
**REALISING WOMEN'S ACCESS TO LAND: A CRITICAL ANALYSIS OF THE
MALAWI CUSTOMARY LAND BILL**

BY

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Abstract

This thesis presents the findings of a study conducted to critically analyse the proposed Malawi Customary Land Bill with the aim of understanding how the formalisation of land under the Bill will affect women's access to land and land rights in general. Taking women's experiences as the starting point, the study engaged women from matrilineal and patrilineal societies to appreciate how they negotiate their land rights in these societies and the effect that the land formalisation process will have on them.

Formalisation of land under the Bill poses a threat to women's access to land in both societies through its having differing effects on women. Despite section 21 providing for equality in the allocation of customary estates, men and women's ability to take up such an opportunity is different with women being the least able to do so. The patriarchal nature of these societies is a huge obstacle to women's access to land and the Bill will further legitimate men's ownership of the land. Women are also not a homogenous group leading to a difference in how different groups of women experience similar land related problems. Women will end up having secondary land rights resulting in others determining their access to land. It is thus necessary to ensure that such programmes are engendered so as to achieve substantive equality for both men and women; equality of opportunity is not enough if there is no equality of results.

Declaration

I, THERESA CHIMWEMWE CHOME, do hereby declare that this dissertation is my original work and has not been presented or submitted anywhere else before for the award of certificates or any other form of assessment.

Signed.....

Date:

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Supervisor.....

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Dedication

To my parents, Janet and Felix.

To Almighty God,

*'Your grace abounds in deepest waters, Your sovereign hand has been my guide, where feet
may fail and fear surrounds me, You've never failed'.*

Hillsong: Oceans (Where Feet May Fail)

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To the women in Nsanje and Thyolo who gave their time to share their amazing life stories, thanks for making this work possible.

List of acronyms

BPFA	Beijing Platform for Action
CBRLDP	Community Based Rural Land Development Programme
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
GoM	Government of Malawi
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner on Human Rights
SADC	Southern Africa Development Community

List of statutes and policies

The Constitution of the Republic of Malawi

The Land Act

The Customary Land Bill, 2010

The Land Bill, 2010

The Gender Equality Act, 2012

The Deceased Estates (Wills, Inheritance and Protection) Act

The Malawi Land Policy, 2002

The Malawi Draft Gender Policy, 2012-2017

Nsanje District Socio-Economic Profile 2009-2012

Thyolo District Socio-Economic Profile 2010-2013

List of international and regional instruments

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (African Court)

Beijing Platform for Action adopted at the Fourth World Conference on Women, 27 October 1995, available at: <http://www.refworld.org/docid/3dde04324.html> [accessed on 18th February 2014]

Convention on the Elimination of All Forms of Discrimination against Women, G.A. res.34/180, 34 U.N. GAOR Supp. (No.46) at 193, U.N. Doc. A/34/46, entered into force Sept, 3, 1981

CEDAW General Recommendation No. 21 Equality in Marriage and Family Relations U.N. [Doc.A/49/38@1](#)

CEDAW General Recommendation No. 25 on Article 4, paragraph 1 on temporary special measures U.N. [Doc.HRI/GEN/1/Rev.7@282](#) (2004)

CESCR General Comment No. 16 Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights (Thirty- fourth session, 2005), U.N. Doc. E/C.12/2005/3 (2005)

Human Rights Committee General Comment No. 28 Equality of rights between men and women (article 3), (Sixty-eighth session, 2000), U.N. Doc.CCPR/C/21/Rev.1/Add.10 (2000)

International Covenant on Civil and Political Rights Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, [6 I.L.M. 368](#) (1967)

International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, [6 I.L.M. 360](#) (1967)

Protocol to the African Charter on the Rights of Women in Africa (African Women Rights Protocol), CAB/LEG/66.6 (Sept. 13, 2000)

SADC Protocol on Gender and Development SADC/M/2007/GAD/2

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Executive summary

The land reform programme in Malawi aims at establishing a sound institutional framework aimed at the democratisation of land management, land tenure protecting procedures and land-based investments and management at all levels (GoM Land Policy, 2002). Protecting and securing land tenure is seen as being made possible through the formalisation of title. The proposed Customary Land Bill is intended to achieve these goals by formalising customary land title through the creation of customary estates. The Bill goes further in section 12 to provide for more than one category of land holding that can be established under Traditional Land Management Areas. It may provide for communal land which is available for use and occupation on a communal or public basis; land being used by an individual or family or a group of persons under customary law and land available for communal or individual use through allocation by customary land committees.

Section 21 of the Bill provides for equality in the determination of applications for customary estates. This paper presents the findings of a study conducted with the aim of critically analysing how formalisation of land under the Bill will affect women's access to land and land rights in general. It argues for the need to engender the land reform process and the Customary Land Bill with the aim of achieving substantive equality for both men and women by ensuring an equal starting point for men and women.

The research paper is presented over five chapters. Chapter One provides an introduction and background to the study as well as the research assumptions and questions and the aim of the study. Chapter Two discusses the human rights, legal and conceptual framework followed by Chapter Three outlining the methodology used in conducting the study. Chapter Four provides a presentation and discussion of the findings and drawing the links between the findings and formalisation of land rights and what it means for women's access to land and land rights in general. The final chapter draws conclusions from the research and suggests a number of interventions aimed at securing women's land rights under the reform programme.

The research was conducted in Nsanje and Thyolo districts, two of the 28 districts in Malawi, which are predominantly patrilineal and matrilineal, respectively. Adopting the women's law approach to research, the study took women as the starting point in appreciating their current

land rights. In addition to this an understanding of how men and women negotiate their land rights at present and the effect of land formalisation was also important which necessitated sex and gender analysis.

The findings of the study indicate that men and women experience land problems differently such that gender neutral laws and policies have the effect of leaving out women as beneficiaries. For instance, as a result of customary practices in patrilineal societies, many women do not own land as individuals leaving them reliant on accessing land through their male relatives. Hence, a law allowing them to own land would be to their advantage. Though, regard must be had to customs that prevent women from being allocated and owning land. On the other hand, custom provides women in a matrilineal society with the ability to own land as individuals though in trying to achieve equality, giving men an equal opportunity as women will end up taking away what women have always had.

Secondly, the study also revealed the non-homogeneity of women along cultures/customs, age, marital status, geographical location as well as economic status. Depending on the character, some women suffer multiple/intersectional discrimination as a result of not only being women but also as a result of belonging to any of the groups above. For instance, the geographical location of the two districts as well as land pressures make women in these districts more vulnerable to land problems. Hence, questions have to be asked such as how such women, who are landless due to land pressures, can secure their interests in land which they do not have when compared to their colleagues in other districts where land is not as scarce.

Related to this, pressure on land and land related resources is a problem in both districts and has led to the creation of alternative land access paths apart from family allocations. Such paths include land rental/sale markets. It was revealed that women do not fully benefit from such paths due, for instance, to their weak financial muscle. Land formalisation creates land markets and women's ability to engage is crucial and this cannot be possible if they are economically weak.

In addition to this, the research revealed that there was a lack of or no participation in the land reform process by the communities. This is very crucial as participation and access to information are crucial elements of a human rights based approach to women's land rights.

Their lack of participation risks resulting in a lack of understanding of their rights and how they can enforce them, thus putting in doubt how effectively the law can be applied.

The research further revealed the preferred registration patterns between men and women with men preferring to register land as individuals and women as a family or in their children's names. Drawing from the gendered relations in these societies, women risk losing out, as many decisions relating to land are made by men.

The study concludes by noting that the land formalisation process as provided for under the Bill risks not benefitting women if adopted in the suggested manner which, for instance, leaves many women with no land over which to secure their interests. The gender neutrality of the Bill and reform process will not translate into substantive equality for men and women. Unless positive customary law is adopted as the standard, women risk losing out as owners of land. There is also a need for communities, especially women, to actively participate and inform the reform process. Women's ability to engage in the land markets is also crucial, hence the need for economic empowerment programmes. Government must also consider carrying out land resettlement programmes as a form of affirmative action which aim at allocating land to the landless, especially women over which they can secure their interests.

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CHAPTER ONE

1.0 INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

‘When we ask whether a social or legal practice works, we must ask ourselves, “works for whom?” Who benefits and who loses from existing political, economic, and legal structures?’

Singer (1990: 1841).

The Malawi Land Policy of 2002 provides a starting point in Malawi’s quest for a land law that is comprehensive and of economic and social significance. It also aims at establishing a sound institutional framework aimed at the democratisation of land management, land tenure protecting procedures and land based investments and management at all levels (GoM Land Policy, 2002). The focus is on providing for secure tenure through the formalisation of title. The policy provides for securing customary land tenure with the creation of customary estates. The same is also replicated in the proposed Customary Land Bill 2010. The Bill provides an interplay between formal and customary law towards securing people’s access to land as it allows for the application of customary law. Others have argued that this Bill and the land reform will not realise women’s land rights (SADC Gender Barometer Malawi, 2013).

The Bill has since not been tabled by Parliament as it was sent back for re-drafting , and so the present study seeks to understand how best the Bill can benefit women in both matrilineal and patrilineal societies.

1.2 Location of the study

The research was conducted in two districts, namely Nsanje and Thyolo, as represented in the map below (Figure 1).

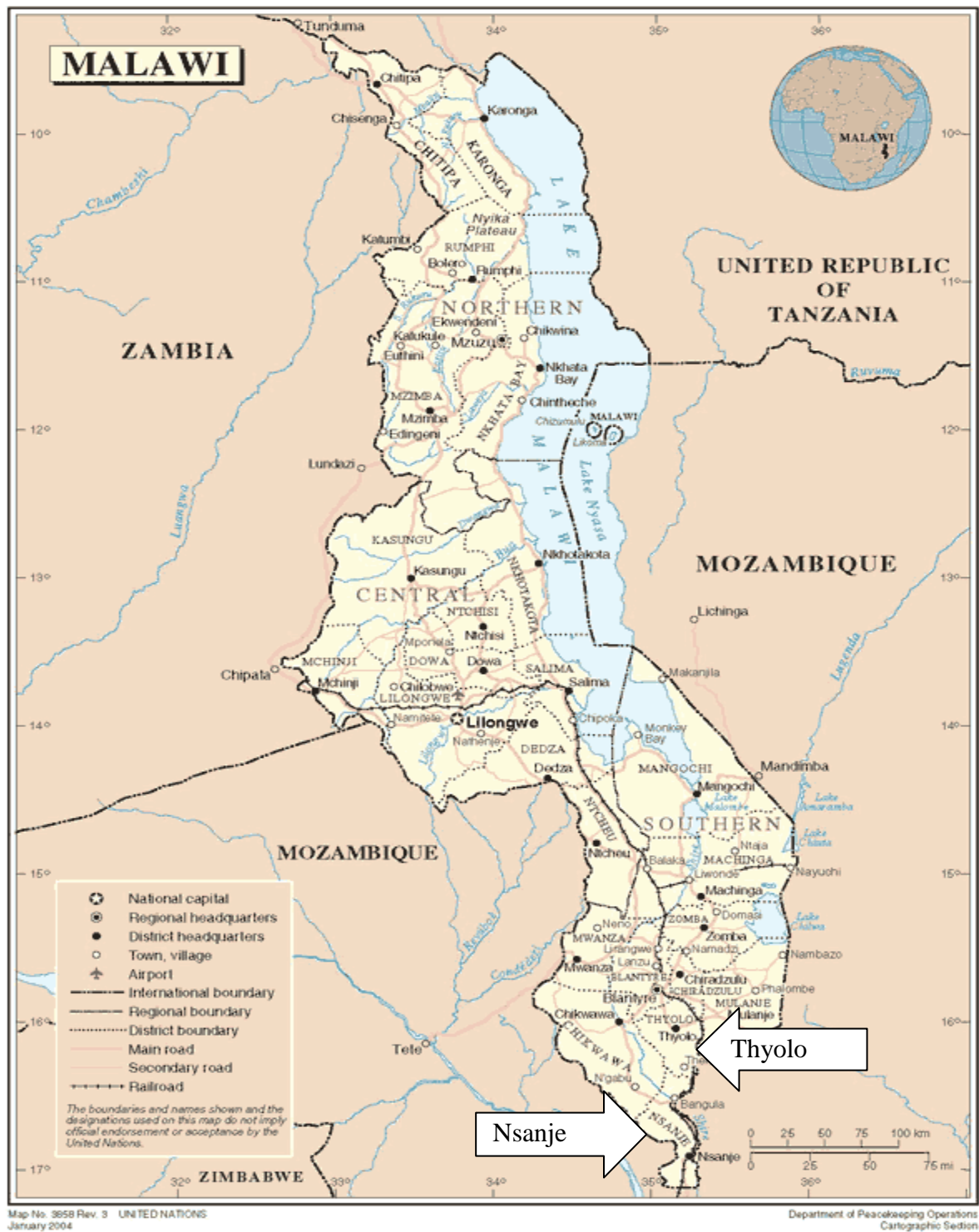


Figure 1: Map of Malawi indicating the two study districts

Nsanje and Thyolo are two of the 28 districts in Malawi. The people in these two areas follow different cultural/customary practices which is crucial considering the stance taken by the

land reform programme that the applicable customary law shall be that prevalent in particular communities.

