

Article

Analyzing the Changes of the Meaning of Customary Land in the Context of Land Grabbing in Malawi

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Abstract: Ordinary Malawians who live in customary land have been suffering from land grabbing due to their weak and ill-defined land rights. Although Malawi has experienced a number of land reforms that should have contributed to strengthening customary land rights, many people in customary land still suffer from land grabbing. Accordingly, it is important to understand the factors that lead to land grabbing in customary land in Malawi. Thus, by looking at the overview of land laws and policies throughout history, this study has two aims: (1) to analyze the historical changes in the meaning and position of customary land in Malawi and (2) to analyze the land grabbers in Malawi before, during, and after the colonial era. In order to achieve the main goals, this research mainly analyzes land laws and policies connected to customary land in Malawi. The main findings of this research are that (1) the meaning of customary land changed before and after the colonial period, but little has changed between the colonial period and the present. Since the creation of land laws during the colonial period, the land rights of the people who live in customary land have not been secured, and (2) the land grabbers changed from the British colonial rulers and European settlers to the Government of Malawi. Further, with the recent land laws, such as Land Act 2016 and Customary Land Act 2016, wealthy Malawians may become new land grabbers who can afford to obtain the customary estate grants. By examining the main results, it was found that from the colonial period until the present, customary land has been vulnerable to land grabbing as its weak position still resembles that of the colonial era. Thus, Malawi appears to face significant challenges in amending its customary land laws for the benefit of the poor.

Keywords: customary land; land grabbing; malawi; land law; colonial era



Citation: Bae, Y.-J. Analyzing the Changes of the Meaning of Customary Land in the Context of Land Grabbing in Malawi. *Land* **2021**, *10*, 836. <https://doi.org/10.3390/land10080836>

Academic Editor: Logan Cochrane

Received: 28 June 2021

Accepted: 6 August 2021

Published: 10 August 2021

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1. Introduction

African countries went through a colonial period, and it is still possible to see many traces of colonial legacies on the continent. Land issues (including land inequality), tenure systems, law, and policies are considered the most obvious colonial legacies in Africa [1,2]. The colonial impact on African land led to a weakening of land tenure rights for the African people. The weak land tenure rights can be observed not only during the colonial period but also after independence in the continent as it is often possible to spot land grabbing incidences in African countries including Malawi; such incidences often occur in customary land [3].

Customary land tenure is closely connected to land grabbing research in Africa. It is estimated that about 90 percent of land in sub-Saharan Africa is under customary land tenure. In addition, two-thirds of the cultivated land in sub-Saharan Africa is under customary tenure [4]. In Malawi, about 65–75% of land is customary land [5]. It is considered property of the people of Malawi and intended to be used for the benefit of the community as a whole [6,7]. Despite this definition, the fact that most incidences of land grabbing in Malawi occur on customary land [3] raises a crucial question as to whether the real owners of customary land in Malawi are indeed the people of Malawi. Accordingly, it is crucial to understand the meaning of customary land and its position, which can present the reason for land grabbing in Malawi. As the colonial impact on land issues in Malawi is evident [8], it is crucial to examine the colonial effects on customary land.

This paper has two main aims: (1) To analyze the historical changes in the meaning and the position of customary land in Malawi. The historical period will be divided into four periods: the pre-colonial era, the colonial era, post-independence, and from 2018 when the new Land Act was implemented. By analyzing the meaning of land, or its position, from the pre-colonial and colonial eras until today, one is able to understand the reason why there has been weak land rights in customary land in Malawi. (2) By analyzing the meaning of customary land in different periods in Malawi, this paper seeks to find the main land grabber(s) in each period and the cause of land grabbing. This is expected to show who has been in control of customary land in Malawi and why it has been difficult for ordinary Malawians living in customary land to secure their land rights.

The overall objective of this research is to show that Malawi's customary land and people living in it have been the victims of land grabbing, and, despite different land grabbers in each period, the vague and weak position of customary land has led to land grabbing throughout the history. Additionally, the study aims to show that the recent land reform in Malawi does not seem to secure customary land rights but may bring about new land grabbers.

2. Understanding Land Grabbing and Customary Land Tenure in Africa

Due to the global crisis connected to energy, environment, finance, and food, the value of land in the Global South has been revaluated. It is possible to see that both transitional and national economic actors from different sectors have put their efforts into acquiring large land areas to build, maintain, and extend large-scale extractive (e.g., oil) and agro-industrial (e.g., food and bioenergy) enterprises [9]. Since the 2000s, among other regions, the African continent has become a hotspot for land acquisitions by various actors or land grabbers [10]. Figure 1 presents all the global land deals that have been concluded, and it is possible to see that most deals are made in developing regions including Africa. (Today, Mozambique (114 deals), Ethiopia (83 deals), Ghana (75 deals) are the top three African countries to make land deals [11]). Although it would be impossible to specifically distinguish which land deals are connected to land grabbing, it is probable that there would be more land grabbing in regions where more land deals are made. A recent study by GRAIN [12] found that between 2006 and 2012, 416 cases of large-scale land grabs by foreign investors related to food crop production occurred globally, most of which occurred in Africa.

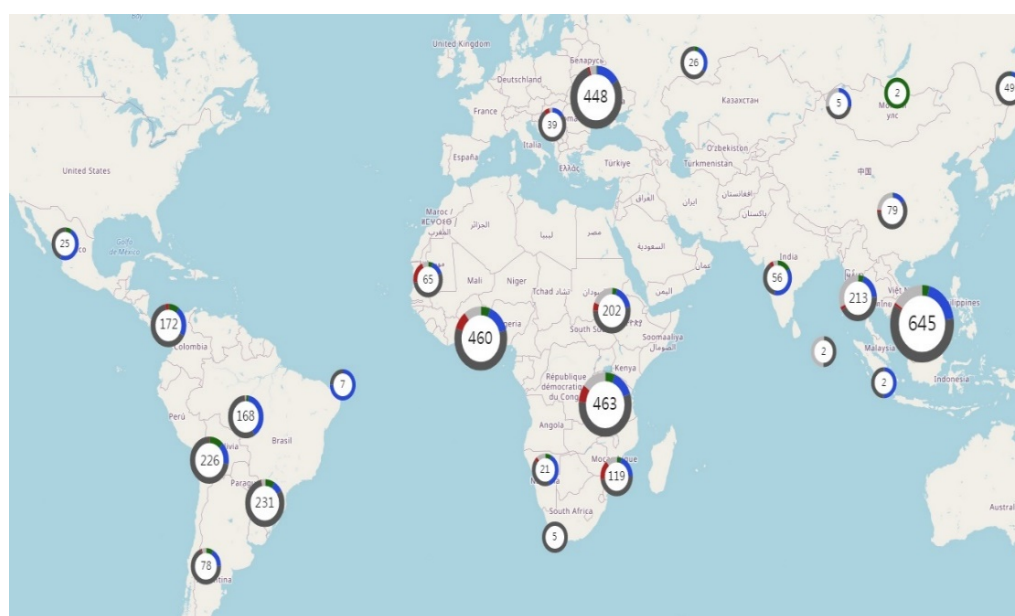


Figure 1. Global land deals [11].

