

**CONFERENCE THEME: Winning The Fight Against Corruption In The Land Sector:  
Sustainable Pathway For Africa's Transformation**

**PAPER TITLE: Customary Land Reform and Institutional Change in Malawi: The  
Case of Customary Land Act, 2016**

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**Abstract:** Institutional change surrounding customary land reform has been presented as a viable strategy for transforming African's tenure insecurities and corruption-ridden customary land sector. Based on economic rational choice thinking, land management regulations are perceived as imposing constraints on rational self-interested actors to preclude corruption and land tenure insecurities. In Malawi, the government promulgated the Customary Land Act in 2016 to address such concerns. Customary land regulations are particularly perceived as equilibrium signposts aimed at addressing corruption and land tenure insecurities.

Institutional engineering is, however, a highly political activity with complex outcomes. To this end, the type of institutions that are put in place are a product of contestation and bargaining among a gamut of self-interested actors within the land sector. In the context of Malawi, significant actors in the customary land sector include local chiefs, politicians, government bureaucrats, civil society organisations, donor community, commercial farmers and the subsistence farmers. All these groups of actors hold different and at times contradictory political economic and social interests with regard to land. For instance, while commercial farmers and government bureaucrats aim at achieving increased productivity, subsistence farmers aim at achieving tenure security for their land parcels. Equally important, the subsistence farmers are not a homogeneous entity but composed of different groups of people with different interests and objectives. Usually men and women have different interests in land and face different challenges.

This paper explores the extent to which institutional change in Malawi's customary land sector will deliver the intended objectives. Four questions are particularly of interest in this paper namely: what were the interests of the different groups of people in the review of the new Customary Land Act, 2016? Who was involved in the formulation of the new Customary Land Act, 2016 and at what particular point of formulating the Customary Land Act, 2016 were they involved? What principles guided the formulation of new Customary Land Act? and which group of people are satisfied with the new Customary Land Act and why?

This study employed a mixed methods approach which allows in-depth understanding of the research questions that were set out in this study. The study particularly used semi-structured interviews, focus groups discussions, key informant interview and document study analysis to collect data. These methods are appropriate in understanding individual and group experiences, motivations and perceptions that were central in this study. The study used purposive and snowball sampling to identify respondents.

The study findings demonstrate that institutional reform per se cannot address land tenure insecurities and corruption concerns. This is so because contestation over land resource and bargaining among self-interested and norm-abiding actors within customary land sector reproduce institutional structures that serve the interests of powerful actors. This study particularly finds that existing institutional structures that regulate social and political life provide the context within which contestation and bargaining takes places. The objectives of customary land reform were to achieve tenure security for all particularly women and the vulnerable groups of people. This study noted that in both patrilineal and matrilineal it is avunculates who are usually male (*Ankhoswe/* marriage counsellors) traditionally make decisions regarding women's land access and ownership rights. This is because the avunculates are regarded as the custodians of the clan. Findings from this study revealed that culturally defined decision makers such as avunculates receive bribes from the land buyers without the knowledge of the powerless landowners such as women.

Equally important, the process of reviewing the 1972 Customary Land Act was heavily controlled by government bureaucrats and chiefs who had contradictory interests to subsistence farmers. For instance, the Customary Land Act initially passed by Parliament was not gazetted into law after chiefs expressed dissatisfaction with their exclusion from land management functions. The customary land law had to be revisited by Parliament and addressed the concerns of chiefs. The Customary Land Act which was finally gazetted into law recognising the managerial functions of Group Village Headmen and Paramount chiefs in customary land. This finding reveals the extent to which institutional engineering is subject to political contestation among different actors and the extent to which local social and political structures reproduces institutions that continue to serve interests of the powerful actors.

Thus, institutional reform without understanding how local power hierarchies perpetuates gender and corruption concerns is inadequate to achieving the set-out objectives. Insights from this study point to the importance of unpacking how historical and social legacies impact on the type of institutions that are created and how such institutions serve the interests of defined groups of people. This finding entails understanding how corruption and tenure insecurities in the land sector are embedded in the social structures that are ironically perceived as agents in ending corruption.

Key Words: Corruption, land rights, gender, institutional Change, land governance

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## 1. Introduction

It goes without saying that land reform and institutional change in the growing pursuance of development has been heralded as a feasible tool for attaining development globally. In particular, institutional change surrounding customary land reform has been presented as a viable strategy for transforming African's tenure insecurities and corruption-ridden customary land sector. Based on economic rational choice thinking, land management regulations are perceived as imposing constraints on rational self-interested actors to preclude corruption and land tenure insecurities. In Malawi, the government promulgated the Customary Land Act in 2016 to address such concerns. Customary land regulations are particularly perceived as equilibrium signposts aimed at addressing corruption and land tenure insecurities. The Act mainly aims to address issues of tenure, security, efficiency land use and improved markets.