Nsanje is dominantly patrilineal with inheritance of property devolving along the male line. On the other hand, Thyolo is matrilineal in nature where property inheritance devolves along the female line. There are differing rights related to land that derive from such customs for women as will be seen in chapter four which presents the findings, hence, the present study's need to not essentialise the women in these two areas in relation to how the Bill will affect them. Thus, the two districts afforded a comparative approach to the study by understanding women's land rights in either system.

Secondly, land in the two districts is predominantly under customary tenure as compared to public and private land as per the current tenure systems under the Land Bill of 1965. According to the Socio-economic Profile for Nsanje District, 60% of land in the district is customary land, compared to 86% in Thyolo (Thyolo Socio-Economic Profile), which signifies the huge impact that the land reform programme has on people living in these two districts.

1.3 Statement of the problem

Recognizing the gendered nature of social relations in society, the land reform process and the Customary Land Bill 2010 will have differing effects on men and women's access to land. In addition to this, different women will be affected differently by the proposed law and of particular interest here are women in matrilineal and patrilineal societies.

It is assumed that under formalisation women in matrilineal societies will be able to achieve formal recognition of their land rights. However, granting an equal opportunity to both men and women in terms of acquisition of land which can be secured will result in these women losing claim to the rights they have been able to claim from inheritance under the matrilineal system as land devolves through the female line. It is argued in this paper that titling which extends land rights to men will result in land no longer devolving along the female line thus women in the matrilineal system losing out. In patrilineal societies it is argued that granting an equal opportunity to men and women will not result in equal results for men and women as most of these women do not currently own land since land devolves along the male line.

This will further be affected by the application of customary law which discriminates against women in the allocation of land. Whilst providing for an equal opportunity in section 21, the Bill fails to take recognition of the existing gendered relations that may not allow women to fully participate in the formalisation process.

Thus, whereas the provisions in both the law and policy are gender neutral and appear to achieve gender equality, there are inherent inequalities for women which will not result in the achievement of substantive equality. Hence it is argued that the Bill will result in women not having secure access to land due to their inability to participate equally in the land formalisation process, hence, their access will be dependent on land owned and controlled by others.

1.4 The aim of the study

The study aims at critically analysing how the formalisation of land under the Customary Land Bill (and the land reform process as it relates to customary land) will affect women's access to land and land rights in general.

1.5 Research assumptions

The following assumptions guided the research process:

1. The Customary Land Bill and Land Policy are gender neutral and fail to recognise women's special circumstances and non-homogeneity in matrilineal and patrilineal societies which will affect women's ability to access land.
2. Women are able to negotiate their access to land under the current land administration regime in matrilineal systems.
3. Women in patrilineal systems access land through male relations.
 - 3(a) The land reform process will entrench this since it is the men who are likely to register land following custom.
4. Women in both systems will lose their decision making power over land in terms of sale and disposal as a result of lack of legal ownership since they will not have land registered in their names.
5. That unless formal law engages with positive living customary law which safeguards women's land rights, women will not benefit from the land reform programme.

6. That the land reform programme and the Customary Land Bill must be gendered if it is to achieve substantive equality.

1.6 Research questions

The following questions were useful in directing the research process:

1. Do the Customary Land Bill and Land Policy take into consideration women's special circumstances and non-homogeneity in ability to access land in matrilineal and patrilineal societies?
2. Are women able to negotiate their land rights to own, access and control under the current land administration system in matrilineal systems?
3. Do women in patrilineal systems access land through male relations?
 - 3(a) Is the land reform process going to entrench women's reliance on male relations to access land since men will register the land in their names?
4. Are women likely to have decision making power over land usage and/or disposal if they do not have legal ownership over the land?
5. Does the engagement between formal law and positive living customary law have the potential of safeguarding women's land rights?
6. Will the gendering of the land reform programme achieve substantive equality for women's ownership, control and access to land?

1.7 Conclusion

This chapter has given a brief background to the study by highlighting its aim as well as the research questions and assumptions. From the above introduction as discussed it can be seen that the role of customary law as well as human rights must be examined to recognise existing women's land rights as well as those that can be foreseen as emanating from the Customary Land Bill.

CHAPTER TWO

2.0 HUMAN RIGHTS, LEGAL AND CONCEPTUAL FRAMEWORK

2.1 Introduction

This chapter aims at engaging with the different concepts, human rights and theories informing the study. In addition to this, a discussion of the relevant policy and legal framework related to land reform in Malawi will follow.

2.2 Land reform in Malawi

Land Reform has been defined as narrowly referring to measures undertaken to redistribute land in favour of peasants and small farmers for purposes of achieving greater equality or social justice (Zarin & Bujang, 1994). However Zuka (2013:162) adopts a definition of Land Reform describing it as aimed at changing land tenure and distribution to achieve efficiency and equity in use of land and landed resources. Thus, it encompasses not only land distribution but also improvement of land user and ownership rights. An example of the former can be given of the Fast Track land reform programme undertaken in Zimbabwe. However, the present study concerns itself with the latter type of land reform involving land formalisation undertaken by the Government of Malawi in relation to customary land, though reference will at some point be made to the Government's initiative towards land distribution and resettlement schemes through the Community Based Rural Land Development Programme (CBRLDP).

Land formalisation as a process for securing land tenure represents a neo-liberal approach to development. Haque (1999:203) defines a neo-liberal approach to development as follows:

‘Neo-liberalism is an ideological position based on strong beliefs in the promotion of the general good by following the principles of free market and open competition, limited state intervention and welfare, individualistic self-interest, rational utility-maximization, and comparative advantage in free trade.’

Proponents of neo-liberalism argue that efficient markets lead to efficient outcomes (Stiglitz, 2002, cited in Silungwe, 2009: 4). A number of policies and reforms whose purpose is to

achieve economic stability and growth are informed by such neo-liberal approaches, one of which is the establishment of clear property rights regime (Purdy, 2004:3).

Here reference can be made to the work of Hernando De Soto's Dead Capital Theory, in which he advocates for formal property rights over assets which he argues raises their value and converts them into 'live capital' as compared to 'dead capital' which he describes as that property held by the poor (2001). He argues that:

'because ownership of such property cannot be readily traced and validated, and exchanges cannot be governed by a legally recognised set of rules, their assets cannot be used in efficient and legally secured market transactions' (2001:13).

De Soto sees formalisation of property as being a catalyst facilitating access to credit as well as providing investment incentives. Institutions like the World Bank have also advanced similar beliefs, for instance in its 2013 publication titled 'Securing Africa's Land for Shared Prosperity: A Program to Scale up Reforms and Investments', the Bank argues that women are the biggest losers if land is not registered since customary laws keep these women out of owning land. However, critics of De Soto argue that formalisation basically serves the interests of the elite and not the poor and this led to the present study considering how women who rank highly amongst the poor relate to such markets among other elements. Silungwe (2009:14) argues that:

'a neo-liberal approach to customary land tenure integrates customary land into the global economy and ends up benefitting the non-poor.'

Gilbert (2002: 9) considers the costs that are involved in obtaining title and whether the poor in society would be able to engage in such markets. Informed by feminist thought specifically related to intersectionality, the present study appreciated how women who are vulnerable to multiple discrimination/marginalisation would relate to such formalisation.

As a way of safeguarding the poor's interests, Silungwe suggests that a way of protecting citizens is through the creation of a trust over all land in Traditional Land Management Areas with traditional leaders as the public trustees over their communities. Thus, traditional leaders would be in a fiduciary relationship to members of their community hence safeguarding community land interests. This is actually what the Policy and the Customary Land Bill have

adopted. However, as this research intended to explore while this may uphold interests over the whole land management area for the entire community, it is still necessary to consider how different individuals and women in particular will negotiate their land rights under such a regime.

It is therefore necessary at this stage to briefly discuss how land formalisation has been reflected in the Malawi land reform programme as set out by the Government starting with the 2002 Malawi National Land Policy followed by the Customary Land Bill itself.

2.2.1 The Malawi National Land Policy

The policy was formulated by the Ministry of Lands, Physical Planning and Surveys with the expectation that it will operate together with legislation that is yet to be passed. Its aim is to give essence to Malawi's quest of establishing land law which is comprehensive and of vast economic and social significance (GoM Land Policy 2002: 1). It has an ultimate objective of ensuring that there are equal opportunities in the acquisition, use and enjoyment of land by all citizens. In relation to this, one of its guiding principles relates to the rights of vulnerable groups where it calls for a clear policy on gender access and the rights of children and the disabled to be considered in policy planning and implementation strategies (GoM Land Policy 2002: 4). The policy framers recognised that women, children and the disabled are denied their rights on the basis of customs and traditions or are disregarded due to prejudice and lack of effective representation. Such a stance reflects the policy's movement towards equal land rights and this will be looked at in relation to the concept of equality.

The Policy recognises three categories of land, namely, Government, Public and Private land. Government land is defined as land which Government acquires and owns privately for specified national uses such as land where government buildings, schools are allocated as well as land which the Government leases to individuals or institutions for which the latter pay ground rent (GoM Land Policy, 2002:iv). Public land is that which is held on behalf of the people of Malawi by traditional leaders and public officials who have the authority to grant leaseholds and permission to use such land to people as well as management of the land. Examples include land for national parks, forest reserves, dambos, grazing land, etc., which are used openly and are accessible to the general public. On the other hand, private land comprises land held, occupied or held under freehold tenure, customary land as well as leasehold estates. Customary land is defined as:

‘land allocated exclusively to a clearly defined community, corporation, institution, clan, family or individual’ (Land Policy, 2002: 13).

These exclusive allocations of customary land as provided for in the above definition will formally be known as ‘customary estates’. The policy provides that customary landholders who register their land as customary estates shall have private usufructuary rights in perpetuity and the title owner shall, following registration, have full legal status and can lease or use the land as security for mortgage loan (GoM Land Policy, 2002:14). However, it has been argued, and rightly so by Silungwe (2009), that a usufruct cannot accrue to an owner because those with individual titles cannot be said to have usufructuary rights since these arise as inferior interests in land legally owned by another.

In their report, the Law Commission on the Review of All Land Related Laws (2010) recommended that land be divided into two categories, that is, public and private with the effect that Government land as provided for under the policy falls under public land. The proposed Land Bill 2010 (section 2) refers to customary estates as falling under the ambit of private land whilst unallocated and communal land under Traditional Land Management Area falls under public land. On Traditional Land Management Areas, the policy aims at recognising the authority that traditional leaders have over the land as well as providing formal and well regulated land administration structures. The policy provides that land falling under these Traditional Authorities shall be demarcated and registered as falling under their jurisdiction with such areas being officially known as ‘Traditional Land Management Areas’ (2002:14). The Land Bill adopts a definition along these lines in section 2.

The Customary Land Bill 2010 goes further to provide for the divisions of land holding that can be established under these Traditional Land Management Areas. Under section 12 provision may be made for communal land which is available for use and occupation on a communal or public basis; land being used by an individual or family or a group of persons under customary law and land available for communal or individual use through allocation by customary land committees.

Therefore, land rights can be derived from individual, family, group or communal ownership of land through allocation by Land Committees from the land falling within the Traditional

Land Management Area. Formalisation and securing land interests can thus be done as an individual, family or group.

2.2.2 The Customary Land Bill, 2010

The aim of the Bill is to provide procedures for managing and administering customary land and other related matters. The Bill in terms of section 2 adopts the definition of ‘customary land’ as that provided in the Land Bill 2010 as:

‘land used for the benefit of the community as a whole and includes unallocated land within the boundaries of the Traditional Land Management Area.’

The same is also true for the definition of ‘customary estates’ which is:

‘any customary land which is owned, held or occupied as private land within a Traditional Land Management Area and which is registered as such under the Registered Land Act.’

Part IV of the Bill provides for the grant and management of customary estates. Section 19(1) gives customary estates the same status and effect as a lease granted under the Land Bill. Going with the spirit of the Land Policy, section 19(2) of the Bill states that customary estates shall be allocated by a land committee to a citizen or family of citizens, a group of two or more citizens associated together under any law or not or a partnership or a corporate body, the majority of whose members or shareholders are citizens. Such allocations shall be made by the Committees following application by the relevant person or group as section 20(1) provides as follows:

‘Any person, family unit, a group of persons recognised as such under customary law or who have formed themselves together as an association, a co-operative society, or as any other body recognized by any written law, may apply to a land committee responsible for that land for the grant of a customary estate.’

