with the objectives of agitating for an end to the state of emergency and the release of the nationalist leadership including Dr Banda from detention. Leadership of the MCP was handed over to Dr Banda upon his release from detention in 1960 and he was quickly endorsed as president for life of the MCP.[61]

The colonial government officials in Nyasaland found it difficult to work with and trust the young nationalists who worked with Dr Banda regarding them as being 'a mixture of idealism and naivety, bombast and good sense, bitterness and generosity that influenced their behaviour' and sometimes 'rabidly racist', 'mentally most unstable', or 'hard core extremists'.[62] Dr Banda was found to be 'marginally preferable to the rest' in governing Malawi.[63]

It was this environment in which self-governing Malawi had to get to work with the legal constitution of agricultural markets as one of the priorities; just like the colonial government seven decades earlier.[64]

7.3 Regimes

This section will analyse the regimes in agricultural markets in this period of 1962 to 1980. One of the issues for this period analysed in the previous section alluded to why Dr Banda and his inner circle in MCP decide to perpetuate and perfect the colonial regimes. This section proceeds to analyse how this was achieved, with the result that smallholder farmers were restricted to a specific regime within agricultural markets. The statements of Dr Banda in the

[59] Short (n 26) 125.
[60] ibid 125–126.
[61] Short (n 26).
[62] McCracken (n 58) 792.
[63] ibid.
[64] Malawi Government, 'Development Plan, 1965-1969' (Government Printer).

representative assembly of Malawi after the first elections of 1961, illustrate the rationality that was to guide the legal constitution of markets as quoted by McCracken, 'We are not living in the days of Adam Smith but of John Maynard Keynes. We are not living in the days of laissez faire economic policy; we are living in the days of regulation, control and even guidance.'[65] As far as Dr Banda was concerned, his approach in relation to the economy would be interventionist just like Sir Geoffrey Colby before him less than a decade earlier discussed in chapter 6. These similarities have contributed to the view that Dr Banda's MCP when it came to agricultural markets, was walking in the footprints of the colonial actors.[66] There are similarities in the approach to regimes, but it seems that the underlying rationalities were somewhat different. As indicated in chapter 6 public actors in the Malawian colonial government were motivated in the legal constitution of markets by sometimes 'capitalist-oriented or market-based economies while others were in favour in merely improving' lives of the colonised.[67] Dr Banda was moved by the pragmatic consideration was as less dependency on aid as possible and needed economic resources he could direct towards his projects without hindrance.[68]

Dr Banda's pragmatism is reflected in Malawi's 'Development Plan' after formal independence in 1964, which stated as regards economic priorities that no attempt had been made at 'any theoretical balance between services but rather to make allocations in accordance with the actual requirements of the nation.'[69] The government understood that 'under colonial rule for a period of 73 years … much has been achieved; but much more needs to be done. The pace of development has been slow; *over the next five years this pace must be greatly accelerated* if Government is to fulfil its responsibilities to the people' [Emphasis supplied][70] The most important focus economically was agricultural markets.

[65] John McCracken, *A History of Malawi, 1859-1966* (James Currey 2012) 397.
[66] Bryson Nkhoma, 'Walking in the Footprints of the Colonial Masters: Agricultural Development and Peasant Food Production In Malawi, 1961-1994' (2019) 44 Southern Journal for Contemporary History 114.
[67] Kayira (n 2) 27.
[68] Kayira (n 30).
[69] Malawi Government (n 64) 5.
[70] ibid.

On self-government after the 1961 elections Dr Banda 'took a very populist approach to develop the agriculture sector and as a means to consolidate power.'[71] He made several decisions in favour of smallholder farmers including ending the colonial land conservation regimes which formed part of anticolonial grievances and the notorious *thangata* discussed in chapter 6, by revoking the rights of the white settlers to demand labour in exchange for rent in the estates.[72] He further considered that

> the whole system of marketing peasants' crops must be reformed, although Banda was initially unclear as to what would take its place. Altogether, these reforms involved an immensely popular response to genuinely widely-held peasant grievances. But they also provided Banda with the opportunity to introduce economic structures that that he would use to his own advantage after independence.[73]

Further proposals were considered to support small-scale farmers interests including considering whether smallholder farmers could grow tobacco without restrictions before abandoning the plan and maintaining the colonial position.[74] Eventually Dr Banda and his inner circle in the MCP seemed swayed by what had been suggested by Imperial Tobacco Company in colonial times, that 'smallholders did not have the technical ability to grow quality tobacco leaf (despite the fact that many worked as tobacco tenants for years or decades and often knew as much if not more about growing tobacco than the owner).'[75]

The government of Dr Banda attempted to strengthen the smallholder agricultural marketing regimes or the largely rural based smallholder farmers through the Integrated Rural Development Programmes ('IRDP') and other projects which since the mid 1970s were subsumed under the National Rural Development Project ('NRDP') financed by the World Bank.[76] The targeted aspect of the projects was agricultural production for smallholder farmers. It was expected by the World Bank and others in international development circles that smallholder farmers could 'behave like good and decent capitalist farmers if they were

[71] Tamani Nkhono-Mvula, Happy M Kayuni and Wapulumuka O Mulwafu, 'Post-Colonial Agriculture Policy and Agrarian Change in Malawi, 1964–1979' (2023) 1 The African Review 1, 9.
[72] ibid.
[73] McCracken (n 65) 390.
[74] Nkhoma (n 66).
[75] Martin Prowse and Paul Grassin, *Tobacco, Transformation and Development Dilemmas from Central Africa* (Springer 2020) 14.
[76] GH Chipande, 'Smallholder Agriculture as a Rural Development Strategy: The Case of Malawi' (PhD Thesis, University of Glasgow 1983) 47–50.

provided with the necessary conditions for doing so.'[77] One of the critiques against the IRDP was that its objectives were set 'according to statistical calculations that [bore] no relation to actual social conditions; and reliance on model (Japan), without recognising any historical specificity.'[78] The thinking of the World Bank, it seems, was that if the 'experiment' were to fail, it would be due 'to the difficulties of life (in the Third World)' although countries like Malawi 'would suffer the consequences of failure [not the World Bank].'[79] Against this background, McNamara as president of the World Bank, 'pledged his organization to direct its resources toward improving the productivity and welfare of the rural poor in the poorest countries.'[80] The approach covering many aspects of improving rural living standards was built around agricultural marketing regimes especially 'agricultural production.[81] The pilot project phase in Malawi took place in central Malawi near the capital, Lilongwe and it was called the Lilongwe Land Development Programme ('LLDP') to be funded by the World Bank for 13 years from 1968. The LLDP aimed 'to increase agricultural productivity on a scale large enough to have a significant impact at national level.'[82] The Government intended that the LLDP be 'directed toward "traditional" smallholder farming, and the emphasis was placed on facilitating the transition from semi-subsistence to a cash economy with *minimum social disruption*' (Emphasis supplied).[83] The emphasised words suggest that the government and World Bank planned the project with minimal considerations of wider social life. The failure of the programme was blamed by the World Bank on the smallholder farmers' 'inability to respond adequately to the programs' inputs.'[84]

The preferred crops for the project were hybrid maize varieties and groundnuts. It was expected that increased productivity in 'maize production [would] stem from packages of fertilizer and seed' while for groundnuts there was 'graded seed'.[85] The planned result was

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[77] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 1995) 158.
[78] ibid 160.
[79] ibid 161.
[80] Vernon W Ruttan, 'Integrated Rural Development Programmes: A Historical Perspective' (1984) 12 World Development 393, 394.
[81] ibid.
[82] BH Kinsey, 'Integrated Rural Development, Agricultural Growth and Equity in Malawi: Redefining Development Strategies and Tactics for The 1980's' (1984) 15 Agricultural Administration 45, 48.
[83] ibid 49.
[84] Escobar (n 77) 158.
[85] Kinsey (n 82) 49.

that 'maize and groundnuts were [expected] to increase dramatically as the combined result of both substantially increased yields' with an expected drop in acreage for growing tobacco, that had almost become been cultivated since the 1920s[86] There was also a credit scheme attached for acquisition of farm inputs.

The result of the project was a failure attributable to failure to consider social factors relating to the beneficiary group of smallholder farmers, such as the type of interactions to which the smallholder farmers could be expected to engage in based on their material endowments.[87] Despite the World Bank at the planning stage being aware of the possibility of a different reaction to project incentives, the planning inevitably assumed economically rational action with stable preferences. In the end it was found that the area planted to tobacco increased by 60% between 1973-74 and 1977-78, whereas the area planted to both maize and groundnuts declined' contrary to project expectations.[88] Further the benefits of the project were not equitably distributed among the smallholder farmers, a result that became more and more pronounced during the life of the project.[89] For instance, 'it was found that a significant proportion of farmers were ineligible for credit – the project's only activity capable of dramatically affecting productivity and income – because they cropped less than the criterion threshold area of half a hectare.'[90] It was also found that the expected incomes for smallholder farmers were negatively affected by the government pricing regime.[91]

Prowse summarises how unilateral pragmatism may have compelled the abandonment of the populist choices in the early days of self-government;

> pro-peasant policies of the 1960s did elicit some growth in customary land production but were confronted with a lack of a sustained supply response. Government started to look towards the estate subsector again. For example, it cancelled reforms to allow smallholder production of burley in 1965. The move back towards estates was precipitated by a severe current account deficit in 1968, and nationalist hostility to the estate subsector, so vehement in the early 1960s, began to wane.[92]

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[86] ibid.
[87] Pierre Bourdieu, 'Making the Economic Habitus: Algerian Workers Revisited' (2000) 1 Ethnography 17.
[88] Kinsey (n 82) 52.
[89] ibid 55.
[90] ibid 56.
[91] ibid 58.
[92] Martin Prowse, 'A History of Tobacco Production and Marketing in Malawi, 1890–2010' (2013) 7 Journal of Eastern African Studies 691, 700.

The state pricing policy effectively maintained 'predominantly subsistence-orientated, mono-cropping unfertilized maize (78% of the country's cultivated area was under maize)' as food producers so that land could be freed for the benefit of the estate agriculture regime for cash crops such as tea, sugar cane and tobacco.[93] The state marketing board enabled smallholder cash cropping for sale to the marketing board by offering prices below the export prices; in turn it was able to export the cash crops at substantial profits.[94]

Dr Banda's era is associated with a strand of the history of Malawi termed the 'exploitation narrative' which is said to involve what economic approaches discussed in chapter 2 term 'rent seeking behaviour'; i.e. behaviour that was ruinous to the rural farming communities but enrichening for largescale estate farmers.'[95] The literature suggests that the dominant estate regimes especially relating to agricultural markets (from production, financing to sales of farm produce) were aimed at the exploitation of smallholder farmers based on 'state intervention and participation in the economy on behalf of the state and the party as embodied in the person of the [then] Life President [Dr Banda] and his cohorts.'[96] The caution against this approach is that it may involve 'reading history backwards based on consequences than intentions.'[97] The approach suggests an instrumental role of formal law during this period in Weberian terms as analysed in chapter 3 i.e. that, 'state regulations were used to prioritise monopoly enterprises owned by the leadership, the party and their close associates.'[98] The economy, so the argument goes, was undergirded by a 'political model' which was predatory on its citizens or a Hobbesian 'Leviathan'.[99]

The taken for granted view of the post-colonial state implies that the state is a single 'jurisgenerative' entity, a single law-making entity in promotion of interests, depending on the

[93] Harrigan, 'U-Turns and Full Circles' (n 9) 416.
[94] Harrigan, 'Malawi' (n 13).
[95] Kayira (n 2) 7.
[96] Guy Mhone, 'The Political Economy of Malawi: An Overview' in Guy Mhone (ed), *Malawi at the Crossroads: The Post-Colonial Political Economy* (SAPES Books 1992); Blessings Chinsinga, 'The Political Economy of Agricultural Commercialisation in Malawi' (APRA, Future Agricultures Consortium 2018) Working Paper 17 <https://opendocs.ids.ac.uk/opendocs/handle/20.500.12413/14028> accessed 20 August 2020.
[97] Kayira (n 2) 7.
[98] Chinsinga (n 96) 18.
[99] Mhone (n 96) 4–6.

preferences of the actors in control of the state.[100] The exploitation narrative presupposes that the Malawian state should have the same trajectory as the European or Westphalian state which is a product of 'long and non-linear processes' to achieve domination over their respective societies.[101] It has therefore been argued that the exploitation narrative inadequately analyses 'the power and autonomy' of the postcolonial state by focusing on the 'internalist perspective that has for long guided much of the country's political economy scholarship and second, the Weberian concept of the state' for the latter represented by 'the [assumed] coercive power of the African state.'[102] The exploitation narrative assumes the 'coercive authority, of law, centralized by political structures' in respect of which those controlling the power of the state centred around the President in Malawi such that

> key actors that interact in the patronage network, which is highly dynamic, include: the governing party (with the President as the chief patron), opposition political parties, the private sector, academia, civil society, media, parastatal organisations, mainstream civil service, security apparatus (police, army and prison), traditional leaders, and civic strongmen (regional power brokers).[103]

This Weberian understanding of the state, complete with a bureaucracy, has informed scholarship on contemporary agricultural markets, including, for example, a research and policy reform project in Malawi at the Institute of Development Studies, University of Sussex.[104] The approach is yet to adequately account for why, despite the postcolonial state in Malawi having 'unmistakable strength', the prospects of building inclusive agricultural markets exhibited or continue to exhibit 'weaknesses in effecting goal oriented change' for legally driven economic changes.[105]

The exploitation narrative puts too much emphasis on formal law as an instrument of state action while overlooking the use of informal legal approaches.[106] It does not adequately explain why and how Dr Banda succeeded to 'direct investment' to build or support for estate

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[100] Robert M Cover, 'Foreword: Nomos and Narrative' (1983) 97 Harv. L. Rev 4; Chinsinga (n 96).
[101] Klaus Schlichte, 'A Historical-Sociological Perspective on Statehood' in Thomas Risse, Tanja A Börzel and Anke Draude (eds), *The Oxford Handbook of Governance and Limited Statehood* (Oxford University Press 2018) 50.
[102] Kayira (n 30) 269.
[103] Chinsinga (n 96) 14.
[104] Institute of Development Studies, 'The Agricultural Policy Research in Africa Brochure: Malawi'.
[105] Joel S Migdal, *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World* (Princeton University Press 1988) 9.
[106] Kayira (n 30).

regime, in the process only using aspects of the state that he needed.[107] The intricacies of the governance of the estate regime does not show the full machinery of government at work supporting the estates regime. Dr Banda created or subordinated 'a number of private and public organisations to direct investments' to support the growth and expansion of the estate regime largely leaving aside 'the state machinery.'[108] Dr Banda and his inner circle in MCP were able to exercise 'direct control over many of the means of [agricultural] production, such as smallholder land, commercial bank credit and the vast range of productive assets' without directly resorting to the formal state machinery as exploitation narrative would suggest in its 'rent seeking' explanations.[109]

This thesis takes the view that in the postcolonial state, the shaky 'unity of state law' may give rise to 'multiple microstates existing inside the same state' resulting in a 'sociological plurality' of regimes, fleeting or persistent, promoting various interests within the available policy space.[110] The formal state provides scaffolding to the microstates and the plural regimes. In these circumstances, the microstates tend to be parasitic on formal state actions. The argument can be further elaborated by showing that postcolonial states are unlike Westphalian states discussed in chapter 3; in the latter, '[state] law dominates with its legal structure, legal consciousness and legal outlook'. It does this insofar as the state maintains – as Weber put it – the monopoly of the legitimate use of physical force.'[111]

In most postcolonial states, social life is radically plural resulting in different formal and informal legal regimes coexisting, conflicting overlapping, and interpenetrating in social life. These formal and informal regimes have their own legal needs, and demands, including own 'legal structure, legal consciousness and legal outlook.'[112] The relationship between formal regimes and informal regimes creates a state that is an 'entangled hybrid' reflecting both

[107] Jonathan Kydd, 'Malawi in the 1970s: Development Policies and Economic Change', *Malawi: An Alternative Pattern of Development* (University of Edinburgh, Centre for African Studies 1984) 308.
[108] ibid.
[109] Harrigan, *From Dictatorship to Democracy* (n 10) 32.
[110] de Sousa Santos (n 6) 44.
[111] Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing 2006) 75.
[112] ibid.

Westphalian, accurately or inaccurately, and non-European aspects.[113] This hybrid state has also been described as 'the heterogenous state.'[114] The hybridity informed by sociological approaches should be the starting point for analysis rather than the Weberian modernist conception of the state in seek to understand law and agricultural markets in Malawi. In these circumstances, the state apparatus may result in 'styles of state legality' which overlap and interpenetrate in socially complex ways with formal state law.[115] The postcolonial state as a 'heterogenous state' is necessarily different from the Westphalian or Weberian state.[116] Further, the ability of the heterogenous state to dominate economic life with 'with its legal structure, legal consciousness and legal outlook' is limited depending on the interests of the actors behind the different microstates within the state.[117]

Further sociological arguments can be made about the nature of the state and necessarily state-centric approaches to law or taken for granted assumptions about the state in law and economics or doctrinal approaches. In such approaches the state may be given two definitions '(1) the state in the sense of a bureaucratic apparatus that manages collective interests, and (2) the state in the sense of the territory on which the authority is exercised.'[118] However, the definition may apply to the state in the European sense also known as Westphalian states. Even states in the European tradition have not eliminated legal pluralism although is rarely competes with or overwhelm formal law; empirically Westphalian states have limited pluralism.[119] In postcolonial states legal pluralism may undermine formal law and structures in extreme ways.

Just like the colonial government before him, Dr Banda seemed convinced by the late 1960s that the smallholder marketing regime could not overcome the many obstacles to contribute to accelerated agricultural productivity that Malawi needed to become economically

[113] Eve Darian-Smith, 'Postcolonial Theories of Law' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (2nd edn, Hart Publishing 2013) 255.
[114] de Sousa Santos (n 6) 44.
[115] ibid.
[116] Kayira (n 30).
[117] Cotterrell (n 111) 75.
[118] Pierre Bourdieu, *On the State: Lectures at the Collège de France, 1989-1992* (Patrick Champagne and others eds, David Fernbach tr, Polity Press 2020) 31.
[119] Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Routledge 2016).

independent after formal political independence.[120] Dr Banda and his inner circle in MCP ensured that their 'partial legal perspective' normatively became the dominant legal perspective of independent Malawi 'at the expense of others.'[121] This resulted in a situation where he could be described by the World Bank as the 'architect of Malawi's policy framework.'[122]

The estate regime required 'four types of resources' at least namely 'land, labour, financial capital and technical/managerial skills.'[123] These were the minimum supporting factors to enable thriving agricultural markets for estates. Although 'in the 1970s, Malawi's two most important estate crops, tobacco and sugar experienced relatively favourable market conditions' they were subject to the vagaries of international markets that set commodity prices and in turned were subject to trends and pattern of the global economic regimes.[124]

Malawi's estates agricultural regime took off in two phases. The first phase (1969-72) saw estates owned by Dr Banda and politically connected persons or companies owned or controlled by him, directly and indirectly, acquire vast tracts of customary land, previously known as Crown land under the land legislation of 1967.[125] Others have called these years the period of 'presidential fiefdom', suggesting a dominance of a legal perspective promoting a narrow interests.[126] In this phase further acquisitions of estates were made through 'compulsory purchase of European-owned estates and their redistribution to the African elite'.[127] The politically connected persons were those which orthodox approaches to economy studies of the Dr Banda years saw as controlling the state.[128] The state marketing board also had a share of the presidential fiefdom through purchases of 'freehold and leasehold farms mainly In the Southern Region which were being offered for sale by Europeans departing voluntarily'; which the marketing board sold on credit terms to preferred

[120] Nkhoma (n 66).
[121] Cotterrell (n 111) 68.
[122] Gulhati (n 9) 33.
[123] Kydd and Christiansen (n 10) 366.
[124] ibid 371.
[125] Prowse (n 92) 700.
[126] Kydd (n 107) 319.
[127] Prowse (n 92) 700.
[128] Mhone (n 96).

Malawians.[129] Dr Banda personally set up a joint venture with the state marketing board called 'General Farming' and became a significant player in the agricultural markets regime.[130] The second phase (1973-1977) 'saw the broadening of estate ownership with further leasehold estates created from customary land mainly in the Central Region' for senior civil servants and other politically connected persons.[131]

The estate agriculture regime was imbricated in complex ways with the smallholder regime involving formal law, state practices and informal regimes driven by Dr Banda's interests. The estate agriculture through these connections was mostly responsible, directly, and indirectly, for inducing Malawi's economic growth as measured by gross domestic product from the late 1960s to mid 1970s.[132] For the purposes of this thesis two linkages are examined, land and finance. The first linkage was through state land laws.[133] These issues tend to fall under the general topic of 'the land question in Malawi.'[134] It has been noted that 'reforms that were carried out reinforced and perfected the dualistic agricultural strategy that distinguished two [regimes]: the smallholder and estate sub-sectors.'[135] Dr Banda 'abandoned key priorities of the independence struggle' which were 'to reform the colonial land tenure in order to create a milieu that would facilitate equitable agricultural development among Malawians.'[136] Dr Banda in parliamentary proceedings for the enactment of the land laws to support estate agriculture famously chided customary approaches to land as follows 'No one is responsible... for the uneconomic and wasted use of land [which is only possible when] one holds land as an individual. Land is held in common ... and everybody's baby is nobody's baby.'[137] He supported English land laws as follows:-

> First by accepting and recognising the principle or idea of individual ownership of land and secondly by insisting that anyone who owns whether as an individual or as the

[129] Kydd (n 107) 320.
[130] ibid 321.
[131] Prowse (n 92) 701.
[132] Simon Thomas, 'Economic Developments in Malawi Since Independence' (1975) 2 Journal of Southern African Studies 30.
[133] Sahn and Arulpragasam (n 11) 6.
[134] Chikosa M Silungwe, *Law, Land Reform and Responsibilisation: A Perspective from Malawi's Land Question* (Pretoria University Law Press (PULP) 2015).
[135] Chinsinga (n 96) 22.
[136] ibid.
[137] Clement Ng'ong'ola, 'The Design and Implementation of Customary Land Reforms in Central Malawi' [1982] Journal of African Law 115.

> head of his or her family, is strictly responsible for the economic and productive use of his or her land; otherwise it is taken away [both quoted by Ng'ong'ola].[138]

It may be recalled that the colonial government introduced dual regimes, one for settler estates, under freehold or leasehold subject to law very similar to English law and the other for Africans, customary title subject to the various customs that prevailed among ethnic groups of Nyasaland.[139] This dual tenure was entrenched in independent Malawi by land law reforms in 1967.[140] The main assumption behind Malawian land law during this time was to retain the 'land tenure structure that existed during colonial times' which increased the state's ultimate control of land and access to land.'[141] The land law supported a dual tenure policy by encouraging 'individually tenured estate sector and restricting the area of land under the customary tenured sector.'[142] On paper, smallholder farmers on customary land could convert their titles to leasehold but the practice was not common for several reasons. The grant of leases from government would come with conditions that would, for instance restrict smallholder farmers 'ability to cultivate an adequate quantity of maize for subsistence purposes.'[143]

While economists in capitalist economies debated about 'the extent to which financial intermediation should lead or follow economic growth', for Dr Banda by encouraging estate agricultural regimes, he set the direction of this debate.[144] Kydd and Christiansen wrote that the financial institutions were 'unable to provide sufficient funds due to a low savings rate and a significant government subsidy was not possible because the government's immediate priority was to phase out the British budgetary grant-in-aid.'[145] As early as 1962, one of Dr

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[138] ibid.
[139] Clement Ng'ong'ola, 'Colonial Law and the Inception of a Dual Land System in Nyasaland' [1985] Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America 283; Clement Henderson Supuni Ng'ong'ola, 'Statutory Control of Land and the Administration of Agrarian Policies in Malawi : An Historical Study of the Role of Legislation in the Administration of Agrarian Change, From the Colonial to the Post Colonial Period.' (PhD, University of London 1983) <https://ethos.bl.uk/OrderDetails.do?did=1&uin=uk.bl.ethos.339744> accessed 7 August 2020.
[140] Bridglal Pachai, 'Land Policies in Malawi: An Examination of the Colonial Legacy' (1973) 14 The Journal of African History 681.
[141] Sahn and Arulpragasam (n 11) 6.
[142] ibid 7.
[143] ibid 8.
[144] Christensen (n 12) 434.
[145] Kydd and Christiansen (n 10) 366, 368.

Banda's ministers was able to argue in parliament in support of an amendment to the law for that purpose that the state marketing board , as reported by McCracken, 'cannot perform only the function of stabilizing prices; it must also help the government in siphoning off money from the growers for further development.'[146] The tool for governing smallholder market regimes, especially for cash crops, was the state marketing board, the Agricultural Development and Marketing Corporation of Malawi ('ADMARC'). It was just a name change of the amalgamated colonial smallholder board governing agricultural markets with an enhanced role. Formal law expanded the mandate of ADMARC beyond price stabilisation to making contributions to national 'development' priorities as determined by Dr Banda in 1971.[147] Just as 'Colby before him, Banda was anxious to maintain a wide gap between world market prices [for cash crops] and those paid to the growers so that surplus funds could be accumulated for investment.'[148]

The 'implicit taxation' of smallholder holder farmers in the 1970s involved ADMARC paying 'peasant producers between 40% and 60% of the farmgate export value of the crops' enabling 'substantial profits' for reinvestment in estate agriculture regimes and an emerging small-scale manufacturing industry.[149] From an economic perspective, 'transfer of resources between sectors is inevitable during a development process [provided] the transfer and subsequent investment of these funds results in the productive capacity of the economy.'[150] The objective of using 'the implicit taxation' of smallholder cash crops for the state marketing board while simultaneously expecting them to should the responsibility of food security is one of the most known features of this era.[151]

It has been noted that in the 1970s 'the role of commercial banks changed quite remarkedly as a larger percentage of their resources was devoted to long term agricultural investments' and this was just at the time 'that Malawian interests acquired effective ownership in the country's commercial banks.[152] The challenge for Dr Banda of controlling access to finance

[146] McCracken (n 65) 398.
[147] Nkhoma (n 66).
[148] McCracken (n 65) 398.
[149] Christensen (n 12) 446.
[150] ibid 449.
[151] Harrigan, 'Malawi' (n 13) 418.
[152] Christensen (n 12) 435.

was resolved through ADMARC's acquisitions of controlling interests in existing financial institutions through profits made from the resale of smallholder cash crops and thereby achieving 'control over key personnel' which allowed Dr Banda to exercise considerable influence.[153] A key role was played by a company known as Press Holdings Limited ('Press'), 'firmly controlled' by Dr Banda with investments in, *inter alia*, agriculture and finance.[154] At its peak of economic activities Press controlled almost 30% of the economy of Malawi, indicting a brand of capitalism.[155] It was during this period that through the directorships of ADMARC and Press Corporation Ltd, itself a wholly owned company of Press Holdings Ltd, Dr Banda's government directed commercial banks 'to finance the development of new tobacco estates' and by 1980 almost '50% of the total advances of the commercial banks were to agriculture, almost all of this being to tobacco.'[156] Another area was the 'cooperation' between Press Holdings Ltd and the state marketing board, ADMARC. Press was 'the single largest beneficiary of ADMARC's investment.'[157] Press and ADMARC cooperated in 'joint equity ventures' with the most important being 'purchase of equity in commercial banks.'[158] The joint ventures enjoyed favourable treatment from ADMARC as demonstrated in a scenario where 'about 45% of ADMARC's loans and investments were extended to companies wholly controlled by Press.'[159] Other forms of cooperation were in the form of unsecured loans by ADMARC 'as indicated in the corporate accounts' of Press.

The enormous support notwithstanding, depressed international commodity prices seriously undermined the estate regime, and this caused a crisis in the Malawian economy.

7.4 Conclusion: Unravelling of the estate regimes.

Dr Banda and his inner circle in MCP promoted regimes that were parasitic on the state for the promotion of their interests; while restricting participation in cash crop markets by

[153] ibid 411.
[154] Kydd (n 107) 308.
[155] Jan Kees Van Donge, 'The Fate of an African "Chaebol": Malawi's Press Corporationafter Democratisation' (2002) 40 The Journal of Modern African Studies 651.
[156] Kydd (n 107) 322.
[157] ibid 310.
[158] ibid.
[159] ibid.

smallholder farmers for specific roles including food security.[160] This was aided by sociological pluralism in the heterogenous postcolonial state going beyond the simple binary between state law and customary law; which facilitated a switch from the populist policies of the early 1960s to support of the estate regime.[161] It is not clear what extent the political context made the switch relatively easy in the light of the continuing exploitation of the legal pluralism to promote narrow interests.[162] By the late 1970s, the estates regimes inspired by the unilateral pragmatic capitalism began to unravel due to several factors. Domestically, the causes of what led to this situation were found in how Dr Banda overfocused on economic growth determined by estate agriculture with perhaps limited thought for long term sustainability of the regime and its place in wider social life. The dual agricultural strategy may have encouraged Dr Banda to believe he could transform the economy by transferring resources from small-scale markets into estate regimes through formal institutions and practices that controlled agricultural markets.[163] When estates failed to demonstrate 'stable, continuing interaction[s]' the economy of Malawi showed symptoms of strain.[164] Some of the important factors in Malawi behind the unravelling of the estate agriculture regimes, as Prowse puts it, include 'excessive lending by Malawian banks, and poor estate management.' There was also a global context which aggravated these factors.[165]

Malawi also faced a serious economic crisis because of a world-wide economic depression which affected its international payments in the early 1980s, and it was compelled to seek the assistance of Bretton Woods institutions -- first the IMF and the World Bank. Public expenditure had been predicated on the expected development of stable, non-transient interactions of estate agriculture with the wider social life, which failed to materialise. The resolution of the crisis coincided with a shift of the dominant rationality in global economic regimes internationally from Keynesian or state interventionist to neoliberalism by

[160] Benson Kandoole, Ben Kaluwa and Steven Buccola, 'Market Liberalization and Food Security in Malawi' in Mandivamba Rukuni and Richard H Bernstein (eds), *Proceedings of the Third Annual Conference in Food Policy Research in Souther Africa* (University of Zimbabwe/University of Michigan Food Security Project 1988).
[161] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020).
[162] Jonathan Mayuyuka Kaunda, 'The State and Society in Malawi' (1998) 36 Journal of Commonwealth & Comparative Politics 48; Kenneth R Ross, Asiyati Lorraine Chiweza and Wapulumuka O Mulwafu (eds), *Beyond Impunity: New Directions for Governance in Malawi* (University of Cape Town Pres/Mzuni Press 2022).
[163] Harrigan, *From Dictatorship to Democracy* (n 10).
[164] Thomas (n 132) 104.
[165] Mkandawire (n 1).

international financial institutions such as the World Bank. This new theoretical rationality underpinned the framing of the assistance requested for postcolonial economies like Malawi that were facing economic crises.[166]

[166] Ankie Hoogvelt, *Globalisation and the Postcolonial World The New Political Economy of Development* (2nd edn, Palgrave 2001).