One of the most critical factors that contributed to Africa becoming a hotspot for land grabbing was connected to the European Union (EU)'s adoption of the Renewable Energy Directive in 2009, which was during the peak period of the global financial crisis. According to the directive, the EU member states should have "20% share of energy from renewable sources in overall Community energy consumption by 2020 and a mandatory 10% minimum target to be achieved by all Member States for the share of biofuels in transport petrol and diesel consumption by 2020, to be introduced in a cost-effective way" [13] (p. 2). Further, it is stated that although it would be possible for them to meet the target of using renewable energy in transport from domestic production, "it is both likely and desirable that the target will in fact be met through a combination of domestic production and import" [13] (p. 3). Accordingly, many investors found it as an opportunity to invest in biofuel production. The African continent, especially the southern region, became a great target for investors due to the continent's low population density, reasonable climate and soil conditions, and underutilized land [14]. Consequently, many foreign investors went to Africa to produce agrofuels for export to the EU and contributed to land grabbing in the continent [15,16].

In fact, global land grabbing, not only applicable to the African continent, is often referred to as the explosion of transnational commercial land transactions and land speculation around the large-scale production and export of biofuels and food [17]. It concerns national governments and private investors in financially rich but resource poor countries to use financially poor but resource rich countries to secure their own food and energy [9], dispossessing peasants and indigenous people and ruining the environment in the South [17]. In other words, land grabbing can be interpreted as an action "driven by global capital accumulation dynamics and strategies in response to crises concerning finance, environment, energy and food" [18] (p. 1559).

However, it would be insufficient to conclude that land grabbing in Africa is solely about the Global North grabbing land in the continent. In Africa, more land grabbing incidences occur in countries where governance is weak. These African governments take advantage of weak land tenure systems in their own countries and reallocate land to foreign government and investors, particularly for agricultural development in order to balance their budgets [10].

As mentioned earlier, most land grabbing cases in Malawi have occurred on customary land. The factor driving this is the inherent problems of the customary land tenure system itself. Customary land tenure can be referred to as a system that African communities use to express ownership, possession, access to land, and also to regulate the use and transfer of land. It is often the case that customary tenures have been sustained by African communities themselves rather than by the state or state law. Local communities follow customary law, which can be seen as a set of rules based on tradition. Codified and uncoded customary law can both be observed. However, most customary law in Africa is not codified. Additionally, it is rarely binding beyond a particular community [19,20]. Customary land tenure can be understood as a social system and as a legal code, which can be referred to as the *de facto* situation, constituting the communally accepted rule that one has to follow for access to land, land use rights, and other interests [19].

Customary land tenure can be regarded as the traditional land tenure system in Africa. In this system, the land belongs to the African communities, villages, and families rather than by an individual. However, the ownership of land in this system is not absolute ownership, but to occupy and use. Although it is well known that traditional chiefs have power over customary land, the ownership of customary land does not belong to them [21]. Land titling in Africa is a recent development and for a long time there was no system for registering who owned or had rights to use the land in most parts of Africa. In other words, it is often the case that customary land rights and tenure are not documented, which can contribute to weak tenure security [22]. For example, since customary land tenure does not provide legal protection for people living on customary land, their land may be confiscated by local elites working with state officials or investors [4]. In the context of land grabbing in

Africa, the protection of land rights, especially customary land rights, is seen as important because it can prevent local communities from being displaced from their traditionally owned land according to customary practices [23].

It must be noted that many African countries have laws and policies that protect their communities' land rights from investors and other parties in the situation where land rights transfer occurs. For instance, in Mozambique, investors are required to consult local communities who hold rights in the land area where the investment project will take place. Community consultation should be undertaken before land use rights are allocated to investors to make sure that the concerned land area is free and has no occupants. Similar laws exist in other countries such as Ethiopia, Madagascar, and Tanzania [24]. However, it is often found that communities are not consulted in land rights transfer negotiations. Additionally, in countries that have a mandatory community consultation process, it is often the case that land transfer negotiations are concluded only between investors and chiefs or local leaders [24–26]. Accordingly, it can be argued that land grabbers in Africa are not solely outsiders (e.g., foreign governments, state-owned enterprises, agri-food companies, foreign investors) but also insiders (e.g., governments, chiefs, traditional leaders).

Therefore, land grabbing should be understood in a broader form and the phrase “accumulation by dispossession” process seems to fit well in explaining land grabbing. This process includes land commodification and privatization and the expulsion of peasant populations by force; the conversion of forms of property rights into (exclusive) private property rights; suppressing the rights of the common, labor power commodification and the suppression of indigenous forms of production and consumption; colonial, neo-colonial, and imperial processes of appropriation of assets (e.g., natural resources); the monetization of exchange and taxation (e.g., of land); and the use of slaves, national debt, and the credit system as a means of primitive accumulation. This process is not only run by foreign actors but is backed up by the concerned states which manipulate their monopoly of violence and legality [27].

The fact that states themselves can be considered land grabbers should be emphasized. There are scholars who blame states for large-scale land deals and land grabbing, especially those with a weak land sector and tenure security [28]. Here, it is possible for the state or government to act as land grabbers because their “legal environment”, such as land law, legislation, or policy, allows them to do so. Legal frameworks or national law define the owner of the land and who has the authority to transact agreements concerning it [29]. In many cases, by using legal devices (e.g., long-term leases, concessions, outright sales), the Government can make land available to investors or administer on behalf of their own people. Normally, it is the Government which makes the final decisions in contracting and land allocation procedures. Additionally, legislation gives the Central Government a strong role in land relations and allocations, and it is often the case that national legislation tends to prioritize making land available to larger-scale investors and features varying and limited degrees of protection of local rights. Thus, it is possible to see that poor land holders rarely have control over process and outcomes of large land deals. Accordingly, local people lack legal options to defend their rights and negotiate a fair deal with incoming investors or their government due to weak land rights [29].

Ultimately, it is the host government that can lease land, transfer land, or provide compensation for land based on the existing national laws of their own country. Even if the land deals may seem unjust and result in the displacement of local people, they continue to happen as the legal environment permits it. Thus, land grabbing can be defined as an illicit behavior, but, in reality, the deals are completely legal [30] which often occur in Africa.

3. Land Grabbing in Malawi

Malawi is not a country that makes many land deals compared to other countries in Africa. Additionally, Malawi is not the most represented country within the land grabbing research field. However, land deals and land grabbing do occur in the country. Table 1 shows the land deals that have been completed in the country since independence, and it

is possible to see that there are land deals for different purposes such as biofuel, food crops, non-food crops, and minerals. It is possible to see that land grabbing occurred in four land deals (e.g., 4433, 4936, 4937, and 5960). These land deals involve the displacement of the local people; no consultation to the local people before land transfers; and insufficient compensations for resettlement from the Government and the investors (see footnote 3, 4, 5, 6). Thus, land grabbers in Malawi are both “insiders” and “outsiders”. Here, three out of four land grabbing incidences found in Table 1 are related to sugarcane or the sugar sector.

Table 1. Land deals in Malawi [31].

Deal Number	Location	Intention of Investment	Land Grabbing ¹
1645	Undefined	Biofuels (Jatropha)	NO
1647	Mzimba, Rhumpi, Kasungu, Mangochi	Vegetables, Poultry	NO
1649	Kasungu, Lilongwe	Cashew, Coffee plant, Peanut	NO
1651	Undefined	Biofuels, Jatropha, Trees	NO
3930	Salima, Mchinji, Lilongwe	Beans, Corn, Peanut, Soya beans, Vegetables, Poultry	NO
4284	Salima, Northern Region (Dzuwa village)	Mango	NO
4433	Dwangwa, Nchalo	Sugarcane	YES ²
4497	Balaka	Cotton	NO
4560	Ekwendeni	Pepper, Macadamia nuts, Paprika	NO
4696	undefined	Cotton	NO
4936	Chikwawa	Sugarcane	YES ³
4937	Nkhata Bay	Sugarcane	YES ⁴
5351	Lilongwe	Corn, Soya beans, Tobacco	NO
5359	Lilongwe, Limbe, Mzuzu	Tobacco	NO
5364	Ntcheu	Corundum	NO
5359	Salima	Corn, Sugarcane	NO
5667	Vphya, Mazuzu	Eucalyptus	NO
5960	Karonga	Coal	YES ⁵
6772	Lilongwe	Tobacco	NO
6838	Kasungu	Bamboo, Eucalyptus, Trees	NO

¹ This column shows whether land deals are in connection with land grabbing; ² this land deal resulted in the displacement of 537 local people, and these people did not receive proper compensation from the Dwangwa Cane Growers Limited and Illovo [32]; ³ this land deal resulted in the displacement of 500 local people, and there was no consultation with the local communities before the land transfer [33]; ⁴ the local communities were not consulted before the land was transferred, and insufficient compensation was given to the local communities [34]; ⁵ the local communities were not consulted before the land transfer, and it is uncertain whether resettlement compensation was provided [35].