Thus, the Bill provides that applications can either be made by individuals or groups of people and this requires the need for the present study to investigate and understand whether women will be able to register that is apply for such customary estates as well as what kind of land rights they will have secured under the Bill depending on the mode of registration. In similar fashion as that adopted by the policy as discussed above, the Bill seeks to achieve

equality between men and women by providing in section 21 that applications for customary estates from men and women shall be treated equally. Section 21(2)(c) reads as follows:

- ‘(2) In determining whether to grant a customary estate, a land committee shall-
 - (c) have special regard in respect of equality of all persons, such as-
 - (i) treat an application from a woman, or a group of women no less favourably than an equivalent application from a man, a group of men or a mixed group of men and women; and
 - (ii) adopt or apply no adverse discriminatory practices or attitudes towards any woman who has applied for a customary estate;’

To classical liberal feminists, such a proposed law whose content attempts to remove bias and discrimination with the aim of ensuring that men and women receive equal treatment before the law would seem adequate in ensuring women’s land rights. Guided by the theory’s emphasis on equality of opportunity, I sought to understand whether section 21 would achieve the desired results. Questions were asked to understand whether treating women the same as men achieves the wanted outcomes or whether this merely perpetuates the existing gender hierarchy (McConnell, 1997:301). At the same time, considering that the study was conducted in matrilineal and patrilineal societies, regard was given to the fact that women do not share the same inherent characteristics therefore there was a need not to essentialise women. An understanding of the context within which women to whom the proposed law will apply is pertinent to avoid generalising the effect it might have on them.

This necessitates an understanding of how the principles of non-discrimination and equality in relation to section 21 which it is argued takes a formal equality approach to land rights as compared to a substantive equality one. Ikdhal *et al.* (2005) note as follows on the importance of ensuring non-discrimination and equality in the enjoyment of women’s land rights:

‘Of paramount importance in regard to all these dimensions of the right to land is *the principle of equality and non-discrimination*. These rights constitute an interrelated and indivisible whole, setting standards that have a bearing on land reform in terms of non-discriminatory principles of distribution, and the establishment of secure tenure on an equal basis.’

In the present study these provide a yardstick for testing whether section 21 of the Bill and the Land Reform Programme in general have the potential of achieving substantive equality for both men and women. Hence the next section seeks to discuss these concepts as well as provide an analysis in relation to section 21 of the Bill.

2.2.3 The principle of non-discrimination and equality

The principle of non-discrimination is provided in almost all the major international human rights instruments, for instance, article 2 of the UDHR, articles 2,3 and 26 of the ICCPR, articles 2 and 3 of the ICESCR, article 2 of the ACHPR, article 2 of CEDAW, article 2 of the Women's Protocol and the SADC Gender Protocol. An understanding of these principles provides a test as to whether section 21(2) of the Bill has the potential of achieving equal rights for men and women guided by liberal feminist's emphasis on equality of opportunity between men and women.

The CESCR clarified what the principles of non-discrimination and equality entail in General Comment No. 16 (2005) on Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights. The Committee noted as follows (paras 7-8):

‘The enjoyment of human rights on the basis of equality between men and women must be understood comprehensively. Guarantees of non-discrimination and equality in international human rights treaties mandate both *de facto* and *de jure* equality. *De jure* (or formal) equality and *de facto* (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.

‘Substantive equality for men and women will not be achieved simply through the enactment of laws or the adoption of policies that are gender-neutral on their face. In implementing Article 3, States parties should take into account that such laws, policies and practice can fail to address or even perpetuate inequality between men and women, because they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women.’

In addition to the above, the CEDAW Committee in its General Recommendation No. 25 on article 4 (1) of CEDAW on Temporary Special Measures further elaborated the principle of non-discrimination as well as achievement of equality between men and women. In its paragraph 8, the Committee noted:

‘In the Committee’s view, a purely formal legal or programmatic approach is not sufficient to achieve women’s de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.’

In advancing substantive equality of opportunity over formal equality of opportunity, theorists like Koggel (1994:45) argue that:

‘this aims at questioning the formal equality theorist’s account of individual freedom by showing the ways in which wealth, talent, education and stereotyped perceptions all work to limit the opportunities of some individuals namely members of groups who have suffered a history of disadvantage, marginalisation and discrimination.’

Sandra Fredman (2009:417) argues as follows in relation to the insufficiency of applying equality with the aim of merely extending rights to women:

‘This is because, to address the gendered nature of social institutions, it is not enough to treat women in the same way as men. Instead, a much more substantive approach to equality is required, which demands restructuring of institutions. A substantive approach to equality, in turn, entails a reconceptualisation of the rights themselves. Rather than regarding socio-economic rights as bundles of goods to be distributed in different ways, it is argued that engendered socio-economic rights should take into account the ways in which goods and opportunities can in fact be enjoyed in the context of the actual relationships in which women live.’

She then proceeds to outline the meaning of substantive equality as compared to formal equality as follows (2009:419):

‘First, substantive equality takes into account existing power structures and the role of gender within them. Far from being irrelevant, gender may be highly relevant in addressing inequalities in society. Second, substantive equality does not simply aim at equal treatment. Where equal treatment leads to disadvantage for women, it may be necessary to treat women differently in order to achieve equalities of outcome. Third, substantive equality moves beyond the need for a male norm. In its transformative form, substantive equality requires social institutions to change, rather than expecting the individual to conform. Fourth, substantive equality is not neutral as to the outcome. Equality cannot be achieved by treating all equally badly, or by removing benefits from the advantaged class. It is substantive in the sense that it advances individuals rather than formal equality which only ensures consistency.’

Applying this understanding to land reform would encompass moving beyond the formal laws providing for equality between men and women to transforming the structures and relations on the ground that determine access, control and ownership of land. The above sentiments are crucial in appreciating whether having a law that provides equal opportunity for men and women (as does section 21) by advancing non-discrimination will have the same effects for men and women. For instance, considering that under custom in patrilineal societies, women cannot be allocated land, it is pertinent to consider how these women will be able to register their land interests just like men as provided under section 21 where such customs are followed. These women will in essence have such a law in operation but their being landless will stop them from benefitting equally with men. This is further so considering that section 19(3)(a) of the Bill provides for the application of customary law when dealing with customary land.

This also necessitated an understanding of the situation of women who may not benefit as a result of multiple oppressions, for example, due to gender, financial standing as well as their cultural orientation. For example, due to their being poor, these women may not be able to buy land in the formalised land markets as envisaged by the formalisation process. Thus, formal equality through the inclusion of section 21 may not result in the achievement of substantive equality in cases where the context in which women find themselves does not provide an enabling environment.

This section has discussed how land formalisation is envisaged under the Customary Land Bill with rights being derived from land within Traditional Land Management Areas. It has

also engaged with the concept of substantive equality and its role in ensuring women's land rights. The next section seeks to discuss a number of concepts assisting in the analysis of the land rights provided for under the Bill.

2.3 Conceptual framework

2.3.1 Access, control and ownership

This section aims at discussing the concepts of access, control and ownership with the aim of understanding how the same are made available under the Bill in relation to property rights.

2.3.1.1 Access

Defined as referring to the availability for use, access to land is crucial in the present case for the purposes of understanding how women are currently accessing land and how land access will be affected by the Bill should it become law. There are various ways through which people access land and these are predicated on the type of land rights that one has over the particular piece of land. There are primary land rights which give direct access to the resource and include rights to bequeath, sanction and dispose, whilst secondary rights are restricted to use rights (ILC, 2011). As can be seen, the latter type of rights is dependent on others who own and control the land in question to exercise their discretion whether to allow use or not. In relation to women, this depends on the different social relationships that act in either constraining or enabling them to use and benefit from the land resources. For instance, patrilineal societies reveal how women's relationship to their male relatives/husbands determines their access to land, which is basically dependent on usufructuary land rights.

Engaging with the proposed land formalisation under the Bill, I sought to appreciate as to what type of land rights will be safeguarded for women by the Bill. As envisaged under the Bill, access to land will either be dependent on one owning the land as an individual through individual titling or it may depend on being granted user rights under family or communal titling with the possibility of being a joint owner under the family or group titling. Thus, a need to understand how women's access to land will be guaranteed or not whether under individualised, family or communal titling arose by engaging the current land access paths for women in both patrilineal and matrilineal systems. This was also necessary in answering the question of whether women will either have primary or secondary rights over land depending on the type of formalisation and how the same secures their access to land.

2.3.1.2 Control

Kameri Mbote (2005:10) notes that:

‘control entails the power to distribute and redistribute access rights to members of the society with such power being determined by the power relations between community members.’

These power relations are in many cases gendered in that it is men who exercise authority in many societies as it is they who predominantly have primary rights over land in question. Previous research has shown that despite women having access to land and using it, they do not have control over land as well as its products or even to own it such that their access to land is not secured (Budlender & Alma, 2011:3). This means that women’s access to land remains conditional as it is dependent on those who have the power over the land in question. As such, I was able to explore currently who has control over land and land related resources in both systems and the effect the Bill has on these.

Custom has often been faulted as granting males control over land resources, especially in patrilineal societies where land devolves along the male line. Hence, reversion to customary tenure systems has been faulted as taking place without recognising the inherent biases of customary systems (Whitehead and Tsikata, 2003). However, it was also pertinent in the matrilineal system to appreciate the power that older male relations exercise over land despite the fact that land devolves along female lines. It is important to recognise the prevailing situation amongst men and women relating to control over land and land related resources. In the light of the Bill, primary rights over land would be available to those able to title land so as to have exclusive rights over that piece of land. With such rights granting one rights derived from owning the land in essence the ability to exercise control over the land.

However, considering gender relations, it is necessary to investigate how existing power relations within society will impact both men and women even in cases where women are able to title land as individuals. At the same time, regard being had to Carol Gilligan’s work which proposes that men and women differ as groups in the way they reason and see themselves (Gilligan, 1982 in Ortiz 1995), there is a need to realise the role this may have on women negotiating their land rights. The assertion that unlike men who see themselves as autonomous, free standing individuals, women see themselves as joined in complex webs of

relationships is pertinent in understanding how men and women view the preferred modes of registering land as well as how women negotiate their land rights even in situations where they are not the owners of the land.

2.3.1.3 Ownership

Tay & Kamenka (1988:1) define ownership as:

‘...the *prima facie* ultimate power and right to use, control, enjoy and exclude others. It is a relationship both to the item owned and to other people. There is no ownership where it is impossible, in logic or in fact, to reduce something to possession and control.’

Thus ownership shows the privileged connection that those who own have to property which gives them the power as well as the right to exclude from, control and dispose of such property from those who do not have this connection. Ownership consists of a bundle of rights and powers as advanced by Honore (1961:113 cited in Bell & Parchomovsky, 2005:546) as follows:

‘Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary: this makes eleven leading incidents.’

Therefore, those having the privileged connection to property described above have these rights and powers which they can exercise over their property, basically having primary rights over land. As can be noted, having ownership gives one the power to choose who can access or use a piece of property and in the present case, land. In the same vein, they are able to have control over who can use the land, what it can be used for as the final decision lies with them. The titling of land either as an individual or as part of a group grants such owners these rights and powers. It cannot be overemphasised what difference ownership of land can make in women’s lives by protecting them against unwanted disposals and sales amongst others.

However, when one considers the power relations discussed in the section on control, formal ownership does not necessarily translate into actual control due to a number of factors. Gendered relations in society is one of them, in that granting ownership rights to women may

not translate to their being able to control and even access the resource as it will be shown later in the paper. At the same time, despite the differing power relations, one may also appreciate that an understanding of the concept of ownership helps in an analysis of the different relations over property between men and women and what this means for women's land rights.

2.3.2 Customary law

It is necessary to understand the concept of customary law in relation to the present study considering that the proposed Customary Land Bill clearly provides in section 19(3)(a) that customary estates shall be governed by customary law in respect of any dealings. The Bill does not provide a definition of what customary law is. However, the land policy does provide a definition of customary law as comprising 'the rules grounded in prevailing customs which are applicable to particular communities' (2002:13). Section 2 of the Land Bill makes reference to customary law to mean the customary law applicable in a concerned area. Thus, from the two definitions it can be seen that customary law is understood as it applies to specific communities. This is comprehensible in light of the fact that communities in Malawi differ in their applicable customs as being either matrilineal or patrilineal.