8 World Bank reforms in Malawi: 1981 to 2000

The previous chapter looked at how Dr Banda and his inner circle in the Malawi Congress Party ('MCP') adopted a 'practical' rationality which manifested itself mostly in the agricultural estate regime. This chapter considers the period beginning in 1981, which is when the World Bank attempted a law and economics reform of agricultural markets inherited from colonial times and perfected by the first postcolonial government. During this process, in 1994, a liberal democratic political system was introduced, putting an end to the grip of Dr Banda on Malawi.[1] Change of the political system had only a marginal impact on the heterogenous postcolonial state, at least economically.[2] From independence, the World Bank had been an aid agency, but from this time it actively participated in the legal construction of markets at all levels of social life as a donor.

The key insights in this chapter relate to the empirical limits of law and economic approaches, which eventually led to demands by various groups for more empirically based approaches to agricultural markets.[3] In the process 'law played a grubby role as collaborator during the disembedding movement in which' the World Bank inspired reforms attempted to reconstitute agricultural markets ostensibly more equitably for the benefit of smallholder farmers.[4] The World Bank reforms overlooked the 'mechanisms and processes through which African people position themselves as legal subjects', one of which in this thesis is *Ubuntu*.[5]

Paradigm shifts in the global economic regimes were spearheaded by Thatcher, Prime Minister in Britain from 1979-1990, and Reagan, President in USA from 1981-1989esulted in 'the resurgence of economic liberalism'; were the public faces of complex, long-gestating shifts away from Keynesian orthodoxy to this economic (neo)liberalism.[6] Its immediate impact on

[1] Fidelis Edge Kanyongolo, 'The Limits of Liberal Democratic Constitutionalism in Malawi' in Kings M Phiri and Kenneth Ross (eds), *Democratization in Malawi: A Stocktaking* (Luviri Press, Reprint 2020).
[2] Jonathan Mayuyuka Kaunda, 'The State and Society in Malawi' (1998) 36 Journal of Commonwealth & Comparative Politics 48.
[3] Johann Kirsten and others, *Institutional Economics Perspectives on African Agricultural Development* (Intl Food Policy Res Inst 2009).
[4] Amanda Perry-Kessaris, 'Reading the Story of Law and Embeddedness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law' (2011) 62 N. Ir. Legal Q. 401, 410.
[5] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020) 149.
[6] Celine Tan, *Governance Through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge-Cavendish 2011) 63.

the global economic regimes was for US and other powers to insist that the Bretton Woods institutions apply 'the [new] rules governing the world economy' that would 'create a world with maximal opportunities to extend the scope of markets internationally.'[7] In the approaches that developed, non-economic values and interests such as food security for smallholder farmers were at best relegated 'to a non-speaking cameo role' and at worst, were written 'out of the story entirely' when delivering 'advice' to countries in crisis such as Malawi. In Polanyian language, the World Bank's advice seemed to want the Malawian government to 'create a society in which the economy had been effectively disembedded' from wider social life.[8] The World Bank attempted to advance 'the dominance of rationalities and regimes that rank liberal, economic above other approaches.'[9] Underlying the World Bank reforms was the thinking of '*society as economy*; which uses liberal economic concepts and relationships to think not only about economic and other instrumental actions, but also about affective, belief-based and traditional actions' such as the thinking and practice of public actors and smallholder farmers thought about food security.[10]

As discussed in Chapter 2 on law and economics one of the key assumptions was the 'idea that the market and the state are separate and autonomous entities.'[11] Related to this is the idea that markets de-contextualised from social life of the kind analysed in Chapter 2 are 'natural' and should therefore be the foundation of economic regimes universally.[12] As a rationality, economic liberalism posits that 'the laws of the market are no different from the biological self-regulatory organisms of nature' such that 'only a self-regulating autonomous market can produce optimal results.'[13] Markets should therefore be freed from the distorting effects of state regulation because market benefits for its participants are 'immanent in the market system' once the markets are freed from state distortions. This approach may only benefit those able to engage in formally rational action and results in regimes 'that mostly disadvantage the poor' or whose legal mindsets are not predominantly utility maximising.[14]

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[7] Karl Polanyi, *The Great Transformation* (Beacon Press 1944) xxx–xxxi.
[8] ibid xxiv.
[9] Perry-Kessaris (n 4) 405.
[10] ibid.
[11] Fred Block and Margaret R Somers, *The Power of Market Fundamentalism: Karl Polanyi's Critique* (Harvard University Press 2014) 6.
[12] Gary S Becker, *The Economic Approach to Human Behavior* (University of Chicago press 1976).
[13] Block and Somers (n 11) 6.
[14] ibid 9.

This is because economic action as social action interpenetrates or overlaps or co-exists with wider social life. The World Bank reforms 'sanctioned the weakening of already weak states' unable to implement reforms.[15]

This thesis argues for a reformulated rationality of *Ubuntu*, as proposed in Chapter 4, to guide the reforms towards the wellbeing of smallholder farmers rather than economic liberalism, which excluded any other forms of rationality - such as those based on food security - for smallholder agriculture. Although 'the problem of food insecurity is a perennial one for Malawi, it has progressively worsened since the beginning of the 1990s, eventually reaching crisis proportions in 2002' attributed, among other reasons, to the undermining of 'traditional supports systems' in wider social life by World Bank inspired reforms.[16] Section 8.1 analyses the key actors involved and their various interests. Section 8.2 provides the reasons and circumstances for the intervention of the World Bank in agricultural markets in Malawi amidst a global crisis. Section 8.3 analyses the World Bank conditionality as rationality cum regime and how the World Bank sought to use the instrument of conditionality to reform agricultural market regimes. Section 8.4 details the successive attempts by the World Bank to erase the estate regime and promote only smallholder farmers markets. It also addresses emergent disagreements on the legal construction of markets between the Malawi government and the World Bank. Section 8.5 addresses the conflict between state action and World Bank action in respect to the making of markets in the context of structural adjustment. Section 8.6 analyses the further crisis in Malawi created by the World Bank reforms through an analysis of its own internal review. It also addresses how Malawi became more than a real-life experiment in mainstream economics. The central plank of the World Bank's reforms was the demand on the Malawi government to subject agricultural markets to the full logic of markets directed almost exclusively by price which affected wider social life in different ways, mostly in disruptive ways. Section 8.7 concludes with how the World Bank-induced crisis compelled it to examine its relations with economies. The World Bank was willing to make some

[15] Thandika Mkandawire, 'From Maladjusted States to Democratic Developmental States in Africa' in Omano Edigheji (ed), *Constructing a Democratic Developmental State in South Africa: Potentials and Challenges* (HSRC Press 2010).

[16] Blessings Chinsinga, 'Poverty and Food Security in Malawi: Some Policy Reflections on the Context of Crumbling Traditional Support Systems' (2004) 25 Canadian Journal of Development Studies/Revue canadienne d'études du développement 321, 338; Stephen Devereux, *Making Less Last Longer: Informal Safety Nets in Malawi* (Institute of Development Studies 1999).

concessions with regard to regimes but not in terms of rationality. This sets the scene for the next chapter which analyses the present and begins to answer the research questions in anticipation of the discussion and conclusion in Chapter 11.

8.1 Key actors

The three key actors involved in the legal reconstruction of markets during this period were the World Bank, the Malawi government, and smallholder farmers. The World Bank had undergone a shift in its legal thinking towards more market-centric and interventionist approaches in aid/loan recipient countries from the first dealings with Malawi government in the 1960s.

At the height of World Bank inspired reforms during a

> donor Consultative Group meeting held in Paris on 11-13 May 1992, under the auspices of the World Bank, the Malawi government requested nearly $800 million in balance-of-payments support. In a move that stunned the government, the donors suspended new aid until significant political reform had been implemented.[17]

Dr Banda was compelled to embrace democracy.[18] The assumption behind the demanded reform seems to be that economically Malawi would have to embrace the full gamut of World Bank economic reforms not only in agricultural markets but economy wide. When the change of government took place in 1994 'it was an open secret that the country could no longer feed itself and that food production was actually declining.'[19] From 1981 to the late 1980s Malawi was subject by the World Bank to reforms based on textbook mainstream economics. Beginning the late 1980s to the early 1990s the World Bank had softened its neoclassical economic approach to reforms in Malawi.[20] However, with the UDF government in power 'by the second half of the 1990s it had reverted back towards neoclassical orthodoxy in the agricultural sector, insisting on complete subsidy removal and favouring a policy of export crop promotion and food imports.'[21]

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[17] Stephen Brown, '"Born-Again Politicians Hijacked Our Revolution!": Reassessing Malawi's Transition to Democracy' (2004) 38 Canadian Journal of African Studies/Revue canadienne des études africaines 705, 712.
[18] S Nzunda and R Ross (eds), *Church, Law and Political Transition in Malawi 1992-1994* (Mambo Press 1995).
[19] Ellias Ngalande Banda, Flora Nankhuni and Ephraim Chirwa, 'Economy and Democracy: Background, Current Situation and Future Prospects' in Kings M Phri and Kenneth R Ross (eds), *Democratization in Malawi: A Stock-taking. Blantyre, Christian Literature Association of Malawi* (Mzuni Press Reprint 2020) 93.
[20] Jane Harrigan, *From Dictatorship to Democracy: Economic Policy in Malawi 1964-2000* (Ashgate Publishing/Routeledge Revivals 2018 2001).
[21] ibid 289.

The Malawi government for part of this period up to 1994 was under the control of Dr Banda's MCP. Empirical analysis would suggest that the 1994 changes, which involved the adoption of a constitution based on liberal principles, did not change the heterogenous nature of the state that Malawi is with its 'multiple microstates existing inside the same state' resulting in a 'sociological plurality' of regimes promoting various interests.[22] Research seems to confirm this trend: the informal microstates tend to be parasitic on the formal state to promote narrow interests; in Malawi, this has persisted throughout the postcolonial history notwithstanding the political reforms of 1994.[23] 1994 witnessed the advent of multiparty democracy in Malawi with a 'liberal democratic constitution' which resulted in Dr Banda's MCP being voted out of government.[24] There is a strand of literature which argues that Malawi adopted a 'liberal democratic constitution' which was expected to considerably shift the state governance structure and become more amenable to voter sentiments.[25]

On the agricultural markets, there was a shift in legal thinking because Dr Banda and his inner circle in MCP 'were predominantly agricultural-oriented' while 'the political elites that took over in May 1994 were primarily interested in business as their primary source of accumulation.'[26] This may explain the efforts in the period 1962-1980 at the legal construction of the estate regime and the reluctance and sometimes opposition to the World Bank's attempted legal reconstitution of agricultural markets. Dr Banda and his inner circle used agriculture to diversify 'to other sectors of the economy such as banks, insurance, wholesale and retail, bakeries, distribution and segments of the sugar value chain.'[27] One of the outcomes of the period before 1994 was a company called Press Corporation Limited controlled by Press Holdings Limited, which was once listed under global depository receipts

[22] Boaventura de Sousa Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique' (2006) 40 Law & Society Review 39, 44.
[23] Kaunda (n 2).
[24] Kings M Phiri and Kenneth R Ross (eds), *Democratization in Malawi: A Stocktaking* (Mzuni Press Reprint 2020).
[25] Kanyongolo (n 1) 412.
[26] Blessings Chinsinga, 'The Political Economy of Agricultural Commercialisation in Malawi' (APRA, Future Agricultures Consortium 2018) Working Paper 17 13 <https://opendocs.ids.ac.uk/opendocs/handle/20.500.12413/14028> accessed 20 August 2020.
[27] ibid.

on the London Stock Exchange.[28] The role that Press Corporation Limited played in supporting agricultural estates regime particularly through ensuring the availability of finances for estates was discussed in the previous chapter. By 1994 Press Corporation Limited controlled almost 30% of the Malawian economy measured by GDP under the direction of Dr Banda and his inner circle.

Most of the political elites who took over from Dr Banda happened to have been former members of the inner circle of Dr Banda in MCP associating under a party called the United Democratic Front ('UDF'). The first president after 1994, Elson Bakili Muluzi, faithfully and uncritically supported the implementation of all neoliberal economic reforms including massive deregulation and privatisation of the Malawi economy, in the process asserting himself 'as the dominant sugar distributor, controlling as much as 60 percent of [Malawi's] sugar distribution trade, [and] becoming a chief patron in the multi-party political dispensation.'[29] He is alleged to have been 'able to neutralise seemingly progressive politicians who genuinely wanted to implement a viable plural political dispensation by using sugar quotas to recruit politicians from within the UDF and other political parties.'[30] In the privatisation process as part of economy-wide reforms under World Bank inspired reforms, 'political elites divested to themselves most of the previously state-owned enterprises that had been recommended for privatisation' as 'found by an audit of the privatisation programme.'[31]

Smallholder farmers were intended to be the main beneficiaries of World Bank inspired reforms as it was thought they had been excluded for a long time from lucrative agricultural markets involving tobacco. As discussed in Chapter 2, the law and economics approach to the role of smallholder farmers was that they are individual rationality maximisers who know their preferences and are able through participation in markets, to make choices that maximise their welfare/happiness/satisfaction subject to their budgetary constraints. The World Bank intended to promote increased market participation of smallholder farmers on this basis.

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[28] Jan Kees Van Donge, 'The Fate of an African "Chaebol": Malawi's Press Corporationafter Democratisation' (2002) 40 The Journal of Modern African Studies 651.
[29] Chinsinga, 'The Political Economy of Agricultural Commercialisation in Malawi' (n 26) 14.
[30] ibid.
[31] ibid.

However, the proposed regime 'was undermined by a series of implementation limitations and almost immediately overshadowed by the food security crisis that quickly demanded a return to' no more than subsistence smallholder farming.[32] The process of integrating smallholder farmers was also affected by the interests of the UDF government which took the opportunity of the liberalised tobacco markets to promote 'non-certified producers or "middlemen" direct access to the [tobacco] auction floors'; in the process flooding 'the market [with] low quality [tobacco], ending years of predictably decent returns to the tobacco farmers' on which the whole reform was predicated.[33] Most of the 'middlemen' were politically affiliated the UDF with limited interest in the welfare of smallholder farmers which grossly undermined the returns to [smallholder farmers] within a very short period of time.'[34] Another result of these reforms was to seriously undermine informal regulation of tobacco production that had developed alongside the formal regulatory mechanism for better quality tobacco. As it has been put 'not very well-thought-out reforms were implemented to the production and marketing institutional framework for burley tobacco, which steadily undermined the accumulation efforts associated with Dr Banda's regime.'[35]

In all this, what gave the World Bank so much influence was being treated as if it held 'shared sovereignty' with the Malawi government.

8.2 The context of World Bank reforms

World Bank structural adjustment reforms and the economic crisis in Africa are topics that have attracted a range of divergent opinions. The views tended to be 'polarized between externalist and internalist perspectives'; where the former attributed 'the crisis largely to external factors and the latter' pointed to a country's internal structural problems such as the relationship between the estates and smallholder agricultural regimes. The World Bank with its rationality and the existing state legalities with their different rationality were in a relationship that was 'very often tense and conflicting'.[36]

[32] ibid 32.
[33] ibid 14.
[34] ibid.
[35] ibid.
[36] de Sousa Santos (n 22) 45.

One economist offering an 'internalist' perspective is Jane Harrigan, a professor of economics at SOAS, University of London and one time economist at the Malawi Ministry of Finance under a British government technical assistance scheme. She notes that by the end of the 1970s, 'estate export-led growth' relying on the estate agricultural regime had probably reached its limits.[37] The growth of the estate markets regimes was a result of heavy borrowing from banks.[38] Malawi had also heavily borrowed on the international commercial markets for large companies and parastatal companies in anticipation of the further expansion of the estate sector.[39] This was enabled because of the 'impressive economic growth' brought by estates agricultural markets. There was a world slump in agricultural commodity prices. The problem was compounded for Malawi since the railway line to the Indian Ocean through Mozambique was cut off due to a civil war in Mozambique which made Malawi's agricultural commodities uncompetitive. Malawi had little choice but to open 'negotiations with the IMF' but the relief from the IMF was a temporary 'stabilisation' loan and for a more lasting solution it went to the World Bank 'for a programme of structural adjustment covering the whole economy in order to complement the [IMF] stabilisation efforts and avoid the sacrifice of growth under short-term stabilisation polices.'[40] Unsurprisingly, the World Bank focused its conditionality on the agricultural markets.

8.3 World Bank's conditionality

Conditionality has both 'normative' and 'operational' aspects. The normative aspects relate to 'activities broadly referring to influence over social, political, and economic organisation and ideology in recipient countries', and operational aspects are 'activities comprising the implementation of aid projects and programmes, including technical assistance, infrastructural development and emergency assistance.'[41] Conditionality was, and continues to be, 'a regulatory instrument' and 'a default mechanism for regulating aid relationships

[37] Harrigan, *From Dictatorship to Democracy* (n 20) 40.
[38] ibid 44.
[39] Robert Christensen, 'Financing Malawi's Development Strategy', *Malawi: An Alternative Pattern of Development* (University of Edinburgh, Centre for African Studies 1984).
[40] Harrigan, *From Dictatorship to Democracy* (n 20) 44–46.
[41] Celine Tan, 'The New Disciplinary Framework: Conditionality, New Aid Architecture and Global Economic Governance' in Julio Faundez and Celine Tan (eds), *International Economic Law, Globalization and Developing Countries* (Edward Elgar Publishing 2010) 116.

[that] has led to the construction of a highly discretionary regime of global law-making, enabling the progressive embedding of policy reforms outside conventional channels of rule-making.'[42]

The approach underpinning IMF conditionality can be contrasted with World Bank conditionality at the time of structural adjustment. The IMF insisted and insists on conditionality which would increase the probability of the repayment of a loan and therefore required the recipient country 'to implement a package of macroeconomic policy conditions which it [believed would] improve the balance of payments' of the recipient country.[43] The primary purpose of IMF conditionality was therefore the 'to serve as a substitute for collateral', as in any financing arrangement.[44] On the other hand, for the World Bank 'the purpose of conditionality [was] no longer primarily to maximise the probability of repayment of the loan', but instead focused on enabling the recipient to 'remove what the lender sees as fundamental policy-induced obstacles to economic growth.'[45] This was a legal reconstruction of the economy.

The World Bank's structural adjustment 'used conditionality as a tool for reforming the economic trajectories of developing countries seeking development assistance from the Bretton Woods institutions.'[46] The underlying framework of conditionality reflected a shift in the legal thinking of the Bretton Woods institutions.

The change is captured in the following quote,

> Over a short period between the mid-1970s and the mid-1980s, the postwar consensus was swept away by a new set of economic ideas about development, which came to be termed "neoliberalism" or "The Washington Consensus," because they came to prominence as the in-house development dogma of the U.S. Treasury, State Department, aid agencies, the International Monetary Fund, and the World Bank, all headquartered in Washington.[47]

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[42] ibid 113.
[43] Paul Mosley, Jane Harrigan and John FJ Toye, *Aid and Power: The World Bank and Policy-Based Lending, Analysis and Policy Proposals*, vol 1 (Routledge 1995) 66.
[44] ibid.
[45] ibid 66–67.
[46] Tan (n 41) 121.
[47] David Kennedy, 'The" Rule of Law," Political Choices, and Development Common Sense' in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 129.

Neoliberalism sometimes is used as a word to describe reforms coming out of the Bretton Woods institutions but here it is used to mean a set of ideas emanating from a type of thinking that seeks to subordinate most social life to self-regulating markets and its price mechanism, and a minimal role for the state in the economy.[48]

The origins of neoliberal thinking about Africa lay in the views of several scholars. One such scholar is Bates who in 1981 noted, applying the approaches of mainstream economics, that 'the difficulties bedevilling the growth of farming' in African economies arose from 'improper incentives' for farmers who are rational economic actors because of those who 'distort the operations of the market'; that is use of formal law and other agricultural marketing regimes by African governments.[49] He thought he could also explain what was happening. He believed that African governments acting as rational economic actors 'intend to transform their economies; they want to move resources from agriculture to industry and therefore they set prices in markets to capture resources from agriculture.'[50] Bates also introduced another aspect of private rent seeking behavior of African governments or those in control. He suggested that because personal motives animate political choices and 'people turn to political action to secure advantages', there is thus a bias against agriculture and this explanation of the basis of agricultural policy in African economies.[51] The solution expressed in normative language suggesting a regime which should be put in place such that 'governments should withdraw from agricultural markets and let economic forces prevail.'[52]

At the height of structural adjustment programmes the World Bank through its flagship World Development Report ('WDR') 1986 weighed in to support such views and complement the

[48] Stephanie Lee Mudge, 'What Is Neo-Liberalism?' (2008) 6 Socio-Economic Review 703.
[49] Robert H Bates, *Markets and States in Tropical Africa: The Political Basis of Agricultural Policies* (Univ of California Press 1981) 2.
[50] ibid 4.
[51] ibid.
[52] ibid.

Berg Report[53] of a few years earlier.[54] In a review of the WDR 1986, it was noted that it comprised 'one-dimensional plea for governments to get smaller, let markets work and set prices right' as if almost saying these are 'necessary and sufficient conditions for agricultural growth-through-trade.'[55]

Others took a more critical attitude towards such neoliberal views which were 'immediately embraced by the World Bank' because it failed to account for some 'paradoxes' that emerge especially when one takes a global perspective.[56] One such instance was some Asian economies that experienced 'high economic performance' despite behaviour that may be called 'rent seeking.'[57] The Asian example created the impression that simply meant that the World Bank was suggesting that 'the state officials, politicians, policymakers, and bureaucrats [did] not have the slightest sense of duty to make them serve anything other than the crass interest of their group or patrons.'[58] The consequences of this analysis was the 'denigration and vilification of African civil servants' which may have led to the 'demoralization and non-cooperation with foreign imposed adjustment programs and to a fatal weakening of African bureaucracies.'[59]

The neoliberal approach adopted by the World Bank through conditionality encapsulated an idea of self-regulating markets which are attained by playing down the role of social context and overemphasising the assumptions of mainstream economics about markets and the role of the atomistic rational individual in it.[60] The level of the smallholder farmers' integration

[53] The Berg report is the name most commonly used for the World Bank-published report "Accelerated Development in Sub-Saharan Africa: A Plan for Action," written by Elliot Berg in 1981. The report was written in response to a 1979 request from the African Governors of the World Bank for a paper analyzing the development problems facing African countries. It also responds to a set of policies determined by African Heads of State in 1980, called 'the Lagos Plan of Action'. While the Lagos Plan endorsed inward-looking policies of African self-reliance, the Berg report advocated for outward-looking policies of increased international trade.

[54] World Bank, *Trade and Pricing Policies in World Agriculture* (World Bank 1986); Elliot Berg, *Accelerated Development in Sub-Saharan Africa: An Agenda for Action* (World Bank 1982).

[55] Michael Lipton, 'Limits of Price Policy for Agriculture: Which Way for the World Bank?' [1987] Development Policy Review 197.

[56] P Thandika Mkandawire and Charles Chukwuma Soludo, *Our Continent, Our Future: African Perspectives on Structural Adjustment* (Idrc 1999) 24–25.

[57] ibid 25.

[58] ibid 26.

[59] ibid.

[60] William A Jackson, *Markets: Perspectives from Economic and Social Theory* (Routledge 2019).

into agricultural markets varied widely depending on such things as 'material conditions of existence' or other forms of capital including social capital and/or as economists would say economic capital.[61] The World Bank seems to have largely ignored agricultural markets that are found in wider social life and are not what have been called 'price-making markets.'[62]

The World Bank, by means of structural adjustment conditionalities, believed that the problem with Malawi was 'neoclassical rent seeking' state action, and favoured the interests of the estate regime at the expense of the smallholder agricultural markets.[63] It therefore took the view that 'market distortions' prevented smallholder farmers from acting as rational economic actors and responding to market incentives to order actions accordingly.

It believed that the focus should be smallholder farmers as part of a 'growth-oriented rural development strategy'.[64] This is because the smallholder farmers marketing regime despite its size, had a 'massive potential [which was] yet to be realized'; secondly that poverty in Africa was 'still predominantly a rural phenomenon' ; and thirdly, 'attention to smallholders [was] a more cost effective way to raise output than other alternatives currently allow.'[65] This diagnosis and prescription was at the core of structural adjustment reforms.

Harrigan, an economist, who carried out extensive empirical work on the Malawi agricultural economy and World Bank conditionality, notes that the approach represented a serious misunderstanding of the regimes that made up agricultural markets in Malawi.[66] As to the World Bank, Harrigan observed, Malawi's problem was not one of agriculture against manufacturing as presented by Bates but *within* agriculture.[67] Malawi did not involve taking resources through implicit taxation from agriculture to other economic activities. It has been demonstrated in the previous chapter how the two regimes, smallholder agricultural markets and the estate agricultural markets, were connected as overlapping and interpenetrating

[61] Megan Vaughan, 'Food Production and Family Labour in Southern Malawi: The Shire Highlands and Upper Shire Valley in the Early Colonial Period' (1982) 23 The Journal of African History 351.
[62] Karl Polanyi, 'The Economy as Instituted Process' in Mark Granovetter and Richard Swedberg (eds), *The Sociology of Economic Life* (3rd edn, Routledge 2011).
[63] Harrigan, *From Dictatorship to Democracy* (n 20) 33.
[64] Berg (n 54) 46.
[65] ibid 50–51.
[66] Harrigan, *From Dictatorship to Democracy* (n 20).
[67] ibid 23.

regimes through other connections, land, and finances. Further, the financing regimes straddling the smallholder farmers and estate regimes were managed through ADMARC and other organisations. The World Bank approach was based on a partial and perhaps incorrect perspective of agricultural markets resulting in inappropriate legal shaping of the Malawi economy.

The World Bank probably 'overestimated the ability of [smallholders] to generate a positive supply response.'[68] In other words, the Bates approach based on rational economic actors made assumptions that turned out not to be applicable to Malawi. Economists do not say much on this overestimation although it is of significance considering that resources were directed as setting up or supporting smallholder market regimes. But it may well be that the World Bank applying mainstream approaches failed to appreciate that a variety of economic/instrumental interactions are formed by actors with dispositions or mindsets towards a particular basis of market involvement. Empirical studies of markets in Africa have suggested that smallholder farmers are 'target marketers', they only engage in market interactions sporadically and for specific purposes.[69] The smallholder agricultural market regime perhaps is an example of what has been described as 'economic hybridity' which are economies 'found at the intersection of multiple cultural currents' something lost on the World Bank.[70]

8.4 Regimes: The Structural Adjustment Programme

The type of conditionality in World Bank policy lending in the 1980s to African agricultural economies such as Malawi was 'structural conditionality' which is 'aimed at changing the overall architecture of national economies.'[71] The World Bank made three structural adjustment loans ("SAL") to Malawi followed by an agricultural sector credit to intensify the reforms. SALs were more than a veritable experiment in the empirical reality of the law and economics approach. After the absence of any meaningful success in the first and second SAL,

[68] ibid.
[69] Paul Bohannan, *Markets in Africa: Eight Subsistence Economies in Transition* (Doubleday 1965).
[70] Eiman O Zein-Elabdin, 'Economics, Postcolonial Theory and the Problem of Culture: Institutional Analysis and Hybridity' (2009) 33 Cambridge Journal of Economics 1153, 1160.
[71] Sarah L Babb and Bruce G Carruthers, 'Conditionality: Forms, Function, and History' (2008) 4 Annual Review of Law and Social Science 13, 16.

serious doubts surrounded the World Bank-inspired reforms against the backdrop of mounting criticism by academics and activists. The World Bank, despite this criticism, insisted that there was nothing wrong with the reforms but perhaps everything wrong with governance in Malawi.

The first loan, Structural Adjustment Loan I ('SAL I') 1981 was disbursed in 1981. SAL I was in response to what the World Bank identified as 'structural weaknesses' in the Malawi economy including the slow growth of exports from the smallholder agricultural marketing regime and 'the narrowness of the export' base including overreliance on tobacco.[72] The approach 'placed most emphasis' on 'increasing smallholder crop export production.'[73] It was the first action in what the World Bank believed would lead to the dominance of smallholder farmers in agricultural markets. According to the project document,

> While the primary cause of the present crisis is the sharp deterioration in the country's international terms of trade, it has revealed several underlying structural weaknesses in the Malawian economy: the slow growth of smallholder exports and the narrowness of the export base; the modern sector's dependence on imported oil, and the progressive depletion of domestic fuelwood resources; the deteriorating financial position of the public enterprise sector; growing budgetary deficits owing to a rapid expansion of expenditures combined with a relatively slow growth of revenues; a growing imbalance between government recurrent and capital expenditures; and increasing economic adjustment difficulties caused by the rigidities in the system of administered prices and wages.[74]

SAL I was granted on *normative* conditions, described as 'mild', that the government of Malawi should 'move towards *price decontrol* and raise the tariffs of various parastatal enterprises' [Emphasis supplied].[75] The conditionalities in other areas as noted above 'were less tangible.'[76] The other aspect that received the World Bank's attention was a considerable reduction in 'Government expenditure and public sector investment programmes.'[77] The indirect effect of the reforms relating to smallholder farmers was to seriously weaken the

[72] Jane Harrigan, 'Malawi' in Paul Mosley, Jane Harrigan and John FJ Toye (eds), *Aid and Power: The World Bank and Policy-Based Lending*, vol 2 (Routledge 1991) 213.
[73] Harrigan, *From Dictatorship to Democracy* (n 20) 68.
[74] World Bank, 'Structural Adjustment Project' (World Bank 1981) P-3024a-MAI para 19.
[75] Jonathan Kydd, 'Policy Reform and Adjustment in an Economy under Siege: Malawi 1980–87' (1988) 19 IDS Bulletin 32.
[76] Harrigan, *From Dictatorship to Democracy* (n 20) 68.
[77] ibid 69.

linkage between the estate regime and smallholder farmers through ADMARC and herald a sure decline in estate agriculture crop production. It was assumed that if the price mechanism worked as textbook economics predicts, this would lead to market development and improved performance of smallholder farmers and overall improved economic performance. The overreliance on price as a reform tool was the result of a partial reductionist perspective of how the estate regime had been supported. Price was just one aspect of a rather complex picture and therefore unlikely to achieve expected goals. During this period the World Bank required the government to introduce price policy reforms for the state marketing board, ADMARC.