The official sugarcane cultivation in Malawi began in the early 1960s when the former President, Hastings Kamuzu Banda, invited Lonrho to search for suitable areas for sugarcane cultivation. Lonrho found the Nchalo area and Dwangwa suitable for sugarcane

cultivation in the 1960–1970s and established its subsidiaries, namely, the Sugar Corporation of Malawi (SUCOMA) and the Dwangwa Sugar Corporation (DWASCO), in both areas [3]. Although Malawi's official sugarcane cultivation began in the early 1960s, its connection to land grabbing issues began to receive attention in the 2000s. The most cited land grabbing cases are closely related to the sugarcane outgrower scheme and the sugar producing company (Illovo Sugar Group: Illovo) in the district of Chikwawa and the Nkhosakota district [36,37].

In the case of the Chikwanwa district in 2010, the former legislator and cabinet minister claimed 10,000 hectares of land, which resulted in 500 farmers not being able to farm in their own land. The 10,000 hectares of land had been earmarked by the new owner for sugarcane plantation, called Mtemadanga Distributors Limited, in conjunction with Genesis Global Commodities, a US-based company [38]. During the process of the land deal, it was found that the new owner colluded with chief Ngowe and the local farmers did not know about the deal until the illegal owner started to survey the area. This led to local church leaders and villagers to protest against the attempt to annex their land. The community took this case to court and won the case against the former politician in 2012 [36].

The land grabbing case in the Nkhosakota district is more widely known as the incidence is connected to a large foreign company (Lornho and Illovo) and the outgrower scheme. Dwangwa is known as a key sugarcane cultivation area in the Nkhosakota district. Near Lake Malawi in this area, Illovo, a sugar estate acquired Lornho in 1997, uses an area of 13,300 ha to cultivate sugarcane and also to produce sugars [39]. Although communities such as Mafupa, Chazuka, Chipembere, and Mphamba were living in this area, they were forced to leave the area in 1976 due to the sugar plantation that was going to be run by Lornho. Since then, they have been living in an area called Kaongozi, which is about 20 km away from the cultivation area with poor soil and a rocky landscape [40]. Another case is a more famous one, namely, the Kazilira dambo case, which is closely related to the Dwangwa Outgrower Scheme (DOS). Kazilira dambo is a swampy area that was selected to grow sugarcane under the DOS. The scheme was established by Dwangwa Cane Growers Limited (DCGL), which is considered to be a state apparatus. In 2006, DCGL entered the Kazilira dambo area to dig canals to lay irrigation pipes growing sugarcane. During the process, locals' houses and crops were destroyed. The Kazilira dambo farmers took this case to the High Court in Blantyre in 2007 and Mzuzu court in 2014. Although the Kazilira dambo farmers received some forms of compensation for the damaged houses and crops, the court did not make any ruling regarding the restoration of land rights [37]. More specifically, one of the communities which used to live around Kazilira dambo, namely, the Kalimkhola community, argue that people who have been living in the area eventually had to leave due to the DOS. The Government of Malawi provided the communities and individuals compensation, and those who accepted the compensation left Kazilira dambo. Although the compensation was not sufficient, they had no choice but leave because the displacement process became violent as local police began chasing them [3].

It is interesting that most members of the Kalimkhola community blame the Traditional Authority Kanyenda for their displacement. They argued that it was the Traditional Authority Kanyenda who made deals with the DCGL and played a great role in land grabbing [3]. As can be seen from the Chikwana and Nkhosakta cases (or the Dwangwa case), traditional authorities or traditional chiefs seem to play a great role in land grabbing in Malawi as they ignore their duties such as being custodians of the cultural and traditional values of the community and act in a (semi-)judicial function by dealing with customary disputes over land for private gain [41]. Additionally, where land grabbing incidences happened, such as in the Chikwanwa and Nkhosakta cases [3,38,40], it was possible for the Government to convert customary land into public and private land for development purposes such as sugarcane and sugar productions. Accordingly, within the frame of the existing literature, land grabbing in Malawi can be summarized as a situation in which traditional authorities, with the backing of the Government, sell customary land to people or companies and allow it to become private land in the process. During the process, the

local people are forced to move out of their land and often do not receive a fair amount of compensation [42]. In fact, most land grabbing cases in Malawi, such as in the Chikwanwa and Nkhotakota cases, occurred in customary land. Therefore, it is important to analyze how customary land was formed initially and what it means now.

4. Methodology and Analysis of the Changes in the Meaning of Customary Land

As customary land, which can be considered the ordinary Malawians' land, is at the center of land grabbing research field, this research will concentrate on determining the meaning (owner) of customary land in order to find the cause of land grabbing in customary land.

One might argue that this study should focus on finding the causes of land grabbing related to the customary land tenure system itself, because it is a key factor facilitating land grabbing. However, customary land tenure system has existed for a long time. Although customary land tenure system may change due to changes in the customary laws of the relevant communities, the core—community ownership and no documentation—has not undergone major changes. Accordingly, one should take an alternative approach to finding the cause of land grabbing.

As mentioned in Sections 2 and 3, land grabbing in Africa is carried out by outsiders (e.g., foreign governments, state-owned enterprises, agri-food companies, foreign investors) and/or insiders (e.g., governments, chiefs, traditional leaders). In the case of land grabbing studies in Malawi, they tend to argue that most land grabbing incidences occur in customary land and find that the insiders are land grabbers (e.g., DOS, Traditional Authority Kanyenda). These studies tend to focus on land grabbing that occurred after 2000 [36,37]. However, land issues, including land grabbing, are regarded as colonial legacies [1,2]. Therefore, in the study of land grabbing, the influence of foreign land grabbers (e.g., the British colonial ruler) cannot be ignored. As it was the colonial rulers who first categorized “land” in most parts of Africa including Malawi, their impacts on ongoing land grabbing are likely crucial. Therefore, this study finds that it is more relevant to determine the causes of land grabbing by looking for historical changes in the actual owners of customary land in Malawi in connection to colonial influences. This connection is best discovered by analyzing the historical changes in Malawi's land law, because it is the land law that determines the meaning of customary land and who can use it. More specifically, as the Government of Malawi recognizes the colonial influences on its own land law and finds it crucial to decolonize from them [8], finding the cause of land grabbing by determining the actual owner of customary land based on historical changes in the land law appears most appropriate. Thus, this paper gives an overview of the changes in the meaning of customary land mainly by analyzing land laws and policies from the colonial period until present. Accordingly, this paper adopts the method of legal history research. This approach compares an aspect of the law at a given jurisdiction (Malawi) at different periods of time [43]. This historical method of legal research helps to unravel the legal problems rooted in the past. In addition, it often provides guideposts showing how the law has developed and evolved over the years [44]. Since the Malawi Government recognizes that their land law is greatly influenced by the land law enacted by the colonial rulers [8], it seems appropriate to adopt the method of legal history research.