The policy goes a step further to shed light on the application of customary law in this manner:

'As a result, *customary tenure* is the right to own, use or dispose of land rights not based on documentary evidence guaranteed by government statute, but based on customary laws and on the fact that they are recognized as legitimate by the community, enforced in the customary courts, or even merely by social pressure and normally not recorded in writing.'

The above definition of customary tenure reflects the fact that the policy adopts an approach towards customary law as not being that recorded officially under statute. Thus, it leans towards accepting as customary law, laws which communities themselves recognise as legitimate and this refers to an adoption of living customary law as compared to official customary law as the one applicable in dealing with customary estates. Himonga and Bosch (2000) refer to living customary law as denoting people's practices and customs in their day to day lives. They thus adopt a definition of the type of law by Hamnett (1975:10) that:

‘customary law [which] emerges from what people do, or - more accurately - from what people believe they ought to do, rather than from what a class of legal specialists consider they should do or believe... [T]he ultimate test is not, “what does this judge say?” but rather “what do the *participants* in the law regard as the rights and duties that apply to them?”’

This is compared to official customary law which is used to describe the version of customary law which is based on the description of observers outside the communities in which the customary law in question is practised (Himonga, 2000). The distinction being that living customary law changes as it responds to current reigning values whilst official customary law remains more static and is often through a western perspective (Himonga, 2000). However, as can be noted, the Land Policy recognises that customary courts can define what the living customary law is.

In this paper I argue that whilst appreciating the adoption of living customary law as applicable is a plus for land reform as it reflects the practices of communities, caution must be exercised as regards for instance who gets to define what the living customary law is in the customary courts and whether such interpretation grants men and women equal land rights. This is specifically crucial considering the inherent biases that customary law has been known to keep. Hence, I argue towards an adoption of positive living customary law as the standard which grants and protects women’s land rights. Positive customary law is adopted to refer to the local customs or practices that contribute to the realisation of women’s human rights. This for instance seeks an understanding of family relations to appreciate how women negotiate their land rights.

2.4 Human rights based approach to women’s rights in land

This section aims at engaging with the international, regional and national human rights framework safeguarding women’s right to land as well as state obligations related to land reform issues. It has been noted that women’s access to, use of and control over land as well as other productive resources play an essential role in realising their right to equality as well as an adequate standard of living (UN, 2013). The same also comes with the recognition that enjoyment of land rights by women has an effect on other human rights such as the right to food, health, housing water, work and education amongst others. As an illustration, the Special Rapporteur on the right to food, Olivier De Schutter (2009, paras 2 and 31) articulated state obligations to respect, protect and fulfil the right to food and land as follows:

‘The right to food requires that states refrain from taking measures that may deprive individuals of access to productive resources on which they depend when they produce food for themselves (the obligation to respect), that they protect such access from encroachment by other private parties (the obligation to protect) and that they seek to strengthen people’s access to and utilization of resources and means to ensure their livelihoods, including food security (the obligation to fulfil).’

At the same time, as the Office of the High Commissioner on Human Rights notes that violating women’s human rights such as the right to information, participation, association, freedom from violence and education has the effect of preventing women from accessing land and other productive resources (2013). In the present context, attention should not only be given to granting women land rights without overlooking other human rights which facilitate the realisation of those rights. So, for example, women should participate in land reform programmes amongst others.

2.4.1 The international legal and policy framework

First and foremost, it is pertinent to note that there is no ‘right to land’ in international human rights law (OHCHR, 2013). There is however, a range of human rights instruments which aim either directly or indirectly to entail access to land for livelihoods, equitable resource allocation, return of dispossessed land to people as a result of colonialism amongst others (Derman *et al.*, 2013). Also of vital importance are state obligations towards the realisation of human rights related to access, use and control over land and other productive resources. Such state obligations are the obligation to respect (that is to refrain from interfering with the enjoyment of rights), to protect (that is to prevent others from interfering with the enjoyment of the rights) and to fulfil (that is the adoption of appropriate measures towards the full realisation of human rights). Hence, government initiatives such as land reform programmes in the present case must reflect the realisation of land rights for all.

There are a number of provisions in different instruments that have been laid out in international human rights instruments which aim at guaranteeing women’s access to land and land related resources and these will be discussed briefly as a way of laying the foundation of analysis of the Malawi land reform programme in general and the Customary Land Bill, specifically.

2.4.1.1 Selected human rights and policy instruments

2.4.1.1.1 *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS*

Article 17 of the Universal Declaration on Human Rights provides for everyone's right to own property either alone or in association with others. At the same time it protects people's right not to be arbitrarily deprived of their right to own property. This is vital as it reflects both men and women's right to own land as a form of property either as individuals or families, groups as proposed by the Customary Land Bill. Article 14(2) on rural women of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) states that:

‘States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development...’

The provision goes further to provide the need for states to ensure that amongst others the right to credit and loans facilities, education and the right to participation. Of vital importance is its recognition of the need for equal treatment in land and agrarian reform as well as in land resettlement schemes. This was of particular importance in the present study conducted in a rural area to understand the extent to which women have been considered in the land reform programme and its resulting effect on them as well as exploring whether will women are able to hold title to land both before and after the reform programme.

In addition to this, article 15(2) requires state parties ensure equality before the law and in civil matters by ensuring that women are accorded equal rights to conclude contracts and to administer property. Related to this is article 16(1)(h) which requires states to ensure that in marriage and family relations both spouses are accorded the same rights in respect of ownership, acquisition, administration, management, enjoyment and disposition of property. This is vital in the present study when dealing with customary practices related to inheritance of property amongst others which can also be viewed in light of article 2's requirement for abolition of customs and practices which discriminate against women.

2.4.1.1.2 *GENERAL RECOMMENDATIONS/COMMENTS*

Apart from the above provisions, there have also been a number of calls by bodies responsible for the implementation of international human rights treaties to ensure women's access to land and land related resources is realised. For instance in its General

Recommendation No. 21 on Equality in Marriage and Family Relations, the Committee on the Elimination of Discrimination against Women stated in paragraph 27 in relation to article 16(1)(h) that there is a need for countries which are undergoing agrarian reform or land redistribution programmes to ensure that the rights of women, regardless of marital status, to share in the redistributed land on equal terms are observed. This speaks of the need to realise the non-homogeneity of women in terms of their marital status and the effect such a status may have on their ability to benefit from land reform programmes. This meant that I had to understand how the land reform programme in Malawi treats the different types of women be it along cultural lines, marital status as well as economic standing just to mention a few.

In addition to the CEDAW Committee, the Committee on Economic, Social and Cultural rights (CESCR) in its General Comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights commented on article 11 on the right to an adequate standard of living. In paragraph 28 of the Comment, the Committee stated that the implementation of the right to equal enjoyment of rights as per article 3 in relation to article 11 requires that women must have a right to own, use or otherwise control housing, land and property on an equal basis with men as well as to access necessary resources to do so. In addition to this, the Human Rights Committee also emphasised women's right to own property in its General Comment No. 28 (2000) on equality of rights between men and women by stating that women's capacity to own property should not be restricted on the basis of their marital status or any other discriminatory ground.

2.4.1.1.3 POLICY INSTRUMENTS/DOCUMENTS

Further, apart from the human rights instruments and the general comments/recommendations, other contributions have come from international policy instruments or documents such as the Beijing Platform for Action adopted at the Fourth World Conference on Women (BPFA), the RIO+20 conference amongst others. For instance the BPFA in paragraphs 58(m), 61(b) and 165 (e) called upon states to ensure that women are able to obtain affordable housing and access to land as well as to embark on legislative and administrative reforms aimed at giving women equal access to economic resources, including the right to inheritance and ownership of land and other property. The RIO+20 Conference also saw heads of State and Government resolve to carry out a similar initiative to secure women's access to land and other resources.

In the same vein, though not provided for as a specific goal under the Millennium Development Goals, access to land especially for women is crucial in realising a number of Millennium Development Goals. For instance, Goal 1, eradicating extreme hunger and poverty requires secure access to land in that it recognises that agriculture is a means for eradicating extreme poverty and hence requires that women's access to land and other productive resources is improved so as to achieve the goal. In addition to this, Goal 3 on promoting gender equality and empowering women requires that women are also empowered to own property, to have a say in how property is disposed. Land reform programmes must be receptive to the need to achieve gender equality.

2.4.2 Regional legal and policy frameworks

On the African continent there are various human rights and policy instruments which also address the issue of women's access to land and land related resources and this part aims at a brief discussion of the same as they apply to Malawi. The African Charter on Human and Peoples Rights (ACHPR) provides a starting point on state duties as article 14 requires state parties guarantee people's right to property and provides that encroachment shall only be in the interest of the public.

The Protocol to the African on Human and People's Rights on the Rights of Women in Africa (the Women's Protocol) also addresses women's land and property rights. Article 15, which provides for the right to food security, requires state parties to:

‘ensure that women have nutritious and adequate food and as such states are required to take measures aimed at providing women with access to drinking water, sources of domestic fuel, land and the means for producing nutritious food.’

A link is drawn between access to land for women and food security. Also necessary specifically for the present study is the right to a positive cultural context (article 17) which further requires women's participation in the determination of cultural policies. In the present study, participation of women in determining cultural policies is vital in ensuring that only those policies that safeguard women's land rights are protected. This might involve dealing away with cultural practices, such as those allowing only male children to inherit property amongst others. The Women's Protocol takes another crucial step in article 19 on the right to sustainable development by providing that state parties take appropriate measures aimed at

promoting women's access to and control over productive resources such as land and guarantee their right to property.

In addition to the Women's Protocol, Malawi is also a signatory to the SADC Protocol on Gender and Development, article 6(b) of which provides for equality in accessing justice requiring that women are among other rights accorded the right to acquire and hold rights in property. Article 4(9)(b) calls for an equitable share of property between spouses for property acquired during the subsistence of their marriage.

Of specific focus however is article 7(9) providing for member states to ensure that, by 2015, they review all policies and laws determining access to, control of and benefit from productive resources by women so as to eliminate discrimination against women and girls with regard to water rights and property such as land and its tenure as well as guaranteeing equal inheritance rights for both men and women. Malawi has undertaken such steps for instance through the enactment of the Deceased Estates (Wills, Inheritance and Protection) Act by providing for equal inheritance rights the same way it has done in the Land Policy. However, as the present study proposes, the same has differential results for different women as it has the potential of denying some women land rights which they have always had. In addition to this, the jury is still out on how effective the law has been since its enactment.

2.4.3 The national framework

Apart from the Land Policy and Customary Land Bill it is necessary to engage with other laws and policies that the Government has adopted aimed at safeguarding women's land rights. The Constitution of the Republic of Malawi does not provide for a stand alone right to land. However, regard is had to section 28 which provides that every person shall be able to acquire property alone or in association with others. Particularly for women, section 24 accords women the right to full and equal protection of the law to enter into contracts as well as to acquire and maintain rights in property, independently or in association with others, regardless of their marital status. Granting these rights regardless of one's marital status is crucial considering the different treatment that women are given in society depending on their status and the multiple oppressions that one's status might bring.

One of the principles of national policy under section 13 of the Constitution is the achievement of gender equality. Section 13(a)(iii) provides that the state has a goal of

achieving gender equality through the implementation of policies aimed at addressing the rights to property. One of the policies adopted is the draft National Gender Policy (2012-2017) whose goal is the reduction of gender inequalities and enhancement of women, men, girls' and boys' participation in socioeconomic development processes (para 2.1:9). In its problem statement, the policy notes that despite studies indicating that about 70% of full time farmers are women, most women do not however take full control over the use and ownership of agricultural land and therefore the policy aims at ensuring that women and other vulnerable groups have access to and control over agricultural productive resources. However, the policy does not go further and explain how the same is to be achieved, though one could argue that the same could be achieved through engendering land reform programmes, i.e., that gender is mainstreamed into these reform programmes.

2.5 Conclusion

In a nutshell, this section has examined the legal and policy framework laying down state duties and responsibilities towards the realisation of women's land rights. At the same time it has also established the basis that women's land rights can be claimed from other human rights. However, having such de jure rights provided for does not automatically result in their de facto realisation hence the need to actively fulfil and realise women's land rights.

CHAPTER THREE

3.0 THE RESEARCH ROUTE

3.1 Introduction

This chapter aims at discussing the methodologies employed during the research process by looking at the data collection process as well as the methods employed based on the research assumptions described in chapter one.

3.2 The data collection process

The research was conducted over a period of four months from October, 2013 to January 2014. As stated earlier the study was conducted in Nsanje and Thyolo but specifically in Chazuka village and Sub/TA Ngolongoliwa in the two districts respectively. I adopted a qualitative approach to the research which involved understanding women's experiences in relation to land access, control and ownership. This was aimed at reaching a deeper insight on land issues and appreciating how people relate to one another in connection with land.