### 1.1. *The organization of this paper*

The following chapter provides the conceptual framework used in this paper. Various concepts such as Intergenerational Wealth Transfer (IWT), property, matrilineal, patrilineal as well as intersectionality concepts are defined. In addition to these, the paper grapples with the theoretical perspectives of the "*field*"/ "*habitus*" adapted from Bourdieu's theory of *the logic of practice*; land reform perspectives as well as feminist stand point with an emphasis on intersectionality. The proceeding chapter ends with a brief reform history of land reform initiatives in Malawi. Chapter three presents the methodology used in this study while chapter four presents the findings and discussions. The concluding chapter 5, gives a summary of the paper but more importantly, it offers recommendations for sustainable pathway to transformation in the land sector addressing issues of corruption, reform structures and processes to achieve a win-win situation for all actors concerned with land issues.

## 2. Conceptual Framework

### 2.1. *Conceptualisation of terms used in the study*

This study makes use of concepts such as intergenerational wealth transfer, property, matrilineal, patrilineal as well as intersectionality. IWT refers to a practice of transferring wealth/ property to the next generation as a way of ensuring family welfare insurance and strengthening family bonds by distributing the resources across the family (Quisumbing, 2009). Zuka (2019) notes that these said resources may be in the form of human resource which enables children to learn and socialize so that they can have a sense of belongingness and significance; but also they could be in the form of physical assets/ property. In this study, the researchers make use of the physical asset which is land. This is because in the study customary land is transferred from generation to generation through established patrilineal or matrilineal forms of inheritance.

Our understanding is that property refers not simply to an external 'thing' or object, such as a field. Rather, following Hoebel (1966: 424) and Hann (1998: 4), property involves a network of social relations that govern the conduct of people in relation to the way they use the thing (the land in question) as well as the meanings they associate with the property and the way they dispose of it. Thus Hann (1998: 34) argues that the

ultimate determinant of what property is and what it is not is embedded in the attitudes of the group whose culture is being studied.

This study makes use of Hoebel and Han's analyses of what property is to explore three pertinent points. Firstly, to explore the meanings that the respondents in the study attach to their land in order to probe the value that they attach to the property. Secondly, I explore the histories of these form of property to understand how the respondents have come to access, own and use the said properties. Thirdly, I explore the network of social relations that influence decisions around property sharing when a marriage is ended.

We also find useful a definition of property developed by Gray (1991) which Maliro et al (2003: 50) have also employed, which is complementary to the analyses of Hoebel and Hann. According to Gary (1991: 39):

“the law does not view property as things, but as power relations constituted by legally sanctioned control over access to the benefits of excludable resources... Property is about excludability and not really the conventional legal emphasis on the assignability and enforceability of benefits. For property resides not in the consumption of benefits but in control over benefits. Property is not about enjoyment of access but control over access”.

Gary's argument is that generally when property ownership is considered in terms of the law (regardless of how the law is formulated and applied), property ownership deals as much or more with who is excluded as with who is said to have the ownership rights or is seen to enjoy the benefits thereof. In essence, his view is that property ownership is about who has control over it, to the exclusion of others. If this is the case, then, Gray's understanding of property ownership rights in terms of power relationships conversely implies that property can also be a source of vulnerability (Maliro, M'chanju-Liwewe, Chirwa and Matenje, 2003: 43). This is particularly the case when considering people's culture in relation to gender roles and relations, which also involve power relations.

'Matrilineal' and 'patrilineal' encompasses a complex set of relationships and practices. On the one hand, in matrilineality is often assumed that women in matrilineal communities have strong ownership rights to land because descent follows the female line and marriage is commonly uxorilocal. In practice, however, decision-making powers over the land that women are said to own are commonly vested in males within their maternal lineage, i.e. in the hands of the uncles or brothers of the woman in question. On the other hand, some men in matrilineal marriages are said to be hesitant to make meaningful investments in the land that they access through their wives and may not even build a house on this land, as matrilineal custom dictates (Mbaya, 2002: 8; White, 2010: 16; MCI, 2010: 20; Linzi, 2011: 9; and Nyondo, 2012: 14). According to Maliro, M'chanju-Liwewe, Chirwa and Matenje (2003: 48), it is noteworthy that ownership entails having the power to make decisions pertaining to the use and disposal of the property in question, as well as being able to exercise control over the property. Additionally, it is often assumed that in patrilineal cultures, it is the men who enjoy stronger access and ownership rights to property (land). They are able to exercise control over the property be it how it should be used, and disposed. The

authors argue that from this perspective women in both matrilineal and patrilineal societies of Malawi do not have such powers, even though they are commonly thought to be the primary land owners in matrilineal communities and those who work the land in patrilineal communities. This is despite government interventions, including the drafting of a National Gender Policy, which was first introduced in 2000-2005 and again in 2006- 2011 and finally passed into law in February 2013. It provides for equal and secure property rights for both men and women.