This paper analyzes four different periods of time: (1) the pre-colonial era; (2) during the colonial era; (3) the commencement of Land Act 1965 after independence until the commencement of Land Act 2016; and (4) the period after the commencement of Land Act 2016. Analyzing the first two periods is expected to show the impact of the colonial era on the changes in the meaning of customary land in Malawi. The analysis of the latter two periods is expected to show whether the two land reforms changed the position of customary land. Dividing the four periods appears the most practical way to analyze the changes in the meaning of customary land as they all, except the pre-colonial era, consist of different land and customary land laws.

Table 2 lists the land laws that this paper will analyze to find out the meaning of customary land. For the colonial period, this paper carefully selected the land laws that led to the “official birth” of customary land, namely The Nyasaland (Native Trust Land) Order in Council 1936 and The Nyasaland Protectorate (African Trust Land) Order in Council 1950. Although in these laws customary land was referred to as native trust land and later African trust land, these land laws played a key role in determining the use of customary land and the people living on customary land.

Table 2. Main land laws and policies in different periods in Malawi.

During the Colonial Period	The Nyasaland (Native Trust Land) Order in Council 1936 The Nyasaland Protectorate (African Trust Land) Order in Council 1950
After Independence	Land Act 1965 Customary Land (Development) Act 1967
After 2016	Land Act 2016 Customary Land (Development) Act 2016

For the post-independence period, Land Act 1965 and Land Act 2016 were chosen. These laws are crucial in understanding how land in Malawi was categorized after independence and show the changes in the position of customary land and land rights of the people who live on customary land. In addition, since this paper attempts to determine the meaning (owner) of customary land in Malawi, it will analyze the specific laws related to customary land, namely the Customary Land (Development) Act 1967 and Customary Land (Development) Act 2016. Since these laws may contain more detailed information about customary land (e.g., the description and use of customary land), analysis of these laws also seem relevant. From each law, it will the description of customary land, the use of customary land, when it is permissible to transfer customary land to another land (e.g., public land and private land), and who has the right to transfer customary land. The results will show the actual owner of customary land in Malawi and why land grabbing occur on customary land. Further, it will be possible to see whether this land grabbing is rooted in colonial influence.

There were no written land laws in Malawi prior to the colonial era. In addition, the number of literature focusing on the land in Malawi before the colonial era is very limited. Accordingly, the meaning of land during this period will be analyzed by looking at the literature that deal with the meaning of African land in general, and mainly Pachai [1]’s work, which is one of the few but crucial papers that deals with the impact of colonial influence on land policies in Malawi.

4.1. The Meaning of Land Prior to Independence

4.1.1. The Meaning of Land Prior to the Contact of the Outsiders in Africa and Malawi

Nowadays, in most Western societies, land is commonly viewed as “property” and “commodity” because one can accumulate financial gains by selling, renting, and leasing land. Accordingly, terms such as tenancy, property rights, and ownership are often used when dealing with land-related matters. In Africa, especially in rural areas, land is an essential source of production and livelihood. In other words, land constitutes a productive asset and is a major source of capital for the poor [45]. However, the meaning of land cannot be simplified to just economic assets in Africa. In Africa, land is considered a cultural, social, and ontological resource. Land plays an important role in the construction of social identity, religious life organization, and the production and reproduction of culture. Further, the “link across generations is defined by the complement of land resources which families, lineages and communities share and control,” [46] (p. 8). Indeed, to most African societies, land is a source of identity and cultural heritage [47]. Terms such as tenancy, possession, feudalism, securing titles, rights and duties had been alien to African tenure [48]. Although

it has become increasingly more common in Africa, the so called “Western” concept of land did not exist prior to the first contact with outsiders in Africa.

To most African societies, including Malawi, traditional land was the preserve of the departed chiefly ancestors and their living representatives. Land was passed on to their current occupants and the future generation. In Malawi, land belonged to the family, local community, and the village. There was no clear concept of absolute ownership but rather useful occupation. Additionally, unlike today, the provision for the sale of land for private gain did not exist [1]. More specifically, in the pre-colonial period, authority over land and natural resources were vested in traditional leaders in systems that were based on clan or tribal groupings. Chiefs also controlled and distributed land to their people and allocated land and settled disputes. However, chiefs were considered more as guardians or trustees. The ownership of land was not vested in them. Land markets did not exist and access to land was guaranteed by individuals’ allegiance to the chief or clan head [21].

However, the arrival of Europeans in Malawi meant that the traditional meaning of land and its use were to change. It is suggested that the pioneer foreigners, traders, and missionaries took advantage of the friendliness of the Malawians, especially the chiefs, to lay claims to vast extents of land. This was carried out by exchanging gifts and information, and the Malawians did not understand the exact meaning of them. It was revealed that planters of an earlier generation manipulated the friendship of the chiefs by giving them presents, and then enquiries regarding the boundaries of chiefs’ land followed. What should be noted here is that, later, the information was incorporated into the deed of sale for a small plot of ground for a house. The planters used the information with the chief’s signature to initially obtain a small plot but later exploited this and used it for the purposes of laying claims to larger areas [1]. Therefore, with the arrival of Europeans, land or land tenure in Malawi, along with many other African countries, started to change from “rights and duties of use, transfer, and administration; of access, occupation, and reversionary control” [48] (p. 349) to commodity and ownership.

4.1.2. Emergence of Customary Land and Its Meaning during the Colonial Period in Malawi

Nyasaland, now known as Malawi, is a country that was carved out along Lake Malawi through colonial rivalries between the British and Portuguese [49]. David Livingstone, a missionary explorer, described the region as rich in land, with a pleasant climate and a well-populated territory, but as suffering from the slave trade during his travel to the region in between 1859 and 1963. Therefore, he saw the region as ripe for commercialization and Christianity [49,50]. The highlands of the Shire River then attracted missionaries, traders, hunters, fortune seekers, and British and European settlers. It is known that from the early 1880s, Europeans, missionaries, traders, and planters acquired or purchased a significant proportion of land from chiefs and headmen [51]. Additionally, the Portuguese from Mozambique (formerly known as Portuguese East Africa) considered the extension of their interests from the Zambezi to the Shire and Lake Nyasa areas [52]. Due to the influx of new settlers, the Shire Highlands in particular had become a fighting arena for rival groups [49]. In fact, the process of colonialization of Nyasaland is known to have started with the introduction of Christianity, and the Portuguese’ intention to extend their interests to the Shire and Lake Nyasa areas led to the British establishing a protectorate across the south of Malawi.

In 1889, the British established a protectorate across the Shire Highlands with the intention of hindering the Portuguese in their colonization process. Many European settlers then increasingly acquired land in the region before formalized arrangements for land claims were established. In 1891, the British established the Nyasaland District Protectorate, published in the London Gazette, and it was formally then proclaimed and called the British Central Africa Protectorate since 14 May 1893 [51,53,54].

Harry Johnston was the first commissioner and consul-general of the Nyasaland colonial administration, and one of his immediate concerns was to settle the land issues in the region. According to Johnston, the British Crown was the landowner of a great part of

the country by purchase, concession, or forfeiture. Accordingly, he found that there was a need to investigate land acquisition in order to protect their land rights. Although Johnston claimed that most of the land was ceded in the treaties' concession agreements concluded with chiefs and headmen, there was no clear references. Nevertheless, Johnston argued that the Crown had control over waste and unoccupied land and had the right of pre-emption over the land. This land, controlled by the Crown, became Crown land. Further, the Crown could give land to new settlers under the terms of freeholds or leaseholds [53,55].