In addition to this, at the research design stage, I had to predetermine my targeted respondents based on the assumptions and probable questions which were to be interrogated in the field. I therefore employed a purposive sampling approach to the research which involved selecting informants based on important characteristics under study. This led me to identify the following as my informants: women, and in this case rural women, considering that the study was located in rural areas but within the category of women I was also able to identify the type of rural women in categorising data in terms of their age, economic standing so as to understand how different groups of women related to the study.

Apart from women, I also included men on my list of informants so as to have a sex and gender analysis of both men and women's land rights. In addition to the above, the study also targeted government officials especially from the Ministry of Lands and Ministry of Gender, traditional leaders were also selected to assist in understanding customary law but also considering that they are the custodians of customary land, non-governmental officials were also selected considering the work some of them have done towards the land reform

programme. But as the research commenced, additional informants were added based on the data collected.

3.2.1 The methodology

The research questions and assumptions as developed at the research design stage guided me on the probable methodologies of collecting data. This section aims at discussing how the methodologies were employed in collecting data in a particular way depending on the issue under question.

To understand women's prevailing land rights in terms of access, control and ownership in both matrilineal and patrilineal societies, I decided to adopt an approach that allowed me to hear the women's experiences. This led to the use of the women's law approach which takes women's actual and lived experiences as a starting point with the aim of unfolding, explaining and appreciating women's legal position to improve their position in society. Thus, it involves examining the law from women's perspective (Dahl, 1988). Before going to the field, my assumption in relation to access was that women's land rights are dependent on inheritance from their relatives as a way of establishing their land rights. However, I was able to appreciate other methods that are being employed in communities to establish their land rights, such as renting or buying land, and understand women's abilities to benefit from such methods. An appreciation of these methods led me to realise how the Bill can be analysed so as to respond to the different needs that women have in relation to their land rights. For instance, hearing from the women as to how they access land through land rental markets enabled me to probe further into how those markets operate and the implications they have on women's land rights together with the formalisation of land under the Bill and other factors such as women's economic standing.

Capturing different women's voices assisted me in realising how different women, depending on their age, economic status among other factors, utilise the above mentioned methods as a way of responding to land access problems. Consequently apart from just understanding women's position in general, I was also able to engage with the intersecting oppressions specific to particular groups of women. This also helped me in understanding what effect the realisation of other rights has on women's realisation of land rights.

Since an understanding of women's experiences was also meant to help me in responding to the assumption that the Bill and land reform programme are gender neutral, I was led to ask 'the woman question' as a feminist legal method of getting data so as to understand whether the proposed Bill and land reform are responsive to women's needs. Asking the woman question as described by Bartlett (1990:837) is designed with the aim of identifying the gender implications that rules and practices (which otherwise might appear to be neutral or objective) have for women suggesting how this may be corrected.

Using this approach, I was able to appreciate the situation of women in both matrilineal and patrilineal societies and how the Bill may or may not change their position in relation to their land rights due to existing social structures and norms. Thus, it helped me understand that whilst the Bill does not explicitly discriminate on the basis of one's sex, the existing practices and norms which make women more vulnerable may render the Bill ineffective should it be passed into law. Therefore, unearthing and securing a deep and meaningful understanding of women's actual lived realities gave me the necessary tools to analyse and evaluate the strong and weak points of the Customary Land Bill so that I could finally discuss and propose how the same could be drafted with the aim of responding with greater precision to women's needs.

In addition to the above approach and for the purposes of establishing the validity of the data I employed the grounded theory approach. This involved triangulation of the data collected and as defined by Bentzon (1998) involves the researcher collecting data, sifting and analysing it as well as considering the implications of the findings and determining what to collect next to meet her needs and continuing with the collection and analysis cycle.

This was particularly helpful in dealing with the emerging categories of data which required further inquiry. For instance, during my interview with an official from the Ministry of Gender in Nsanje, he was able to provide me with a document outlining the socio-economic profile of the district which included information on land use and tenure systems. In my interview with him he had highlighted that men own more land than women in the district which is patrilineal in nature due to the prevailing culture but the document indicated that women were the dominant land owners. Having noted that the information in the document was supplied by the Ministry of Agriculture (who I initially had not included on my respondents list), I visited their office where they verified that women's ownership in that

sense was being used in reference to the dominant land users who are women due to the fact that they contribute much of the labour force in agriculture.

In addition to this, the triangulation of data was also useful in trying to establish the prevailing customary law in relation to the inheritance of land and other property. I engaged with women to hear from them what the practice is as well as how they relate to the same. I however also engaged men as well as traditional leaders, as a way of verifying what the prevailing customs are. It was also necessary to hear from government officials as to their version of customary law with the aim of understanding whether there was any disparity between the 'living' and 'official' customary law. In the end it was pertinent for the research as it helped in analysing how the Bill should incorporate customary law which safeguards women's land rights.

Thirdly, as the research adopted a human rights based approach to women's land rights, I employed the human rights based approach methodology of research. The Office of the High Commissioner on Human Rights (FAQ, 2006: 15) defines a human rights based approach as:

'a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.'

This approach aims at identifying the human rights aspects arising out of the issue in question thus identifying who the duty bearers are in relation to the right holders. It involves an analysis of whether programmes adhere to the human rights principles established under the international Bill of Rights which include universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion and accountability and the rule of law. As discussed in Chapter Two on the state obligations that states have towards their citizens, I was able to analyse whether the land reform programme and the Bill reflect a fulfilment of Malawi's obligations towards the realisation of women's land rights. This was done by using the respondents' voices to test whether the state is or is not meeting its obligations.

For instance, one of the state obligations under the CEDAW is to ensure that women participate in land and agrarian reform programmes, thus women's participation is vital and reflects the principle of participation and inclusion. Hearing from the women themselves as to their opinion on the land reform programme and the Bill, I was able to realise the extent to which they participated in the land reform process in general and contributed towards the Customary Land Bill. It also reflected the principle of interdependence and interrelatedness of human rights which basically encompasses the concept that the realisation of one right often depends wholly or in part on the realisation of other human rights, in the sense that realising women's land rights might depend on the realisation of other rights, such as participation and access to information.

Further, as one of the research assumptions dealt with the concept of substantive equality and how the land reform programme in general and the Bill specifically can ensure substantive equality for women, I had to relate the prevailing experiences of women, as well as men, to the Bill. Such an analysis was aimed at appreciating how equality and non-discrimination have been reflected in the land reform programme. It, for instance, revealed the problems that women in both societies will have if they are to register land as individuals due to other factors despite the Bill providing an avenue for them to own land as individuals. These factors led me to the realisation that having the law on paper might actually not be enough; it may also call for other state action to realise women's land rights.

Related to the above approach, was also the use of the actors and structures approach to the research process with the aim of engaging with the key players entrusted with carrying out the human rights based obligations. This involved engagement with government officials, non-governmental organisation (NGO) officials as well as traditional leaders with the latter forming part of the semi-autonomous social field. Government officials for instance from the Ministry of Lands were interviewed as they form part of the current land dispute structure available at the district level.

It was also necessary in the present case to hear from traditional leaders on their thoughts on the proposed Bill knowing the role they play at present as custodians of customary land, allocating land as well as settling land related disputes. For instance their interpretation of what custom is followed in terms of land inheritance in both the matrilineal and patrilineal systems was illuminating in trying to recognise whether having customary law regulating the

operation of customary estates will have a positive or negative impact on women's land rights. This was all the more so considering that section 4(2) of the Bill establishes Committees who among other duties will be responsible for allocation and grant of customary estates. These committees shall have Group village headmen for the area concerned as chairpersons.

Apart from this, Part VI of the Bill on dispute settlement sets up structures responsible for mediation on disputes concerning customary land in the concerned area. These structures from the first point of call to the last are as follows: Customary Land Tribunal (Section 43), District Land Tribunal (Section 45) and the Central Land Board (Section 47). In each of these, the Bill provides that they shall each have traditional leaders as represented in Figure 2 below. It is also necessary to point out that provision is made for the inclusion of women as part of these tribunals depending on the type of tribunal.

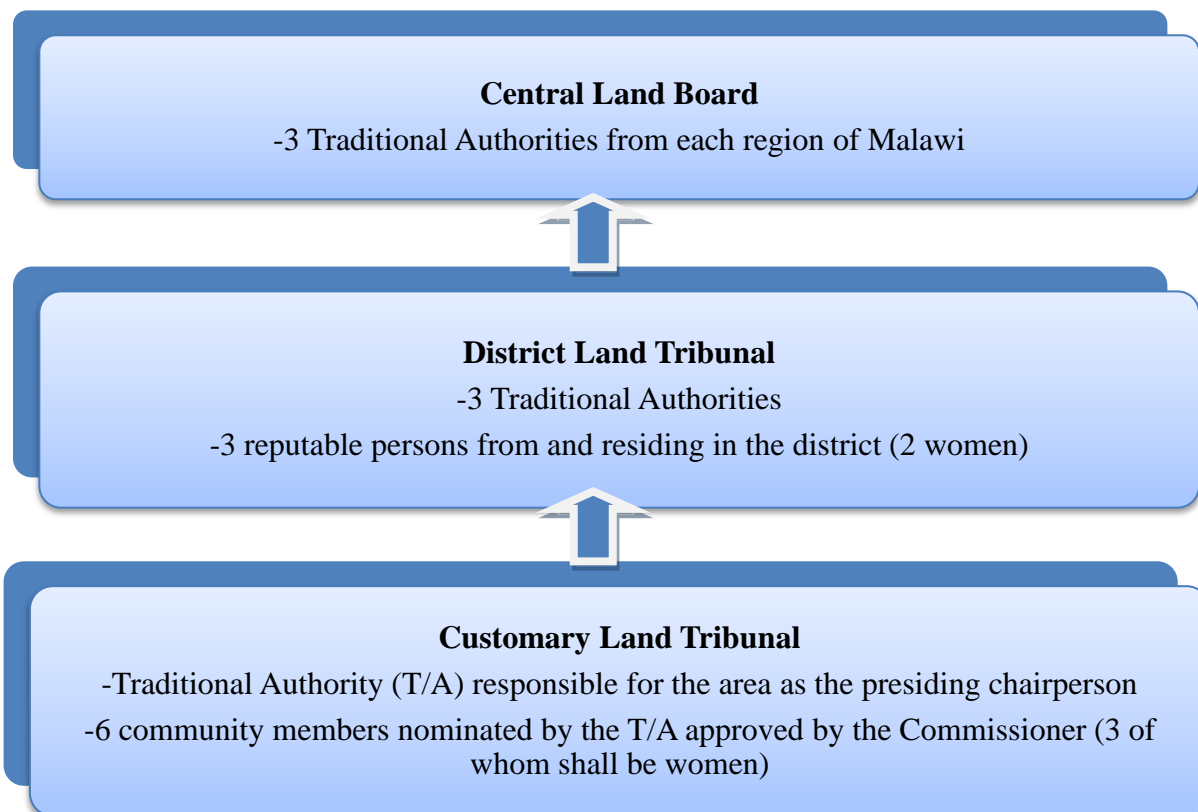


Figure 2: Diagram showing Land Dispute Settlement Structures

As the structure shows, traditional leaders have a very crucial role to play when it comes to issues related to customary land such as the nomination of community members to form part of the customary land tribunal. This is very important as it also transpired during the research that they command a huge amount of respect amongst their subjects hence their opinion is very crucial.

Therefore, it was vital for me to know from these different people who are responsible for making decisions at different levels how they perceive the Customary Land Bill. Their views were crucial considering that it is these same people who will be entrusted with the enforcement of the Bill in case it becomes law. In other words, it will be their responsibility to ensure that there is gender equality. On the next page is a table showing the key respondents interviewed:

Interviewees	Female	Male	Total
Government officials	2	9	11
Non-Governmental Organisation Officials	2	6	8
Traditional Leaders		2	2
Total	4	17	21

Table 1: Showing key respondents interviewed

Having targeted men as my probable respondents gave me an opportunity to have a comparative analysis of the issue at hand from the perspective of both men and women and assessing whether the Bill has the same effect on them. This involved the use of the sex and gender analysis as an approach to research. Sex and gender analysis involves appreciating the impact sex and gender has on people's daily lives. 'Sex' is defined as the biological characteristics distinguishing male and female, whilst 'gender' is meant to refer to the social and cultural traits linked to men and women through particular social contexts. The use of this approach highlighted how roles associated with being male or female have a bearing on people's access, control and ownership of land. For instance, men's role as the head of the family helped to understand why it was the men who exercised control over the sale of farm produce which they would have produced together. Below is a table representing the community respondents (both male and female) who were interviewed.