The Structural Adjustment Loan II ('SAL II') was disbursed in 1983 and focused on ADMARC which had hitherto governed smallholder markets. Conditionalities in SAL II 'incorporated the findings of [economic] studies under first SAL' and were said to be 'tighter.'[78] The conditionality that directly affected smallholder farmers was 'the removal of Government subsidy on smallholder farmers' farming inputs first through 'a 60% reduction in the subsidies on fertilisers supplied by ADMARC to smallholder farmers in 1984-85 and subsidy elimination by 85-86.'[79] SAL II noted that 'prices paid to smallholders by the Agricultural Development and Marketing Corporation (ADMARC), which handles smallholder crops, have been less favorable than those paid for estate produced crops sold on the world market.'[80] The World Bank demanded '(i) the ending of ADMARC's taxation of small-scale farmers, (with the implementation of large producer price increases for export crops), and (ii) the restructuring, and bringing into the public domain, of President Banda's massive holding personal company, Press Holdings.'[81] The relationship of Press Holdings and Dr Banda was much more complex than a personal relationship. It seemed that the basis of including Press Holdings was its borrowing on the international finance market guaranteed by government. However, the role of Press in agricultural markets was much more than that. Together with ADMARC, 'it played

[78] ibid 74.
[79] ibid 74–75.
[80] World Bank, 'Second Structural Adjustment Project' (World Bank 1983) P-3663-MAI para 17.
[81] Jonathan Kydd, 'Malawi in the 1970s: Development Policies and Economic Change', *Malawi: An Alternative Pattern of Development* (University of Edinburgh, Centre for African Studies 1984) 82.

a central role' in supporting the estate regime, and in financing the expansion of the estate regime, as discussed in the previous chapter[82]

The Structural Adjustment Loan III ('SAL III') was disbursed in 1985. While cumulatively continuing with previous conditionality, SAL III focused on reform of state development institutions including the state marketing board, ADMARC. The third phase is when the interactions between the World Bank and the Government of Malawi 'became more politicised and a schism developed between the bank and the Government.'[83] The issue of food security began to occupy a central place because World Bank's emphasis on increased smallholder export crop production failed to realise the importance of smallholder food production for the Malawian economy.[84] This has been an era when matters of 'governance' began to take a central stage echoing the debate on why agricultural market reforms were not working as expected in Malawi.

Despite the World Bank envisaging SAL to continue, in 1990 the approach changed because

> there was already general agreement, both within and outside [World] Bank that SAL measures designed to stimulate smallholder export-led growth had been *unsuccessful* because they had failed to address the structural constraints which inhibited an aggregate supply response [Emphasis supplied].[85]

The fourth loan was the Agricultural Sector Adjustment Credit ('ASAC') disbursed in 1990. The conditionalities in the ASAC loan in 1990 directly required changes to formal law that had restricted smallholder farmers and privileged estates. These were the restrictions contained in the Tobacco Act and Special Crops Act, both of which prohibited smallholder farmers from growing tobacco on customary land otherwise than for sale to ADMARC. The conditionality specifically called for formal laws 'allowing at least 5000 smallholder farmers to grow burley tobacco on customary land in areas where at least 75% of the farmers own less than 1 hectare of land.'[86] This loan was 'closely connected' with a United States International Development

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[82] Kydd (n 81).
[83] Jane Harrigan, 'U-Turns and Full Circles: Two Decades of Agricultural Reform in Malawi 1981–2000' (2003) 31 World Development 847.
[84] Harrigan, *From Dictatorship to Democracy* (n 20) 103.
[85] ibid 266.
[86] World Bank, 'Malawi - Agricultural Sector Adjustment Program' (World Bank 1990) Credit number 2121 MAI 15.

Agency's Malawi Agricultural Sector Assistance Program ('ASAP').[87] The latter was more direct in opening up the tobacco agricultural market to smallholder farmers through the 'introduction of intermediate buyers'.[88] The intermediate buyers were introduced ostensibly to solve the problem of the access of smallholder farmers to government supported tobacco auction floors for estates. Tobacco auction floors are the formal markets for the international sales of tobacco in Malawi since colonial times.[89]

Although the World Bank in SAL I was almost adamant on proceeding in way of typical economics textbook market assumptions, there was a gradual softening of its position as time went on. In the interactions between the Malawi government and the World Bank 'a more flexible position was taken by both the Bank and the Malawi Government both of whom acknowledged the structuralist critique of earlier policies.'[90] There was more cooperation during this time as the World Bank seems to have slowed down in its insistence on extreme versions of self-regulating markets. The softening of approach did not reflect in any practical changes in the neoliberal rationality or demands for self-regulating regimes.

Under the regimes of conditionality relating to smallholder agricultural markets liberalisation, it seems the Malawi government had suggested that this liberalisation should occur within the existing smallholder farmers market regimes governed by ADMARC. This was to be done by means of secondary legislation under the *Agricultural (General) Purposes Act 1987* to regulate market liberalisation that it had agreed to. However, 'donors involved took the view that the restrictions contained in the legislation', e.g., the requirement that trade take place within ADMARC markets, and that minimum price levels be set by the government, would unduly interfere with a self-regulating markets that the World Bank was intent on introducing under 'market liberalization.'[91] It looks like government's insistence 'on regulatory authority' to ensure the transition from complete ADMARC governance of smallholder farmers market

[87] David F Gordon, 'Malawi Agricultural Sector Assistance Program: The Political -Economic Interface' (Abt Associates 1993) Mid Term Evaluation PD-ABP-808 4.
[88] Martin Prowse, 'A History of Tobacco Production and Marketing in Malawi, 1890–2010' (2013) 7 Journal of Eastern African Studies 691, 702.
[89] Prowse (n 91).
[90] Harrigan, 'U-Turns and Full Circles' (n 84).
[91] Robert E Christiansen and Lee Ann Stackhouse, 'The Privatization of Agricultural Trading in Malawi' (1989) 17 World Development 729, 732.

regimes to a shared market, fell on deaf ears.[92] The result of the absence of regulation was *ad hoc* attempts to create a liberalised marketing regime with limited success.[93] From 1996 government abandoned the scheme of private market regulation although the law to date remains on the statute book.[94] The World Bank was insistent that state action in any form would only distort markets and that the market mechanism of price should be left alone.

8.5 Limiting the role of the role of the state

The World Bank conditionalities under SAL proceeded on the assumption that 'the main obstacle to growth in poor countries [had] been, not misfortune with terms of trade or drought, but *unduly interventionist governments*, and above all their tendency to set prices which discriminate against agriculture' [Emphasis supplied].[95] The World Bank assumed that its point of view was shared and understood by all other actors. On the contrary, disagreements emerged 'on the most appropriate food security policies for Malawi' between World Bank staff and the Malawi government, especially its Ministry of Agriculture.[96] The World Bank insisted that the solution was for the Malawi government to be less interventionist 'by shrinking or dismantling parastatals that dominate agricultural marketing' and therefore allow markets to regulate themselves according to price movements.[97]

It was lost on the World Bank that it was the state in colonial times that had attempted to create markets and taught the profit motive to the smallholder farmers. The postcolonial state in Malawi inherited inadequate state structures compared with the task they had of strengthening agricultural markets.[98] Another challenge was that the World Bank tends to adopt what has been termed 'revisionist history', that was giving the impression that 'Africans inherited strong states from erstwhile colonial masters' which is a rewriting of the sociolegal historical approach to the legal constitution of markets analysed in Chapter 6.[99] Global economic regimes at the time of independence in the 1960s seem to suggest that 'the

[92] ibid.
[93] Wycliffe Chilowa, 'The Impact of Agricultural Liberalisation on Food Security In Malawi' (1998) 23 Food Policy 553, 561–562.
[94] ibid 565.
[95] Lipton (n 55) 198.
[96] Harrigan, 'U-Turns and Full Circles' (n 84) 849.
[97] Lipton (n 55) 198.
[98] Malawi Government, 'Development Plan, 1965-1969' (Government Printer).
[99] Mkandawire (n 15) 62.

postcolonial states [should derive] their plans in the context of Keynesian economics, the Soviet experiment and the emergence of development economics.'[100] Dr Banda had indicated that Malawi would pick those elements which conformed with its demands for rapid agricultural markets development regardless of origins.[101] During this time the leading views expected the state to act 'as an instrument of modernisation - socio-economic, political and cultural' and for Malawi agricultural markets to be the basis of this transformation.[102] One leading strand was a stagist approach to progress, with public actors directing the progress.[103]

This was the basis for targeting the agricultural parastatal, Agricultural Development and Marketing Corporation, ('ADMARC'). On the basis of the mandate conferred by state law, ADMARC, the state marketing board had been reorganised from its previous colonial form since 1971 to govern the smallholder farmers marketing regimes by focusing on cash crops over which it had the sole rights to buy from small-scale farmers through a physical presence in rural areas. These places were central to market regulation from production by providing inputs to purchase of produce. Places were set up throughout Malawi offering uniform prices known in advance of the crop cultivation season by smallholder farmers regardless of any profit that ADMARC could make. In the event of food shortages, these same places sold food. Their governance extended 'informally to many other agricultural products that were supposed to be freely traded.'[104] In some ways, regardless of the overall fairness of its activities, ADMARC provided a link between smallholders and the estate marketing regime and the wider economy. This was possible because of the 'trusting' relations it had with smallholder farmers.

At its peak of activities in the late 1970s, the state marketing board left a lasting memory of agricultural market governance with smallholder farmers; it 'provided assured and reliable markets for smallholder output; paid farmers cash on delivery; provided credit for and subsidised the cost of inputs to members of farmers'; 'stabilised prices seasonally and

[100] V Biju Kumar, 'Postcolonial State: An Overview' [2005] The Indian Journal of Political Science 935.
[101] Kamuzu Hastings Banda, 'What Is Communism?'
[102] Kumar (n 103).
[103] Walt Whitman Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge university press 1990).
[104] Chilowa (n 96) 556.

annually.'[105] ADMARC was perfected from the colonial state marketing board discussed in Chapter 6 at the time 'when there was unshakeable faith in the ability of the state to spearhead development as a mobiliser of resources, provider of infrastructure and public entrepreneur advancing the pace of economic growth and development.'[106] The first postcolonial government of Dr Banda and his inner circle made no secret of this as discussed in the previous Chapter 7. ADMARC became more of a holding company spearheading the state's role in the economy. It became a victim of the shifts in the rationality of global institutions towards neoliberal market-centric approaches. Although the World Bank and others have been dismissive of the idea of state led development in Africa; notwithstanding the efforts of the first postcolonial government in Malawi to transform agricultural markets.[107] Despite the achievements of the first two decades of self-government, the state in Malawi 'was firmly condemned as the major impediment to the achievement of rapid and sustainable economic growth and development in the developing world.'[108]

The advantage of ADMARC for smallholder farmers that became visible with World Bank reforms was the 'the social function provided by ADMARC's markets in remote areas.'[109] Empirical research suggested that World Bank reforms insisting on the scaling down of the activities of ADMARC to make room for private traders had 'been largely detrimental to the smallholder sector…'[110]

In the early 1980s ADMARC faced serious challenges due to several factors. The cheapest route to international markets was through Mozambique to the Indian Ocean sea and it

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[105] Chilowa (n 96).
[106] Blessings Chinsinga, 'Resurrecting the Developmental State in Malawi: Reflections and Lessons from the 2005/2006 Fertiliser Subsidy Programme' in Richard Tambulasi (ed), *Reforming the Malawian Public Sector Retrospectives and Prospectives* (Council for the Development of Social Science Research in Africa (CODESRIA) 2010) 83.
[107] Thandika Mkandawire, 'Thinking about Developmental States in Africa' (2001) 25 Cambridge Journal of Economics 289.
[108] Chinsinga, 'Resurrecting the Developmental State in Malawi: Reflections and Lessons from the 2005/2006 Fertiliser Subsidy Programme' (n 109) 83.
[109] Milton Kutengule, Antonio Nucifora and Hassan Zaman, 'MALAWI: Agricultural Development and Marketing Corporation Reform' in Aline Coudouel, Anis A Dani and Stefano Paternostro (eds), *Poverty and Social Impact Analysis of Reforms* (World Bank 2006) 423.
[110] Ben Kaluwa and Wycliffe Chilowa, 'Malawi: Food Marketing Liberalisation and Household Food Security: Preliminary Results from Baseline Surveys' in Mandivamba Rukuni and JB Mycoff (eds), *Market Reforms, Research Policies And SADCC Food Security* (UZ/MSU Food Security Research in Southern Africa Project, Department of … 1991).

became unusable because of a civil war in that country; the situation was compounded by 'deteriorating terms of trade, … rising costs of fuel, adverse weather conditions and weakening internal demand.'[111] ADMARC had been used to expand a portfolio of investments, more or less as an investment company for the state.[112] As a result, there was 'a gradual shift from specialisation in crop marketing services towards a holding corporation' which undermined its governance of small-scale farmers agricultural marketing.[113] Thirdly, the state used ADMARC to build and manage strategic grain reserves at considerable cost - an investment which 'was costly as it did not bring immediate returns' because of food shortages, a regular occurrence in Malawi. The state marketing board borrowed internationally to meet the obligations at a time when interest rates were high on the international loan market and agricultural commodity prices had fallen.[114] Finally, the state marketing board failed to manage the smallholder farmers' subsidies with increasing imports cost since 'as the principal outlet for farm inputs to smallholder farmers [it] had been subsidising inputs, such as seeds and fertilisers, by selling them at prices below the purchase price plus transport and handling costs.'[115] These factors represented structural issues which attracted the World Bank believing that they were at the centre of the inefficiencies that bedevilled ADMARC.

The World Bank 'concluded that the correct response' to the challenges faced by ADMARC was 'to liberalise the grain market.'[116] This meant removal of any interventions directly or indirectly in agricultural markets except those supporting self-regulating markets. The World Bank approach overlooked or paid no attention to the complex sociological regulation of markets, especially between the estates and smallholder markets regimes.

The rapid liberalisation of the tobacco market negatively affected the internal regulation of regimes and /or communal networks that supported and enhanced the effectiveness of the regulatory framework and international sales. For instance, a successful quality standard

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[111] Benson Kandoole, Ben Kaluwa and Steven Buccola, 'Market Liberalization and Food Security in Malawi' in Mandivamba Rukuni and Richard H Bernstein (eds), *Proceedings of the Third Annual Conference in Food Policy Research in Souther Africa* (University of Zimbabwe/University of Michigan Food Security Project 1988) 558.
[112] Christensen (n 39).
[113] Chilowa (n 96) 558.
[114] Uma Lele, 'Structural Adjustment, Agricultural Development and the Poor: Lessons from the Malawian Experience' (The World Bank 1989) 8324 1212.
[115] Chilowa (n 96) 558.
[116] Lele (n 118) 1212.

regime for farm produce is important for the other connected steps in agricultural marketing such as sales or merchandising.[117]

It has been suggested that a possible cause of the failure to build a new smallholder marketing regime based on tobacco was that the World Bank and USAID had a rather naïve view of the qualitative aspects of regimes of tobacco marketing before structural adjustments reforms, especially the regulatory role of the estates marketing regime on the tobacco agricultural market.[118] The poor response of smallholder farmers was because, *inter alia*, the World Bank had 'insufficient appreciation of the role the estates had played in ensuring quality [of cash crops]' and failed 'to put in place support systems for independent growers of equivalent effectiveness to those provide by the estates.' The World Bank ignored the estates regime in market reforms resulting from a failure to appreciate the complex linkages between the estates and smallholder farmers and ultimately their 'non-price' basis or social basis.[119]

One important aspect was regulation of quality of produce in agricultural production which directly impacts the prices that international buyers are willing to offer. An ESL approach clarifies that while the exclusion of smallholder farmers from growing tobacco was inequitable except through ADMARC, it was a step in a 'regulated economic order.'[120]

Low prices offered for tobacco offered by ADMARC meant only the most persistent smallholder farmers and those willing to undertake the strict quality control measures could grow it.[121] Regulation was not entirely by formal law but much more through informal mechanisms lost to the World Bank. Firstly, after liberalisation '[t]he system that emerged for producing and marketing tobacco made it more profitable to have a high turnover of tobacco with a high margin, rather than produce high quality tobacco that fetched high prices.'[122] As a result 'the common interest between tobacco exporters and growers in keeping prices high in

[117] James E Boyle, *Marketing of Agricultural Products* (McGraw-Hill Book Co 1925).
[118] Chinsinga, 'The Political Economy of Agricultural Commercialisation in Malawi' (n 26) 32–33.
[119] Harrigan, *From Dictatorship to Democracy* (n 20) 339.
[120] Jan Kees Van Donge, 'Disordering The Market: The Liberalisation of Burley Tobacco in Malawi in the 1990s' (2002) 28 Journal of Southern African Studies 89, 114.
[121] Martin Prowse and Paul Grassin, *Tobacco, Transformation and Development Dilemmas from Central Africa* (Springer 2020).
[122] Van Donge (n 124) 114.

a particular market niche was undermined by loss of control over supply and quality of the crop.'[123] The introduction of intermediate tobacco buyers for smallholder tobacco was probably much more retrogressive than expected. With ADMARC willing smallholder farmers were organised in 'farmers clubs' through which they received agricultural production advisory and farm inputs for the exacting process of growing tobacco. These farmers clubs were informal regulatory centres in the complex tobacco market. The reforms had a direct effect of erasing the informal regulation. With liberalisation of tobacco markets 'smallholders now [sold] to traders and therefore [received] a smaller share of the world market price, as the trader [was] between them and the world market.[124]

The challenge with these early reforms for economists was that there was inadequate appreciation by the World Bank of the unique features of tobacco markets that required addressing.[125] The World Bank was motivated by 'dogmatism of the World Bank's 'pricist and state minimalist' interests as some economists acknowledge.[126]

It has been noted that the period after 1994 was marked by almost wholesale adoption of the 'advice' of the World Bank on agricultural markets.[127] Although the smallholder markets were hailed as a success by the World Bank, the literature suggests that it was a failure attributed to, inter alia, 'the absence of an appropriate regulatory framework [that] resulted in smallholder farmers supplying poor quality tobacco since it was a free-for-all cash generation venture; and poor quality of crop forecasting led to unexpected price swings' on the international market.[128] ADMARC had acted as a regulator of smallholder marketing regimes in cash crops and its removal under conditionalities proved disastrous for the stability of smallholder agricultural markets.

The World Bank was able to dismantle the estate agricultural regime by cutting off the smallholder marketing regime as a source of financing, however the dominance of

[123] ibid.
[124] ibid.
[125] Harrigan, 'Malawi' (n 72) 213.
[126] Harrigan, 'U-Turns and Full Circles' (n 84) 847.
[127] Chinsinga, 'The Political Economy of Agricultural Commercialisation in Malawi' (n 26).
[128] ibid 32.

smallholder farmers was not achieved. This probably resulted in the World Bank actions that abstracted smallholder markets from wider social life.

The attempted reorganisation of the smallholder agricultural markets regime did not work well despite the 'swift implementation' of the World Bank's regimes particularly 'the liberalisation of the cultivation of burley tobacco' hastened by the end of the Dr Banda regime and a new multiparty politics. The agricultural marketing regimes were 'almost immediately overshadowed by the food security crisis that quickly demanded a return to the food self-sufficiency philosophy' of Dr Banda.[129] Food sufficiency or food security has become a rationality affecting agricultural markets at a local level and state actions. It is also a source of conflict because at national level the demands are for practical ways of ensuring food security while the World Bank and its supporters continue to insist on reliance on markets for food security.

The World Bank believed that 'food security could best be achieved by allowing market determined production of exportable cash crops such as tobacco and using the resulting foreign exchange earnings to make good any food deficit through imports.'[130] The Malawi government through its Ministry of Agriculture regarded the World Bank's position as unworkable in Malawi and believed 'that government intervention was necessary to achieve food security.[131] Further reasoning of the Malawi government's Ministry of Agriculture was that relying on the cash crop prices failed to appreciate the linkages between cash crops and food crops discussed earlier in Chapter 6.[132] From SAL III, the World Bank and the Malawi government adopted variable positions ranging from intervention by the Malawi government to insistence on the logic of the market by the World Bank.

This is one of the problems of mainstream economics as Rodrik writes, 'One problem was that the Washington Consensus skated over the deeper institutional underpinnings of a market

[129] ibid 37.
[130] Harrigan, 'U-Turns and Full Circles' (n 84) 849.
[131] ibid.
[132] ibid.

economy, without which none of the market-oriented reforms could reliably deliver their intended benefits.'[133] Following scholars such as Bates, Rodrik argues that

> …the Washington Consensus presented a universal recipe. It presumed that all developing countries were pretty much alike - suffering from similar syndromes and in need of an undifferentiated list of reforms. Local context received little consideration, as did the need to prioritize according to urgency or feasibility of reforms. As country after country failed to respond to the reforms, the advocates' instinct was to expand the "to do" list rather than to fine-tune the reforms already in place.[134]

Despite the centrality of Dr Banda's regime until 1993, whose agricultural markets regimes affected the outcomes of projects, there were other issues raised by the impact and evaluation exercise by the World Bank. It noted that the World Bank 'did not appreciate or perhaps understand the basic structure of the estate subsector and its impact on the agricultural sector as a whole.'[135] The World Bank failed to see that the smallholder marketing regimes overlapped and interpenetrated in complex ways with the estate agriculture and wider social life through their financing or credit, production, and merchandising regimes, the very least. This might have resulted from excessive reliance on quantitative data or limited use of emerging qualitative data that was decontextualised and probably not historicised except for events that the World Bank was looking at.

8.6 The World Bank's internal review

The World Bank reforms attempted 'to sweep away all traces of [the regimes and the rationality existing in 1980] and make a new beginning, unable or unwilling to accommodate the immediate past' at the level of regimes and rationality.[136] The World Bank inspired regimes of agricultural marketing mixed with the old dual regimes, estates, and smallholder farmer 'giving rise to very complex legal and institutional constellations and hybridizations' which made the reforms unsuccessful.[137]

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[133] Dani Rodrik, *Economics Rules: The Rights and Wrongs of the Dismal Science* (WW Norton & Company 2015) 161.
[134] ibid 161–62.
[135] Operations Evaluation Department, 'Malawi Impact Evaluation Report The World Bank and the Agricultural Sector' (World Bank) 17898 para 4.3.
[136] de Sousa Santos (n 22) 48.
[137] ibid.

The World Bank's impact and evaluation report prepared by its Operations Evaluation Department in 1998 observed that since 'the 1993 ouster of the Banda regime, there [had] been a dramatic improvement in the performance of the smallholder sector and a corresponding reversal of performance by estates' but that '[quantitative] data obscure[d] a substantial element in the evolving picture of Malawian agriculture over this period.'[138] This led the report to ask:

> Was the Bank sensitive to the plight of the smallholder sector in the 1980s? Did the Bank contribute to it, or mitigate it? Did it contribute significantly to the turnaround in the 1990s? Does the present growth path appear sustainable and is the present Bank approach and program compatible with it and supportive of it?

The report observed how the World Bank became 'a prisoner of its paradigm'; this became an issue because 'agricultural staff focused on the smallholder sector, taking the estate sector as a given and therefore saw the problem in terms of apparent stagnant or declining productivity on a fixed land base, implying declining fertility' while relatedly 'the macroeconomists felt that, with an "improved" price-setting mechanism, the system could be programmed to come up with an appropriate set of price signals.'[139] This was reflected in the World Bank's position in its negotiations, the report noted, with the Malawi government represented by the Ministry of Finance and the Ministry of Agriculture taking 'a secondary role.'[140] The issues observed within the World Bank were also of interest to other such as non-governmental organisation on the effects of structural adjustment regimes and rationality on smallholder farmers.

8.7 Conclusion

From the perspective attributed to Bretton Woods institutions, the structural adjustment reforms were 'a resounding success' because they accelerated 'the process of globalization' by tying 'the physical resources of Africa more firmly into servicing' the global financial regime.[141] Some economists viewed the structural adjustment reforms as no more than neutral and objective economic reforms and seemed to regret that from '1994 to the present

[138] Operations Evaluation Department (n 135) para 2.4-2.5.
[139] ibid 4.3.
[140] ibid.
[141] Ankie Hoogvelt, *Globalisation and the Postcolonial World: The New Political Economy of Development* (2nd edn, Palgrave 2001) 184.

when the reform process in agriculture became more politicized.'[142] Other economists believed that the reforms were 'partial' and there was still lingering 'state intervention in agricultural production and marketing' to ensure successful results for the benefit of smallholder farmers.[143]

However, others disagree. Regimes underpinned by neoliberal rationality promoted by the World Bank had led 'to a deterioration the social and economic condition' countries like Malawi.[144] It has been noted the structural adjustment reforms were 'nothing short of 'social engineering', that is attempting to restructure social life at all levels from the micro to the metal level. For example, SAPRIN (The Structural Adjustment Participatory Review International Network) is 'a broad range of citizens' groups in various countries to organize public processes to assess the real impact of World Bank and IMF-supported economic reform programs and to chart a new course for the future', which launched in 1997. It observed that the agricultural regimes imposed on countries through conditionality had resulted in

> inadequate cultivation of food crops for the domestic market, along with a lack of improvement in earnings by many low-income sectors and a rise in the cost of living, [and] there has been a general deterioration in food security nearly everywhere.[145]

Some economists did not take long after the onset of structural adjustment to observe the challenges and limits of self-regulating markets in Malawi[146] Without acknowledging that free markets or self-regulated marketing regimes are not possible, the economists insisted that what was required in and for Malawi 'a *realistic* assessment of the advantages and disadvantages of a market-oriented system in a particular set of circumstances' [emphasis supplied].[147] Similar views were echoed by World Bank economists who wrote after almost a decade of structural adjustment reforms, that the regimes introduced as part of World Bank conditionality had 'ignored many of the *nonprice constraints* to smallholder growth which had become evident from the rural development experience in the decade preceding the start of

[142] Harrigan, 'U-Turns and Full Circles' (n 84).
[143] Mylene Kherallah and others, *Reforming Agricultural Markets in Africa: Achievements and Challenges* (Intl Food Policy Res Inst 2002) 163.
[144] Tan (n 6) 61.
[145] SAPRI, *The Policy Roots of Economic Crisis, Poverty and Inequality* (Zed Books, TWN, IBON 2004) 149.
[146] Christiansen and Stackhouse (n 94) 737.
[147] ibid.

the adjustments' [emphasis supplied].[148] Nonprice constraints could be explained as wider social life. Heterodox economists have argued that mainstream economics focuses on a 'structure-free account of markets.'[149] It is no surprise that the regimes of conditionalities viewed smallholder agricultural markets regimes from the outside as a 'voluntary exchange' with 'rational agents [exploiting] gains from trade.'[150]

In the case of Malawi such conditionality focused exclusively on tobacco cultivation as the magic wand to effect changes to agricultural markets and wider social life in favour of smallholder farmers. The taking of such steps

> by a country of the South to meet a World Bank or IMF loan condition may look benign and, in fact, universally beneficial to a banker sitting in London, but to a poor Third World farmer who has come to understand how local, national and even global systems, structures and institutions work to reward the more powerful and influential, expectations may be much lower.[151]

SAPRIN was motivated by the need for those most affected by the reforms to have a greater say on the nature and possible impacts of the reforms; it emphasised the need for the participation in the formulation of reforms of 'those who are close to, and who understand best, their local and national realities.'[152] It was argued that there should be a way where conditionalities as regimes conceived by the bureaucracies of IFIs and other international agencies are legitimised and democratised considering that their conception and design 'occur beyond the boundaries of the state' where they are to be implemented.[153] These calls led to the 'new face of conditionalities' as an important part of 'restoring faith in the international economic order in the post- Washington Consensus period.'[154]

SAPRIN argued that in ignoring wider social life, 'the economic reforms of neoliberal globalisation were leading to a deterioration in the social and economic conditions of

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[148] Uma Lele, 'Structural Adjustment, Agricultural Development and the Poor: Some Lessons from the Malawian Experience' (1990) 18 World Development 1207.
[149] William A Jackson, 'On the Social Structure of Markets' (2007) 31 Cambridge Journal of Economics 235.
[150] ibid.
[151] SAPRI (n 149) 220–221.
[152] ibid 221.
[153] Richard Higgott, 'Contested Globalization: The Changing Context and Normative Challeges' (2000) 26 Review of International Studies 131, 134.
[154] Tan (n 41) 122.

communities undergoing change'.[155] Although multilateral IFIs and other aid agencies 'did not envisage a rolling-back of the neo-liberal policies which characterised the old conditionality regime' they took steps to bring in more legitimacy and democratisation to the process of conceiving and developing regimes of conditionality.[156] As Tan suggests, this was done through development of 'the new aid architecture' that is 'geared towards mobilising support in aid recipient states for the policy and institutional reforms associated with development policy loans and grants.'[157]

The suggested new regime within the neoliberal rationality reflected what has been termed a '*crisis of legitimacy*' for the World Bank's regimes and their failure to resolve the economic crisis that required its involvement in recipient countries such as Malawi [Emphasis in original]. The response to the crisis by the World Bank and others adopted the process of 'institutionalising the requirements of participation and partnership' in developing regimes but not rationality by recipient countries.[158]

This was achieved through

> incorporation of the new principles of ownership, partnership and participation into the design of aid programmes [and a] shifting the emphasis away from coercion and compulsion towards policy dialogue and cooperation as the basis for donor-recipient negotiations in aid relationships.

Thus, the World Bank after several changes trying to implement a modified approach, has now developed a 'Country Partnership Framework' ('CPF') and their website states the CPF 'aims to make our country-driven model more systematic, evidence-based, selective, and focused on the Bank's twin goals of ending extreme poverty and increasing shared prosperity in a sustainable manner.'[159] The CPF is informed by a Systematic Country Diagnostic ('SCD') which identifies 'the most important challenges and opportunities a country faces in advancing towards the twin goals' of the World Bank, ending poverty and shared prosperity through

[155] Tan (n 6) 61.
[156] Tan (n 41) 123.
[157] ibid.
[158] Tan (n 6) 66.
[159] 'Country Engagement' (*World Bank*) <https://www.worldbank.org/en/projects-operations/country-strategies> accessed 17 February 2023.

stakeholder consultation.[160] The modification seems inadequate and unlikely to be effective because the World Bank only agreed to involve recipient countries such as Malawi on regimes while their rationality remains neoliberal. It is therefore not surprising that the next period 2001 to present regularly exhibits disagreements, misunderstanding and sometimes conflicts in legal thinking and practice in agricultural markets.