As mentioned in Section 4.1.1, the British and other settlers in Nyasaland claimed that they purchased land from chiefs, while others (chiefs and Malawians) argued that foreigners took advantage of the friendliness of the Malawians to lay claims to vast extents of land. Despite the different ways of perceiving the matter, the British administration formalized the white settlers' land rights, which were acquired from the local communities prior to 1894 through the Certificate of Claim in 1902 [51]. In fact, since the establishment of the Protectorate, the British promoted export-oriented large-scale agriculture as the backbone of economic development of Nyasaland. The British established a dual agrarian system by acquiring unoccupied lands as Crown land while providing Europeans with occupation of the land *de jure* on behalf of the Crown, which was considered private land. In other words, the British Commissioner was the administrator of the Protectorate who aimed to develop agriculture through the agency of the European farmers [56,57].

Consequently, the Malawians were divided between those who lived in Crown land and private land. In both Crown land and private land, the Malawians' land rights were not properly secured. For instance, Johnston continuously emphasized that it was necessary to transfer African land to the Crown in order to protect the natives from Europeans [53,55]. Theoretically, the authority of the Crown was meant to be only involved in the management of external relations and the affairs of British subjects. It was only when natives needed protection and there was the need for preventing land grabbing on the part of Europeans that the British became involved in managing these issues. Africans were supposed to retain internal sovereignty, and they were subject to Crown control only to the extent agreed upon in the treaties and concession agreements. However, the British found that it was more profitable to lease land to the European settlers because they were more useful for the development of the Protectorate. Additionally, as the British administrators strongly believed that the control of land led to the establishment of effective government, the total area of the Crown land became bigger under Johnston [55]. For instance, in 1893, Johnston summarized that one fifth of Protectorate land belonged to the Crown, but later it was found that three-fifths of the country's land surface was Crown land [55,58]. Further, an Order in Council issued in 1902 empowered the Commissioner to deal with and dispose of Crown land. This meant that all land in Nyasaland, except for the private land where Europeans settled, was Crown Land [53]. Accordingly, all Africans living in Crown land became the tenants of Crown land. This situation was also apparent for the Africans living in private land.

The case of the natives living in private land was more complicated. The European settlers acquired land, especially the Shire highland area, and produced crops for export. This meant that they needed workers. The natives who were living in the boundaries of the private land then acquired a form of legal title, which meant that they were obliged to work for the estate owners for a certain period of time. Such tenancy was called *thangata* [59]. It must be noted that the meaning of *thangata* prior to colonial period was different. The meaning of *thangata* in Chewa language is "to assist". The pre-colonial *thangata* concerned village community members working in the chief's gardens for a certain period of time. This was similar to a social institution that embodied a pre-colonial notion of reciprocal labor. The meaning of *thangata* changed during the colonial period. The colonial-period *thangata* concerned the community members working for the European landlords instead of chiefs. However, the natives became equivalent to forced laborers as they were declared tenants and obliged to work for the Europeans [57]. Here, the natives, or the original inhabitants, were technically allowed to live in private land without working for the

Europeans. According to Johnston, regarding the natives' loss of land rights, chiefs were heedless of the possible consequences of selling land to the Europeans. The chiefs' only concerns, when selling land, were the immediate possession of trade goods or money. Johnston almost blamed the chiefs for the land issues by arguing that although chiefs did not have the right to alienate the land, they assumed that they had such rights and that it was accepted by their own people. Further, Johnston found that it was necessary to protect the Malawians' land rights as they were to become the serfs of the European settlers. Therefore, he inserted a clause into the title deed, which was to restore the inalienable occupancy of the natives and plantations so that they were free from any dependency on the European settlers. This was often referred to as the non-disturbance clause [60]. It can be said that the non-disturbance clause was a reaction to dissatisfaction among the natives who became landless or forced into *thangata* through European land alienation because it became a central site of social struggle for the natives [49]. However, the problem was that the Europeans' land rights were legally defined and registered, while such demarcation was not implemented for the existing villages and plantations. Additionally, there were no records or population statistics kept. This meant that it was not possible to find out which natives were entitled to live freely on private land [1]. However, Johnston claimed that the Europeans accepted the whole settlement, and the natives were also distinctively satisfied with the non-disturbance clause. Accordingly, the whole process was approved without modification by the Government [60].

Further, the tenants did not only consist of "Malawians" but also other Africans. The Shire highland in particular was becoming very crowded as more migrants from Portuguese-ruled Mozambique (Portuguese East Africa) arrived due to more oppressive conditions there [49]. For instance, between 1902 and 1909 alone, the number of Africans living in the Shire Highlands increased from 95,000 to 210,000. The European estate owners welcomed the influx of immigrants. This was because the new tenants would be more dependent for their land compared to the original inhabitants who had certain rights in living in private land due to the non-disturbance clause [59].

Despite the non-disturbance clause, however, Africans' complaints about their land rights kept on rising. In the early 1900s, it was found that a number of estate owners collected rents from the laborers regardless of whether they were original inhabitants or recent migrants. For instance, in 1903, a company was taken to the court as it made illegal land deals and also made a labor-tenancy agreement that ignored the non-disturbance clause. The concerned company attempted to manipulate the original terms of the certificate of claim. For instance, laborers were required to work for two months during specified times (e.g., the rainy season) instead of paying rents and the annual tax due to the company and the administration. The tenants were to be evicted if they failed to comply with the conditions. The Protectorates' chief judicial officer, Judge Nunan, ruled that such a manipulated agreement was illegal and violated the non-disturbance clause [1]. The administration paid attention to the judgment and set up the British Central Africa Lands Commission under the chairmanship of Judge Nunan to enquire into land issues. This called for a new land settlement to replace the already unworkable provisions, which were to protect African interests on private estates and give them land. In return for the allocation, the hut owners were to pay annual rents of 4s to the estate owner [1], which, however, still made the natives tenants.

As more Africans were suffering from the *thangata* as well as land scarcity, their grievance towards the European estates rose. This led to incidences such as Chitembwe Rising in 1915 which resulted in a number of estate managers of the Bruce Estate in the Shire highlands being killed. This was fueled by the harsh labor conditions and land shortages in private land as well as Crown land [49]. It must be noted that natives' grievance was not entirely ignored before and after the Chitembwe Rising. In 1903, the Land Commission lamented the fact that European settlers ignored the non-disturbance clause and made natives into tenants without providing security [61]. The British Government introduced an ordinance in 1917 that made it illegal for European landlords to exact labor services

in lieu of rent from the natives living on the estates [62]. In 1918, another ordinance was introduced which stipulated that Africans were not be required to perform *thangata*. Here, Africans were given a choice to either provide labor or pay rents [59]. Further, the 1920 Land Commission recommended to extinguish the natives' rights in areas subject to Certificate of Claim but provide them with reserved land to support the communal way of life to which they were accustomed [61].

Thus far, it is possible to see that the changes in the Protectorate administration's land policy. Initially, the main concern for the Protectorate administration was the regulation of the disposal of Crown land to European settlers. This was because the British aimed to develop agriculture through the agency of the European farmers [56,57]. Thereafter, the Protectorate administration paid more attention to African territories, which included the matter of protecting African land rights due the increasing importance of African producers in the agricultural economy. This appeared as more protection of African land rights was being secured through the concept of African Trust Land [53].

The Nyasaland (Native Trust Land) Order in Council 1936 was the first statutory instrument which implemented the trust concept in Nyasaland. It classified Nyasaland land into Crown land, reserved land, and native trust land. The Crown land meant all lands that were acquired or occupied by or on behalf of Britain. Reserved lands meant land occupied under a Certificate of Claim. This included private land and land granted, leased, or disposed of by the British Government during the period of Crown land alienation. Reserved land also included forest reserves and Crown lands in township areas. Native trust land included all other land that did not fall in the categories of Crown and reserved land, which was the largest and most important category [53].