Interviewees	Female	Male	Total
Nsanje	15	4	19
Thyolo	17	4	21
Total	32	8	40

Table 2: Showing the community respondents who were interviewed

3.2.2 Data collection methods

This section provides a discussion of the tools and techniques that were used to gather data during the research process. These included individual in depth interviews, collective

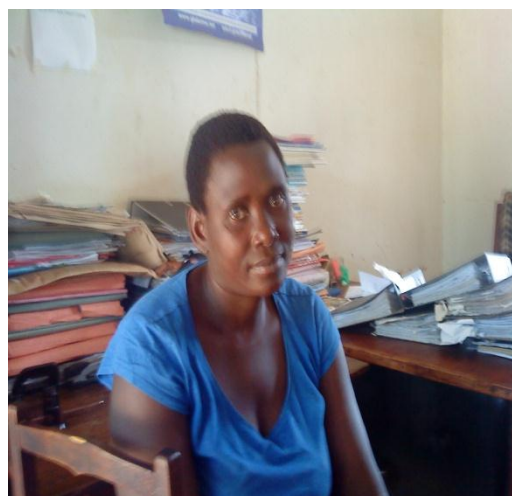
individual interviews, key informant interviews, focus group discussions as well as desk research (written sources).

3.2.2.1 Interviews

3.2.2.1.1 *INDIVIDUAL IN-DEPTH INTERVIEWS*

This involved one-on-one interaction with the respondents in a conversational manner. I was mainly able to interview community respondents (both men and women) using this method. This allowed me to engage in open ended discussions with them. Locating these respondents was done mainly through random sampling as they were found in their homes within the villages, though some were located through other respondents directing me to them. The following photographs show some of the respondents interviewed using this tool.

Figure 3: Two photographs showing some female respondents



A few questions guided the point of departure for the interviews but the respondents were free to express their experiences and views related to land issues as well as the proposed Customary Land Bill. The interview was structured in such a way that it allowed the respondents to start by explaining how they access land at present which allowed them to speak about and understand how they were part of the dynamics surrounding land both within their families and the community in general. It also helped in bringing to the surface the customs and practices of the people as well as the daily problems faced in accessing land. This also assisted in discovering who among the community were the owners and controllers of the land; where this was not clear further questions were posed to guide the interview. Questions relating to their views on the Customary Land Bill would only be asked at a later stage. This method was crucial as it also allowed the respondents to tell their life stories which helped in appreciating how land rights are negotiated throughout one's lifetime.

3.2.2.1.2 *COLLECTIVE INDIVIDUAL INTERVIEWS*

These were utilised in cases where other people would join in an interview which was initially being conducted with one person. This was mostly the case in situations where respondents were located in their home compounds where there were several houses belonging to different people. I would allow them to take part in the interview because it assisted in providing an additional insight into some of the issues under discussion.

3.2.2.1.3 *KEY INFORMANT INTERVIEWS*

This technique assisted me in getting information mainly from government officials, NGO officials and traditional leaders. These were people in authority and therefore in a position to provide the official position and in some cases data on land in the concerned areas. Traditional leaders were vital in providing the position on customary law relating to land as well as additional information. It was particularly important to hear from these 'officials' as in some cases it transpired that what said was the official position representing the prevailing situation amongst community members actually turned out to be different from what the community members actually said. Therefore using this method together with the women's law approach as a methodology assisted in uncovering women's real situation on the ground as opposed to what is called the official situation and which is often reflected in key policy documents and programmes.

3.2.2.2 Discussion groups

Here I use the term discussion groups with the aim of further discussing the type of discussion groups which were conducted to gather data. These are focus group discussions and general group discussions. The distinction lies in the fact that focus group discussions were employed in interviewing groups of people who have a specific expertise on the topic of discussion (Stewart, Paving a way forward, p50).

3.2.2.2.1 *FOCUS GROUP DISCUSSIONS*

As described above, this tool allowed me to get information mainly from officials with specific knowledge and expertise on land related issues. For instance, one of the focus group discussions was conducted with officials from the Ministry of Agriculture in Nsanje district. These comprised of officers responsible for different departments in the Ministry. They were able to provide an insight into the prevailing land use patterns in the district and specifically patterns along gendered lines. They also provided a whole new perspective to the land issue (such as competition for land use between cattle rearing farmers and crop growing farmers) which was one of the emerging issues. Below is a photograph of one of the focus group discussions conducted.

Figure 4: Photograph of a focus group discussion with Ministry of Agriculture officials in Nsanje



3.2.2.2 *GENERAL DISCUSSIONS*

General discussions were utilised for community members who included both men and women, although in some cases it was just women. One of the advantages of using this method was that it allowed me to involve both men and women in the discussion and was therefore useful in conducting a sex and gender analysis of the data being collected. This also allowed me to gather data not only from men and women but also to break it down further, for instance, into sub-groups based on variables such as age, status, etc. Below is photograph of an example of a group of some of the people who participated in a general discussion in Thyolo.

Figure 5: Photograph of a group discussion in Thyolo



3.2.2.3 **Written sources**

This involved reading and analysing documents on land as well as other documents providing related information. Considering that the research concerns itself with analysing the Customary Land Bill and the land reform programme, I had to read the Bill, the land policy as well as other pieces of legislation such as the Constitution, Gender Equality Act and the Deceased Estates (Wills, Inheritance and Protection) Act. In addition to this, interviews conducted with officials also gave me the opportunity to study documents such as those outlining the Socio Economic Profiles of the two districts or those concerning the concept of primary justice and its application to land related disputes.

3.3 Conclusion

This chapter has outlined the methods employed in the data collection and analysis as designed at the research design stage but also during the field work. Such methods influenced how data was collected and analysed with the aim of answering the questions raised by the research.

CHAPTER FOUR

4.0 FINDINGS

4.1 Introduction

This chapter provides an outline and discussion of the research findings.

4.2 Women's current land rights in matrilineal and patrilineal systems

This section aims at providing a comparative discussion of both matrilineal and patrilineal societies with the aim of understanding how women's access to land will be affected (either positively or negatively by the Customary Land Bill). This will be done by discussing the current land tenure system in each system, how women are accessing land in each system and the power relations and dynamics over land rights as well as the role of customary law in these two systems. The latter part of the chapter will discuss the findings that are common to both systems.

4.2.1 Matrilineal society

Matrilineal family circles revolve around women who have primary land rights through their lineage (Liwewe *et al.*, 2008 cited in WOLREC 2010:12). However, a distinction can be made between the type of matrilineal systems prevailing in Malawi, that is, the *chikamwini* and *chitengwa* systems. In the *chikamwini* system marriages are validated through the meeting of advocates from both sides and there is no payment of *lobola*. The woman's village is taken as the matrimonial home with property being inherited along the female lineage. Ngwira (2003:7) writing on the *chikamwini* system in relation to land rights, comments as follows:

'Land belongs to the clan and its inheritance passes through female offspring. Women have custodial ownership of land...upon death of a man the wife and children are undisturbed in terms of residence and land use. When a wife dies the man returns to his village.'

On the other hand, in *chitengwa* system, just like in the *chikamwini*, there is no payment of *lobola* to validate marriages. Though in this system, the man's village can be used as a matrimonial home and upon a man's death, the woman and her children go back to her home.

The land rights in this system also fall along the female lineage. This system is particularly popular in the central region in Malawi.

4.2.1.1 Customary land tenure in matrilineal societies

The present study was however conducted in a matrilineal setting which follows the *chikamwini* system. All land falling within a village is under the authority of a traditional leader in that area. These traditional leaders are responsible for allocating land to the different clans/families who further allocate it to the members falling within that family according to the female lineage. Women are allocated land upon marriage since their husband comes to live with them at their home and the land is to be used by the new family. Before marriage, women rely on the land that their parents have.

For male children, the expectation is that they will access land where they will get married. The male respondents interviewed said that they rely on land which has been allocated to their wives, or, in some cases, they are given land by the clan. The latter is rare as males are not allowed to dispose of that land or allocate it to their children since land devolves along the female line. One man who was interviewed explained how he was lucky to have been allocated land by the family, but that he still has no idea as to what land he can allocate his children since he does not own it. As one study has noted, in these societies, men are users and borrowers of land as they are not allowed to own and inherit land (Berge *et al*, 2013). Therefore, in matrilineal societies, custom acts to grant women direct land rights, both as users as well as controllers of the land (WOLREC, 2010). In other words, compared to men, women in these systems enjoy favourable land rights. As an official from the Ministry of Lands noted as follows:

‘When one considers the prevailing customs in matrilineal societies, men can be said to be the ones who are in a vulnerable position in relation to land rights, as they cannot own and inherit.’

Read together section 19 of the Customary Land Bill (allowing men and women to be allocated land equally and to allow them to register land as individuals) as read with section 21 (the equality provision in matrilineal societies) may have the positive effect of extending rights to men but removing pre-existing rights from women. In other words, in this particular context, using equality as the principle to guide the land reform process may actually result in undermining women and making them more vulnerable position.

4.2.1.2 Access to land in matrilineal societies

Access to land for women in a matrilineal setting is guaranteed through its passing on of land through the female lineage. Women who are allocated land upon marriage have unlimited access to that land as they are taken to be its 'owners'. However, in relation to ownership, it was discovered that such ownership is traced to the clan/family and that, in essence, these women do not have full ownership of the land. Hence, some decisions over the land cannot be made without consulting the clan members. Decisions like the sale and disposal of land have to be made by consulting the clan members. In many cases sale and disposal of land is not allowed because there is a desire to keep it within the clan to protect the interests of future generations. Clan/family decisions are also important in cases where decisions on the allocation of land to a newly married woman are to be made. Sometimes where there is no free land available for allocation, a clan/family decision is made to find solutions within the family. This may entail allocating to the woman some land which is currently being used by another member. Suffice it to say that the woman may only have limited control over such land and cannot make her own individual decisions over the same.

Hence the present customary tenure system thus provides an avenue for guaranteeing women's access to land through the grant of user rights through customary family allocations. As Kishindo (2009:214) writes:

'...when land is allocated to persons they acquire user rights and not ownership. While products of the land can be sold, the land itself cannot be sold because it belongs not just to the present users but future generations as well.'

In essence the 'ownership' that the women have is loosely defined. It is not the same as that envisaged by the proposed Bill which speaks of primary rights that give the person in relation to those who do not have any connection with the land power to exclude them from the land and to control and to dispose of it. The user rights granted at present together with land transfers through female lineage protect women's access to land since land is made available for them to use. Formalisation of land through the grant, for instance, of individual titles will thus grant such owners primary land rights giving them the power to, for example, dispose of such land. If land allocation is done according to the female lineage, it means women will positively benefit by having their land rights secured through formalisation. However,

allowing allocations to men under section 19 will lead to the erosion of the very practices which have all along safeguarded women's land rights. Section 27 of the Bill provides for the disposal of customary estates which in essence legalises sale of customary land. The grant of such primary rights also has the potential of weakening the transfer of land through female lineage as the land will now have a market value attached to it.

Further, the study also revealed that at present it is not all women whose access to land is secured by the prevailing landholding practises in matrilineal societies. For instance, the traditional leader in the area told me that clan leaders in these systems are women and whatever decisions are to be made are to be done so along the female line. However, the study revealed that male relatives yield the decision making power despite the expectation that decisions are to be made by women over clan land. This has manifested itself in men who own clan land and which they have allocated to their children as well. This has resulted in women who were initially entitled to inherit land not being able to do so since their male relatives will have taken over. Thus access to land in this case ends up being dependent on decisions made by their male relatives. As one woman explained to me:

‘My uncle (my late mother's brother) is the one who makes decisions over the land. He brought his wife to come and stay on this land and has allocated land to his children a thing he is not supposed to do. I was allocated a very small piece of land by my grandmother as she felt sorry for me. I am afraid to take the issue to the chief for fear of being bewitched.’

Despite being entitled to the rights over the clan land, she is not able to enforce the same as decisions are made by the male relatives. This situation results in insecure land access rights for women and this predicament and others like it are crucial and must be taken into consideration when land reform initiatives are taken. If no caution is exercised the men exercising such control and power over the land will end up legitimising their ownership of such land by registering their individual interests over the land (or it may be clan land). This will mean that even if a woman's may have registered her interest in the land, decision making power over the land will be with these men. Hence whilst land may be registered as clan/family land, women's access to land may not be secured as a result of these changes. In addition, in relation to the registration as family land under Section 19(2) (a), the Bill does not specify the people in whose names such land will be registered. Considering the concept of the head of the family being male in such societies, it leaves room for these male relatives

to now exercise control over the land in question and the same applies for married women, in that their husbands, being the head of the family, are likely to register these interests in their own names (WOLREC, 2010).