9 The post Washington Consensus era: 2001 to 2022

This chapter presents the regime of agricultural subsidies for smallholder farmers as a case study of contemporary econo-legal thinking in/about agricultural markets in Malawi. It demonstrates the continuing market centric-rationality, mostly led by Bretton Woods institutions, and largely supported by influential Western based institutions. The emerging empirical trends indicate public or private support is necessary for the inclusion of smallholder farmers in agricultural markets at least on the ground of *Ubuntu*, a meta-level value which was explored in Chapter 4. This rationality suggests missed opportunities for improvement in supporting participation of smallholder farmers in agricultural markets. This lays the basis for the next chapter with a case study of formal markets in contemporary Malawi. In the new thinking, the World Bank and its supporters diagnosed the challenge of reforms from the 1980s as lack of institutions.[1] After criticisms even from within economics for excessive reliance on prices, this era there has been an increasing calls from within economics for reliance on new institutional economics ('NIE') because of its assumed relaxation of the assumptions of mainstream economics for increasing the participation of smallholder farmers in agricultural markets.[2] It was argued in chapter 2 (limits of law and economics) that NIE is unlikely to increase the participation of smallholder farmers because of its reliance on the neoclassical core of mainstream economics, namely, 'maximising behaviour, market equilibrium and stable preferences.' This is not withstanding bringing 'bounded rationality', 'transactions costs' and 'property rights.' It was demonstrated how NIE considers only a Eurocentric perspective to the exclusion of social life elsewhere.

Under this approach, the World Bank and others believe that the state should become as Weberian as possible through 'good governance' or 'capacity building' or similar epithets.[3] In Malawi the introduction on the policy scene of the National Planning Commission is an instance of these efforts ostensibly to 'coordinate the development of long and medium term

[1] Andrew Dorward, Jonathan Kydd and Colin Poulton, *Smallholder Cash Crop Production under Market Liberalisation: A New Institutional Economics Perspective* (CAB International 1998).
[2] ibid; Johann Kirsten and others, *Institutional Economics Perspectives on African Agricultural Development* (Intl Food Policy Res Inst 2009).
[3] Thandika Mkandawire, 'From Maladjusted States to Democratic Developmental States in Africa' in Omano Edigheji (ed), *Constructing a democratic developmental state in South Africa: Potentials and challenges* (HSRC Press 2010) 63.

national development plans for Malawi including the flagship projects that would operationalise them.'[4] At its heart, good governance is derived from mainstream economics models and 'idealised Anglo-Saxon institutions' with the state having the monopoly of law-making.[5] Under the new forms of conditionality there is almost 'shared sovereignty' between the state, international aid agencies and international research organisations resulting in law for agricultural markets that is 'increasingly complex'.[6] A good example comes from studies in political sciences suggesting that 'the democratic gains [of 1990s] in African countries are being slowed, if not reversed', probably because of this complex plurality.[7]

While the World Bank claims to have adopted a more consultative approach with the state recipient under the new aid architecture, this was only at the level of regimes. New epithets in the World Bank's approach include 'governance, participation, decentralisation, gender knowledge and environmental sustainability.'[8] Its neoliberal rationality remains intact and is what underlies and directs its approaches and 'advice' on regimes in agricultural markets in Malawi.[9] The challenge for the World Bank is 'to close the gap between its rhetoric and the reality of its lending operations' with agricultural markets being 'a sector that has traditionally performed poorly in operational terms but remains vital to the central objectives of poverty alleviation and economic growth.'[10] On the other hand the Malawi government believes the era of 'blind faith in spontaneous progress' through unregulated markets and 'the fanaticism of [structural adjustments reforms]' is over.[11] Of concern to this thesis, is how the insistence on neoliberal rationality excludes smallholder farmers from formal markets. This will be demonstrated through a case study of the evolution of the Agricultural Commodity Exchange for Africa ('ACE') from 2000s to the present in the next chapter. The more the World Bank and

[4] National Planning Commission, 'Home Page -' <https://npc.mw/> accessed 8 May 2023.
[5] Mkandawire, 'From Maladjusted States to Democratic Developmental States in Africa' (n 3) 63.
[6] Boaventura de Sousa Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique' (2006) 40 Law & Society Review 39.
[7] Leonardo R Arriola, Lise Rakner and Nicolas Van de Walle (eds), *Democratic Backsliding in Africa?: Autocratization, Resilience, and Contention* (Oxford University Press 2022).
[8] Jonathan Pincus, 'The Post-Washington Consensus and Lending Operations in Agriculture: New Rhetoric and Old Operational Realities' in Ben Fine, Costas Lapavitsas and Jonathan Pincus (eds), *Development Policy in the Twenty-First Century: Beyond the post-Washinton Consensus* (Routledge 2001) 211.
[9] Amanda Perry-Kessaris, 'Reading the Story of Law and Embeddesness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law' (2011) 62 N. Ir. Legal Q. 401.
[10] Pincus (n 8) 211.
[11] Karl Polanyi, *The Great Transformation* (Beacon Press 2001) 79.

others push forward liberal rationality in the legal thinking and practice around agricultural markets, the more the Malawian state displays 'heterogenous state action' with the result that 'a very complex matrix of legal pluralism has emerged' in agricultural markets.[12] This may lead to a deepening what has been termed 'multicultural legal plurality' implying a diversity of legal thinking and practice in agricultural markets.[13] The current dominance of large-scale traders in formal markets and the unwillingness or feelings of exclusion from the same is one instances of this plurality.[14]This demonstrates how legal thinking and practice around agricultural marketing regimes may exclude smallholder farmers. The positive aspect about it is that by adopting *Ubuntu* as a rationality through the communal lens it can become inclusive.

The arrangement of the chapter is as follows. Section 9.1 analyses the key actors in the legal construction of markets in this period. Section 9.2 discusses the conflict between the market interventionist approach by the Malawi government and the neoliberal rationality of the World Bank and its supporters. Section 9.3 critically analyses the new drive by the World Bank and its international supporters to push the neoliberal reforms to agricultural markets in subsidised inputs regime of the post-Washington Consensus era and attempts by the Malawian government to resist such attempts. Section 9.4 concludes and suggests a role for the government in agricultural markets.

9.1 Key actors

This section looks at the Malawi government, international actors including the World Bank and the International Monetary Fund ('IMF') who share a worldview, and smallholder farmers, as key actors in the legal thinking and practice in agricultural markets. One such international actor is the Institute of Development Studies ('IDS'), University of Sussex, which started implementing a project called 'Agricultural Policy Research in Africa' ('APRA') funded by the UK Government through UK Aid.[15] IDS has recently led a five-year research consortium that

[12] de Sousa Santos (n 6) 50.
[13] ibid 47.
[14] Jack Thunde and Bob Baulch, *Who Uses and Who Benefits from Warehouse Receipt Systems? An Examination of Contract Level Transactions on the Agricultural Commodity Exchange for Africa, 2011–2018* (Intl Food Policy Res Inst 2020).
[15] Institute of Development Studies, 'The Agricultural Policy Research in Africa Brochure: Malawi'.

is working 'to identify the most effective pathways to agricultural commercialisation that empower women, reduce rural poverty in selected countries in sub–Saharan African countries' including Malawi.[16] Other actors although mentioned in the discussion are not described in detail because their view are not considered here. Although there are several other actors involved such as large-scale trading companies[17], these are left out because of their unwillingness to participate in research relatively little is known about them.[18]

Another influential institution on agricultural research in Malawi is the Washington-based International Food Policy Research Institute ('IFPRI') which started carrying out research on Malawian agriculture in the 1990s. According to its website IFPRI 'provides research-based policy solutions to sustainably reduce poverty and end hunger and malnutrition in developing countries'; it was set up as 'a research center of CGIAR', the Consortium of International Agricultural Research Center 'the world's largest agricultural innovation network.'[19] IFPRI set up the Malawi Strategy Support Program in 2008 with the aim of conducting 'evidence-based research' to 'advise government and development partners on strategic policy options to support agricultural development and economic growth, promote food security, and support broad-based economic growth' in Malawi.[20]

United Sates Aid for International Development ('USAID') has been in Malawi for some time and its legal thinking is very much like that of the World Bank.[21] The Alliance for Green Revolution ('AGRA') was established in 2006 focusing on 'uniquely African solutions designed to meet their specific environmental and agricultural needs so they can sustainably boost

[16] ibid.
[17] The large scale traders include the Meridian Group of Companies known in Malawi as Farmers World Group of Companies https://meridian.africa/about-the-meridian-group/meridians-subsidiaries/farmers-world-malawi, accessed 28 July 2023 and Export Trading Company https://www.etgworld.com/ , accessed 28 July 2023.
[18] Dennis O Ochieng, Rosemary Botha and Bob Baulch, 'Structure, Conduct and Performance of Maize Markets in Malawi' (International Food Policy Research Institute 2019) Malawi Strategy Support Programme, Working Paper 29.
[19] 'Home | IFPRI : International Food Policy Research Institute' <https://www.ifpri.org/> accessed 20 February 2023.
[20] 'Malawi Strategy Support Program | IFPRI : International Food Policy Research Institute' <https://www.ifpri.org/program/malawi-strategy-support-program> accessed 20 February 2023.
[21] Martin Prowse and Paul Grassin, *Tobacco, Transformation and Development Dilemmas from Central Africa* (Springer 2020).

production and gain access to rapidly growing agriculture markets.'[22] It has taken on Malawi as one of the countries to work with 'supporting the Government of Malawi in creating a policy environment that encourages private sector participation in' agricultural markets.[23]

An international policy actor which seems to work alongside the World Bank and share its rationality is the International Food Policy Research Institute ('IFPRI') headquartered in Washington DC, a research center of the Consultative Group on International Agricultural Research ('CGIAR'). IFPRI has a Malawi strategy, and the overall objective of the Malawi Strategy Support Program is to conduct evidence-based research and advise government and development partners on strategic policy options to support agricultural development and economic growth, promote food security, and support broad-based economic growth.[24]

IDS African research programme is funded by the UK Government through UK Aid 'to help inform future policy and investment decisions to promote more inclusive forms of agricultural commercialisation in sub-Saharan Africa.'[25] More recently, IDS has met demands for more empirically informed advice from policy makers in countries such as Malawi. Previous experience with expert advice on agricultural markets seems to have made the Malawian government require empirical evidence of smallholder-oriented 'inclusive business models for agricultural commercialisation.'[26] There are also scholars from other universities internationally interacting with private farming actors such as smallholder farmers and small-scale traders as research participants. The Michigan State University's Food Security Group ('FSG') seems behind a recently established organisation called the MwAPATA Institute which according to its website claims to be 'an independent agricultural policy think tank in Malawi' which 'is engaging the Government of Malawi, private sector, and civil society stakeholders in applied policy analysis, policy outreach, capacity building, and policy coordination.'[27] The FSG seems to base its empirical study within a normative structure of Western modernity

[22] 'AGRA – Alliance for a Green Revolution in Africa' <https://agra.org/> accessed 11 August 2020.
[23] ibid.
[24] 'Malawi Strategy Support Program | IFPRI : International Food Policy Research Institute' (n 20).
[25] Institute of Development Studies (n 15).
[26] Louise Clark and Joe Taylor, 'ALRE Report on Evidence Demand on Inclusive Agricultural Commercialisation in Africa' <https://opendocs.ids.ac.uk/opendocs/handle/20.500.12413/17447> accessed 27 June 2023.
[27] MwAPATA, 'MwAPATA Institute' (*MwAPATA Institute*) <https://www.mwapata.mw/about> accessed 25 May 2023.

because of the 'relatively predictable changes in economic structure that happen as incomes rise.'[28] Other empirically-minded economists have warned against predictions in economics mostly due to taking a very narrow perspective on social life.[29] The tendency by mainstream economics to investigate 'economies in isolation from the social relations' has oftentimes set out inappropriate normative agendas and incorrect predictions.[30]

Smallholder farmers are an important group in agricultural markets with increased importance in this period. It was estimated that smallholder farmers 'provide an estimated 80% of the food produced in Asia and in sub-Saharan Africa.'[31] Attempts to increase smallholder market participation were central to World Bank structural adjustment reforms with limited success as seen in the previous Chapter 8. Studies in Africa have evaluated efforts to increase market participation by smallholder farmers.[32] The results note that despite the potential to provide improved welfare, these attempts can lead to exclusion for the simple reason that smallholder farmers in sub–Saharan Africa are not a homogeneous (of the same kind) group. Approaching the smallholder market participation requires different approaches to accommodate the diversity.[33] This point has also been repeated in the case of Malawi. After World Bank inspired liberalisation of agricultural markets, the diversity of smallholder farmers has become much more pronounced.[34] It was established that there were at least three groups, namely, net food sellers, intermediate and net food buyers, by reference to whether they sell, buy, or do both in an agricultural season in relation to their food needs.[35]

[28] 'Food Security Group' (*Food Security Group*) <https://www.canr.msu.edu/fsg> accessed 25 May 2023.
[29] Abhijit V Banerjee, Abhijit Banerjee and Esther Duflo, *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (Penguin 2012) 268.
[30] Rina Agarwala, 'An Economic Sociology of Informal Work: The Case Of India' in Nina Bandelj (ed), *Economic sociology of work*, vol 18 (Emerald Group Publishing 2009) 319.
[31] Sergio Gomez y Paloma, Laura Riesgo and Kamel Louhichi, *The Role of Smallholder Farms in Food and Nutrition Security* (Springer Nature 2020) 13.
[32] Arnould, E and Press, M "Systemic small-player market exclusion in an east African context" (2019) 22 *Consumption Markets & Culture* 508.
[33] Shenggen Fan and others, *From Subsistence to Profit: Transforming Smallholder Farms* (International Food Policy Research Institute 2013).
[34] Chirwa, E W "Fostering private food marketing and food policies after liberalization: the case of Malawi" (1998) 12 *World Development Studies* 63.
[35] Id.

9.2 Context for the post-Washington Consensus

This section analyses contested rationalities between the Malawi government on the one hand and the World Bank and others on the other in agricultural markets. Since the 1980s' World Bank inspired reforms issues of food security have taken centre stage at the place of contested rationalities. The Malawi government aspires to be a developmental state. This thesis believes that such an inspiration can be realised if the Malawi government embraces Ubuntu. As argued in chapter 7, the Malawi government as a postcolonial hybrid society can do more in supporting smallholder farmers who are willing to undertake agricultural market (inter)actions. A 'developmental state' is a state 'whose ideological underpinnings are developmental and one that seriously *attempts* to deploy its administrative and political resources to the task of economic development' (Emphasis in original).[36] The emphasis underscores the position that such a state may succeed or fail in delivering on development but at least makes a serious attempt to do so which in every case will be determined empirically.[37] The definition also forestalls what has been termed as the 'impossibility theorem' largely spearheaded by institutions like the World Bank for developmental states to be found in the current global economic regimes in African places like Malawi.[38] The World Bank insisted that what is known as 'the East Asian Miracle' was a result of 'market-friendly policies' and 'getting basics right' and cannot be replicated especially in Africa.[39] Critique demonstrated that the East Asian Miracle was the case of the legal constitution of markets led by the state.[40] The World Bank approach is also contradictory because African '[s]tates whose capacity to pursue any national project is denied at one level (theoretical or diagnostic) are exhorted, at the prescriptive level, to assume roles that are, *ex definicione*, beyond their capacity, character or political will' such as creating an enabling environment for agricultural markets.[41] It has been argued that any developmental states that could emerge are likely to

[36] Thandika Mkandawire, 'Thinking about Developmental States in Africa' (2001) 25 Cambridge Journal of Economics 289, 291.
[37] Thandika Mkandawire, 'Neopatrimonialism and the Political Economy of Economic Performance in Africa: Critical Reflections' (2015) 67 World Politics 563.
[38] Charity Musamba and Peter Meyns, *The Developmental State in Africa: Problems and Prospects* (University of Duisburg-Essen/Institute for Development and Peace 2010).
[39] World Bank, *The East Asian Miracle Economic Growth and Public Policy* (Oxford University Press 1993).
[40] Musamba and Meyns (n 38); Alice H Amsden, 'Why Isn't the Whole World Experimenting with the East Asian Model to Develop?' (1994) 22 World Development 627.
[41] Mkandawire, 'Thinking about Developmental States in Africa' (n 36).

be different from the developmental states of the East Asian Miracle.[42] It is added here that considering that in Chapter 7 the thesis analysed the emergence of the ideology of 'unilateral pragmatic capitalism' and a serious commitment to develop regime that led to growth, Malawi has very little reason to doubt that it can be a developmental state again. A 'developmental state' would not be a new idea, the first two decades of self-rule in Malawi were about a developmental state despite its heterogenous nature.[43]

The self-professed role of the Malawi government is an 'inclusive democratic developmental state' as stated in its long-term policy document called 'Malawi Vision 2063'.[44] The vision on agricultural markets states that while 'focusing on crops that guarantee food security' the 'emphasis shall be on strategic crops, livestock and fisheries that will yield high-income in the local, regional and international markets.'[45] This process will be driven by a state 'agricultural development and marketing entity running on commercial principles, promoting the commercialization of agriculture and providing local and international structured market linkages to our farmers' while simultaneously operating 'under a strong alliance with the private sector, in a transparent and accountable manner and independent of political interference.'[46] The vision of the government is a publicly-led not market-led approach to agricultural markets.

The World Bank continues to be very active in providing aid and advice to the Malawi government under the post-Washington Consensus as discussed in the conclusion to chapter 8. One of the features of the relationship is the difference in perspective on 'what social intervention should be' in agricultural markets.[47] The new aid architecture has created an almost permanent place for 'international aid agencies and so-called donor countries' in conceiving and implementing agricultural markets.[48] There are also 'foreign and transnational

[42] Laura Routley, 'Developmental States in Africa? A Review of Ongoing Debates and Buzzwords' (2014) 32 Development Policy Review 159.
[43] Mkandawire, 'Thinking about Developmental States in Africa' (n 36).
[44] Malawi Government, 'Malawi Vision 2063: An Inclusively Wealthy and Self-Reliant Nation.' (National Planning Commission 2020) 9.
[45] ibid 14.
[46] Malawi Government (n 44).
[47] de Sousa Santos (n 6) 52.
[48] ibid 51.

NGOs' supplementing the actions of international aid agencies.[49] The actors not only influence thinking about agricultural markets but also claim as 'international solidarity with a legitimate right to establish the terms' the making of agricultural markets.[50] The views of these international actors with the influence they hold over the international financial organisations and donor countries may end up in 'anarchic superimpositions that generate exclusion' in agricultural markets from smallholder farmers. Food security provides one area of contested rationalities in practice.

Food security is a key policy objective that has since the 2000s fed into the rationalities in the legal construction of agricultural market regimes in Malawi.[51] This section suggests a way in which the Malawi government could address both food security and smallholder market participation ('agricultural commercialisation') as stated in the long-term Malawi Vision 2063 framework. The way to achieve this is to listen to some of the economic approaches put forward by institutions such as IFPRI while ignoring their dogmatism towards markets, bringing in the private sector while maintaining control through its parastatal such as ADMARC Limited.

Smallholder farmers in the group of net food buyer are in majority. This has compelled any actor in the policy space to have a view on smallholder farmers.[52] Such thinking needs to appreciate that these general categories that may not be mutually exclusive could be responsible for what has been termed as 'idea gaps' (knowledge of market standards or formal markets for example) and 'object gaps' (material endowments, land for example) in the section 9.1 discussing smallholder farmers as actors above.

In earlier period discussed in chapter 6 and 7 there were relatively fewer challenges because of the bifurcation between crops cultivated for food (food crops) and cash crops cultivated almost solely for the market such as tobacco. Government would simply restrict the quantities

[49] ibid.
[50] ibid 52.
[51] Department of Disaster Preparedness, 'National Resilience Strategy (2018 – 2030) Breaking the Cycle of Food Insecurity in Malawi' (Malawi Government); Gomez y Paloma, Riesgo and Louhichi (n 31); Wycliffe Chilowa, 'The Impact of Agricultural Liberalisation on Food Security In Malawi' (1998) 23 Food Policy 553.

of cash crops that could be cultivated by smallholders and the effects would more less regulate the smallholder food regime. In this period (2000-2022) food crops are the main market crops.

Structural adjustment reforms sought to affect the smallholder marketing regime by encouraging the cultivation of tobacco in the expectation that smallholder farmers as 'rational economic actors' would achieve a balance between food crops and cash crops. Unsurprisingly, food shortages overshadowed the World Bank reforms leading some to doubt any beneficial aspects of the reforms because they assumed that markets would self-regulate to achieve food security.[53] The World Bank/IMF believed that the better approach would be to rely on southern African regional markets for the purchase of food than direct intervention by government.

9.3 Regimes

The Malawi government decided to take reinstitute regulation at least for food security following after devastating food shortages in 2004/05. The crisis led to an almost agreement 'that subsidising food production rather than reliance on food imports was the surest way to guarantee national food security' as advised by the IMF/World Bank was unworkable.[54] On paper, according to the World Bank/IMF following a harvest, Malawi could rely on the market to provide it food needs and need not maintain any food reserves. The national consensus that resulted from the devastating food shortages challenged the World Bank's rationality which was behind the policy its prescriptions for regimes of agricultural regimes. Since the 2005/2006 agricultural season, the Malawi government reintroduced a programme for input subsidies scrapped under structural adjustment reforms 'amidst fierce donor resistance, led by the World Bank and IMF'.[55] Farm input subsidies had been abolished at the instance of the World Bank under structural adjustment programmes. An analysis of the stance by donors ranges from 'dogmatic market centric resistance' to 'a wait-and-see approach' while others were in 'full support' of the subsidy regime, demonstrating the contested rationalities of this era. The dogmatic approach was taken by the IMF and USAID who argued that 'the

[53] Blessings Chinsinga, 'The Political Economy of Agricultural Commercialisation in Malawi' (APRA, Future Agricultures Consortium 2018) Working Paper 17 <https://opendocs.ids.ac.uk/opendocs/handle/20.500.12413/14028> accessed 20 August 2020.
[54] ibid 38.

implementation of the subsidy programme risk[ed] wiping out the private sector dealing in fertiliser' and this position was ' justified on the basis that smallholder farmers' demand for fertiliser in Malawi [was] estimated at 200,000 metric tonnes per annum, while the subsidy programme [would] provid[e] up to 150,000 metric tonnes.'[56] This was against the background that '[u]ntil the turn of the 1990s, ADMARC was the sole outlet for fertilisers to the smallholder market' but as part of the neoliberal reforms the fertiliser market private participation was allowed resulting in instances where the private sector imports of fertiliser 'remained over 70 per cent, at times peaking to over 90 per cent, until the introduction of the fertiliser subsidy in the 2005/2006 growing season.'[57] According to IMF and USAID 'the most effective way to boost agricultural development [was] to promote a market-based approach to input provision.'[58] A wait-and-see approach was adopted 'by [UK's former] DFID, the World Bank and the EU, among others.'[59] They were 'wary about government capacity and emphasise[d] the challenges of targeting' the most deserving smallholder farmers to receive the subsidised fertiliser but conceded 'that some type of "smart subsidy", building on the lessons of the targeted input programme [reintroduced in 1998], might be feasible'; for them 'there [was] a clear case for subsidies in the case of market failure, but the subsidies [had to] be properly targeted at economically active and productive beneficiaries.'[60] Their view was that 'subsidies have to be conceived within the broader framework of social protection when market failures are rampant and the incidence of poverty and vulnerability is acute.'[61] The subsidies, according to the group, should have been 'provided only to those that are genuinely unable to afford a certain commodity' and therefore have been provided within 'market-friendly mechanisms, subsidies that are clearly defined in terms of duration and financial commitments so as to ensure predictability.'[62] The supporters of the regime of subsidies for smallholder farmers were 'most UN agencies, NORAD [Norwegian agency for development cooperation] and local and international NGOs such as Oxfam, ActionAid, Plan International

[56] Blessings Chinsinga, 'Resurrecting the Developmental State in Malawi: Reflections and Lessons from the 2005/2006 Fertiliser Subsidy Programme' in Richard Tambulasi (ed), *Reforming the Malawian Public Sector Retrospectives and Prospectives* (Council for the Development of Social Science Research in Africa (CODESRIA) 2010) 95.
[57] ibid.
[58] ibid 96.
[59] ibid.
[60] ibid.
[61] ibid.
[62] ibid.

etc.'[63] Their support was based on the arguments that 'fertiliser is critical to boosting production and assuring food security, and that phasing out subsidies over time, once farmers have ratcheted up their capacity, is the best option'; secondly and thirdly 'that agriculture in Malawi cannot survive without subsidies and that subsidies will not distort the market because the private sector is almost non-existent.'[64] It was also their view that looking at how real markets operate in Malawi, 'some areas in the country would not be served at all because of the extremely high costs of doing business in remote areas.'[65] It has been argued that the 'implementation of the 2005/2006 fertiliser subsidy programme was fairly successful despite a number of glaring shortfalls' leading others to speculate that a developmental state in agricultural markets was possible in Malawi.[66] The subsidy regime culminated 'in a dramatic decline in the severity of the food-security problem in the country for the first time in nearly 20 years, is a significant achievement' creating much needed space for pursuit of the development of agricultural markets.[67] From an ESL perspective the major challenge for the Malawi government was how it compelled donors to accept a modification of their neoliberal rationality. It has been stated that 'donors later reconsidered their initial hard-line positions and became willing to engage with the' the subsidy regime.[68] There are lessons for the heterogenous state like Malawi in creating and supporting smallholder inclusive agricultural market regime.

Initially the smallholder farm input subsidies were intended to induce market participation beyond food security. The market participation orientation of the programme was abandoned 'during the 2009/2010 growing season after [the then president] President Bingu wa Mutharika won historic landslide victories at both presidential and parliamentary levels, and continued preoccupation with the issue of food security.'[69] This has left the question of smallholder farmers market participation or smallholder agricultural commercialisation to divergent views. The World Bank in its recent country strategy continues the trend of blaming

[63] ibid 97.
[64] ibid.
[65] ibid.
[66] ibid 98.
[67] ibid 103.
[68] ibid 105.
[69] Chinsinga (n 53) 38.

government for failures to achieve smallholder market participation and food security because

> state intervention combined with export restrictions—although popular and even yielding some positive results in the short term' which it believes 'has deterred investment in commercial production, thereby impeding diversification and falling short of social objectives.[70]

On the other hand, the Malawi Government has stated in its policy that it will adopt 'an active role while forging a strong alliance with the private sector in the implementation and realization of' Malawi Vision 2063 ('MW2063').[71] It will 'embark on a progressive and extensive agricultural commercialization programme to boost incomes and spur economic growth' and simultaneously the 'drive to commercialize the agricultural sector shall be undertaken to guarantee that every household in Malawi is food secure.'[72] One of the most important issues for Malawi is how to bring smallholder farmers to the markets or in short, how should agricultural commercialisation in Malawi take place. It seems the presence of well-intentioned research institutions in Africa is playing the role of continuing to maintain and push the neoliberal rationality of the World Bank on governments.

IFPRI researchers in their policy advice to the Malawi government observe that 'persistent food insecurity at the individual and household levels strongly influences the policies pursued by the government.'[73] As demonstrated in Chapter 8 this is not just an afterthought on the part of public actors, it's something that has run very deep within government approaches to agricultural regimes, it informs its rationality. Very much like the World Bank on food security, IFPRI believes that 'Malawi could reduce persistent food insecurity by moving away from its reliance on subsistence farming' and establishing 'stronger agricultural markets' so that 'commercially oriented smallholder farmers across Malawi could efficiently produce much of the food needed.'[74] This approach may work where many smallholder farmers are engaged in price-making markets but evidence in Malawi suggests that even smallholder farmers who

[70] World Bank, 'Country Partnership Framework for Malawi For the Period 2021-2025' (World Bank 2021) 154505-MW para 41.
[71] Malawi Government (n 44) 10.
[72] ibid 14.
[73] Todd Benson, *Disentangling Food Security from Subsistence Agriculture in Malawi* (Intl Food Policy Res Inst 2021).
[74] ibid ix.

have a surplus to sell do not want to see their (inter)actions with markets in purely instrumental means-end terms. The application of the 'market principle' is limited to specific purposes for specific smallholder farmers such that 'market sales are not the dominant source of livelihood' in rural Malawi because a characteristic of these markets was 'minute quantities transacted.'[75]

This critique of the market reliance approach seems to have confirmed this trend from empirical studies of markets in rural sub-Saharan Africa among smallholder farmers in countries including Malawi and published his work in 2000s by Michel Fafchamps, an Agricultural Economist and Belgian trained lawyer. He carried out extensive empirical economic research in 12 countries including Malawi.[76] After noting that in Western countries such as the USA 'the domain of gift exchange has all but vanished' and social protection is largely the responsibility of the state, in rural African countries, Fafchamps studied market interaction which took place in wider social life to generate social protection, solidarity and traditional communities.[77] It was also noted that in 'a typical Western country, grain is purchased from farmers by a large corporation (e.g., Cargill), processed in the corporation facilities, purchased by supermarkets and agro-businesses, and sold to consumers.'[78] On the other hand, 'in Africa, grain to be sold to retailers, and finally to micro-retailers, is first purchased from a myriad of small farmers by collecting agents, assembled for shipment by a rural wholesaler, and purchased by an urban wholesaler or processor.'[79] Smallholder farmers seemed to be 'target marketers involved in marketing sporadically to acquire a specific amount of cash income for specific expenditure' while they keep in mind the need for food sufficiency.[80]

A recent publication from IDS noted that 'greater attention needs to be paid to inequity considerations to prevent and reverse inequities driven through [agricultural

[75] Marcel Fafchamps, *Market Institutions in Sub-Saharan Africa: Theory and Evidence* (MIT press 2004) 8.
[76] Fafchamps (n 75).
[77] ibid 9.
[78] ibid 10–11.
[79] ibid 10.
[80] Paul Bohannan and George Dalton (eds), *Markets in Africa: Eight Subsistence Economies in Transition* (Northwestern University Press 1962) 7.

commercialisation] processes' particularly in Africa.[81] Other researchers have suggested that more insights are needed than solely relying on and privileging mainstream economic approaches in small holder issues on markets and food security.[82] Mainstream economists should

> carefully examine whether the assumptions implicit in pathways' theories align with market conditions and livelihood orientations in their research context. Otherwise, they risk reinforcing discursive framings of hunger and agricultural development, even as they obscure more transformative pathways to food security.[83]

Such research among smallholder farmers in Malawi, using qualitative methods, has revealed several issues otherwise taken for granted in policy recommendations in mainstream economics such as those of the World Bank, IFPRI, USAID, AGRA and confirms the caution coming out of IDS. The dominant economic thinking around smallholder food security and markets involves the belief based on economic maximising utility approach '*regardless of their consumption preferences and needs'* (Emphasis in original).[84] It has been noted that mainstream economists measurements including 'distance to market,' 'share of harvest sold in market', and proximity of markets to determine the role of markets in food security Farmers (inter)actions with agricultural markets is part of wider social life and any isolation of the economic out of this wider social life is artificial.