In 1950, the colonial state passed the Nyasaland Protectorate (African Trust Land) Order in Council that made a small modification to land categorization. Public land consisted of "(a) all lands and interests in land acquired or occupied by or on behalf of His Majesty; (b) land in townships not in private ownership; (c) land in forest reserves; (d) land which has been declared to be a public road" [63] (p. 2). All land, excluding public land and land under lease or grant and under certificate of claim or private land, was declared African trust land, which can be considered to be native trust land in the Nyasaland (Native Trust Land) Order in Council 1936 [22,63].

When looking at the Order in Council 1936 and 1950, it appears that the colonial state guaranteed certain rights of the natives and tried to respect the customary law. However, the Order in Council 1936 only gave rights to the Africans to occupy and use native trust land [53]. Further, the state still had the power to dispose of native trust land by grants or lease as private land [64]. According to the order in council 1950, "the governor shall administer and control all African trust land for the common benefit, direct or indirect, of Africans, and in so doing shall have regard to African law and custom so far as they are applicable and not repugnant to justice or morality" [63] (p. 3). This meant that although the customary law and customs may be respected, the natives should still respect the colonial law if the situation requires it. It is important to note that the African trust land could always be taken away from the indigenous people. For instance, the Order in Council 1950 states that "the governor may grant lease or rights of occupancy of African trust land, or dispose of other interests therein, or permit or license it to be temporarily used or occupied, on such terms and conditions as he may think fit" [63] (p. 3). Further, "Whenever it appears to the Governor that any African trust land which is not the subject of a grant, disposition, permit or license made or given under the existing Order is needed for a public purpose which is for the benefit, direct or indirect, of Africans, he may, after consulting the native authority, if any, of the area in which it is situated, declare by Proclamation published in the Gazette, that such land is public land and upon such Proclamation such land shall become public land, and shall be used for a public purpose" [63] (p. 4). Thus, African trust land could always become public land or private land whenever the state saw it as fit. In fact, both native trust land and African trust land were vested in the Secretary of State [53,63]. In other words, during the colonial

period, natives' land, or customary land, was easily converted to Crown land (owned by the colonial state) or private land (owned by European settlers).

In 1951, the Nyasaland Legislation Council passed a land ordinance. Its purpose was to formalize the reality that was made through treaty, convention, or agreement according to the British Central Africa Order in Council of 1902. This ordinance categorized land into public, private, or customary land. Although customary land was legally defined, it was more or less a part of public land. Customary land was not under legal control of the natives but controlled by the governor [61]. Thus, it can be said that natives did not have any land during the colonial period, and their land was grabbed by the colonial state and European settlers.

4.2. *The Meaning of Customary Land after Independence*

4.2.1. The Meaning of Customary Land until the Commence of Land Act 2016

Malawi gained independence in 1964. This was a time to redefine land rights as the natives had suffered greatly from the colonial land categorizations. In 1965, Land Act 1965 was approved, which was the first Land Act after independence. However, it is doubtful whether this act changed the meaning of the land of the Malawians.

The Land Act of 1965 does not contain a specific definition of land, but divides it into public land, customary land, and private land. Public land refers to "all land that is occupied, used or acquired by the Government and any other land, not being customary land or private land" [6] (Part 1: 2). Private land refers to "all land which is owned, held or occupied under freehold title, or a leasehold title, or a Certificate of Claim or which is registered as private land under the Registered Land Act" [6] (Part 1: 2). Customary land refers to "all land which is held, occupied or used under customary law, but does not include any public land" [6] (Part 1: 2). Further, Land Act 1965 states that customary land is "undoubted property of the people of Malawi" [6] (Part V: 25). By looking at the descriptions of all three types of land, they do not intertwine with each other, and customary land is solely for the Malawian people. However, it is stated that the Minister is in charge of administering and controlling all minerals in, under, or upon any customary land (or all customary land) for the use or direct or indirect common benefit of the inhabitants of Malawi [6]. Additionally, customary land can or shall become public land whenever the Minister perceives that customary land is needed for public purposes, whether directly or indirectly beneficial for the community as a whole or a part of the community [6]. Similarly, according to Customary Land (Development) Act 1967, which was set to provide for the Ascertainment of Rights and interests in customary land, the Minister can prescribe a development scheme for areas (customary land) whenever he finds that the ascertainment of the interest in customary land and the better agricultural development of such land in any area should be affected [65]. This means customary land can become private land when it is found necessary for agricultural development purposes. In fact, even after independence, Malawian people who live in customary land do not have any rights or power over the land. According to Land Act 1965 [6], customary land is vested in perpetuity in the President, which is controversial as it is also stated that customary land is considered undoubted property of the people of Malawi.

Additionally, the settlers' lack of rights over customary land can be further viewed in the Land Act. According to Land Act 1965, when the Minister decides that customary land is needed for public purposes, he can "give any Chief directions relating to the disposition of customary land, or occupation thereof by any persons or classes of person specified in such directions, and may by such direction restrain any native authority or other person from procuring the removal of any such persons or classes of persons from customary land" [6] (Part V: 29 (2)). Thus, the chief can authorize the use and occupation of any customary land within his area (in accordance with customary law) subject to the general or special direction of the Minister [6]. Of course, from the pre-colonial period until present, the chief has had authority over the land. They have controlled and distributed land to their people and allocated land and settled disputes. Land Act 1965 seems to give the same

“power” to the chiefs. However, the difference is that such chiefs are also under the control of the Minister, and thus the Government. Accordingly, chief did not have entire freedom of allocating or distributing land.

Therefore, customary land can be taken away from the local people whenever the Minister, the Government, or chiefs see that the land should be used for other purposes under Land Act 1965. As customary land can or shall become public land when “necessary” with minor difficulties, it almost seems that customary land is just a part of public land. Further, as the Minister, who seems to decide whether to take customary land or not, should act subject to the general or special directions of the President [6], most land appears to belong to the President. In fact, as all public land is also vested in perpetuity in the President, which includes customary land based on the analysis made here, almost all land seems to belong to the President. For instance, according to Land Act of 1965, land “should not be assured to or for the benefit of, or acquired by or on behalf of any body corporate, unless such body corporate is authorized by a license issued by the President to hold land in Malawi” [6] (Part II: 4(1)). Here, the issue of licenses is at the absolute discretion of the President, and the decision of the President whether or not to issue a license is final and shall not be questioned in any court [6]. For instance, if the President issued a license to a foreign company to use a part of customary land, this is the final decision that cannot be changed. By looking at the President’s and the Government’s power over land, it can be said that land rights of the people who are settled in customary land barely existed. In fact, Land Act 1965 resembles the colonial land laws, such as the Nyasaland (Native Trust Land) Order in Council 1936 and the Nyasaland Protectorate (African Trust Land) Order in Council 1950. The only difference is that it was the British Government who had power over the natives’ land during the colonial period, whereas since independence, it was the Government of Malawi, or the president, who had the power over the native’s land. The main land grabber, therefore, changed from the British and European settlers to the Government of Malawi itself. Accordingly, it was the natives, the ordinary Malawians, who continued to have weak land rights. Whether they lived in native trust land, African trust land, or customary land, it was the natives who suffered from land grabbing.