Apart from the above, it was also discovered that the younger as compared to the older generation of women are more vulnerable when it comes to accessing land. It was shown that the context and situation on the ground is such that young women are not guaranteed allocation of land due to a rise in the population and the resulting pressure on land, among other factors. This was not the case for older women (these young women's mothers or grandmothers) who have already been allocated land before these changes. Where these young women are allocated land, it is usually not enough to fully support their families. The average landholding size that one can get from such an allocation is usually also small. According to the data available from Thyolo's Socio-Economic Profile, the average landholding size per smallholder is 0.6 Ha. But as the study found such allocations keep getting smaller and smaller. Therefore, one becomes compelled to question whether such landholders can fully benefit from a land formalisation process which claims to encourage the productive use of land but becomes increasingly vulnerable to the allocation of smaller and less productive pieces of land.

In other cases, despite the expectation that older women will allocate land to the younger generation, these older women have opted to rent out part of their land due to the monetary value attached and end up not allocating any to their children reflecting informal formalisation. For instance one woman whom I interviewed stated as follows:

'Amayi anga ali ndi malo akulu koma sanandipatse mbali ina chifukwa amapangitsa lendi kwa anthu ena. Ndimachita kusowa malo oti ndikuwagawira ana anga akazi bola pano kuti enawo sanakwatiwe.'

(Meaning, 'My mother has a big piece of land which she rents out to other people but refuses to allocate part of it to me. I even have problems in finding land to allocate to my own daughters even though she has. I am at present lucky that my other daughters are not yet married and still in school.')

Formalisation of land will thus formally recognise these older women's land ownership rights thus granting them primary land rights to rent out such land and in return doing away with family transfers which would have granted the younger women the access rights (user rights)

as provided by custom. It is thus necessary, as it will be argued later in the paper, to appreciate the role positive customary law has in preserving women's access to land.

In other cases, older women allocate land to other women, but only on a temporary basis, and both women use it. In this case, the access to the land of the woman to whom such land has been allocated is not secured as it is dependent on the control by the owner. This was the case in the scenario narrated to me by one woman:

‘My mother has a piece of land which she allows me to use when she is able to find separate land for use through renting from others. When she fails to do so or if we quarrel, she takes the land away from me.’

It is also important to appreciate how the land rights of female children born to male members of matrilineal societies are realised. It is in many cases easier for these female children to get land from their mother in cases where she has land. However, where she does not have adequate land, it becomes problematic for them as they cannot claim from their father's side. By extending land allocations to males under the proposed land reform will thus positively provide an avenue for their children to be allocated land. However, if not carefully implemented, disposal of this land by the primary land holders (in this case, men) may result in these female children not inheriting the land.

It cannot be overemphasised how crucial the issue is of the availability of land which can be subject to family transfers. There is a need to understand how the formalisation of land can benefit women where the land over which their land rights can be secured is not available. At the same time, where such land is available, the mechanisms for which land can be made available for use by women (that is granting access to them) must be those that are favourable for women.

4.2.1.3 Custom and women's land rights in matrilineal societies

From the above discussion it cannot be denied that the custom relating to the inheritance of property, and land in particular, acts, to a larger extent, to uphold women's land rights. It is, therefore, important to exercise caution when laws such as the proposed Customary Land Bill aimed at achieving equality between men and women have the probability of taking away the rights and privileges which women have always had under custom. An example can be given of a study conducted by Liwewe (2008) on small scale irrigation schemes in matrilineal

societies in Malawi which showed the eroding land rights of women's customary land rights in relation to their participation in the schemes. Such irrigation schemes ended up benefitting men more than the women who have all along been the 'owners' of such land. Applying gender equality clauses, such as section 21 of the proposed Customary Land Bill, without engaging with the prevailing dynamics on the ground within the communities in which such laws are to be enforced risk ending up taking away women's claims. In other words, well-intended, noble sounding clauses designed to empower women can, if they are blindly or mechanically implemented, have the exact opposite effect and disempower or further marginalise them. An official in the Ministry of Lands expresses that danger in the following words:

'If the land reform process including land redistribution in case it occurs, do not consider the prevailing culture in matrilineal societies then women will suffer. Men here in Thyolo are a vulnerable group in relation to land such that this will be their opportunity to claim their land rights.'

The CESCR in its General Comment No 16 (2005) on Article 3 (the equal right of men and women to the enjoyment of all economic, social and cultural rights) observed as follows on gender neutral laws and the achievement of substantive equality:

'Substantive equality for men and women will not be achieved simply through the enactment of laws or adoption of policies that are gender neutral on their face. In implementing Article 3, States parties should take into account that such laws, policies and practice can fail to address or even perpetuate inequality between men and women, because they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women' (para 8).

Having gender neutral laws is not enough if steps are not taken to ensure that men and women are able to enjoy *de facto* equality without any differentiation. Hence, the equality clause in the Bill must be interpreted and put into operation in such a way that women's position, as already protected by custom, continues to be so protected with the aim of affording them the same starting point in relation to claiming their rights under the Bill. In these matrilineal societies, it cannot be overemphasised how the inheritance of land through the female lineage acts to protect women's land rights. Hence, it is necessary to ensure that such practices are not eroded by the formalisation process under the Bill which aims at

affording men in matrilineal societies similar rights and thus eroding what women have always relied on.

A study conducted in Northern Uganda revealed how recognising the role of customary institutions can ensure the protection of people's land rights. In that study, clans were found to be a useful agent of securing women's land rights with the men acting as guardians over the land and not individual owners, hence protecting against sales (Daley & Englert, 2010). Daley and Englert argue for the utilisation of existing customary institutions in cases where they act as a vehicle for securing women's land rights (2010:6). They also argue that strategies aimed at sustaining and encouraging women's land rights must be context specific and responsive to the needs and situation on the ground. Culture and custom in Malawi matrilineal societies has the potential to safeguard women's land rights.

4.2.2 Patrilineal society

In patrilineal societies, marriages are validated through the payment of *lobola* to the parents of the bride. Unlike in the matrilineal society, the matrimonial home in the patrilineal system is at the man's village. Thus, the woman moves from her home to stay at the husband's place upon marriage.

4.2.2.1 Customary land tenure in patrilineal societies

In this case, land allocations are made through the male lineage, with male children being allocated land for use with their families. Female children are taken to be transient in nature and are thus expected to get married and rely on the land given to their husbands and they therefore do not inherit property and land in particular. In case of termination of marriage either due to death or divorce, the woman is expected to go back to her parents. During the research it was discovered that when such women return to their homes their parents or male brothers exercise their discretion as to whether to give her land or not. One man explained:

'Mkazi akuyenera kubwelera kwawo kaya kuli malo kaya kulibe amakazionera konko.'

(Meaning, 'A woman has to go back to her parents, whether there is land to be given to her or not she will see that for herself.')

Another man even said that whatever the circumstances, his wife cannot continue staying on his land. The women themselves stated that it is males who are highly regarded by their

society and that it is only parents who understand and allocate land to their female children. I managed to interview some women whose parents had allocated them land and who said that it was because their parents were considerate and had allocated land to both male and female children. However, the interesting thing was that such women were mostly elderly women many of whose parents had already died.

4.2.2.2 Access to land in patrilineal societies

As a result, in patrilineal societies women's transient nature makes women's land rights dependent on their male relatives. Access to land is predicated on their relationships to their husbands, parents or brothers. Ownership and control of the land remains with the male relatives who have the power to withdraw access rights from these women. In such a scenario, women's access to land is not secure as the primary rights over the land remain with other people.

These customs deny women equal rights to land and do not provide secure land access and land rights in general. This means that applying the Customary Land Bill within the context of the customary law prevailing in these areas has the effect of excluding women from benefitting from the land formalisation processes. This is because according to custom, they cannot inherit or own land, hence the probability of their being able to register land as individuals is low since their opportunity to have land to register is minimal due to lack of allocation. However, if such customs are removed and their families allocate land to women in the same way as they do to men, women in these societies stand to benefit as owners of land, since the law will extend such rights to them. Otherwise, the Bill will formally recognise men's ownership and control of the land and leave women only with user rights.

As discussed in the previous section, with regard to registering land interests as a family, the Bill does not state in whose names that this is to be done. Considering that the head of the family in such societies are male relatives, women are unlikely to be able to register their interests. For instance, as observed by a volunteer with a civil society organisation, due to the patriarchal nature of patrilineal societies, men are the main decision makers. As she put it in the vernacular, '*Amayi ndi michira, mitu ndi abambo*' (Meaning, 'Women are the tails, men the heads'). Consequently, the formalisation of land rights (through, e.g., the full grant of ownership rights to men) risks entrenching the existing inequalities against women in patrilineal societies. In other words, the present status quo is likely to be maintained.

4.2.2.3 Custom and women's land rights in patrilineal societies

Article 2(f) of CEDAW on state obligations puts an obligation on state parties to eliminate discrimination against women by taking appropriate measures including legislation aimed at modifying or abolishing existing customs and practices which constitute discrimination against women. In its concluding observations to Malawi's sixth periodic report, the CEDAW Committee expressed concern over the continued existence of negative cultural practices and stereotypes which are harmful to and discriminate against women (2010: para20). It then called upon the state to take measures aimed at modifying or eliminating these practices. One of the measures was the adoption of the Gender Equality Bill and the Deceased Estates (Wills, Inheritance and Protection) Bill which have now been passed into law. However, their effect remains to be seen, though having such laws on paper does not directly translate into de facto equality for women on the ground. Hence there is a need to engage with community members and leaders on such laws as the obligation under Article 2(2) of the Women's Protocol requires the state to:

‘commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.’

Hence, for these laws as well as for the proposed Bill to be effective, there is a need to go beyond the provisions on paper and take active steps to change people's perceptions. Considering that the application of custom to customary estates is provided for under the Bill, there is a need to ensure that such customs are those that protect women's land rights. For there to be equality of results there must be equality of opportunity between men and women and, in this case, acquisition of land whose interests can be secured must be the same for men and women. Therefore, whilst the Bill will provide an avenue for women in patrilineal societies to register primary rights over land, the same will not be possible if the custom dictating land allocations remain discriminatory against women.

At this stage, it is necessary to engage with some of the research findings relating to women's access to land and the reform process which are common to both systems. These are (1)

pressure on land resources, (2) women's access to land using alternative land access paths, (3) lack of participation in the reform process and (4) preferred registration patterns.

4.3 Pressure on land resources

The study revealed that the availability or lack of availability of land will have an impact on women's ability to benefit from the land formalisation process. For instance, the research districts in the present study, Thyolo and Nsanje, were both found to be prone to land scarcity leaving the women in these areas particularly vulnerable, unlike those women in areas where land may be available.

An example can be given of the trial Community Based Rural Land Development Programme (CBRLD), which is one strand of the land reform programme which focuses on land redistribution. The project in a nutshell involved purchasing and redistributing land to land stressed farmers and the pilot project saw people from Thyolo and Mulanje relocating to the districts of Machinga and Mangochi. Thus, the receiving districts' capacity to receive other people illustrated that there was less pressure on land prevailing in those areas.

Here, it is pertinent to discuss briefly the land scarcity situations in the two districts. Nsanje is prone to land scarcity due to a number of reasons. The first reason is due to its geographical location which affects the availability of arable land. The western side of the district is mountainous and also suffers from lack of rain which results in low yields. This information was given to me by officials from the Ministry of Lands and Ministry of Agriculture. Despite having soil which may be suitable for agriculture, inadequate rainfall renders such soil unproductive under rain fed agriculture and so, of the 51% of land considered to be arable in the district, only 23% is under cultivation (Nsanje District Profile, 16). This results in pressure on the land to the east along the Shire River which forms the country's boundary with Mozambique. The district is also prone to floods which occur every year and this means that pressure is exerted on land which is not prone to flooding. The figure below shows the land pattern use in the Nsanje district which has a total physical land area of 193,132 Ha.