It the research, '[a]nother farmer, who had sold one bag of soybeans after another to farmgate traders, was asked why she did not just sell all four bags at once.'[85] She responded that she only sells when she needed the money to meet pressing need not as a rational economic actor.[86] This is support for the view that smallholder farmers are 'target marketers' involved in 'marketing sporadically to acquire a specific amount of cash income for specific expenditure.'[87] Mainstream economists would like to portray these inter(actions) as

[81] Jessica Gordon, 'Food Security and Nutrition Inequities in the Context of Agricultural Commercialisation in Sub-Saharan Africa: A Narrative Literature Review' (Institute of Development Studies, University of Sussex 2022) IDS Working Paper 567.
[82] Sidney Madsen, 'Farm-Level Pathways To Food Security: Beyond Missing Markets and Irrational Peasants' (2022) 39 Agriculture and Human Values 135.
[83] ibid 136.
[84] ibid 137.
[85] ibid 141.
[86] Madsen (n 82).
[87] Bohannan and Dalton (n 80) 7.

premodern suggesting that markets are no longer peripheral in Africa.[88] This thesis argues that this is economic hybridity where what look like capitalist markets coexist/combines/interpenetrate with other forms of markets such as gift exchange. The complex motivations for engaging in market interactions have recently been the subject of research suggesting how econo-legal (inter)actions are pursued together with traditional (inter)actions; whether for traditional community solidarity purposes or as social insurance.[89]

The research also looked at 'the question of whether it is correct to assume that market failures' are the only reason that smallholders continue to pursue subsistence farming as the World Bank and others would have everyone believe. The research by Sidney Madsen, from an agroecological perspective, noted that 'for many farmers interviewed, self-reliance was an integral part of their identity.'[90] In another interview, the smallholder farmer seemed to indicate that while 'she recognized that money was necessary to support her livelihood, generating income was not this farmer's principal objective, rather, autonomy guided decision-making.'[91] Examples were also provided of 'few farmers who reported that maize prices often remained so low that they refused to sell their surplus on regional and export markets, instead preferring to trade it with community members.'[92] This demonstrates the complexity of market (inter)cations which economic approaches alone cannot untangle. The position taken by smallholder farmers seemed to reveal the limited role of impersonal relations and the importance of social relations before the pursuit self-interest.

To analyse smallholder farmers (inter)actions with markets further, the evolution of their participation in formal markets provides further insights and suggest ways of inclusive legal thinking and practices in the next Chapter.

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[88] Jane I Guyer and Karen Tranberg Hansen, 'Markets in Africa in a New Era' (2001) 71 Africa 197.
[89] Madsen (n 82); Fafchamps (n 75).
[90] Madsen (n 82) 144.
[91] ibid.
[92] ibid 145.

9.4 Conclusion

There is evidence of how the state was central to the creation of markets in Europe.[93] The heterogenous state is in a unique position to advance a rationality informed by *Ubuntu* in the making of smallholder markets. The ESL approach allows the application of a communal lens to advance a people-centred framework analytically, normatively, and empirically within the legal pluralism that is inherent in the heterogenous state of Malawi. The literature around government or state activities refers to the 'patronage' or promotion of interests that are not necessarily in the interests of the state or 'patrimonialism', which this thesis suggests is a problem of the heterogeneous nature of the postcolonial state.[94] Microstates parasitic on the formal state emerge to support or originate regimes that sometimes-run counter to interests of formal regimes. In agricultural markets probably public and private collaboration is likely to reduce the scope and power of microstates to promote or support regimes that run counter to inclusion of smallholder farmers in formal markets.

[93] Polanyi (n 11).
[94] Chinsinga (n 53).

10 A case study of the Agricultural Commodity Exchange for Africa

This chapter analyses a case study of the Agricultural Commodity Exchange for Africa ('ACE') as a formal market and the participation of smallholder farmers in it since its inception in 2005. ACE is selected because it started off with the limited participation of smallholder farmers, which this thesis attributes to its market centric rationality. Since 2016, it has deliberately put in place measures to encourage the participation of smallholder farmers after noting their non-participation after close to decade of operations in Malawi.[1] ACE presents a natural 'single experiment' to assess what leads to limited smallholder participation in formal agricultural markets and what could be done to encourage their increased participation.[2] It provides an empirical setting to examine the ESL approach set out in Chapter 4 relating to the roles that law can play in the participation of smallholder farmers in agricultural formal markets. The markets context historically is provided by Chapters 6 to 8 and the contemporary setting in provided by Chapter 9.

This chapter may be regarded as a continuation of the previous chapter covering the same period and addresses empirical aspects of the role that law does and can play in the participation of smallholder farmers in agricultural formal markets through a case study. One of the critical challenges for the Malawi government is identifying markets for non-tobacco commodities such as grains for smallholder farmers. This is after structural adjustment reforms removed the monopoly of the state market board, ADMARC as the sole buyer of smallholder farmers' farm output. The Malawi government states in its long-term policy document that 'structured market linkages to our farmers' should be a key part of its approach to agricultural markets.[3] 'Structured markets' refers to more organised markets for market functions such as production, agricultural financing and markets as explained in Chapter 5 and thereby involving a high degree of formality.[4]

[1] Paul Cronjaeger, 'A Situation Analysis and Needs Assessment for the Development of an ACE Rural Vision and Strategy' (Agricultural Commodity Exchange for Africa (ACE) 2015) Briefing Paper.
[2] Robert K Yin, *Case Study Research and Applications* (6th edn, Sage publications 2018) 49.
[3] Malawi Government, 'Malawi Vision 2063: An Inclusively Wealthy and Self-Reliant Nation.' (National Planning Commission 2020) 15.
[4] Anderson Gondwe and Bob Baulch, 'The Case for Structured Markets in Malawi' (International Food Policy Research Institute 2017) Policy Note.

Sometimes economic approaches give the impression that economic inter(actions) should be purely instrumental, that the self-interested pursuit of profits is the only societal goal. At the outset it must be mentioned that ACE has been recently said to be pursuing what has been called 'an inclusive business model' which is defined as 'organizational arrangements' in agricultural markets 'that involve a dual logic: a *commercial logic*, i.e., aiming at efficiency and profit in the supply chain, and *social logic*, aiming at the inclusion of marginalized actors in communities where the transaction takes place' [Emphasis supplied].[5] ACE is involved with commercial formal markets which on one hand, that 'facilitate the trade of agricultural commodities (mostly grains and legumes) by creating an efficient and transparent market system linking farmers to traders and processors' and on the other hand it promotes the objective of making smallholder inclusive markets, 'a market that is inclusive of small-scale producers.'[6] This thesis identifies this as an empirical manifestation of *Ubuntu* rationality in the constitution of inclusive formal agricultural markets The focus for this thesis is the participation in formal markets of small-scale producers. The case study of ACE as a formal market provides strong empirical support for the view that 'theories in economics are either so general that they have little real leverage in the real world or so specific that they can account at best for a particular slice of reality'.[7] This view is represented by the World Bank and others that tend to view budgetary constraints as the only impediment to the participation of smallholder farmers in formal markets.[8] However, over two decades of formal markets in their various forms in Malawi seem to suggest that a significant number of Africa's smallholder farmers are not participating in these markets. Law and economics approaches keep insisting on analyses the assume that

[5] Domenico Dentoni, Boaz Liesdek and Larissa Shnayder, 'The Case of Malawian Agricultural Commodity Exchange: Dealing with Institutional Issues and Fostering Entrepreneurial Ecosystems in Rural Areas' <https://pdf.usaid.gov/pdf_docs/PA00WKTP.pdf> accessed 6 June 2023.

[6] Boaz Liesdek and others, 'Addressing Tensions in and around Inclusive Business Models: The Case of the Malawian Agricultural Commodity Exchange' (USAID n.d.).

[7] Dani Rodrik, *Economics Rules: The Rights and Wrongs of the Dismal Science* (WW Norton & Company 2015) 144.

[8] World Bank Group, *A Guide to Warehouse Receipt Financing Reform: Legislative Reform* (World Bank 2016) <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/885791474533448759/a-guide-to-warehouse-receipt-financing-reform-legislative-reform> accessed 23 June 2023; Guigonan Serge Adjognon and others, 'Implementing Effective Warehouse Receipt Financing Systems: Lessons from a Pilot WRS Project in the Senegal River Valley' (The World Bank 2019); Gideon E Onumah, 'Improving Access to Rural Finance Through Regulated Warehouse Receipt Systems in Africa' (2003).

smallholder farmers are rational economic utility maximisers, as set out in Chapter 2.[9] This case study will demonstrate the empirical limits of law and economics.

10.1 Context

To understand the case study adopted in this thesis to explain the inclusion of smallholder farmers in formal markets, it is important appreciate the agricultural markets context created by failed neoliberal reforms of the 1990s. The 2000s raised an important and persistent question of the markets for smallholder agricultural output because the expected self-regulating market around tobacco as a cash crop never materialised despite vigorous and sustained application of law and economics approaches as discussed in the last chapter. Chapter 5 provided a conceptual overview of regimes that make up agricultural markets and are key to clarifying orthodox legal thinking and practice around markets. These regimes may include production, transportation, storage, credit and 'merchandising' or cash sales and management of risks.[10] State action tended to focus of regulation of production, credit, and cash sales of commodities in the period covered by Chapters 6 and 7. Since the 2000s there have also been regimes privately regulating markets 'through new voluntary or contractual codes of conduct, third-party certification schemes, and other forms of non-state private standards.'[11]

Empirical evidence has demonstrated limited participation by smallholder farmers in these markets and the dominance of large-scale traders, who sometimes are affiliated with multinational agricultural commodity companies.[12] Smallholder farmers are an important group because by some accounts they are the dominant players in the production of commodities and their inclusion in these is imperative. A common view by the World Bank and its supporters such as IFPRI and AGRA is that smallholder farmers as rational economic

[9] Shahidur Rashid, 'Commodity Exchanges and Market Development: What Have We Learned?' (2015); Shahidur Rashid, Alex Winter-Nelson and Philip Garcia, 'Potential and Purpose for Commodity Exchanges in African Economies' (International Food Policy Research Institute 2010) Discussion Paper; ibid; Onumah (n 8).
[10] James E Boyle, 'Marketing of Agricultural Products' (1921) 11 The American Economic Review 207, 208.
[11] MC Canfield, Amy J Cohen and Michael Fakhri, 'Agriculture, Law, and the State' in M Valverde and others (eds), *Routledge Handbook of Law and Society* (Routledge 2021) 71.
[12] Jack Thunde and Bob Baulch, *Who Uses and Who Benefits from Warehouse Receipt Systems? An Examination of Contract Level Transactions on the Agricultural Commodity Exchange for Africa, 2011–2018* (Intl Food Policy Res Inst 2020); Sophia Murphy, David Burch and Jennifer Clapp, *Cereal Secrets: The World's Largest Grain Traders and Global Agriculture* (Oxfam 2012).

actors experience uncertainty whether to engage in market (inter)actions. Research from IFPRI suggests that smallholder farmers 'are uncertain as to whether they will find buyers who will offer them a profitable price for their food crops, so any surplus production for most farmers primarily is generated as a safety measure against the food security risks of a bad cropping season, rather than as a commercial decision.'[13] This analysis goes further to blame the Malawi government for its interventionist approach in agricultural markets distorts prices. This view is held by the International Food Policy Research Institute ('IFPRI') who have continued the mainstream economics argument that government regulation distorts markets.[14] The World Bank in its Country Partnership Framework (2021-2025) supports this view.[15] Wider social relations that have been demonstrated to influence the attitudes of smallholder farmers towards markets hardly feature in this view.[16] A contradiction in the research on agricultural markets in Malawi and elsewhere is how markets of mainstream economics seem to be invisible to smallholder farmers. This view was expressed by AGRA, which noted how research in countries like Malawi consistently finds that markets for smallholder farmers are listed as one of the obstacles to selling commodities. This finding is not easy for economic approaches to explain.[17] The explanation offered by AGRA is that the participation is limited because of 'three fundamental bottlenecks: [l]imited access to finance, the difficulty of sourcing grain quality, and policy constraints.'[18]

The regulation of formal markets can take different paths. Examples familiar to Malawi include contract markets and commodity exchanges. Contract farming may be defined as 'an institutional arrangement in agriculture where buyers and processors contract farmers to provide goods under certain specifications, as opposed to procuring thee in open spot

[13] Todd Benson, *Disentangling Food Security from Subsistence Agriculture in Malawi* (Intl Food Policy Res Inst 2021) 79.
[14] Brent Edelman and others, 'Have Market Policies Turned Malawi's Large-Scale Farmers into Subsistence Maize Producers?' (International Food Policy Research Institute (IFPRI) 2016).
[15] World Bank, 'Country Partnership Framework for Malawi For the Period 2021-2025' (World Bank 2021) 154505-MW; T Benson and B Edelman, 'Policies for Accelerating Growth in Agriculture and Agribusiness in Malawi' [2016] Malawi Country Economic Memorandum background paper, World Bank.
[16] Sidney Madsen, 'Farm-Level Pathways To Food Security: Beyond Missing Markets and Irrational Peasants' (2022) 39 Agriculture and Human Values 135.
[17] Ones Karuho and Kate Collins, *Improving African Grain Markets for Smallholder Farmers* (AGRA 2020) 7.
[18] ibid 14.

markets.'[19] Contract marketing or farming can take different forms and one of the forms being used in Malawi for tobacco markets. This came in after the limited success of neoliberal agricultural reforms analysed in chapter 8. The Malawi government has developed a strategy to regulate this regime that covers production and other aspects including marketing of crops.[20] The limits of contract farming and participation of smallholder farmers have been noted and it therefore not be a focus in this thesis, although the challenges are similar to those analysed in this chapter in relation to commodity exchanges.[21] In the early 2000s an idea to introduce structured agricultural markets into Malawi was proposed and supported by the World Bank and USAID.[22] Structured markets involve a high degree of private or public regulation of the marketing functions, that is, production, transportation, storage, credit and 'merchandising' or cash sales and management of risks in each of these functions; making them a formal market.[23] A key instrument holding the different regimes of the market is the warehouse receipt. Warehouse receipts can be defined as

> documents issued by warehouses to depositors against the commodities deposited in the warehouses, for which the warehouse is the deposit bailee. This gives depositors the confidence that their commodities will be stored with guaranteed quality and quantity. These are negotiable instruments that can be traded, sold, exchanged, and used as collateral to support for short term financing.[24]

It enables dealings in commodities without the physical display of the goods. This enables sales, purchases, or pledge of goods by means of documents, in paper form or electronically.

It has been noted that the

> multimillion dollar cost of all these exchanges [came] from a small range of mainly US donors and [covered] the cost of the studies needed to establish the exchange, the exchange's buildings and equipment, quality-testing laboratories, legal work to authorize the system, diplomatic exercises to sell the idea to governments and other stakeholders and running costs including staffing.[25]

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[19] Helena Pérez Niño and Carlos Oya, 'Contract Farming' in A Haroon Akram-Lodhi and others (eds), *Handbook of Critical Agrarian Studies* (Edward Elgar Publishing 2021).
[20] Jason Moyer-Lee and Martin Prowse, 'How Traceability Is Restructuring Malawi's Tobacco Industry' (2015) 33 Development Policy Review 159.
[21] Dennis O Ochieng, *Beyond the Passbook Relationship: Assessing Preferences For Contracts among Cotton and Tea Farmers and Companies In Malawi*, vol 34 (Intl Food Policy Res Inst 2020).
[22] Peter Robbins, *Commodity Exchanges and Smallholders in Africa* (International Institute for Environment and Development 2011).
[23] CTA and EAGC, *Structured Grain Trading Systems in Africa* (Technical Centre for Agricultural and Rural Cooperation/East African Grain Council 2013).
[24] Devajit Mahanta, 'Review of Warehouse Receipt as an Instrument for Financing in India' (2012) 1 International Journal of Scientific & Technology Research 42.
[25] Robbins (n 22) 5.

It was expected that these commodity exchanges would provide better markets than state marketing boards to address what were regarded as 'some of the most intractable failures of prevailing market practice, such as lack of transparency, competition, market information, bargaining power of small-scale producers, and credit in the industry.'[26] It was taken for granted that with these agricultural market reforms would benefit smallholder farmers although 'small-scale producers especially would have to be educated in the ways that markets work and be provided with the necessary market information to enable them to make sensible production and bargaining decisions.'[27] The model proposed for Malawi, Zambia, Uganda and Kenya was the same with 'components of the proposed system consist[ing] of a pyramid of institutions with, at its apex, a commodity exchange' in a structure that saw the smallholder farmers at the bottom of the formal markets or what may be seen as 'the base of the pyramid of the new trading system.'[28] The model had 'predicted that, if a major reform of the higher tiers of the trading system were offered, major traders would switch to the new system and, under their influence, medium-sized traders would follow suit' and smallholder farmers as rational economic actors would follow.[29] In the process the model of commodity exchanges overlooked that the commodity exchanges in the countries of origin developed in the context of countries 'with very different histories and cultural characteristics.'[30] One of the issues against the model was that it overlooked that 'sophisticated market systems in developed countries, such as commodity exchanges, were established by the users of the market' and that further 'were not established and funded by outside organizations' such that it needed to be borne in mind that the 'new African exchanges, therefore, represent[ed] something of an experiment.'[31]

Commodity exchanges are a typical structured market arrangement involving 'an open and organized marketplace where commodities are traded'.[32] In this marketplace buying and selling 'is done in an organized way through a system of bids (to buy) and offers (to sell), governed by a set of rules.' The commodity exchanges introduced into Africa during this

[26] Robbins (n 22).
[27] ibid 3.
[28] ibid.
[29] ibid 17.
[30] Robbins (n 22).
[31] ibid 3.
[32] CTA and EAGC (n 23) 78.

period, following the prompting of international organisations such as the World Bank and USAID, seemed to continue the trend of privileging 'economic values and interests, usually claiming this to be for the good of all types of social action, including other instrumental action, and also affective, belief-based and traditional actions.'[33] Initially an institution known as Malawi Agricultural Commodity Exchange ('MACE') was set up 'as a market information system for farmers'.[34] It had 'the vision of making markets work better for smallholder farmers through reliable market information and improving transparency in trade.[35] This 'model' was also introduced in Kenya, Zambia, and Uganda.[36] The Kenyan and Malawi institutions focused 'their attention on smallholder suppliers' of agricultural commodities.[37] Under the model 'the main activity [was] a rudimentary market information service which collect[ed] estimates of prices and traded volumes in several wholesale centres and disseminate[d} this information using Short Message Service (SMS), email, newspapers and some radio.'[38]

Ethiopia took a different approach and had greater direct state involvement from inception and admittedly resulted in a much more sustainable exchange; this approach was, however, deprecated by some economists because of government involvement from conception to execution of the commodity exchange institution.[39] A study conducted in 2011 observed that MACE was 'no longer commodity exchanges in anything other than name' as it seemed that its funding from the Rockefeller and Gates Foundations had been exhausted. It was possible to support it in any other way and had limited appeal to the Malawi government.[40] Around the same time '[t]he idea for ACE [the Agricultural Commodity Exchange for Africa] came from Common Fund for Commodities (CFC) research and was established with US$1 million from

[33] Amanda Perry-Kessaris, 'Reading the Story of Law and Embeddesness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law' (2011) 62 N. Ir. Legal Q. 401, 405.
[34] Blessings Chinsinga, 'The Political Economy of Agricultural Commercialisation in Malawi' (APRA, Future Agricultures Consortium 2018) Working Paper 17 35 <https://opendocs.ids.ac.uk/opendocs/handle/20.500.12413/14028> accessed 20 August 2020.
[35] A Vyver and A Nordier, 'The Role of a Warehouse Receipt System in an Agricultural Commodity Exchange. A Case Study of the Malawian Agricultural Commodity Exchange' (2013) 6.
[36] Robbins (n 22) 4.
[37] ibid 14.
[38] ibid 4.
[39] Eleni Gabre-Madhin, *A Market for Abdu: Creating A Commodity Exchange in Ethiopia* (International Food Policy Research Institute 2012) <https://www.ifpri.org/publication/market-abdu-creating-commodity-exchange-ethiopia> accessed 27 June 2023.
[40] Robbins (n 22).

USAID.'[41] The Common Fund for Commodities commonly known as 'CFC' describes itself as 'an autonomous intergovernmental financial institution established within the framework of the United Nations' set up under the 'Agreement Establishing the Common Fund for Commodities [that] was negotiated in the United Nations Conference on Trade and Development (UNCTAD) from 1976 to 1980 and became effective in 1989.'[42]

10.2 The regime of ACE

This section introduces the ACE regime within the broader context of Chapter 9. It also analyses the rationality underpinning the establishment of the regime. The key actor in the case study is the Agricultural Commodity Exchange for Africa ('ACE') which was incorporated as a limited liability company in 2005 following a feasibility study.[43] Within two years, it was realised that there was a need 'to implement structured trade projects in partnership with a wide range of development partners' in a manner not requiring a non-profit approach which led to the setting up and registration of Registered Trustees of ACE Trust ('ACE Trust').[44] Structured trade is likely to thrive when the different regimes that constitute agricultural markets are in place which prompted ACE to embrace expansion of its activities 'organically' in response to the social context.[45] This probably also meant a willingness to change the rationality in legal thinking and practice in 'the task of adapting regulation sensitively to current social and cultural diversity.'[46] ACE was built around several 'pillars' including first 'a farmer would register on the market information system and receive market information via SMS', 'the second step was to facilitate the farmer actually selling at the best price in the urban centres', and 'third step of the structured trade ladder is the [the warehouse receipt system]. ACE needed the receipt system to be able to ensure and guarantee the performance of the seller and thereby build trade volume on the exchange.'[47]

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[41] ibid 39.
[42] 'Home Page | Common Fund for Commodities' <https://www.common-fund.org/> accessed 6 June 2023.
[43] Kristian Schach Møller, Paul Clearly and Pete Whyte, 'ACE Retrospective 2005-2020: A Journey Through Structured Trade, from an Idea to a Licensed Agricultural Commodity Exchange'.
[44] ibid 25.
[45] Cronjaeger (n 1) 3.
[46] Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing 2006) 74.
[47] Schach Møller, Clearly and Whyte (n 43) 26–27.

The commodity exchanges were expected to work *the same* way as they do in countries such as the USA. While resources and efforts were dedicated to commodity exchanges 'the millions of typical' smallholder farmers, who are at the centre of agricultural production were 'neglected.'[48] The feasibility report that led to the establishment of ACE was commissioned by the National Smallholder Farmers' Association of Malawi with financial support from the United States Agency for International Development ('USAID').[49] The report was the result of a study carried out between 31st May, 2004 and 30th June, 2004 by a consultant, a former manager of the Zimbabwe Agricultural Commodity Exchange (ZIMACE). ZIMACE was an agricultural commodity exchange for the mainly settler commercial farmers who until relatively recently had dominated structured markets in Zimbabwe.[50] The report stated that smallholder farmers were not expected to ' the only way they [could] participate [was] through organised groups.'[51] The report also noted that a key part of establishing the commodity exchange 'must include acceptance by government that it shall not interfere in any way with normal market forces.'[52] It also overlooked the role of regulation of storage in market regimes by deeming it 'not essential', a statement that proved almost disastrous.[53]

These normative statements reflected orthodox thinking despite a report as recently as 2020 noting that 'more than 90% [of smallholder farmers]… are not organized in a farmer group or integrated into an off-taker scheme that reliably buys their grain rely on assembly traders who go to farm gate with a bicycle or truck.'[54] This was also despite an acceptance by leaders on legal thinking and practice on markets such as the World Bank, acknowledging that 'governments are learning that market reforms and fast-changing technology pose their own regulatory challenges' a few years earlier.[55]

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[48] Robbins (n 22) 5.
[49] Ian Goggin, 'An Agricultural Commodity Exchange for Malawi?' (National Association of Smallholder Farmers in Malawi 2004).
[50] Chiedza L Muchopa and Joseph Rusike, 'A Structure Conduct Performance Analysis of the Zimbabwe Agricultural Commodity Exchange' <https://core.ac.uk/download/pdf/43538268.pdf> accessed 5 June 2023.
[51] Goggin (n 49) 13.
[52] ibid 36.
[53] John Kennedy, 'Report For ACE Malawi Concerning Business Development Model and Strategy' (Agricultural Commodity Exchange for Africa (ACE) 2011).
[54] Karuho and Collins (n 17) 70.
[55] World Bank, *World Development Report 1997: The State in a Changing World* (The World Bank 1997) 61.

10.3 The participation of smallholder farmers in the ACE regime

This section analyses how ACE moved away from the neoliberal market-centric approach of rational economic actors for its exchange to support the interactions of smallholder farmers in Malawi. This did not mean abandoning its vision of running a commodity exchange but adapting to the social context of Malawi to become more inclusive and to make the participation of smallholder farmers in the commodity exchange possible.[56]

The early years of ACE demonstrate that 'that so much faith was invested in the new top-down, commodity exchange-based system to deliver country-wide reforms' excluding smallholder farmers who are key actors in the production regime.[57] Perhaps it is not surprising that within a few years of commodity exchanges there was little progress on commodity exchanges becoming a go-to formal marketing place. After a decade it was noted that 'agricultural commodity exchanges in the region have thus far failed to develop into sustainable trading platforms' which was puzzling to scholars in mainstream economists as they work just fine in the West.[58] The problem was on that the architects of these the commodity exchanges focused on: maintaining the features of their places of origin rather than considering how they could adapt to the African context to meet the unique challenges of Malawi. These had emerged during and after structural adjustment reforms, in relation to the dominance of smallholder farmers who may not be rational economic actors in the sense envisaged by mainstream economics. One important adaptation in countries like Malawi is involving the smallholder farmers, who are majority of the agricultural producers.

Proposals for regimes that excluded smallholder farmers continued around 2007 when a study financed by the World Bank looked at the role of the Grain Traders and Processors' Association ('GTPA') in structured market regulation 'in a market-based way.'[59] The GTPA is an organisation representing traders who usually purchase commodities from smallholder

[56] Dentoni, Liesdek and Shnayder (n 5); Boaz Liesdek, 'Why Do Challenges in African Commodity Exchanges Persist? The Case of the Agricultural Commodity Exchange in Malawi' (Wageningen University & Research 2017) <https://edepot.wur.nl/430423> accessed 28 August 2020.
[57] Robbins (n 22) 5.
[58] Nicholas J Sitko and TS Jayne, 'Why Are African Commodity Exchanges Languishing? A Case Study of the Zambian Agricultural Commodity Exchange' (2012) 37 Food Policy 275.
[59] Senews Ltd and Grain Traders Association of Malawi, 'Final Proposals for the Implementation of a Pilot Warehouse Receipts System in Malawi' (2007).

farmers and commodity processors. One of the guiding reasons for the study was to position the GTPA as 'the main implementing agency' for the warehouse receipts in Malawi.[60] It was felt that including smallholder farmers would imply that commercial grain warehousing would be 'encumbered with the provision of social services' which would stand in the way of the need for the industry to be 'be profit driven in open competition with one another.'[61] It seems the GTPA believed that was felt that provision of social services for smallholder farmers 'should be provided by institutions that are able to participate in the warehousing industry but that specialise in the provision of services to small-scale farmers and rural communities.'[62]

A study by ACE in 2015 asked why the participation of smallholder farmers was low despite,

> access to affordable credit, access to higher-value, formal and structured markets, transparent trade, market information and price discovery, reduction of storage losses, possibility of making use of temporal arbitrage with the effect of improved income compared to selling right after harvest.[63]

This was also 'despite heavy investments in rural infrastructure (such as building warehouses and market information points) and offering other integral marketing support services such as market information or (at least partially) transport as well as also boasting a costly nation-wide rural field staff presence'.[64]

Studies demonstrated the mistrust that smallholder farmers had of the activities of the post-structural adjustment agricultural markets including commodity exchanges.[65] Such mistrust by smallholder farmers included mistrust of private traders.[66] For commodity exchanges such ideas as grain storage where the commodities are treated the same because they are fungible and hence not physically separated, were confusing to small-scale farmers.[67] Upon deposit of commodities by farmers, a warehouse operator would grade it and mix it will identical

[60] ibid 2.
[61] ibid 22–23.
[62] ibid 23.
[63] Cronjaeger (n 1) 2.
[64] ibid 2–3.
[65] Nicholas J Sitko and TS Jayne, 'Exploitative Briefcase Businessmen, Parasites, and Other Myths and Legends: Assembly Traders and the Performance of Maize Markets in Eastern and Southern Africa' (2014) 54 World Development 56; Stuart Kent and John Magrath, *Making Maize Markets Work for All in Southern Africa* (Oxfam 2016).
[66] Kent and Magrath (n 65).
[67] Brent Edelman and others, 'Strengthening Storage, Credit, and Food Security Linkages: The Role and Potential Impact of Warehouse Receipt Systems in Malawi' (International Food Policy Research Institute 2015).

commodities. Previous experiences with private traders in liberalised agricultural markets had shaped their mindsets about the markets and private sector cheating.[68] This could probably be attributed to the mindsets of the small-scale farmers and the retreat of the state and its supporting entities from agricultural markets during World Bank's reforms. African agricultural markets have come to be dominated by very few large-scale traders with a neoliberal outlook.[69] As long as these powerful actors are labelled as private sector, mainstream economic approaches deem them harmless. There is little doubt that the large-scale traders wield enormous power in agricultural markets affecting the (inter)actions of other actors in those markets.[70] There is empirical evidence that they have dominated formal agricultural markets such as commodity exchanges to the exclusion of other actors due the vast resources that they have at their disposal.[71] Their emergence is almost directly attributable to the retreat of the state marketing board during World Bank-inspired reforms in agricultural markets liberalisation.[72] Empirical research suggests that agricultural commodities markets in Malawi have 'many small traders, rural assemblers, and few large private traders.'[73]

The study was prepared by a consultant under the 'USAID-funded Competitiveness and Trade Expansion (COMPETE) project' which was 'a four-year, regional, private sector-oriented project designed to enhance economic growth and food security in Eastern and Central Africa by stimulating increased trade and competitiveness in both regional and global markets.'[74] It was observed that 'based on evidence of contractual defaults for non – secured sale / purchase contracts the reputation of ACE as a commodity contract facilitator will falter unless the intended development move into a warehouse receipts system (WRS) occurs rapidly.'[75]

[68] Sitko and Jayne (n 65).
[69] Chalmers Mulwa and others, 'Emergent Large Traders in Smallholder Grain Markets and Their Role in Incentivizing Adoption of Sustainable Agricultural Intensification Practices in Kenya'; Jack Thunde and Bob Baulch, 'Who Uses and Who Benefits From Warehouse Receipt Systems?' (Institute for Food Policy Research 2019).
[70] Murphy, Burch and Clapp (n 12).
[71] Dennis O Ochieng, Rosemary Botha and Bob Baulch, 'Structure, Conduct and Performance of Maize Markets in Malawi' (International Food Policy Research Institute 2019) Malawi Strategy Support Programme, Working Paper 29.
[72] Nicholas J Sitko, William J Burke and TS Jayne, 'The Quiet Rise of Large-Scale Trading Firms in East and Southern Africa' (2018) 54 The Journal of Development Studies 895.
[73] Ochieng, Botha and Baulch (n 71).
[74] Kennedy (n 53).
[75] ibid.