4.2.2. The Meaning of Customary Land after the Commence of Land Act 2016

As discussed thus far, it can be stated that the land law and policies in Malawi have been deeply connected to colonial land law and policies. The land laws and policy in Malawi during the colonial period concerned satisfying British sovereignty and facilitating the access of the European settlers on the basis of private titles. It was realized that the failure to deal with Malawi’s land policy contributed to the country’s rising poverty, food insecurity, and inequalities in access to land [8]. Despite the realization of the problems regarding land rights due to the land laws and policies that were affected by the colonial influence, Malawi only implemented new land laws such as Land Act 2016 and Customary Land Act 2016 in 2018.

By looking at the new Land Acts, one is able to see a number of differences from the former Acts. One of the most visible differences between Land Act 1965 and Land Act 2016 is the classification of land. Unlike the Land Act of 1965, which categorized land into public, customary, and private land, the Land Act of 2016 categorizes land into two main categories as public land and private land [7]. Although it may appear that customary land does not exist in the Land Act of 2016, customary land is described as “all land used for the benefit of the community as a whole and includes unallocated customary land within the boundaries of a traditional land management area” [7] (p. 3) (Traditional land management area (TLMA) refers to as an area demarcated and registered as falling within the jurisdiction of a traditional authority [7]). In fact, customary land is in both the public and private land. For instance, public land includes Government land (Government land means “land acquired and privately owned by the Government and dedicated to a specified national or public use or made available for private uses at the discretion of government” [7] (pp. 3–4)) and unallocated customary land; private land includes freeholds, leaseholds, or customary

estates. These lands are all vested in perpetuity in the Republic of Malawi [7]. Here, what should be emphasized in the new Act is the customary estates. Customary estates include “any customary land which is owned, held or occupied as private land within a traditional land management area” [7] (p. 3). More specifically, according to Customary Land Act 2016, “A person, family unit, a group of persons recognized under customary law or as an association, a co-operative society or as any other body recognized by any written law” [66] (p. 16) can apply for the grant of a customary estate. When registered as a customary estate, it should be of indefinite duration, inheritable, and transmissible by will [66]. Further, it seems that almost anyone can apply for the customary estate as Customary Land Act 2016 allows men, women, a group of two or more Malawians whether associated together under any law or not, and partnerships or a corporate body to apply for the customary estate. In other words, the customary estate can be referred to as a way of protecting the natives’ land rights by giving them titles.

However, it is ironic that even after being registered as a customary estate, it should still be “liable, subject to adequate notification and prompt payment of full and appropriate compensation, to acquisition by government in the public interest, in accordance with the Land Acquisition Act” [66] (p. 16). According to Lands Acquisition Act 1970, “the Minister may, whenever he is of the opinion that it is desirable or expedient in the interests of Malawi so to do, acquire any land, either compulsorily or by agreement, paying such compensation therefor as may be agreed or determined under this Act” [67] (p. 2). The amended version of this Act, the Lands Acquisition (Amendment) Act 2017, softened the tone by stating that “the Minister may acquire land for public utility either compulsorily or by agreement, and pay compensation therefore as may be agreed or determined under this Act” [68] (p. 2). In fact, it is difficult to distinguish between the former Land Acts and the current Land Acts regarding customary land because the former can turn customary land directly into public land, whereas the latter first seems to secure the natives’ land rights by giving them a land title (customary estate) but can still turn it into public land (Government land).

Here, one of the positive changes from the former Land Acts to the new ones are connected to compensation for land. Due to the new Land Acts, individuals can register their land as a customary estate. This means that when there is any transfer of customary land, the assessment for compensation should also include land itself [66]. For instance, when communities such as Kalimkhola were displaced from their customary land due to the outgrower scheme, the compensation did not include the value of the land. This happened during the period when Land Act 1965 and Customary Land (Development) Act 1967 were still applied [3]. With the new Land Acts, one can assume that the natives can at least obtain fairer compensation when they are required to move away from their land. However, this does not convince one to believe that the new Acts related to land in Malawi have made the natives’ land rights or ownership more secure because even the customary estate can be transferred to public land. Additionally, one aspect which should be emphasized is one of the conditions applied when an applicant wants to obtain the grants of customary land. According to Customary Land Act 2016, “occupier shall pay any applicable rent, fees, charges, taxes and other requirements, if applicable, in respect of his occupation of land” [66] (p. 20). This means that regardless of whether a person or group has been living in customary land for a long period of time, one has to pay for surveying, mapping, and titling fees, which may be unaffordable [69]. Thus, although ones’ land rights may be more secure once they are granted a customary estate, it is difficult for the poor to gain such security from the beginning.

5. Results and Discussion

Most parts of Africa experienced a colonial era, and its impacts vary among African countries. One of the outcomes of the colonial era is the weak land rights of the ordinary people in the continent. Accordingly, many African countries have been going through land reforms in order to secure their citizens’ land rights, Malawi being one of them.

This research analyzed the historical changes in the meaning of customary land from the pre-colonial period until present. The main findings of this research are as follows: First, the meaning of customary land in Malawi in each period is as follows: (1) the land of the natives (pre-colonial era) to (2) the land of the European settlers and the Crown (during the colonial era), (3) the land of the President (after independence until the commencement of Land Act 2016), and (4) the land of the Government and potentially wealthy Malawians (since the commence of Land Act 2016). Second, similar to the meaning of the customary land changes, land grabbers since the colonial period have changed from (1) European settlers and the Crown (during the colonial era), (2) the President of Malawi and the Government (after independence until the commencement of Land Act 2016), and (3) the Government and potentially wealthy natives (present day).

As was analyzed in the previous section, the meaning of customary land dramatically changed between the pre-colonial period and the colonial period but changed little between the colonial period and the post-colonial period. Prior to the colonial period, or before the arrival of Europeans, land in Malawi, like in most African countries, largely did not consist of the meaning of property or ownership. The meaning of land in Malawi was much more than just a property as it was also connected to the identity and cultural heritage of the Malawian people [47]. For instance, in 1976, communities such as Mafupa, Chipmebere, and Chazuka were displaced from Matiki (an area in Dwangwa) due to the sugar producing company (Illovo) leasing the area. These communities are currently living in an area called Kaongozi, which is about 20 km away from Matiki. Although they have been living in Kaongozi for about 40 years, they still identify themselves as Matiki people [40]. Thus, it is possible to see that land does not only mean where they live but who they are. Further, the land belonged to the family, local community, and the village prior to the colonial era in Malawi. Traditionally, land and natural resources were vested in traditional leaders who controlled and distributed land to their people and allocated land and settled disputes. This was how issues regarding land were settled and can be referred to as customary law [1,21]. However, this does not mean that Malawians' land was called "customary land" prior to the colonial period. Before the colonial era, it was not necessary to categorize land. Thus, it can be said that land in the pre-colonial period was the land that people lived on, and this represented their identity. Further, as there was no concept of property, or "exchange value", linked to land prior to the colonial period in Malawi, it is unlikely that the modern concept of land grabbing existed. This is not to say that there was no concept of land competition. However, such competition was more related to the issues of land fertility and access to water for agriculture and subsistence in Malawi, which is different from the land grabbing we know today [3].

The arrival of Europeans and the colonial period led to a dramatic change in the meaning of land in Malawi. As seen in the previous section, the arrival of Europeans inserted property and exchange values into the Malawians' land. These new concepts were used or manipulated by the Europeans, which provided a starting point for them to take the natives' land, and, later, the British establishment of a protectorate. After the British established the Protectorate, Malawi's land was categorized as Crown land and private land. This meant that the natives became tenants of the Crown and European settlers' land that used to be their own land. In particular, the fact that the natives had to either perform *thangata* or pay rents on private land must have made them feel that their land and rights had disappeared [59]. Of course, the implementation of a non-disturbance clause, the creation of native trust land and African trust land, which eventually became customary land that "respected" the communal way of life according to the natives' customs, meant that the natives' land rights were somewhat secured. However, the fact that the native trust land and African trust land could always be transferred to other types of land such as public and private land meant that the natives' land did not exist in reality. Therefore, customary land can be considered only as an arbitrary term, which colonizers used to deal with the native's grievances due to the loss of their land. Thus, the meaning of land during

the colonial period became European (private) and British land. With these two actors, the era of land grabbing truly began in this period.