According to Crenshaw (1989: 39), feminist theorist who first coined the term intersectionality, feminist research ought to consider the 'multidimensionality' of marginalised subjects' lived experiences. This study makes use of Crenshaw (1989), Hill (2000), Burman (2003), Bhavanani (2007), Davis (2008) and Hesse-Biber (2010) (among others) to look at the differences as well as the interconnections that configure women's experience around land and housing. Together with Bourdieu's notions of 'habitus' and 'field' as part of the conceptual framework, it provides a way of understanding the setting within which the women and men under study, are located. Here the study draws especially on his 1990 book entitled *The logic of practice*. According to Bourdieu (1990), an individual's actions are shaped by the environment in which she or he lives, including influences exerted by principles or norms embedded in his or her culture. Various feminists have argued that Bourdieu's work offers relevant conceptual insights that are useful for determining the 'field' in which various gendered interactions are at play and could inform new directions for developing feminist theory (Lash 1995; Moi, 1999; Fowler, 2003; Adkins and Skeggs, 2004). This is in spite of the fact that Bourdieu himself did not deal in any significant way with the concept of gender in his work. Walker (2009: 470) proposes that understanding women's rights to property such as land, as these my study, requires engaging with 'gender' as a primary construct but, equally importantly, it also requires understanding the significance of the social, demographic and spatial changes that have reorganised relationships within families and households over time. She further argues that 'women' do not constitute a simple social category and should thus not be treated as a homogenous unit. According to her, women's interests in property (such as land) vary. Their interests in land are shaped by complex intersections amid various issues, including the broader economic context, their social location, and the effects of social change on family forms and household structures. Thus, there are various intersections that affect women as well as men's experiences which could include, religion, gender, race, ethnicity among others.

### **3. Methodology**

This study employed mixed method approach. The mixing was at various levels. Firstly, the mixing was in terms of the approach in which the qualitative was of a greater magnitude than the quantitative aspect. Secondly, the mixing was at the level of data collection in which qualitative data was sourced through semi-structured interview schedules, Key informant interviews as well as Focus Group Discussions comprising of at least 8 people per group. This also meant that this triangulation of data collection methods assisted in yielding valid as well as reliable results. The main purpose for sourcing qualitative data was to describe the what is happening around issues of land as experienced by citizens as well as key informants and making explanations possible. The quantitative data was sourced to give a picture of how much the suggested strategy adopted by formal structure and institutions through legislation seems to be capable of yielding the intended goals. Sampling was done using purposive sampling. After data was collected it was cleaned to eliminate any errors

and it was then coded ready for analysis. The analysis was done using SPSS and thematic analysis was also employed and analysed against the conceptual framework and emerging themes were identified from the findings.

#### **4. Findings and discussion**

##### *4.1. Experiences and practices around issues of access to and ownership rights to land in Malawi*

In this study, it was found that there are varying experiences and practices around issues of access to and ownership rights to land in the studied areas. In almost all the areas which practice matrilineal cultures and consequently follow matrilineal forms of inheritance, in practice, residents explore various options at their disposal. For instance, in Muluwira village in Zomba district, about 26 out of 33 men said that as men they find ways in which they “run away” from staying at their wives’ maternal homes for fear of being controlled by their in-laws. The strategies that the employ is either to ask their in-laws that the should excuse the man to build a house later because they do not have the resources for building or they ask for permission to build at a neutral place citing that they need to be near their work place. The study found that for those who had been engaging in such practices, when their marriages dissolve whether through divorce or death of the spouse, the woman in question is not able to claim her access nor ownership rights to land that the husband bought. A similar pattern was observed in household in the patrilineal communities. In these communities, it was found that, since customarily, in patrilineal communities, it is the men that make decision powers over land, when they die, the families of the deceased claim ownership rights to land leaving the woman in question without land which could have assisted her. In this study, it was found that at least 23% of the women married in these patrilineal communities remained with user rights to land which they had when their husbands were alive but lost even the user right to land when they decided to re-marry. This illustrates what Bourdiue submitted that often, in communities, it is the people living in that community that may understand the hidden strategies and tactics that the actors implore to have an advantage over situations getting around laws, norms, beliefs. Often these are not considered by policy-makers. In this regard, structures, formal reforms that government agencies, and other stakeholders may come up with may not necessarily yield the intended effects.

##### ***Corruption***

Another theme that come up strongly through out the areas of study was the issue of corruption. Respondents from both the patrilineal as well as the matrilineal communities claimed that corruption is rampant. In one of the matrilineal communities, a young divorced woman narrated how her own uncle who was her aveculate/ marriage counsellor received a bribe of MK500 from her husband when processing their divorce and lost her land. Corruption cases were also cited in cases when divorcing parties go to courts and often the woman in question would not have a fair share of property (land) after divorce.

#### **5. RECOMMENDATION**

As can be seen from these studies, the land question goes beyond reformulating policies and structure. It require a deeper understanding of the social relations and strategies employed in the every day experiences of both men and women. We

recommend that government should incorporate its citizens right from identifying and conceptualizing problems and solutions concerning land otherwise government's efforts will keep on having beautiful policies on paper which will not be effective nor useful to its citizens.

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