The report stated in no uncertain terms that ACE was at a 'crossroads' for its survival because of its failure to regulate, resulting in non-fulfilment of many contracts; such 'that based on evidence of contractual defaults for non – secured sale / purchase contracts the reputation of ACE as a commodity contract facilitator will falter.'[76] The study recommended that ACE should seriously consider regulating the other regimes for agricultural markets such as the storage function by introducing warehouse receipts as a means of imparting impersonal trust sales of commodities. Opportunistic traders would participate in sales on ACE's trading platforms without any commodities and hoping that they would be able to buy and resale agricultural commodities if the prices were good enough for them.

The haphazard introduction of structured markets has been criticised. It was argued that the structure of commodity exchanges transplanted to Africa were skewed towards 'few individuals and institutions that are already in a position to help themselves than it [was] to help tens of millions of typically small-scale actors'; the latter being smallholder farmers.[77] In fact, large-scale traders have benefitted and continue to benefit the most and small-scale farmers have benefitted the least, due the low participation by smallholder farmers in commodity exchanges.[78] It was not surprising that the transplanted commodity exchange proved unworkable due to defaults in the absence of regulation as demonstrated by another study in 2011.[79] The model of trade facilitation by ACE was a transplant that barely understood the social context of commodity markets in the West particularly the USA. The model reflected the problem about legal transplants which are not attuned to the social context of the recipient jurisdiction. It has been argued that even in the USA apparently sophisticated markets can be conceived as outcomes of complex (inter)action rather than 'atomized' means-end transactions 'in which masses of individuals engage in frictionless transaction [sic].'[80]

[76] ibid.
[77] Robbins (n 22) 5.
[78] Thunde and Baulch (n 12).
[79] Kennedy (n 53).
[80] Mitchel Y Abolafia, 'Markets as Cultures: An Ethnographic Approach' in Michel Callon (ed), *Laws of the Market* (Blackwell Publishers 1998) 70.

In an unpublished 'partial rebuttal' to the report taking stock of commodity exchanges and small-scale farmers in Malawi and other African countries, ACE's then principal legal advisor replied that to enable the participation of smallholder farmers on commodity exchange would require 'restructuring of the agricultural markets', an endeavour that various actors in the agricultural markets need to jointly undertake. He went on,

> Government and NGOs need to promote these structures; farmer organizations need to be educated; and private sector need to see value in storage and handling as a component to their normal trading activities. All these essentials are starting to show in Malawi. *ACE is not trying to establish an African Chicago Board of Trade; ACE is trying to establish a structured system for the small-scale sector*.[81] (emphasis supplied)

There was recognition that the context in which the commodity exchange was to be established was different from the Western commodity exchanges.[82] The commodity exchange may shape but also be shaped by the context in which it is established. The other aspects that the study had criticised were almost tacitly accepted. Perhaps ACE needed to take a critical look at how it could enable and allow interactions by small-scale farmers with the commodity exchange.

According to a study prior to the Malawi government's enactment of a law relating to warehouse receipts, warehouse receipts is a regulatory tool to address lack of trust and prospective defaults in commodity exchanges by providing the foundation of secured sales.[83] Mainstream economics underestimates 'the extent to which impersonal systems of confidence are underpinned by and, in a sense, modelled on idealized relations of mutual interpersonal trust.'[84] The warehouse receipt is as good as the trustworthiness of the issuing warehouse. Warehouse receipts can act a 'generalised symbolic media of communication' if they 'provide ways of transmitting trust between actors' in agricultural commodity exchanges.[85] It must be borne in mind that 'possibilities for action increase proportionately

[81] Kristian Moller, 'Partial Rebuttal of "Review of the Role of Commodity Exchanges in Supporting Smallholder Farmer Market Linkages and Income Benefits", Peter Robbins 2010 from a Malawian Perspective'.
[82] ibid.
[83] Robert Gibson-Jarvie, *The London Metal Exchange: A Commodity Market* (3rd edn, Prentice-Hall 1988).
[84] Cotterrell (n 46) 74.
[85] Niklas Luhmann, *Trust and Power* (Christian Morgner and Michael King trs, Polity Press 2017).

to the increase in trust' especially where 'trust is tested and proven'.[86] Understanding the process of the 'displacement of interpersonal trust' and its replacement with impersonal trust in modern societies is key to issues of smallholder inclusive commodity exchanges. Questions of trust arise when it is important for actors to engage in what on close analysis may be termed as 'thoughtless, careless and routinized' behaviour and therefore there is no need for 'expenditure of consciousness especially if expectation approaches certainty.'[87] It has been stated that legal mindsets discussed in chapter 4 or as Bourdieu would say 'habitus' can be described as 'structuring structures, orienting and organising the economic practices of daily life'.[88] The legal mindset in economic life in different societies depends on the 'type of activity and especially on the intensity and duration of previous' similar (inter)actions.[89] A person not familiar with Auto Teller Machines would be justified in refusing to use them because in her mind the machine may not provide what it says it will provide. In modern societies, the mindsets have been gradually developed to readily bestow trust in various electronic devices. This is because the decision 'whether or not to bestow trust' is socially constituted through previous numerous repeated economic (inter)actions.[90] It has been argued interpersonal mutual trust is an essential part of all social (inter)actions including economic (inter)actions; that 'all aspects of social life are built to some degree on it.'[91] Trust is an important basis for many non-transient (inter)actions 'strong and weak, organized or diffuse– that occur in social life.'[92] Warehouse receipts only exist as legally constituted objects meant to be interactive between individuals and an analysis of interpersonal trust can draw out 'these interconnections'. [93] Warehouse receipts being legally constituted objects demand impersonal trust in them but 'impersonal systems of confidence [or trust] are rooted, however distantly and indirectly, in judgments of interpersonal trust.'[94] Steps that develop and protect 'empirical conditions that facilitate trusting relationships' are important for

[86] ibid 44.
[87] ibid 28.
[88] Pierre Bourdieu, *Algeria 1960: The Disenchantment of the World, The Sense of Honour, The Kabyle House 0r The World Reversed* (Richard Nice tr, Cambridge University Press 1979) vii.
[89] ibid 2.
[90] Luhmann (n 85) 53.
[91] Cotterrell (n 46) 74.
[92] ibid 73.
[93] Clare Williams, *An Economic Sociology of Law Reimagined: Beyond Embeddedness* (Routledge 2022) 49.
[94] Cotterrell (n 46) 75.

inclusive formal markets with non-transient and trusting (inter)actions.'[95] This would explain why 'increased interaction with producers throughout the entire growing season would increase trust and uptake of services' offered by ACE to smallholder farmers.[96] The same thinking would address the challenge noted by mainstream economic studies of economic (inter)action in agricultural markets in places like Malawi: how trust depends on personal knowledge of the other party to the transactions and (inter)actions 'with others who are strangers to them is limited.'[97] Mainstream economics has narrow explanations that the resort to 'reputation mechanisms' in economic relations is a result of an 'imperfect way of enforcing contracts' common to weak institutions of contact enforcement.[98] It ignores the subjective experiences of the smallholder farmers and just focuses on observable facts.

Another study in 2012 under the auspices of ACE funded by the Common Fund for Commodities and the European Union looked at the smallholder farmers as potential commodity exchange participants.[99] The study acknowledged the criticism that had been directed at commodity exchanges in Africa as 'donor-driven, failing to attract sufficient trade volumes to be sustainable, ignorance of local conditions and structural inadequacies, being prohibitively expensive and drawing resources from other important sectors or projects.'[100] Some of the criticisms could be addressed by increasing or enabling participation of smallholder farmers in the face of 'the complexity of poor smallholder farming dynamics' which could be resolved through regulatory techniques.[101] It noted that other actors such as large-scale traders had an 'upper hand' because of their resources and mindsets; therefore ACE should avoid abdicating 'questions of access and participation of the majority of the

[95] ibid.
[96] Anne-Cécile Delwaide and Luke Coulson, 'A Case Study of the Chithumba Model: A Non-Traditional Finance Mechanism to Improve Access to Farm Inputs in Malawi' (Agronomy Technology Limited 2017) 4 <https://www.meda.org/document/a-case-study-of-the-chithumba-model-a-non-traditional-finance-mechanism-to-improve-access-to-farm-inputs-in-malawi/> accessed 27 June 2023.
[97] Anthony Giddens, *The Consequences of Modernity* (Stanford University Press 1991) 80.
[98] Marcel Fafchamps, *Market Institutions in Sub-Saharan Africa: Theory and Evidence* (MIT press 2004) 170.
[99] Valeria Morua Hernandez, 'The Agricultural Commodity Exchange for Africa: Mapping the Progress of Structured Trade Systems in Malawi' (Agricultural Commodity Exchange for Africa (ACE) 2012) <https://bidvolumeonly.org/media/7618/The%20ACE%20Model%20Valeria%20Morua%20-%20Revised.pdf> accessed 28 August 2020.
[100] ibid 6.
[101] ibid 30.

farmers up to the corporate world or even up to farmer organizations [who cannot] guarantee the improvement of the prevailing market system.'[102]

This call challenged ACE that for its continued relevance to the Malawian agricultural markets it needed to embrace *Ubuntu*, as discussed in Chapter 4, aimed at enabling the participation of smallholder farmers through facilitation, regulation, and constitution as legal participants.[103] ACE it seems took into account smallholder farmers including 'how they live and interpret reality, as opposed to neoliberal capitalism and socialism which tend toward dogmatism.'[104] *Ubuntu* expresses the values that hold the formal market together, coordinates conflicting values and interests among actors, and encourages widespread participation in economic life.[105] *Ubuntu* as a guiding principle for the inclusion of smallholder farmers in formal markets, would require that formal should enable trusting and non-transient (inter)actions among smallholder farmers. It was thought that the problem was lack of systematic (inter)actions aimed at building trust among the smallholder farmers or in the words of the report: 'lack of a clear and coherent rural strategy aimed at increasing adoption rates and its continuous implementation.'[106] In this approach ACE decided that recognising the differences in capacity for (inter)actions, 'smallholder farmers' needs, capacities and rationales should be the starting point for any intervention and activity aimed at engaging and supporting them.'[107] It was also established that among smallholder farmers such things as 'risk aversion and trust issues' mattered.[108] ACE examined its activities including analysing 'the environment in which it operates and how it collaborates with others in order to really understand the issues on the ground that keep [smallholder] farmer adoption rates [of its services] low.'[109] Among actions ACE explored 'innovative ways to more holistically support farmers and their organisations along the entire value chain and beyond its core business,

[102] ibid.
[103] Lauren B Edelman and Robin Stryker, 'The Handbook of Economic Sociology', *A Sociological Approach to Law and the Economy* (Princeton University Press 2005).
[104] Grivas Muchineripi Kayange, *Capitalism and Freedom in African Political Philosophy* (Palgrave Macmillan 2020) 264.
[105] Amanda Perry-Kessaris, *Global Business, Local Law: The Indian Legal System as a Communal Resource in Foreign Investment Relations* (Routledge 2016).
[106] Cronjaeger (n 1) 3.
[107] ibid 10.
[108] ibid.
[109] Paul Cronjaeger and others, 'ACE Rural Strategy 2020' (Agricultural Commodity Exchange for Africa (ACE) 2016) 18.

from input supply to marketing.'[110] The facilitation, regulation and constitution of legal participants was key to the making of inclusive smallholder ACE in the *ACE Strategy (2016-2022)*.

To build trust through frequent interactions between the agent of ACE such as agricultural advisors, ACE introduced a package of services for smallholder farmers called *Chithumba*, a vernacular word, may be roughly translated as 'carryall' signifying its nature as a holistic support package to farmers to enable market participation.[111] By 'tailor made services', ACE meant that its services should be 'more accessible, affordable and appropriate in terms of their complexity' and further, the ACE should 'bring them closer to the rural clients.'[112] This was an attempt to reduce the 'moral distance' that may result in declining trusting (inter)actions.[113] The *Chithumba* model started as 'a holistic bundle of services, based on farmers' stated demand and needs, farmers would increase adoption of high-quality inputs, improve their production techniques and access marketing services through ACE.'[114] The initial support came from 'the Malawi Oilseed Sector Transformation Program, a UK-AID funded program and received additional financial support from USAID in 2017.'[115] The model has proved to be a more tailored approach to supporting small-scale farmers for inclusive agricultural markets.

In addition to 'its core services' of trade facilitation, warehouse receipts and market information, ACE 'in order to remove the current bottlenecks to adoption and a functioning inclusive market system' decided to include add on services such as 'input supply, insurance, mobile-money payments or transport' enabling the core agricultural functions by smallholders .[116] The support was intended to increase the 'social capital' of the farmers in

[110] ibid.
[111] ACE, 'ACE's Chithumba Strategy' (Agricultural Commodity Exchange for Africa (ACE) n. d.).
[112] Cronjaeger and others (n 109) 24.
[113] Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford University Press 1995) 330.
[114] Anne-Cécile Delwaide and Luke Coulson, 'A Case Study of the 'Chithumba' Model: A Non-Traditional Finance Mechanism to Improve Access to Farm Inputs in Malawi' (Agronomy Technology Limited 2017) 4.
[115] MarketShare Associates, 'The Chithumba Model: Combining Pre-Harvest Financing, GAP Training, and Access to Markets for Smallholder Farmers in Malawi' (*MarketShare Associates*, December 2019) <https://marketshareassociates.com/the-chithumba-model-brief/> accessed 29 December 2020.
[116] Cronjaeger and others (n 109) 24.

the functions that make up the agricultural markets.[117] This would enable them to 'produce effects' through increased (inter)actions in formal market regimes.[118] A review of the regime had noted substantial differences between farmers stated demand and actual behaviour.[119] In particular, although respondents highly valued the knowledge on Good Agricultural Practices (GAP) received, their ability and willingness to move away from their traditional cultivation practices remained non-committal.[120] This may be evidence of some gaps in the holistic support provided.

A key part of the change in mindsets is how actors such as small-scale farmers are able to see a continuity from their perspective of (inter)actions in the regimes; any signs of transitoriness of the support the receive are likely to discourage lasting (inter)actions.[121] It has been noted that present (inter)actions refer back to previous interactions; 'interactions [are] part of extended sequences that recall past interactions and presume future ones.'[122] ACE has to be prepared to an extended period of interaction before non-transient (inter)actions of the small-scale farmers are achieved.[123]

The 'Training and Outreach' intervention included 'the training of clients and other outreach activities that increase awareness and understanding are key to increasing adoption' including 'follow-up support strategy.'[124] This approach was adopted because previously 'trainings and sensitisations were not tailored to different rural audiences; they were often one-off activities aimed at reaching numbers rather than impact.'[125] This was in essence a training of mindsets towards market (inter)actions.[126] ACE services represented edu-

[117] Pierre Bourdieu, 'The Forms of Capital' in Mark Granovetter and Richard Swedberg (eds), *The Sociology of Economic Life* (3rd edn, Westview Press 2011).
[118] Pierre Bourdieu, *The Forms of Capital* (Polity Press 2021) 16.
[119] Delwaide and Coulson (n 96).
[120] ibid.
[121] Bourdieu, *Algeria 1960* (n 88) 68.
[122] Cotterrell (n 46).
[123] ibid.
[124] Cronjaeger and others (n 109) 26.
[125] ibid.
[126] Sebastian Matthias Schlerka, 'It's Time for A Change: A Bourdieusian Approach on Social Change' (2019) 28 Time & Society 1013.

regulation techniques for increased formal market (inter)action.[127] Malawi has had agricultural advisory services delivered in different ways including using leading farmers as examples with mixed results.[128] These approaches have been criticised for 'using approaches that are not responsive to the needs of their clientele.'[129]

The approach by ACE contrasts with that of the Malawi Government. Since the turn of the millennium, it has adopted approaches that are 'market-led and demand driven.'[130] The challenge with this approach is the rational actor that is sassumed in the expression 'market-led and demand driven'. This approach, although hailed as encouraging 'pluralistic provision' of services that are more responsive', has suffered from the challenge of 'institutionalizing farmer demand in extension reform.' This may probably be the result of continuing to treat the farmers as 'rational actors who use the information received to make their decision and maximise their utility.'[131] The approach taken by ACE in its systems is to constitute legal participants to enable them if they like to participate on the commodity exchange; in other words ACE is seeking to 'edu-regulate' for agricultural markets of a specific type.[132] Key to this approach is avoiding mainstream economic approaches and approaching farmer training 'outside the realm of rationality, objectivity, neutrality and efficiency.'[133] The interactions through training is likely to address the 'lack of trust and understanding of ACE's marketing services was partly responsible for the low adoption of ACE services.'[134]

As a result of the positive feedback from farmers on its rural strategy which ran from 2016 to 2020, ACE has adopted a follow up strategy. It seems ACE, through the surveys it conducted among smallholder farmers, it had innstituted 'feedback loops' in its (inter)actions with

[127] Andrew TF Lang, 'The Legal Construction of Economic Rationalities?' (2013) 40 Journal of Law and Society 155, 158; Patricia Ewick and Susan Silbey, 'Sociology of Legal Consciousness and Hegemony' in Jiří Přibáň (ed), *Research Handbook on the Sociology of Law* (Edward Elgar Publishing 2020) 172.
[128] Clodina Chowa, Chris Garforth and Sarah Cardey, 'Farmer Experience of Pluralistic Agricultural Extension, Malawi' (2013) 19 The Journal of Agricultural Education and Extension 147.
[129] ibid 148.
[130] Malawi Government, 'National Agriculture Extension and Advisory Services Strategy FY 2020/21-2024/25'.
[131] Asta Zokaityte, *Financial Literacy Education: Edu-Regulating Our Saving and Spending Habits* (Springer 2017) 33.
[132] Malawi Government (n 130).
[133] Asta Zokaityte, 'The UK's Money Advice Service: Edu-Regulating Consumer Decision-Making' (2018) 47 Economic Notes: Review of Banking, Finance and Monetary Economics 387, 396.
[134] Delwaide and Coulson (n 96) 3.

smallholder farmers.[135] The follow up strategy is named *Structured Trade for Better Livelihoods ACE Trust Strategic Plan 2021-2026*.[136] While continuing with its interventions ACE will 'regularly review assumptions made about stakeholders involved in our services, amend services as needed, develop new services if required, and disseminate information on those services to all relevant stakeholders.'[137] On the specific intervention of training and outreach ACE 'has developed a graduation scheme that defines which activities should be provided, depending on the group's current capacity, progress, and previous engagement with ACE.'[138] Through this approach ACE will allow farmers capable of enhanced econo-legal interactions graduated from its marketing school.

ACE realises that its effectiveness as an organisation depends on how well communal networks within it coordinate towards a 'convergence of interests.'[139] Therefore ACE has undertaken in its strategy to develop, improve, and expand relationships and networks with key implementation and funding partners to increase the scale, impact, and sustainability of activities, while finding synergies and disseminating information to increase recognition of ACE operations and services.[140] Partners such as the World Bank, IFPRI and others may be a source of legal rationalities and systems that influence the interactions of actors with the formal agricultural commodity markets that ACE is promoting. ACE needs to be in a socio-legally informed position to achieve its objective of enabling small-scale farmers' participation in formal agricultural markets. It may be able to achieve this if it maintains its sociological approach as undertaken in its new rural strategy. It has undertaken 'to reject participation in projects which fall outside the strategy, but also be in a position where the opportunities and unique position of ACE are appreciated and used to increase the impact of projects, whether implemented by [ACE] or other organisations.'[141]

[135] ibid.
[136] Paul Clearly and Kristian Moller, 'Structured Trade for Better Livelihoods ACE Trust Strategic Plan 2021-2026'.
[137] ibid 17.
[138] ibid 21.
[139] Cotterrell (n 46) 73.
[140] Clearly and Moller (n 136) 15.
[141] ibid 25.

10.4 Public and private cooperation in the making of inclusive markets.

This section suggests how ACE could increase the impact of its inclusive markets approach by drawing on the synergies and collaboration with the state. The section proceeds on the basis that the public and private sectors 'co-creating value and directing growth require experimentation, exploration and trial and error.'[142] The debate of public or private is avoided as being less useful specially in the context of Malawi as set out in Chapters 6 (when the colonial state was key to the legal constitution of agricultural markets), 7 (the role of the state in promotion of market regimes) and 9 (the declared intention of the state to co-lead the growth of agricultural markets with the private sector).[143] The debate is also unhelpful in the context of the poor results of the withdraw of the state from agricultural markets in Chapter 8 during World Bank inspired reforms. The Malawi government's long terms vision states that the state shall 'have an agricultural development and marketing entity running on commercial principles, promoting the commercialization of Agriculture' and promoting formal markets inclusive of smallholder farmers.[144] The long term strategy goes on to state that its agricultural commercialisation entity 'shall operate under a strong alliance with the private sector, in a transparent and accountable manner and independent of political interference.'[145] Researchers have noted that most of the reforms in this era tend to draw from best practices elsewhere and the result has been weak reforms that don't take root.[146] They have advised that Malawi should practice 'greater willingness to experiment, iterate, adapt and explore in the process of turning ideas into solutions.'[147] The idea of ACE about inclusive markets for smallholder farmers represents such an opportunity for experimentation, iteration, adaptation and exploration. The activities for increasing the trust of smallholder farmers in formal markets represent no core activities, probably with some risk for ACE. It has been argued that the state has been 'willing to take risks that businesses won't'.[148] It is likely that the state could include some of the activities that ACE is involved with such as market advisory in its agricultural sector policies.[149] The current extension approach has noted the prevalence

[142] Mariana Mazzucato, *The Entrepreneurial State* (Penguin 2018) xxiv.
[143] Mazzucato (n 142).
[144] Malawi Government (n 3) 15.
[145] ibid.
[146] Katherine Bridges and Michael Woolcock, 'How (Not) to Fix Problems That Matter: Assessing and Responding to Malawi's History of Institutional Reform' (World Bank 2017) 8289.
[147] ibid 24.
[148] Mazzucato (n 142) 4.
[149] Malawi Government (n 130).

in Malawi of 'poor market systems where trading of most agriculture commodities is done through unstructured and unregulated markets.'[150] One of the proposed activities ~~on~~ in the strategy is to '[b]uild capacity of farmers and SMEs in warehouse receipt systems and commodity exchange.'[151] Further, there is no reason why such involvement would not provide a the a better way of realigning its support for bringing to the market as many willing smallholder farmers as possible which would prove 'transformative, creating new markets and sectors'.[152] This could possibly be part of the regime of subsidised farm inputs which has been criticised for lack of integration with wider agricultural markets.[153]

10.5 Conclusion

An ESL approach can analyse economic (inter)action at all levels of social life to find more explanations of the non-participation of smallholder farmers in formal markets than the law and economics approach that could be described as 'the search for understanding one cause at a time.'[154] The explanations could add to or improve the explanations based on slicing up economic life into 'determinants' of smallholder farmers' formal market participation as necessary and sufficient explanations, with warehouse receipts financing being a favourite slice of reality.[155] This chapter has analysed how ACE adapted to the smallholder farmers, while maintaining its business of running a commercially based commodity exchange. It was able to include smallholder farmers for direct participation in the commodity exchange by taking 'plurality seriously' in line with guiding principles of a reformulated version of *Ubuntu*.[156] This was a shift from the original assumptions of its formal market. The approach by ACE seems to have the promise of including willing smallholder farmers in formal agricultural markets. It could do even better by experimenting and exploring working with the

[150] ibid 8.
[151] ibid 42.
[152] Mazzucato (n 142) 4.
[153] Joachim De Weerdt and Jan Duchoslav, *Guiding Principles of AIP Reform* (International Food Policy Research Institute 2022); Chimwemwe Banda and others, 'Self-Targeted Fertilizer Subsidies' (International Food Policy Research Institute 2022).
[154] Rodrik (n 7) 145.
[155] Mawazo M Magesa, Kisangiri Michael and Jesuk Ko, 'Access and Use of Agricultural Market Information by Smallholder Farmers: Measuring Informational Capabilities' (2020) 86 The Electronic Journal of Information Systems in Developing Countries e12134; Mario J Miranda, Francis M Mulangu and Francis H Kemeze, 'Warehouse Receipt Financing for Smallholders in Developing Countries: Challenges and Limitations' (2019) 50 Agricultural Economics 629; RMJ Kadigi and EM Falanta, 'Challenges and Opportunities for Implementation of Warehouse Receipt Systems in Smallholder Agriculture: The Case of Cereals and Pulses in Tanzania.' (2018).
[156] Bagele Chilisa, *Indigenous Research Methodologies* (2nd edn, SAGE Publications 2020) 234–235.

state. It is suggested that approaches that prioritise *Ubuntu* than neoliberal market rationality in marketing regimes are more likely to increase participation. *Ubuntu* may provide approaches to improve a 'facilitative legal environment', a 'regulatory legal environment' and a 'constitutive legal environment' for the participation of smallholder farmers in agricultural formal markets [157]

[157] Lauren B Edelman and Robin Stryker, 'A Sociological Approach to Law and the Economy' in Neil J Smelser and Richard Swedberg (eds), *The Handbook of Economic Sociology* (Princeton University Press 2005) 535–542.

11 Conclusion: The legal constitution of formal markets

This chapter synthesises the findings of the thesis to answer the research questions and further to suggest how the revised economic sociology of law (ESL) approach in this thesis makes original contributions to conceptual, theoretical, and empirical dimensions of legal thinking and practice around the making of inclusive agricultural markets. The contribution to the empirical part is explaining 'the low levels of reform success evident in Malawi' despite 'a huge output of activity in terms of more laws, regulations, structures and systems.'[1]

This chapter is arranged as follows. Section 11.1 answers the research questions, bringing back the three smallholder farmers in the vignette in the introductory chapter. Section 11.2 proposes how ESL-driven research may be taken further in the context of Malawi and/or Africa. Section 11.3 discusses the specific contributions the modified ESL approach makes to the inclusive law, economy, and society analytically, normatively, and empirically. The purpose is to demonstrate how ESL thinking could inform the making of inclusive agricultural market regime. Section 11.4 critiques current approaches to law reform because of their overfocus on legal text and paying little or no attention to legal context and rationalities. Section 11.5 concludes by proposing the wider relevance of revised ESL approaches for economic and other reforms.

11.1 Key findings

This subsection provides answers to the main research question and sub questions using the stories of three smallholder farmers Martha, Mary, and James from the vignette in Chapter 1. ESL provides a conceptual approach to apply an analytical, normative, and empirical lens to agricultural markets in Malawi and can 'do the heavy lifting required of a middle-range approach' needed to explain aspects of such markets.[2]

ESL approaches seems to provide ways which '[i]nstead [of] looking at Africa and comparing it with Europe', these middle-range theories can investigate the legal and economic challenges

[1] Katherine Bridges and Michael Woolcock, 'How (Not) to Fix Problems That Matter: Assessing and Responding to Malawi's History of Institutional Reform' (World Bank 2017) 8289 17, 23.
[2] Amanda Perry-Kessaris, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013) 4.

of African countries such as Malawi 'as separate with its own historical path' analytically, normatively, and empirically.[3] To be inclusive, law in Malawi should be approached in manner that is 'permanently sensitive to the specific historic and social context, causes and consequences of legal experience.'[4] The main research question asked '*What role does and can law play in the participation of smallholder farmers in agricultural formal markets?* Dominant approaches take a 'positivist, statist and sometimes formalist view of law' resulting in the exclusion of smallholder farmers from formal markets.[5] For over five decades attempts have been made to include farmers such as Martha, Mary, and James in agricultural markets and more recently in formal agricultural markets. The approaches have been framed in the language of incentives to which smallholder farmers can respond. These approaches take smallholder farmers as *homo economicus* or her doctrinal counterpart, *homo juridicus*. As recent sociological research has demonstrated, shown in Chapter 9 on agricultural commercialisation together with the findings of ACE in Chapter 10, these smallholder farmers adopt a different kind of thinking from the dominant approaches; it may even be labelled irrational from a law and economics perspective.[6]

ESL approaches take law as 'more open, more pluralist, more grounded in social fact' to reveal how law, analytically, normatively, and empirically can be more inclusive.[7] They look at how dispositions that enable econo-legal (inter)actions are constituted socially and materially through collective or personal histories.[8] These dispositions as Bourdieu emphasized 'can only be understood by reference to the economic and social situation which structures the agent's whole experience through the mediation of their subjective apprehension of their objective, collective futures.'[9]

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[3] Meike De Goede, *An Analysis of Mahmood Mamdani's Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Macat Library 2017) 12; Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 2018).
[4] Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford University Press 1995) 274.
[5] Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017) 1.
[6] Sidney Madsen, 'Farm-Level Pathways To Food Security: Beyond Missing Markets and Irrational Peasants' (2022) 39 Agriculture and Human Values 135; Paul Cronjaeger, 'A Situation Analysis and Needs Assessment for the Development of an ACE Rural Vision and Strategy' (Agricultural Commodity Exchange for Africa (ACE) 2015) Briefing Paper.
[7] Davies (n 5) 1.
[8] Pierre Bourdieu, *The Social Structures of the Economy* (Polity 2005).
[9] Pierre Bourdieu, *Algeria 1960: The Disenchantment of the World, The Sense of Honour, The Kabyle House 0r The World Reversed* (Richard Nice tr, Cambridge University Press 1979) 64.