Since independence, Malawi experienced two major land reforms. The first reform took place almost immediately after independence with the implementation of Land Act 1965. Customary land was defined as all land held, occupied, or used under customary law. One can suspect that the natives expected to have secured their land rights and re-started living their traditional way of lives. However, it is possible to observe a number of examples, such as in the Chikwanwa and Nkhoktakota districts (see Section 3), which prove that land grabbing occurred in Malawi and led to the displacement of the natives. All land grabbing occurred after independence until the implementation of new Acts took place on customary land (see Table 1). Here, as mentioned in Section 3, it should be emphasized that many displaced communities do not only point to foreign companies such as Lonrho or Illovo as the land grabbers who physically moved into where they used to live, but also to their traditional authorities. For instance, communities who currently live in Kaongozi blame their traditional authority, Kanyenda, for their displacement as they state that it was the traditional authority who sold their land to the company [40]. Similarly, the Kalimkhola community also blames the traditional authority, Kanyenda, who led to their displacement from Kazilira dambo [3]. In fact, the traditional authority was seen as the land grabber who ignored his duty to protect his own people and led to their displacement. As traditional authority or chiefs can authorize the use and occupation of any customary land within his area, in accordance with customary law [6], it seems that Malawians' customary land was vested in the traditional authority. However, although this is not to deny the traditional authority was bargaining for his personal gain by leasing land to others such as in the Nkhoktakota region cases, they may not have had any choice but to displace their people from the customary land, as it was the presidential orders of 1969 and 1975 that led customary land being used for cane growing [70]. In fact, customary land, according to Land Act 1965, is vested in perpetuity in the President. Thus, the meaning of land, since independence until the commencement of Land Act 2016, was that it became the president's land from the Crown land, which meant that only the ultimate owner of the land changed without any land security granted to the natives.

The commencement of new Land Acts, such as Land Act 2016 and Customary Land Act 2016, can be referred to as Malawi's attempts to eradicate the colonial influence on its land issues. Land Act 2016 categorizes land into public and private land. Customary land can be either in public land or private land. For instance, unallocated customary land falls into the category of public land, and customary estates fall into the category of private land [7]. Customary estates should be emphasized here. For a long period of time, people who lived in customary land lacked any land rights. By applying for and obtaining land titles, Malawians', especially smallholder farmers', land rights can be secured. Of course, applying for a customary estate is not mandatory. Here, it is concerning that fees must be paid in order to successfully apply for and receive grants to a customary estate. In recent years, about 50 percent of the Malawian population live below the poverty line, and about 20 percent live in extreme poverty [71]. In 2016, 69.2% of Malawians live on less than 1.90 dollars per day [72]. Accordingly, it is unlikely that ordinary Malawians, especially poor smallholder farmers, can afford to pay the fees for the land title. One can assume that Malawians who can apply for the customary estates are the ones who are, or whose family are, wealthy. It is thus likely that poor farmers have to lease or sublease customary estates. In fact, strengthening land rights by providing land titles only seems applicable to wealthy Malawians. This might increase the inequality between rich and poor Malawians in the context of land rights, which is not the objective of land reform.

It seems that wealthy Malawians have the potential to become the new owners of customary land and appear to be the substitute of the European settlers from the colonial period. However, the fact that the customary estates can be acquired by the Government according to public interest with appropriate compensation [66] suggests that even those who own the customary estates still face the possibility of losing their lands. In other words,

the ultimate owner of the land is the Government of Malawi. This means that the poor are still vulnerable to land grabbing and may suffer from the two parties mentioned above, as occurred in the colonial period.

In summary, whilst the outsiders (e.g., the British and Europeans) were the main land grabbers during the colonial period, it has been the insiders (e.g., the Government of Malawi, president), who “grabbed” and “owned” customary land in Malawi. These land grabbers used the “legal environment” (e.g., land laws and policies) to continue exploiting customary land. Although foreign companies, such as Lonrho and Illovo, are often pointed as land grabbers in Malawi [3,40], it is the state, or the Government of Malawi, that has been using the “legal environment” and contributed to land grabbing in customary land after independence. This behavior of the Malawi Government is similar to that of colonial rulers during the colonial period, and the common result is that ordinary Malawians suffer from land grabbing.

6. Conclusions

Most research on land grabbing in Malawi has focused on identifying those who are involved in the land grabbing process, and have concluded that government, multinational corporations, and traditional authorities are land grabbers. They mainly focus on the sugarcane industry after 2000 and find that land grabbing mostly occurs in customary land. These studies are limited by their primary focus on identifying land grabbers during a short post-colonial period.

By analyzing the historical changes in the meaning and position of customary land in Malawi, the findings and the accomplishments of this research show that from the colonial period until the present, customary land and poor land rights of the people who live on customary land have been vulnerable to land grabbing as their weak position still resembles that of the colonial era. Although the new Land Acts try to get rid of colonial influences, they still do not seem to protect the land rights of the poor who live on customary land. Malawi’s land reform does not seem to have fully attained its main purpose of securing all Malawians’ land rights. In other words, this research proves that existing studies focusing on land grabbing in Malawi in recent years should not ignore the importance of colonial influence in analyzing land grabbing in Malawi. In addition, since this study provides land grabbers in four historical periods, other researchers can use this as a starting point to carry out research related to land grabbing in Malawi.

One of the key factors that make customary land and people living on it vulnerable to land grabbing is the historical pressure on agricultural development, which is mainly operated by large-scale agricultural estates. For instance, during the colonial period, the British promoted agriculture as the backbone of economic development of Nyasaland and the dual agrarian system led to strengthening European estates’ land rights whilst weakening of Malawians’ land rights [56,57]. After independence, former president Banda paid more attention to the agricultural estates sector than the smallholder section [73]. By seeking socio-economic modernization through the development of large-scale plantations, Banda continued the dual agrarian policy of the colonial period. Since Banda introduced the Land Act of 1965, customary land can be leased to individuals and corporations for 99 years. For instance, between 1977 and 1997, 1,200,000 hectares of customary land was converted to leased land for the production of tobacco [56]. The new Land Acts promote individuals’ land rights by offering the chance to apply for customary estates. However, this is still related to agricultural development, as the new acts aim to provide poor farmers with opportunities to strengthen land rights, thereby encouraging investment in land improvement [74]. However, it is likely that the wealthy Malawians’ land rights will be secured whilst poor farmers will either work for customary estates or live in customary land without securing their land rights. This means that a dual land system may be established within customary land, which may lead to more land grabbing. Therefore, the Malawi Government should separate agricultural development aspects and needs from the formulation or modification of land laws and policies as much as possible. This will

help eliminate the colonial influence that led to general land grabbing and prevent the establishment of unnecessary dual land systems on customary land, which may lead to land grabbing among ordinary Malawians in the future.

Funding: This work was supported by the Ministry of Education of the Republic of Korea and the National Research Foundation of Korea (NRF-2020S1A5B5A17087343).

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Acknowledgments: I would like to thank the Ministry of Education of the Republic of Korea and the National Research Foundation of Korea for supporting this research.

Conflicts of Interest: The author declares no conflict of interest.

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