This is related to the idea of capital in the Bourdieusian sense, to enable actors 'to produce effects' (inter)actions or regimes.[10] The 'unequal distribution of capital' among actors may shape or govern the (inter)actions or regimes in a number of ways, such as exclusion of those with less.[11] This is where *Ubuntu* - a meta-level value which this thesis incorporates into ESL approaches - would require public or private actors constituting markets to adopt 'an alternative approach' which 'is self-consciously opposed to' mainstream economics and other formalist approaches.[12] Law has both a regulatory and constitutive role as it is involved in the ongoing process of the 'evolution of individual market *participants*' (emphasis original).[13] The constitutive role of the legal environment involves how smallholder farmers perceive their econo-legal (inter)actions in relation to the formal market regimes including the underpinning rationalities in the market. The public or private actors should provide facilitative tools for market (exchange) relations, drawing on law to enable other actors to carry out or not economic exchanges.[14] Public or private actors in formal markets, part of *Ubuntu*, may through their services shape experiences and understandings that the small-scale farmers have toward formal market services. This has been referred to as 'modern edu-regulatory technique that aims to govern consumer behaviour through information, education and advice.'[15] Further, there is scope for the public and private sectors to partner to build smallholder inclusive markets by experimenting and exploring how together they can be 'strategic, flexible and mission oriented'.[16]As preceding chapter have argued especially chapters 7 and 9, Malawi as a postcolonial society is an 'entangled hybrid' and it's sociologically plural. This plurality goes beyond the colonial state law vs customary law. These orthodoxy approaches of 'legal pluralism in Africa have largely been confined to the study of so-called informal, non-state and customary institutions, leaving the state and its official institutions out of detailed empirical

[10] Pierre Bourdieu, *The Forms of Capital* (Polity Press 2021).
[11] ibid 16.
[12] Stephan Haggard, *Developmental States* (Cambridge University Press 2018) 7.
[13] Andrew TF Lang, 'The Legal Construction of Economic Rationalities?' (2013) 40 Journal of Law and Society 155, 157.
[14] Lauren B Edelman and Robin Stryker, 'A Sociological Approach to Law and the Economy' in Neil J Smelser and Richard Swedberg (eds), *The Handbook of Economic Sociology* (Princeton University Press 2005) 532.
[15] Asta Zokaityte, *Financial Literacy Education: Edu-Regulating Our Saving and Spending Habits* (Springer 2017) 25.
[16] Mariana Mazzucato, *The Entrepreneurial State* (Penguin 2018) 1.

analysis.[17] This thesis has demonstrated that the state is not autonomous but 'heterogenous'. From one perspective, this sociological plurality of the Malawian state frees it from any ideological leanings to carry out these activities. Chapter 7 demonstrated how regimes drove spectacular economic growth although largely excluding smallholder farmers and Chapter 9 demonstrated how the state was able to promote the regime of subsidised farm inputs for smallholder farmers against the opposition of Bretton Woods institutions. The previous Chapter 10 suggested that the state, directly or through its agencies should support and promote formal agricultural markets.

The first sub question was '*What roles does law actually play in the participation of smallholder farmers in agricultural formal markets?'* This thesis adopted an ESL approach to law that emphasises the 'multidimensional character' or its inherently pluralistic nature reflecting social diversity of a society like Malawi.[18] The pluralistic approach excavated the exclusion from participation of smallholders in agricultural formal markets due to the restricted perspectives of law and economics and state law/doctrinal approaches, approaches which take a very limited view of actual social life. The narrow approaches of mainstream economics and formal law are informed by *homo economicus-juridicus* perspectives, which are rarely found among smallholder farmers.[19] The regimes of formal law and mainstream economics required instrumental (inter)actions and are inspired by formal rationality. The ESL approach taken enables one to interrogate the documents from mainstream economics with regard to how they frame the four levels of social life and the assumptions they make about economic and legal life of smallholder farmers in this way. Research on how smallholder farmers (inter)act was recently conducted outside the dominant economic approaches in Malawi.[20] To return to the people in the vignette, Martha, despite to outwards appearances owning assets, is a community member and is unlikely to simply pursue her self-interest. She is unlikely to subject her economic life to the 'laws of the market' because empirically it has been demonstrated that 'few farmers [have shown] any inclination to fully commercialize,

[17] Helene Maria Kyed, 'Review Artlce: Legal Pluralism in Post-War Mozambique' (2013) 39 Journal of Southern African Studies 989, 990.
[18] Davies (n 5) 20.
[19] Clare Williams, *An Economic Sociology of Law Reimagined: Beyond Embeddedness* (Routledge 2022).
[20] Madsen (n 6).

even under ideal market conditions.'[21] Firstly, the three smallholder farmers in the vignette Martha, Mary and James are unlikely 'to sell their surplus on regional and export markets, instead preferring to trade it with community members.'[22] This trade represents some kind of 'social insurance' as economic studies have found.[23] Further, empirical studies have demonstrated 'that many smallholders, although limited by market conditions, make choices according to a different logic than the one assumed in economic models' which prioritises 'maintaining control over subsistence and the means of production for subsistence is prioritized over profit.'[24] Dominant approaches ignore that these econo-legal (inter)actions 'may be a deliberate choice, which dominant approaches may not adequately explain.[25]

The second sub question was '*What roles does law have the potential to play in supporting small scale farmers to access formal agricultural markets in Malawi?'*. ESL enables us to understand how other rationalities such as *Ubuntu* are position against deprivation and the requirement of the 'social minimum' that enables econo-legal (inter)actions.[26] This enables private or public actors to constitute inclusive regimes in Malawi. There is a natural veritable case study of ACE. The initial years of ACE (2005-2010) involved a law and economics formal agricultural regime that witnessed very limited participation of smallholder farmers. It was recognised that a broader ESL-like approach that increased (inter)actions throughout the crops' growing season was key to increasing trust and ultimately support for increased access of smallholder farmers to formal agricultural markets. Martha is likely to feel responsibility towards James and Mary because econo-legal (inter)actions are influenced not only by 'market conditions but also reflected the collective nature of food security within rural farming areas, based in reciprocal practices of food sharing and selling within kinship and friendship networks.'[27]

[21] ibid 144; Michel Callon (ed), *The Laws of the Markets* (Blackwell Publishers 1998).
[22] Madsen (n 6) 145.
[23] Marcel Fafchamps, *Market Institutions in Sub-Saharan Africa: Theory and Evidence* (MIT press 2004) 9.
[24] Madsen (n 6) 144.
[25] ibid.
[26] Toomas Kotkas and others (eds), *Specifying and Securing a Social Minimum in the Battle Against Poverty* (Bloomsbury Publishing 2019).
[27] Madsen (n 6) 145.

The third sub question was '*What is preventing us from understanding the actual and potential roles of law in the participation of small-scale farmers in formal agricultural markets in Malawi?'* Narrow law and economics ~~or~~ approaches seem to be a major barrier to understanding the role of law in the participation of smallholder farmers in formal agricultural markets in Malawi. Doctrinal approaches limit participation to *homo juridicus* 'the rational man of law' and economics restricts participation to the *homo economicus*, the 'typical utility maximiser'.[28] Sociological approaches recognise how (inter)actions are always and everywhere motivated by different interests and values. The dominant approaches fail to see that relationships among smallholder farmers such as Martha, Mary, and James 'encompass connectivity and solidarity' such that although farmers did not feel that 'the state should provide social services for hunger alleviation, most believed that food security was not just a personal responsibility, but directly tied to that of kin, friends, and neighbors.'[29]

11.2 Suggested areas for future research

This section offers three areas for further research using the revised ESL approach developed in the thesis. Firstly, the empirical component of the thesis was, due to the constraints imposed by the pandemic, pursued entirely through document-based methods. Of immediate interest would be to research how small-scale farmers 'understand their own activities' and (inter)actions informal markets through ethnographic methods.[30] Ethnography would be suited for ESL empirical research because it 'attempts to be holistic' in investigating social life.[31] In the published literature, most of the understandings of the smallholder farmers and their limited participation in agricultural formal markets are from the perspective of dominant economic approaches. These approaches 'reduce the poor [smallholder farmers] to a set of cliches' for whom simple formulas prescribed, 'rarely have much space for overage poor women and men, with their hopes and doubts, limitations and aspirations, beliefs and confusion.'[32]

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[28] Williams (n 19) 140.
[29] Madsen (n 6) 145–146.
[30] Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 70.
[31] David M Fetterman, *Ethnography: Step-by-Step* (4th edn, Sage publications 2020) 13.
[32] Abhijit V Banerjee, Abhijit Banerjee and Esther Duflo, *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (Penguin 2012) vii–viii.

Secondly, ESL is an analytical, normative, and empirical approach that can contribute to the understanding of informality. Informal economic activity varies in 'form and effects' and the 'process[es] are not random' but could be said to 'reflect the character of the specific social and economic order in which they occur.'[33] One area that may have policy relevance for most countries in the global south 'is a process of informalization which takes place precisely because formal rules and controls exist, through manipulation of their application for private gain.'[34] Economic approaches lump all these activities as rent-seeking behaviour.

Thirdly, the revised ESL approach could also offer some explanation of the persistence of phenomena such as informal cross-border trade in the context of formal regional integration against the dominant 'monodisciplinary' economic approaches.[35] Informal cross-border trade (exchange beyond official borders that don't use formal state mechanisms) is a major phenomenon in southern Africa and in some instances 'the value of informal trade may meet or even exceed the value of formal trade.'[36] It is carried out mostly by women-owned small enterprises.[37] Mainstream policy recommendations are that 'to encourage movement from informal to formal trade is to create policies that decrease the cost of formal trade without increasing the cost of informal trade.'[38] However, some African scholars have suggested that 'multidisciplinary approaches that weave in theory [for instance ESL] with the appropriate choice of method [are needed] to illuminate our understanding of specific trade regimes' such as informal cross-border trade.[39] An ESL approach could and can facilitate a study of 'the diversity of actors (focusing on gender and social inclusion), their social interactions in the formal and informal trade they co-constitute, and the legal institutions affected by these trade regimes.'[40]

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[33] Lauren A Benton, Manuel Castells and Alejandro Portes, 'Conclusion: The Policy Implications of Informality' in Lauren Benton, Manuel Castells and Alejandro Portes (eds), *The Informal Economy: Studies in Advanced and Less Developed Countries* (JHU Press 1989).
[34] ibid.
[35] Clair Gammage, '(Re) Conceptualising International Economic Law: A Socio-Legal Approach to Regionalism' in Amanda Perry-Kessaris (ed), *Socio-Legal Approaches to International Economic Law* (Routledge 2013).
[36] Caroline Lesser and Evdokia Moisé-Leeman, *Informal Cross-Border Trade and Trade Facilitation Reform in Sub-Saharan Africa* (Institute for Food Policy Research 2009) 1.
[37] UNCTAD, *Borderline: Women in Informal Cross-Border Trade in Malawi, the United Republic of Tanzania and Zambia* (United Nations Geneva 2019).
[38] Lesser and Moisé-Leeman (n 36) 39.
[39] Olabisi D Akinkugbe, 'Reflections on the Value of Socio-Legal Approaches to International Economic Law in Africa' (2021) 22 Chi. J. Int'l L. 24, 35.
[40] ibid 39.

11.3 Value of this study to ESL scholarship

After demonstrating the limits of law and economics in considering culture or wider social life in Chapter 2, Chapter 4 argued for the promise of economic sociology of law, and demonstrated how sociological approaches set out in Chapter 3 could be the basis of making formal markets inclusive. Chapters 6 and 7 offer the context for later chapters and demonstrate the legal constitution of agricultural markets and smallholder farmers as market participants in Malawi. Chapter 8 presented the coming of neoliberal ideas in agricultural markets and an attempted reconstitution, by law and economics approaches, of smallholder inclusive agricultural markets and the challenges that led to its limited success. Chapter 9 demonstrated the continuing influences of the World Bank and others most visible at the level of rationality. Chapter 10 demonstrated through the case study of Agricultural Commodity Exchange for Africa (ACE), how economic approaches to the making of agricultural marketing regimes failed to achieve the inclusion of smallholder farmers in early years, before deliberate inclusive steps were taken. It also demonstrated how agricultural regimes that started off with a neoliberal rationality can be made more inclusive. The drive for inclusiveness should be not only at the level of regimes but also rationalities. This approach will be adopted with a view to answering the research questions. The chapter will also discuss in some detail the contribution of this thesis as indicated in Chapter 1, especially how sociological approaches are relevant for legal practice areas such as law reform.

11.3.1 Conceptual and theoretical

Chapter 2 argued that economic approaches need to be supplemented by other approaches when studying relationships between law and economic life (production, exchange, and distribution). It has been argued that 'main foci for the mainstream economist are economic exchange, the market, and the economy' such that to some extent 'the remainder of society lies beyond where the operative variables of economic change really matter.'[41] In mainstream economics thinking for some time 'the classical and neoclassical traditions have enjoyed a certain dominance' including variations of the mainstream, such as new institutional

[41] Neil J Smelser and Richard Swedberg, 'Introducing Economic Sociology' in Neil J Smelser and Richard Swedberg (eds), *The Handbook of Economic Sociology* (Princeton University Press 2005) 5.

economics, which have maintained their assumptions.[42] In mainstream economics, 'the analytic starting point of economics is the individual' who 'is assumed to have a given and stable set of preferences and to choose that alternative line of action which maximizes utility' and engages on that basis 'in rational action with the efficient use of scarce resources. [43] It has been argued that mainstream economics 'is based on an initial act of abstraction that consists in dissociating a particular category of practices, or a particular dimension of all practice, from the social order in which all human practice is immersed.'[44] It was argued in Chapter 2 that this view of an atomized individual pursuing self-interest in way that maximises her utility is divorced from real life. The World Bank's World Development Report (WDR) 2015 noted how the model of the atomised individual contrasts with real social life which exhibits 'the tendency of people to be concerned with and associate with each other.'[45] Law and economics therefore should be supplemented by an analysis of social life to adequately understand the behaviour of smallholder farmers and their limited or non-participation in formal agricultural markets, even in the face of incentives to do so.

Chapter 3 examined how sociological approaches to law involve looking at law in the wider context of social life by studying the individual as 'interactive and intersubjective'.[46] Chapter 3 also analysed the assumption of state law approaches, with the state as the exclusive maker of law. It demonstrated that postcolonial societies are entangled hybrids, and 'sociological plurality' is in their nature.[47] Sociological pluralism presents both challenges and opportunities as seen in regimes in the postcolonial state as established in Chapters 7 and 9.

This analysis led the thesis to consider the promise of ESL as an analytical, normative, and empirical framework for the integration of economic and sociolegal approaches law. Chapter 4 has demonstrated that ESL holds the promise of suggesting how legal thinking and practice may be made more inclusive. In this thesis, law has been approached from the sociological

[42] ibid 3.
[43] ibid 4.
[44] Bourdieu, *The Social Structures of the Economy* (n 8) 1.
[45] World Bank, *Mind, Society and Behavior: World Development Report 2015* (World Bank 2015) 55.
[46] Sabine Frerichs, 'The Legal Constitution of Market Society: Probing the Economic Sociology of Law' (2009) 10 Economic Sociology_the European Electronic Newsletter 20.
[47] Eve Darian-Smith, 'Postcolonial Theories of Law' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (2nd edn, Hart Publishing 2013) 255; Boaventura de Sousa Santos, 'The Heterogeneous State and Legal Pluralism in Mozambique' (2006) 40 Law & Society Review 39, 40.

perspective because at a broader level the thesis is about 'examining interrelationships between law and the economy' and 'both law and the economy are deeply embedded in social action.'[48] Sociological approaches also include 'law-related ideas, ideals, principles, and rituals that permeate society' of the interactive individual (Emphasis original).[49] It also includes the legal context made up of *law in action*, which refers to the behavior of law, legal actors, and legal institutions; and *legal consciousness*, which refers to 'how law is experienced and understood by individuals in and through their legal experiences.'[50] Law in action includes '[l]egal (inter)actions are what we do with legal texts—creation, destruction, (ab)use, and avoidance—and are motivated primarily by our values and interests (instrumental, traditional, affective, belief).'[51] Law in action goes beyond formal rules to recognise that 'rules are mutually constitutive of the (inter)actions by which they are created, destroyed, used, abused, and avoided, as well as of the rationalities' that underlie them.[52] It provided a framework for econo-legal thinking and practice.

Chapter 4 on the promise of economic sociology of law also demonstrated that efforts to constitute smallholder inclusive agricultural markets should consciously support metalevel rationalities that would make sense to local context in Malawi. Further change should be supported by necessary material conditions that actors live in and from which they can engage in future (inter)actions. It was also argued that ESL should be made more relevant to agricultural markets in Malawi and perhaps Africa. This can be done at the level of rationalities which inspire regimes and (inter)actions. This is because rationalities are 'mutually constitutive of others' and 'multiple often competing rationalities are often in operation' in any given system or regime.[53] Disposition for specific (inter)actions are socially and materially constituted.[54] It was empirically demonstrated Not every form of (inter)action is available to everyone. Such mundane econo-legal (inter)actions as savings, credit or insurance are the product of individual and social histories and the material world in which they take place.

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[48] Edelman and Stryker (n 14).
[49] ibid 530.
[50] ibid.
[51] Amanda Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (2015) 11 Annual Review of Law and Social Science 57, 61.
[52] ibid.
[53] ibid 60.
[54] Pierre Bourdieu, 'Making the Economic Habitus: Algerian Workers Revisited' (2000) 1 Ethnography 17.

One of the defining moments in individual (inter)actions and their motivation is when there is change of the regimes and required (inter)actions. The idea of legal mindset or legal consciousness has the most explanatory value when one asks 'what uncertainties and miseries people feel when their habitus [or mindset] is overtaken by rapid change in objective structure' of social life such as that those brought by new regimes.[55] Here is where exclusion and similarly inclusion may be achieved. Illustration is provided of Bourdieu's 'hysteresis effect'. The hysteresis effect results in formidable challenges for actors whose (inter)actions are motivated predominantly by substantive rationalities such as tradition when new economic regimes are imposed, and related specific economic (inter)actions required usually by public or private actors.[56] The result is exclusion or the excluded engaging in activities of economic hybridity such as informal economic activities. These (inter)actions come about because 'multiple, often competing, rationalities are often in operation', with the rationality within the reach of the actors manifesting itself the most.[57] Most economic action demands formal rationality. The chapter established the need to link the practical rationality of economic (inter)actions such as economic hybridity with the required formal rationality. This can be achieved by adopting *Ubuntu*. After reformulating *ubuntu*, Kayange concludes that 'the reconceptualized ubuntu is a more general theory that takes into consideration the way human subjects live and interpret reality, as opposed to neoliberal capitalism and socialism which tend toward dogmatism.'[58] In communal networks and associated regimes necessarily involving power, (inter)actions should not 'be brutal and unpleasant' to other actors.[59] The need for a social minimum as a precondition for econo-legal (inter)action is the foundation of inclusive regimes.[60]

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[55] ibid.
[56] Eva Barlösius, 'Pierre Bourdieu: Transformation Societies and the Middle Class' (2014) 2 Middle East-Topics & Arguments 37.
[57] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 51) 61.
[58] Grivas Muchineripi Kayange, *Capitalism and Freedom in African Political Philosophy* (Palgrave Macmillan 2020) 264.
[59] Amanda Perry-Kessaris, 'Reading the Story of Law and Embeddesness through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law' (2011) 62 N. Ir. Legal Q. 401, 404.
[60] Kotkas and others (n 26); Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist* (Chelsea Green Publishing 2017).

11.3.2 Building inclusive regimes with ESL approaches

Mainstream economics has tended to focus only on 'economic capital' (material assets readily convertible into money) firstly because of its overfocus on quantification to the exclusion of aspects that can only be explained qualitatively, and secondly, convertibility into monetary assets or cash and rights readily convertible into money.[61] The exclusion of other forms of capital such as 'social capital' (shared values or resources that allows individuals to work together in a group to effectively achieve a common purpose), 'symbolic capital' (resources available to an individual on the basis of prestige or recognition) or 'cultural capital' (an individual's social assets such as education) undermines the importance for the economy of non-economic forms of capital.[62] Bourdieusian capital can enrich micro-, meso-, macro- and meta-level sociological analysis in ESL.

As Bourdieu suggests, 'capital is a form of power that is effective' either for (inter)actions or regimes; 'to produce effects' such that 'unequal distribution of capital' among actors may shape or govern the (inter)actions or regimes in a number of ways; such as exclusion of those with less or no capital or lead to inequalities.[63] The existence or nature or structure of regimes may even be determined by capital. Taking inspiration from Bourdieu's use of the sociologists' process of 'differentiation', this thesis suggests that capital may be one of the factors the lead to social life 'to be divided up into' regimes such as formal and informal markets.[64] According to Bourdieu, differentiation 'is a process which leads the "social world' to divide up into sub-universes with their own autonomy, laws of functioning relatively independent of what surrounds them.'[65]

Cotterrell has wondered about issues of inclusion or exclusion of communal networks and for this thesis, his analysis has been extended to constellations of communal networks which are regimes.[66] A possible answer may come from the Bourdieusian capital that is required for

[61] Ben Fine and Dimitris Milonakis, *From Economics Imperialism to Freakonomics: The Shifting Boundaries between Economics and Other Social Sciences* (Routledge 2009) 3; Pierre Bourdieu, 'The Forms of Capital' in Mark Granovetter and Richard Swedberg (eds), *The Sociology of economic life* (3rd edn, Westview Press 2011).
[62] Bourdieu, *The Forms of Capital* (n 10) 79.
[63] ibid 16.
[64] ibid 12.
[65] ibid.
[66] Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate Publishing 2006).

entry; 'what new entrants must possess' for the required (inter)actions of a particular quality and depth.[67] The quality of interactions may suggest the '*degree* of stability and permanence' (Emphasis in original).[68] Communal networks and associated regimes may 'overlap, interpenetrate' and may involve 'conflict.'[69] This is particularly important for economic regimes because unlike mainstream economics, ESL recognises that economic regimes may well interpenetrate, overlap or conflict with other non-economic regimes.[70] Non-members of a regime may force their entry without the required capital, however, they 'will produce effects that are not those of regime' and are likely to be 'excluded and covered in ridicule' unless the regime does not have strong barriers to entry.[71] Capital may be specific to a regime where it enables interactions of a particular quality or depth, which is probably why 'transferable skills' are valued because they allow useful (inter)actions across regimes. Regime inequalities may arise from 'unequal distribution of capital.'[72] Social capital (such as trust resulting from interactions) 'is convertible, in certain conditions, into economic capital.'[73] The various forms of this capital in regimes makes possible productive interactions in formal agricultural commodity markets.

'Cultural capital' may exist in an 'embodied state' which are 'long-lasting dispositions.'[74] Acquisition of cultural capital is 'linked to the body and presupposes' its expression in visible form. This may explain why the low use of warehouse receipts among smallholder farmers may change with the introduction of non-market services such agricultural advisory, training and agricultural inputs and finance to smallholder farmers, which increase social and cultural capital.[75]

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[67] ibid 55.
[68] Roger Cotterrell, 'Rethinking "Embeddedness": Law, Economy, Community' in Diamond Ashiagbor, Prabha Kotiswaran and Amanda Perry-Kessaris (eds), *Towards an Economic Sociology of Law* (Wiley-Blackwell 2013) 55.
[69] ibid.
[70] Cotterrell, 'Rethinking "Embeddedness"' (n 68).
[71] Bourdieu, *The Forms of Capital* (n 10) 15.
[72] ibid.
[73] Pierre Bourdieu, 'The Forms of Capital' in Mark Granovetter and Richard Swedberg (eds), *The Sociology of Economic Life* (3rd edn, Westview Press 2011) 87.
[74] ibid 79.
[75] Anne-Cécile Delwaide and Luke Coulson, 'A Case Study of the Chithumba Model: A Non-Traditional Finance Mechanism to Improve Access to Farm Inputs in Malawi' (Agronomy Technology Limited 2017) 3.

The legal environment may provide facilitative tools for market (exchange) relations, allowing actors to draw on law to carry out or not economic exchanges.[76] This may involve the depth and quality of actions; the legal environment also affects the ease and regularity with which farmers engage with formal agricultural markets including their underlying rationalities for small-scale farmers' access to formal markets.[77]

Most informal practices by smallholder farmers such as 'subsistence production' that have been subject to much study by economists are a manifestation of practical rationality,that is the limited interactions within their reach.[78] In Bourdieusian language, the econo-legal interactions represent the future that is present with their (inter)actions.[79] Such subsistence activity takes places informally, that is through econo-legal interactions that do not conform to regimes of the state for those interactions. As economic actors, the small-scale farmers are likely to be responsive to formal law that is available in contexts that also accommodate informal practices, norms and resources that are planned to keep them out of deprivation as a social minimum that they require for econo-legal interaction of the required quality and depth.[80] By way of example, China has built successful markets, or econo-legal interaction, not by adopting 'international best practice' but by 'building markets with weak institutions and more fundamentally by crafting environments that facilitate improvision among the relevant players.'[81] This involves a process of experimentation, iteration, and exploration. Th alternative approaches like those of China are likely to achieve intended purposes because instead of searching for and adopting 'best practice' they encourage adopting 'best fit', that is adopting (inter)actions within the reach of actors.[82]

What may be regulating the market, is combined law and resources. that shape the experiences and understandings of the actors in the formal market such as farmers and market services providers. For instance, formal markets in Malawi have had to provide agricultural

[76] Edelman and Stryker (n 14).
[77] Cotterrell, 'Rethinking "Embeddedness"' (n 68).
[78] Alejandro Portes and William Haller, 'The Informal Economy' in Neil J Smelser and Richard Swedberg (eds), *The Handbook of Economic Sociology* (2nd edn, Princeton University Press 2005) 406.
[79] Pierre Bourdieu and Abdelmalek Sayad, *The Uprooting: The Crisis of Traditional Agriculture in Algeria* (Paul A Silverstein ed, Susan Emanuel tr, Polity Press 2020).
[80] Cotterrell, 'Rethinking "Embeddedness"' (n 68).
[81] Yuen Yuen Ang, *How China Escaped the Poverty Trap* (Cornell University Press 2016) 16.
[82] ibid 53.

advisory support and inputs to encourage trusting relationships with smallholder farmers that may increase the regularity of the small-scale farmers' interactions with formal markets.[83] They are affected and can affect (inter)actions or regimes with their underpinning rationalities. The state and its agencies in agricultural markets are ever present and may contribute to this environment through shaping understandings and experiences of the legal texts, contexts, and subtext of law.[84]

Formal market actors may through their services shape experiences and understandings that the small-scale farmers have toward formal market services. This has been referred to as 'modern edu-regulatory technique that aims to govern consumer behaviour through information, education and advice.'[85] This system may comprise 'various policies, programmes, strategies and other regulatory practices' using 'information, education and advice to govern' smallholder farmers and make formal markets more inclusive in a manner that is more interactive.[86] This contrasts with mainstream approaches to agricultural advisory services under 'demand driven' extension services which tend to focus on the supply of the smallholder advisory services than the smallholder actor as an interactive and intersubjective actor.[87]

Law has both a regulatory and constitutive role as it is involved in the ongoing process of the 'evolution of individual market *participants*' (emphasis original).[88] The constitutive role of the legal environment involves how smallholder farmers perceive their actions in relation to the other econo-legal actors, actions, interactions, regimes including the underpinning rationalities in the market. Mainstream economics assumes law and formal agricultural markets can only work 'to modify pre-existing market logics and pre-existing behavioural dispositions of economic actors.'[89] In capitalist markets 'the infrastructure needed to bring markets into being and enable them to function effectively – [included] what we might call

[83] Paul Clearly and Kristian Moller, 'Structured Trade for Better Livelihoods ACE Trust Strategic Plan 2021-2026'.
[84] Perry-Kessaris, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?' (n 2).
[85] Zokaityte (n 15) 25.
[86] ibid 32.
[87] Clodina Chowa, Chris Garforth and Sarah Cardey, 'Farmer Experience of Pluralistic Agricultural Extension, Malawi' (2013) 19 The Journal of Agricultural Education and Extension 147.
[88] Lang (n 13) 157.
[89] ibid 155–156.

the motivational foundations of modern economic [formal] rationality', that is the calculative market actor.[90] Actors such as the state and its agencies and non-state actors such as providers of formal markets services are engaged in 'ongoing production' the smallholder farmers' legal consciousness 'enabling and constraining' their interaction with formal agricultural markets.[91]

11.3.3 Empirical insights

Chapter 6 demonstrated empirically how law was at the centre of constituting both agricultural markets and the participants in those markets.[92] In Chapter 6 during the coonial period, agricultural markets were constituted by the public actors aligning the regimes of taxation, land, labour and transport in aid of the making of agricultural markets taking into account sometimes conflicting interests of those in colonial Malawi and those in London.[93] Simultaneously, the public actors in colonial Malawi were actively engaged in encouraging the 'profit motive' and the regimes of land and taxation in an attempt shape the rationality of the smallholder farmer towards markets. This is not surprising since markets are not natural but a result of 'instituted processes' in the economy.[94] Further, the markets (inter)actions of smallholder farmers was shaped by the regimes especially that of taxation to become 'target marketers', which is selling in markets as and when needed. Markets remained peripheral to wider social life than an organising principle of markets.

Chapter 7 demonstrated how the previous constitution of smallholder farmers as market participants was left in place by the first postcolonial government that actively built a regime of large-scale commercial agriculture. Unlike law and economics approaches that suggest that formal law is used to promote the interests of a narrow group, the public actors thrived on the sociological plurality of the postcolonial state as an 'entangled hybrid society'; formal law was just a part of the regimes that were drawn upon. Chapter 7 also demonstrated how large-scale commercial agricultural markets were shaped by actively focusing on the regimes

[90] ibid 157.
[91] ibid 158; Patricia Ewick and Susan Silbey, 'Sociology of Legal Consciousness and Hegemony' in Jiří Přibáň (ed), *Research Handbook on the Sociology of Law* (Edward Elgar Publishing 2020) 172.
[92] Lang (n 13).
[93] Leroy Vail, 'Peasants, Migrants and Plantations: A Study of the Growth Of Malawi's Economy' (1984) 11 Journal of Social Science (Malawi) 1.
[94] Karl Polanyi, 'The Economy as Instituted Process' in Mark Granovetter and Richard Swedberg (eds), *The Sociology of Economic Life* (3rd edn, Routledge 2011).

of production, financing, and sales.[95] The resulting crisis resulted in the direct intervention of the World Bank in the Malawian economy.

Chapter 8 was a law and economics approach to undoing agricultural markets as they had been constituted in the preceding, almost 100, years. Although there was a willingness to include smallholder farmers in all agricultural markets, the World Bank's neoliberal/market centric rationality was exclusionary of the benefits of any that would have accrued to smallholder farmers. It completely overlooked the wider understanding of capital and how it can enable econo-legal (inter)actions including entry and participation in market regimes. The central assumptions behind the agricultural market reforms were that the smallholder farmer was a natural rational economic person. It was of little or limited concern that rational economic persons are 'not natural and unchanging but, rather, emerged historically as the product of particular socio-cultural formations characteristic of early industrializing nations.'[96] This view was mostly lost to mainstream economics which attributed the limited impact of the World Bank-inspired agricultural market reforms to poor sequencing of the reforms than the basic assumptions about smallholder farmer.[97]

The failure of the World Bank to appreciate the sociological complexity of agricultural markets in Malawi led its Operations Evaluation Department in 1998 to ask, 'Was the Bank sensitive to the plight of the smallholder sector in the 1980s? Did the Bank contribute to it, or mitigate it?'[98] The report observed how the World Bank became 'a prisoner of its paradigm'; this became an issue because 'agricultural staff focused on the smallholder sector, taking the estate sector as a given and therefore saw the problem in terms of apparent stagnant or declining productivity on a fixed land base, implying declining fertility' while relatedly 'the macroeconomists felt that, with an "improved" price-setting mechanism,

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[95] Robert Christensen, 'Financing Malawi's Development Strategy', *Malawi: An Alternative Pattern of Development* (University of Edinburgh, Centre for African Studies 1984); Jonathan Kydd, 'Malawi in the 1970s: Development Policies and Economic Change', *Malawi: An Alternative Pattern of Development* (University of Edinburgh, Centre for African Studies 1984).
[96] Lang (n 13) 157.
[97] Mylene Kherallah and Kumaresan Govindan, 'The Sequencing of Agricultural Market Reforms in Malawi' (1999) 8 Journal of African Economies 125.
[98] Operations Evaluation Department, 'Malawi Impact Evaluation Report The World Bank and the Agricultural Sector' (World Bank) 17898 para 2.4.

the system could be programmed to come up with an appropriate set of price signals.'[99] This approach demonstrates the inconsistency within the World Bank between rhetoric and action which seems to be characteristic of its approaches in agricultural markets.[100]

Chapter 9 demonstrated the adoption of the Comprehensive Development Framework in the late 1990s by the World Bank with its mostly international supporters and its willingness to accept changes at the level of regimes while maintaining an unchanging market-centric rationality towards agricultural markets. This was demonstrated in the disagreements between the Malawi government and the World Bank in the reintroduction of farm input subsidies for smallholder farmers, the former in the early 2000. The unchanging market centric rationality continues to show itself in relation to efforts to increase the market participation of smallholder farmers, also known as agricultural commercialisation. There is research supporting alternative views about the rationality of smallholder agricultural markets, demonstrating that perhaps smallholder farmers are not rational utility maximisers and attempts to promote market participation could benefit from this understanding.[101] Smallholder farmers are willing to forgo profit-making transactions for the sake of maintaining traditional community relations and as a form of social insurance, instead of the distance to market as posited by mainstream economics.[102] This is consistent with earlier studies published in 2004 that found that 'solidarity among relatives and kin represents the dominant form of social insurance.'[103] Other writing of agricultural markets have suggested 'less prejudiced analyses' the (inter)actions on smallholder farmers reveal that they 'act rationally in terms of their own situation and in terms of the way they perceive the options available to them.'[104] It has further been demonstrated how 'analyses have revealed other forms of rationality which guide the peasants' mode of taking decision.'[105] For such

[99] ibid 4.3.
[100] Jonathan Pincus, 'The Post-Washington Consensus and Lending Operations in Agriculture: New Rhetoric and Old Operational Realities' in Ben Fine, Costas Lapavitsas and Jonathan Pincus (eds), *Development Policy in the Twenty-First Century: Beyond the post-Washinton Consensus* (Routledge 2001).
[101] Madsen (n 6).
[102] ibid.
[103] Fafchamps (n 23) 8–9.
[104] John Martinussen, *Society, State And Market: A Guide to Competing Theories of Development* (Zed Books, Fenwood Books, HSRC Publihsers 1997) 135.
[105] ibid.

smallholder farmers 'risk avoidance and risk-minimising behaviour are both necessary and more sensible than profit maximisation that involves considerable risk-taking.'[106]

This is supported by the case study of Malawi's Agricultural Commodity Exchange ('ACE'). Initially the ACE treated all market participants as rational utility maximisers.[107] The limited participation of smallholder farmers was addressed by increasing interactions with smallholder farmers to increase trust.[108] It was acknowledged that simply supporting access to farming inputs was not enough, more needed to be done to increase trust for increased market participation.[109] It seems to be acknowledged that econo-legal interactions require a social minimum of capital.[110] This would be only possible with an *Ubuntu* rationality alongside other rationalities behind the aiming of agricultural markets.[111]

11.4 Value of this study to law reform

This section identifies some of the lessons to be learned by law reformers from the modified ESL methodology developed in the thesis, and empirical insights that emerge from its application. As stated in Chapter 3 this section will examine further lessons for those responsible for formulation of state law in Malawi particularly their overemphasis on the text of the law, which is usually at the expense of the legal context 'taken to include legal (inter)actions (commonly referred to as law in action) and legal rationalities (commonly referred to as legal consciousness).'[112] As some researchers have recently observed in Malawi there 'is a huge output of activity in terms of more laws, regulations, structures and systems but little evidence of these having actually addressed existing functional problems'.[113] This section serves four functions. Firstly, it looks at the legal formalist methodology of the Malawi Law Commission ('MLC') which has a key role of reforms relating to the role of law in economic

[106] ibid.
[107] Ian Goggin, 'An Agricultural Commodity Exchange for Malawi?' (National Association of Smallholder Farmers in Malawi 2004).
[108] Anne-Cécile Delwaide and Luke Coulson, 'A Case Study of the Chithumba Model: A Non-Traditional Finance Mechanism to Improve Access to Farm Inputs in Malawi' (Agronomy Technology Limited 2017) <https://www.meda.org/document/a-case-study-of-the-chithumba-model-a-non-traditional-finance-mechanism-to-improve-access-to-farm-inputs-in-malawi/> accessed 27 June 2023.
[109] Cronjaeger (n 6).
[110] Kotkas and others (n 26); Raworth (n 60).
[111] Grivas Muchineripi Kayange, 'Restoration of Ubuntu as an Autocentric Virtue-Phronesis Theory' (2020) 39 South African Journal of Philosophy 1; Kayange (n 58).
[112] Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (n 51) 61.
[113] Bridges and Woolcock (n 1) 23.

life including agricultural law reform. Secondly this section looks at the limitations of the approach. As part of scrutinising the deficiencies of the legal formalist approach, the chapter also points to the limitations of applying that approach to customary law. Thirdly, it highlights the need for law reforms to take into account legal context when considering legal text. Fourthly, it draws attention the importance of legal 'subtext'. This the role that values may play in legislation and some of the assumptions made by doctrinal approaches/legal formalism.

This section uses the example of the Malawi Law Commission ('MLC'), which is mandated to keep law under review.[114] The MLC is one of the many institutions in Malawi transplanted from Britain under reforms to advance 'the rule of law' in the externally driven 'political and economic liberalization' from 1980s to 1990s, the economic aspects of which have been discussed in Chapter 8.[115] The MLC is headed by a person who qualifies for appointment as a high court judge which suggests that it takes seriously a legal formalist approach to law reform.[116] The function of the MLC is 'to provide independent advice to Government on the reform of the law in Malawi' and claims that its work is 'inclusive and participatory.'[117]

11.4.1 Methodology of the Malawi Law Commission

Under its mandate, there is no prescription as to the approaches or methods which the Malawi Law Commission should take although it is required to focus on 'the Laws of Malawi'; a collection of the state laws of Malawi.[118] The approach of the MLC seems to be that law should be 'methodologically limited to the nation-state' or any other laws that state law recognises ('state-centric').[119] According to its website the MLC focuses on the non-existence of state law to regulate part of social life or 'existing deficiencies that need rectification' in state law or 'codification of customary law'.[120] If we assume, as this thesis does, that law

[114] Robert Kandulu, 'Law Reform in Malawi: An Overview'.
[115] Thomas Carothers, 'The Rule of Law Revival' (1998) 77 Foreign Aff. 95, 95–96.
[116] 'Malawi Law Commission' <https://www.lawcom.gov.mw/> accessed 20 June 2023.
[117] ibid.
[118] Chikosa Mozesi Silungwe, 'The Law Commission as a Sovereign Unit: The "Textual" and "Perceptional" Mandate' [2013] The Law Reformer (Malawi Law Commission) 8.
[119] Davies (n 5) 22.
[120] 'Malawi Law Commission' (n 116).

should serve broad interests of society, this orientation towards state law is problematic. Limiting law to the law of the state serves limited purposes such as

> the alignment of capitalism with statism; the colonialist downgrading of non-state law; the gendered imagining of law as a man writ large and of legal subjects as mini-sovereigns; the insistence on disciplinary separation; and other matters that serve to isolate law from its social and relational foundations.[121]

The state-centric approach forecloses 'the inherent openness and emergent qualities of law' such that its vision cannot extend 'beyond the dualism of lawful versus lawless, a place of singular state-based (deconstructable) law or a lawless state beyond governance.'[122] This approach is mired in the thinking of the global north that was prevalent in the 1960s, that a 'modern legal system' was important for 'radical social change' which 'the emerging nations of sub-Saharan Africa' needed for 'development'.[123] The disappointing results are well documented.[124] It is doubted whether narrow state-centric approaches can provide an 'adequate basis for understanding the process of social change' which is needed to address many aspects of societies of the global south including the challenge of reducing poverty.[125] Narrow approaches also put the MLC out of touch with Malawi's aspiration to be inclusive as stated in its long-term vision, *Malawi Vision 2063*, to build 'an inclusively wealthy and self-reliant industrialized upper-middle-income country by the year 2063'.[126]

The restricted qualifications of the head of the MLC, and the dominance of eligibility for judicial appointment as the benchmark, ensures that approaches to law adopted 'reinforce a view of law and lawyers as part of social pathology' (focusing on disputes and litigation) and overlooks sociological reach which 'gives a more balanced view through studies of law's contributions to the routine structuring of social relations, as well as its responses to social

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[121] Davies (n 5) 39.
[122] ibid 39–40.
[123] Robert Allen Sedler, 'Law Reform in the Emerging Nations of Sub-Saharan Afica: Social Change and the Development of the Modern Legal System' (1968) 13 . Louis ULJ 195, 196–197; Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 1995).
[124] David M Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 The Yale Law Journal 1; David M Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' [1974] Wis. L. Rev. 1062; David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006).
[125] Roger Cotterrell, *The Sociology of Law: An Introduction* (2nd edn, Butterworths 1992) 10.
[126] Malawi Government, 'Malawi Vision 2063: An Inclusively Wealthy and Self-Reliant Nation.' (National Planning Commission 2020).

breakdown.'[127] Its state-centric approaches suggest that it is only concerned with lawyers' 'assumptions about legal doctrine' and probably akin to Hart's approach to law.[128] This does not sit well with reference in its legal documents to 'norms' as a source of informing law reform unless the MLC believes that the only source of norms is state law.[129] An ordinary understanding of norms refers to social practices whose source should be social life determined analytically, empirically, and normatively.

11.4.2 Text in law reform

The MLC should be entitled 'in some contexts and for certain purposes, to adopt a provisional definition of law' to promote social wellbeing within their constitutional mandate rather than a single definition for all purposes and in all contexts due the limitation with an overfocus on the legal text for all purposes.[130] After the wave of 'political and economic liberalization' from 1980s to 1990s, the economic aspects of which for Malawi have been discussed in chapter 8, it could be predicted that transplanted legal reforms would have limited impact on or penetration into social life.[131] The reforms [proposed by the MLC?] were predicated on the basis that law acts on society to change it. The assumption of these changes was 'the myth [of] an inevitable division of labour' where 'law as doctrine – norms, rules, principles, concepts and mode of their interpretation and validation' was the exclusive domain of legal professionals and would be implemented using the power of the state to effect changes in society.[132] The division of labour between law and social life 'was in no way inevitable' even among 'the classic founders of sociology of law'.[133] The exclusive focus on law as text can disconnect law from wider social life.

It was expected that law based on 'self-evident truth[s]' advancing 'values whose acceptance in the context of Malawi rest[ed] on unproven historical, philosophical, and political assumptions' would engineer societies like Malawi in the liberal tradition, both economic

[127] Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies' (2002) 29 Journal of Law and Society 632, 639.
[128] Cotterrell, *Law's Community* (n 4) 24; HLA Hart, *The Concept of Law* (2nd edn, OUP Oxford 1994).
[129] 'Malawi Law Commission' (n 116).
[130] Davies (n 5) 40.
[131] Carothers (n 115) 95–96.
[132] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 66) 45.
[133] ibid 46.

liberalism and legal liberalism.[134] Sociological considerations remained firmly outside the law, these were to be considered anecdotally and impressionistically.

Almost exclusive focus on state-centric approaches are inappropriate because such approaches rest on 'the idea that law is in some way, radically autonomous, self-reproducing, or self-validating in relation to an environment defined as "extra-legal"'.[135] While sociological approaches do not regard such approaches as 'misguided', they insist that it is 'social conditions that may make law so appear' rather than anything inherent in law.[136] Taken to its logical conclusion such an approach to law 'leads to the suggestions that efforts to use law to engineer social development should largely be discarded' in favour of the approach where law 'produces regulatory signals to which' various social regimes 'can respond in terms of their own criteria of understanding and evaluation.'[137] This approach is too abstract to apply to how and why people interact and how social regimes are constituted and their complex relationship with state-centric regimes. The functions of state law should be 'in its primary aspect' regulating social diversity, more concerned with societal wellbeing.[138] The challenge for states such as Malawi is that their position as postcolonial states makes them 'entangled hybrid societies incorporating European and non-European laws, values and sensibilities.'[139] Therefore sociological approaches to law reform are not an optional extra but should be taken seriously, if law is to be meaningful and efficacious in these societies.

It is sometimes thought that by addressing issues of governance, the state in Malawi and elsewhere can become powerful enough to assert state law as the legal perspective.[140] However, it was suggested that '[i]t is an error to think as often happens, that all the modern state need to do is simply to employ the means of power at its disposal in order to overcome everything that comes in its way' when it comes to implementation of state law.[141] The sociological approaches suggested in this thesis may assist in thinking of ways in which 'state

[134] Fidelis Edge Kanyongolo, 'The Limits of Liberal Democratic Constitutionalism in Malawi' in Kings M Phiri and Kenneth Ross (eds), *Democratization in Malawi: A Stocktaking* (Luviri Press, Reprint 2020) 410, 412.
[135] Cotterrell, *Law's Community* (n 4) 91.
[136] ibid 91–92.
[137] Cotterrell, *The Sociology of Law* (n 125) 68.
[138] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 66) 166.
[139] Darian-Smith (n 47) 255.
[140] World Bank, *Governance and Development* (The World Bank 1992).
[141] Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Walter L Moll tr, Routledge 2017) 373.

law must therefore continually take the social forces into account.'[142] Similarly, Cotterrell suggests that '[l]aw that does not resonate in the experience or consciousness of those it purports to regulate is not law *in society*, hardly law at all.'[143] This is because law 'needs stronger foundations than those provided in the normal fora of interpretation of state law by legal officials whose ultimate authority is guaranteed only by the state's coercive power.'[144] The MLC should be entitled 'in some contexts and for certain purposes, to adopt a provisional definition of law' to promote social wellbeing within their constitutional mandate rather than a single definition for all purposes and in all contexts.[145]

11.4.3 Legal context in law reform

A scholarly article reviewing Canadian law reform commissions 'noted that the standard formula for official law reform in the 1970s and early 1980s was highly instrumental' as reflected in the legislation by which the commissions were established.[146] The paper went on to inquire into 'the assumptions about law and the legal system, which informed' its exclusive focus on legal formalism.[147] It was then put forward that 'my complaint is not that expert Law Reform Commissions pay insufficient attention to the law in action; it is, rather, that because they have typically adopted a narrow conception of law, they examine only a small part of the phenomenon of the law in action.'[148] A similar view was noted by a recent World Bank World Development Report (2017). After noting that there were considerable gaps between state law and law in action especially in developing countries like Malawi, it went on to suggest an explanation as follows.

> In all societies, state law is but one of many rule systems that order behavior, authority, and contestation. These rule systems include customary and religious law, cultural and social norms, functional normative systems (rule systems developed for the common pursuit of particular aims such as sports leagues or universities), and economic transactional normative systems.[149]

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[142] ibid 374.
[143] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 66) 34.
[144] ibid.
[145] Davies (n 5) 40.
[146] Roderick A Macdonald, 'Recommissioning Law Reform' (1996) 35 Alta. L. Rev. 831, 847.
[147] ibid 851.
[148] ibid 852.
[149] World Bank, *World Development Report: Governance and Law* (World Bank Group 2017) 84.

The major weakness of formal law approaches is to overlook the importance of these normative systems or 'social regimes'.[150] This may be an explanation of persistence of regimes such as those of informal activities despite laws meant to increase formality. This is because 'the mere existence of formal laws by no means leads to their intended effects. In many developing countries, 'the laws on the books are just that; they remain unimplemented, or they are selectively implemented, or sometimes they are impossible to implement.'[151]

The state-centric approach prioritises 'rational law.'[152] That is law based 'on general rules and procedures.'[153] The effect 'was to rid the western world of local, contingent, irrational, and non-objective' forms of law.[154] Rational law is 'formal and abstract' and developed in Europe 'under influence of a mixture of economic, cultural, political, and legal conditions' for instance 'the increasing centrality of private contract law was a function of the maturation of capitalism' and '[a]t the cultural level, the secularization of law led to discarding the substantive irrationality and religious charisma and mystery from law, while, politically, the expansion of bureaucratic government, because of its interest in clarity and orderliness.'[155]

The state-centric approach of the MLC seemed to be inspired by the English Law Commission set up in the 1960s including the common law approaches of British colonial rule.[156] As has been explained by Cotterrell, writers of law in England in the early to mid-nineteenth century, 'could hardly have known that in the mid and late twentieth century attempts would be made to use the law of the state to restructure, plan or encourage economic enterprise on a massive scale.'[157] This happened after state power was able to assert its legal perspective 'as an agency of power, an instrument of government.'[158] The processes by which it achieved the dominance

[150] Williams (n 19) 53–55.
[151] World Bank (n 149) 83.
[152] Max Weber, *The Theory of Social and Economic Organization* (AM Henderson and Talcott Parsons trs, Free Press 1947).
[153] Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge University Press 2008) 45.
[154] Shane Kilcommins, 'Doctrinal Legal Method (Black Letterism): Assumptions, Commitments and Shortcomings' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 15.
[155] Deflem (n 153) 47.
[156] RJ Sutton, 'The English Law Commission: A New Philosophy of Law Reform' (1966) 20 Vand. L. Rev. 1009; Franz von Benda-Beckmann, *Legal Pluralism in Malawi: Historical Development 1858-1970 and Emerging Issues*, vol 24 (Kachere Series 2007).
[157] Cotterrell, *The Sociology of Law* (n 125) 44.
[158] ibid.

relate to the development of the nation-state in Europe.[159] This unique feature of western societies allows law to be 'seen as no more than an instrument of state power' in that context, 'it is thought of as independent of other aspects of social regulation.'[160] It is very unlikely that this is true in places like Malawi.

The MLC recognises customary law as part of the law in Malawi. However, it seems to overlook the conceptual and practical problems about customary law. The MLC seems oblivious to how 'an increasing number of local, national and global legal orders also interact, merge and confront each other in dynamic combinations that make plurality ever more intense.'[161] As was argued in Chapter 3 there is a recognition among African scholars about the limits of colonial customary law in Africa especially in the light of its origins as a tool of African colonial governance.[162] It has been argued in the context of Malawi that customary law is a 'myth that portrays a viable indigenous law predating colonial rule and surviving in essence throughout the colonial period as an identifiable body of traditional African law that can be used today.'[163] Other African scholars have suggested 'customary living law' to distance present African societies from the colonially constituted customary law.[164] Furthermore, others have also noted that customary living law acts more than as just a necessary supplement to state law. It helps to 'scaffold [African] states in areas they cannot reach.'[165] The colonial approach to customary law was limited and needs reconceptualization. While during the colonial period maintaining that a 'distinction could be made between European colonial laws and African customary laws' served its purpose, the distinction is unlikely to be helpful in postcolonial Malawi.[166] Malawi's neighbour, Mozambique has usefully adopted a form of legal pluralism

[159] Pierre Bourdieu, 'Rethinking the State: Genesis and Structure of the Bureaucratic Field' (1994) 12 Sociological Theory 1; Pierre Bourdieu, *On the State: Lectures at the Collège de France, 1989-1992* (Patrick Champagne and others eds, David Fernbach tr, Polity Press 2020).
[160] Cotterrell, *The Sociology of Law* (n 125) 45.
[161] Kyed (n 17) 990.
[162] Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020); Mamdani (n 3).
[163] Martin Chanock, 'Neo-Traditionalism and the Customary Law in Malawi' (1978) 10 The Journal of Legal Pluralism and Unofficial Law 80, 81; Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985).
[164] Anthony C Diala, 'The Concept of Living Customary Law: A Critique' (2017) 49 The Journal of Legal Pluralism and Unofficial Law 143; Tamale (n 162).
[165] Berihun A Gebeye, 'Decoding Legal Pluralism in Africa' (2017) 49 The Journal of Legal Pluralism and Unofficial Law 228, 231.
[166] Kyed (n 17) 990.

that looks at both 'traditional or community cultures' today, which is seen 'as a dynamic network, including different historical layers of state law, international regulations, and various local norms and values'; evincing 'elements of competition, overlap, and the potential for conflicts over values and standards in concrete situations.'[167]

11.4.4 Subtext in law reform

One area that formal law approaches do not address or do so only cursorily is the subtext of the law. The subtext which is 'the moral subtext of a legal text, that is, its implied or deeper meaning' including 'notions of justice underlying a legal argument, which also make it necessary to read between the lines.'[168] It seems off bounds to question assumptions of law reform as seen by the MLC. Values and interests are central to law; law is hardly neutral as state-centric approaches assert, sometimes 'popular expectations as to what law should be doing are often seriously at odds with what it actually does.'[169] These popular concerns may suggest that little or no attention about normative values and interests of society are considered in law reform beyond its use as assumed instrument of social change.

Shared interests contribute to the 'quality of interaction' in different regimes and 'seem plausible identifiers of community when these interests are regularly promoted and expressed in interaction within the group, and through group activity to address perceived threats to them from outside it.'[170] These values and interests become quite important where the state is limited to dominate 'with its legal structure, legal consciousness and legal outlook.'[171] This problem seems unique to non-Western societies for various historical reasons including the unsuccessful attempts at what has been called the 'civilising mission' or 'political modernity' during colonialism by imperial European colonial powers.[172] It has been argued that in Anglo-American legal thinking 'law's social environment' could be assumed as a 'morally cohesive association of politically autonomous people' and as 'individual subjects of a superior political

[167] ibid 990–991.
[168] Sabine Frerichs, 'Studying Law, Economy, and Society: A Short History of Socio-Legal Thinking' (University of Helsinki 2012) Helsinki Legal Studies Research Paper 19 9.
[169] Roger Cotterrell, *Sociological Jurisprudence: Juristic Thought and Social Inquiry* (Routledge 2018) 204.
[170] Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (n 66) 70.
[171] ibid 75.
[172] Mahmood Mamdani, *Neither Settler Nor Native: The Making And Unmaking of Permanent Minorities* (Harvard University Press 2020).

authority.'[173] It is doubtful if similar assumptions could be made of an 'entangled hybrid society'.

Cotterrell argues that law is always seen in terms of values. 'So it possible to ask: whose or what side is *law* on? It was the asking of this question which surely impelled may legal scholars' to come to the sociological study of law (Emphasis original).[174] These 'values are sociologically significant only insofar as people, individually or collectively, actually recognize them as important; so, their social salience is always relative to time and place.'[175] There may be a plurality of values in different times and places. As was seen in Chapter 2, markets in economics tend to be seen mainly in instrumental (means-ends) terms without any apparent values. As Schumacher made the point economics can be people-centred instead of treating persons as means as in some cultures. In mainstream economics, he wrote, for the employer labour 'is simply an item of cost to be reduced to a minimum if it cannot be eliminated altogether' while from the perspective of the employee 'to work is to make a sacrifice of one's leisure and comfort, and wages are a kind of compensation for the sacrifice.'[176] In Buddhist economics however, 'the function of work would be threefold; to give a man [sic] a chance to utilise and develop his faculties; to enable him to overcome his ego-centredness by joining other people in a common task; and to bring forth goods and services needed for a becoming existence.'[177] The challenge posed by law and economics, or formal law approaches is that they 'tend to reinforce a narrow view of the nature of law as techniques, practices, and norms-because it underestimates law's potential cultural significance and its power to reinforce and help to constitute broad understandings of the nature of the social world.'[178] These approaches which represent

> powerful theoretical traditions and wider currents of common-sense understanding of the nature of law reinforce an *instrumental* view of it and also a view of social life as structured primarily around instrumental action, rather than giving due weight to the significance of action shaped by commitments to ultimate values or beliefs [emphasis original].[179]

[173] Cotterrell, *Law's Community* (n 4) 223.
[174] Roger Cotterrell, 'Theory and Values in Socio-Legal Studies' (2017) 44 Journal of Law and Society S19, s21.
[175] ibid S25.
[176] Ernst F Schumacher, *Small Is Beautiful: Economics as If People Mattered* (Sphere Books 1973) 45.
[177] ibid.
[178] Cotterrell, 'Theory and Values in Socio-Legal Studies' (n 174) S25.
[179] ibid.

These dominant views persistently see law mostly 'as a tool of government and as a resource by means of which actors (citizens, corporations, groups) pursue their private purposes or protect their interests.'[180] The values and interests of the postcolonial society are driven from outside by dominant powerful global interests and from inside by various actors including weaker ones clamouring for equality, which results in 'normative inconsistency and mutually incompatible prescriptions.'[181] What is usually claimed as the '*obvious usefulness* in the pursuit of governmental and private interests' of the dominant approaches may be responsible for exclusion in some formal regimes. Law can achieve 'the task of establishing peaceful, productive relations between communal networks' and associated regimes by encouraging cultural values that support sustained (inter)actions.[182]

How can the apparently 'continued and irreconcilable conflict' in African economies such as Malawi between rationalities or value systems, whatever they may be, and imported, imposed and local rationalities be addressed? It is proposed that this can be achieved by recognising that 'qualitatively different rationalisation processes… take place at various socio-cultural levels and in different spheres of life…'[183] One obvious place to look is in African societies themselves, and at what sustains and gives longevity to the various systems such as informal marketing systems.

11.5 Conclusion

As the answers to the research questions suggest, legal thinking and practice in the making of inclusive agricultural markets play a major role in inclusive agricultural markets generally and formal agricultural markets in particular. The revised ESL approach which studies the role of law in economic life, analytically, empirically, and normatively adopted in this thesis can provide insights in many areas of the economy in Malawi and perhaps in other parts of Africa. The revised ESL approach's usefulness as a 'middle-rage approach' to the variations of social

[180] ibid.
[181] ibid S26.
[182] ibid S34.
[183] Stephen Kalberg, 'Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History' (1980) 85 American Journal of Sociology 1145, 1150.

life in different contexts is its strength.[184] The ESL approaches can offer useful insights to the challenges of law reform perhaps even wider economic reforms in Malawi.[185] This they can do by suggesting 'hybrid, second-best solutions, building on the available supporting conditions' that 'may succeed better than transplanting foreign institutions' that are seen as standing for best practice.[186] This is the process of experimentation, iteration, exploration, and adaptation. 'The idea is not to abandon planning but rather to recognize that plans often reflect best guesses about the future (and about the past too) and will likely shift over time.'[187] ESL approaches can and could provide 'organized evaluation, learning and feedback mechanisms.'[188] This approach has proved successful elsewhere.[189]

Most reform initiatives in the global south tend to be short lived and/or dogged by many challenges. It has been suggested by Tamanaha that in the global south 'legal reforms have not taken hold' and 'many transplanted codes lie unused'; law reform advisors in international development organisations admit 'that they do not have a good idea of what works; they also recognize that success in one context does not necessarily mean success in another.'[190] As demonstrated in section 11.3 one reason could be that law reform is driven and controlled by an inward looking stance, either towards legal formalism (doctrinal approaches) or law and economics which have limited legal perspectives of wider social life. This thesis demonstrates that 'law is connected to every aspect of society.'[191] It has suggested ways in which law reforms might become more connected to society in Malawi rather the current practice of approaching social life 'anecdotally or impressionistically' in the practices of the Malawi Law Commission which seems focused on 'modernising' law with little reference to the empirical

[184] Perry-Kessaris, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?' (n 2); Diamond Ashiagbor, Prabha Kotiswaran and Amanda Perry-Kessaris (eds), *Towards an Economic Sociology of Law* (Wiley-Blackwell 2013); Diamond Ashiagbor, Prabha Kotiswaran and Amanda Perry-Kessaris, 'Continuing towards an Economic Sociology of Law' (2014) 65 N. Ir. Legal Q. 259.
[185] MK Hussein, 'The Challenges Facing Development Policy and Projects Implementation in Malawi' (International Conference on Public Administration and Development … 2018).
[186] Bridges and Woolcock (n 1) 24.
[187] ibid.
[188] ibid.
[189] Ang (n 81); ibid.
[190] Brian Z Tamanaha, 'The Primacy of Society and the Failures of Law and Development' (2011) 44 Cornell Int'l LJ 209, 213.
[191] ibid 214.

context.[192] It has been suggested that such an approach is unlikely to meet the inclusiveness necessary to meet Malawi's long-term aspirations.[193]

[192] 'Malawi Law Commission' (n 116).
[193] Malawi Government (n 126).

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