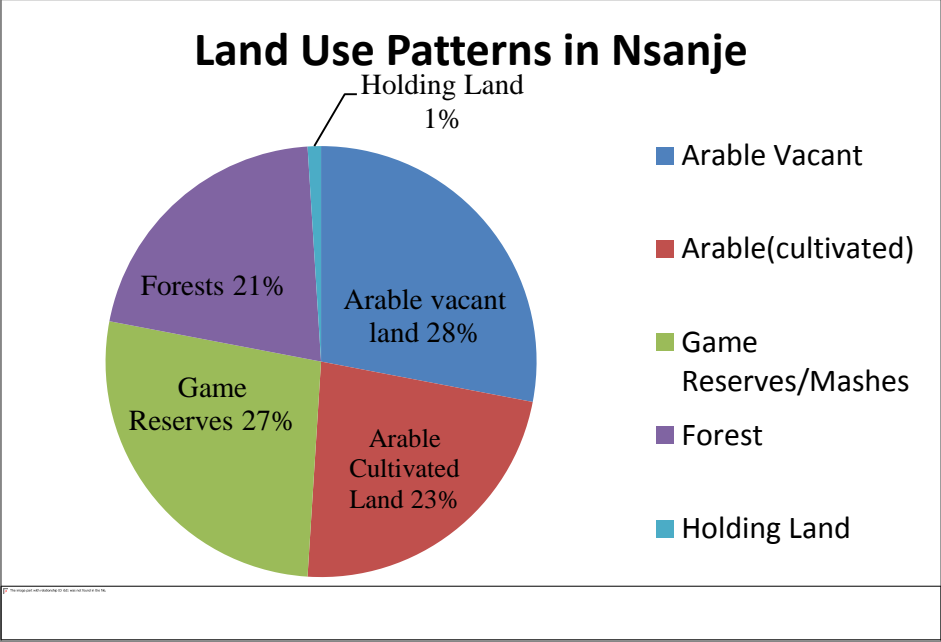
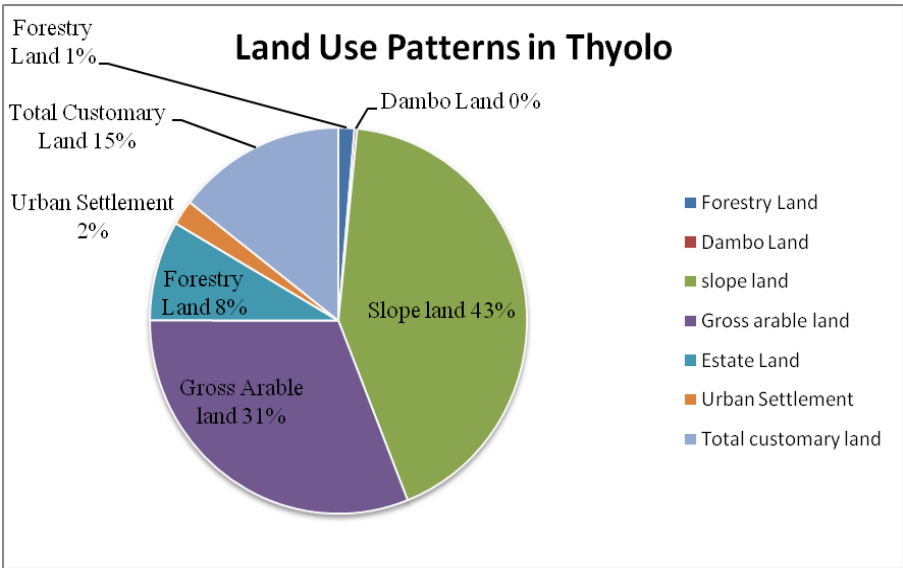


Figure 6: Pie chart showing land use patterns in Nsanje district

In addition, the population growth in both districts has also contributed to the pressure on land. This is especially the case for Thyolo district which has a total physical land area of 171,500 Ha and its land use pattern is represented in the figure below.

Figure 7: Pie chart showing land use patterns in Thyolo district



As can be seen from the figure representing the land use pattern for Thyolo district, gross arable land forms 31% of all land which is not even half of the total land of the whole district. The average land holding size per smallholder is 0.56 Ha and 0.6 Ha for Nsanje and Thyolo, respectively. In Nsanje two-thirds (2/3) of that land is owned by men and the rest by women.

This difference in land availability has an effect on women's ability to either own land as individuals or as families in these districts as compared to those districts where land is available. Despite having the opportunity to register and protect their interests, the question that will be asked is, 'What interests are they protecting if they have no land to formalise as envisaged under the Bill?'

These differential experiences by women cannot be taken for granted and are crucial in putting in place mechanisms that achieve equality not only between men and women, but also amongst the different groups of women. This requires the need to avoid essentialising women. Writing on essentialism, Elizabeth Grosz (1990) states:

'Essentialism entails that those characteristics defined as women's essence are shared in common by all women at all times: it implies a limit on the variation and possibilities of change' (Grosz, 1990 cited in Bunting, 1993:11).

Anti-essentialism therefore aims at denying the notion of the 'one woman' and recognising the dynamics among women. It advocates for a need for feminists to be more self critical and aware and to address the context in each situation where women are and not fall prey to vast generalisations (Wong, 1999:282).

This also brings to the fore the intersectionality concept. CEDAW Committee had this to say on intersectionality and the elimination of discrimination in paragraph 18 of General Recommendation No. 28 on Core Obligations of State Parties under article 2:

'Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men.'

The Committee thus went further to spell out state obligations in dealing with intersectionality by requiring that States parties legally recognise the intersecting forms of discrimination and their compounded negative impact on the women concerned and require that they prohibit them. It also called for the adoption of policies and programmes for purposes of eliminating such discrimination including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and General Recommendation No. 25. For instance, in Kenya, in its response to the land rights of women affected by HIV, the Kenya Legal and Ethical Issues Network on HIV/AIDS embarked on educating elders, widows and local law enforcement officials in alternative dispute resolution to raise awareness on women's human rights (OHCHR, 2013).

It is clear from the above findings, enforcing the provisions of the Bill alone without taking other active steps to protect its harmful effects against women has the potential of excluding women who would otherwise have benefitted from the programmes. Without having land whose interests they can secure, the plight of these women will remain unchanged.

4.4 Alternative paths to accessing land

In both matrilineal and patrilineal systems it was discovered that apart from relying on inheritance/family transfers, there are alternative paths to accessing land rights. These paths are now discussed in order to understand how both men and women are utilising the same kind of land rights that emanate from these paths.

4.4.1 Land rentals

These land rentals are done yearly according to the growing season. Such rentals only provide access to land while ownership and control remains with the landlord who has the power to decide who uses the land in a particular growing season. Rental prices are not fixed and are dependent on the size of the land as decided by the owner. This was found to have differing effects on men and women's ability to rent such land with many women being able to afford smaller sizes of land as they cannot afford to pay for large pieces of land. This in turn has an effect on the crop yield which is realised. This is because, as the women put it, they end up using money which they would have used on buying farm inputs such as fertiliser to pay for the land and they have to sell livestock or work in other people's fields to raise the money. There was also a noted difference between married and single/widowed women's

ability to rent such land. The latter (single/widowed women) expressed concern that they find it difficult to afford renting large pieces of land unlike the married women most of whom said that their husbands paid their rent for the land.

Apart from being unable to afford paying high rent for land, women also expressed concern over their being unable to negotiate a fair rent for the land like their male counterparts. As one woman explained:

‘Women are not feared in land negotiation deals, unlike men and hence end up renting at high prices which many of us cannot afford.’

Although paying rent for land in both systems provide women with an opportunity to access land in cases where they have not been allocated land by their families, this does not provide them with secure title to such land. This is the case since user rights (e.g., the rights of a tenant) are dependent on both economic status as well as the owners of the land deciding who their users/tenants will be. By formalising land under the Customary Land Bill the owners of the land will have legitimate primary rights over the land. With the creation of formalised land markets, the expectation is that the formalisation process will result in proper regulation of such markets with land being made available at its market value. It is argued that women who are the poorest amongst the poor will not be able to fully engage in such markets due to the inevitable rise in value of the land.

Even if such markets are regulated, women’s economic status will continue to affect their ability to access such land. Initiatives aimed at economically empowering these women will thus become crucial to ensure that they benefit. Article 14(g) of CEDAW is clear on the state obligation to ensure that women have access to agricultural credit and loans. Article 19(d) of the Women’s Protocol is also clear on the need to ensure that there is promotion of women’s access to credit aimed at reducing the level of poverty amongst them in a manner similar to that contained in article 7(9) (c) of the SADC Gender Protocol.

However, putting such obligations on paper alone does not have the potential to benefit women unless proper support structures are put in place. For instance a gender officer in the Ministry of Agriculture spoke of the difference that initiatives on irrigation farming have made on women’s access to land in Nsanje. These women are not required to pay anything to

access the land, although it is not all women who benefit as there are limits to the number of beneficiaries depending on the land available. However, the extent of such impact is subject to further research. A further challenge is whether there will be enough land available for rent due to the pressures that are already exerting themselves on the land.

4.4.2 Land sales

Another path that is available in accessing land is through the purchase of land from others who are able to do so. Just like the land rental markets mentioned above, these markets are not regulated as there are no set prices for land. The only regulation that is in place is that when such land is being sold, traditional leaders act as witnesses to such sales. During the research, however, these traditional leaders were reluctant to admit that they were involved in selling customary land which they hold in trust for the people. Some community members said that the traditional leaders are given money as a token of appreciation while others said that the money they receive is their charge for the stamp that they append (to the purported sale document).

However, just as in the case of renting lands, women in both systems have difficulties in participating in these markets. During the research, I tried to find out if there were any women who had managed to buy land on their own, but the respondents could not think of one woman. Many of the women interviewed said they could only manage to do so if they teamed up with their husbands or their parents. It should be mentioned here that buying land provides an opportunity for both men and women to acquire land in cases where the land allocated to them by their families is inadequate or they have not been given any. For women in patrilineal societies, this has allowed some women to keep land even after their husbands have died. One woman told me of how she and her husband had left his village to acquire separate land and that following his death his relatives had not taken that land.

It should also be pointed out that the research found that there cannot be a blanket statement on benefits since some women have ended up losing such land due to their lack of knowledge about their rights. In other cases, men have used such avenues for stamping their authority on the resource of land. For instance, it was discovered that during the trial CBRLD land redistribution programme described above, the men were given the opportunity to assert their control and ownership of land which they would not otherwise have had in the matrilineal societies from which they ventured. This became evident from the many divorces that took

place at the at the instance of husbands who chased away their wives claiming that the land was theirs alone. For women in matrilineal societies, considering that such land purchases normally involve moving away from their families to new places where land is available, they risk losing out on their custom supported land rights thus threatening their access to land. Another problem found was that land for sale is scarce and where it is available its prices are normally high and it is only those who are well off who manage to buy land.

The land formalisation process will introduce men and women into formalised markets but women's capacity to benefit from the same, as shown by the above discussion, is in doubt. Daley and Englert (2008), commenting on commoditisation processes in East Africa, noted that such processes have in many cases lead to the weakening of women's land rights since the opportunity of many of these women to buy land is limited. This is due to the fact that most women enter into the market with 'no property', little cash income, minimal political power and a family to maintain (Lastarria-Cornhiel, 1997:1326). Commenting on the proposed formalised markets' aim of moving land from the 'inefficient' to 'efficient' producers under the Malawi land reform programme, Kishindo (2) notes as follows:

'In practice the 'inefficient' producers tend to be resource-poor households while the 'efficient' producers tend to have financial resources, either from business or formal employment. There is a risk of destitute families losing their land to more affluent households.'

During the present research in Thyolo district, one official gave an example of how a government initiative which involved the purchase of land from an estate in Makande and redistribution of land to citizens, ended up being utilised mostly by pensioners who had previously been in town and less by the villagers. In addition, a study by Chinsinga (2008) on the pilot Community Based Rural Land Development Programme revealed how the initiative ended up being ambushed by the elite who benefitted from the buying and selling of the land. Consequently, though providing an avenue for acquiring land, land sales do not benefit women due to their financial capacity and hence their access to land remains insecure as it is dependent on the person who bought the land (for instance, their husbands). The land formalisation process runs the risk of exacerbating this situation for women, due to their inability to fully participate in the formalised markets. In other words, the land formalisation process is not an answer to the problems being faced by those who have no land and are at

the same time not able to utilise alternative paths to accessing land which will be formalised under the proposed Bill.

4.5 Lack of participation in the land reform process

The study further revealed a lack of awareness and knowledge of the land reform programme and the Customary Land Bill amongst community respondents as shown by the lack of engagement on the matter with them. As pointed out in chapter three, I was required to explain the details of this situation to them. Many of the respondents confused this with the Community Based Rural Land Development Programme. Such responses spoke of the lack of involvement of the people in the processes during consultation periods.

When I took this up with a government official, he admitted that, as a Ministry, they had not been able to carry out these awareness programmes as fully as possible. He had this to say:

‘We were, as a Ministry, supposed to be carrying out awareness campaigns but we are not able to do so due to lack of funding at the district level.’

On the other hand, some organisations within civil society admitted that they had been involved in the consultation processes and made their contributions towards the Bill but that they could not start awareness campaigns before the Bill becomes law.

Such lack of participation breaches article 14 (on rural women) of the CEDAW which lays emphasises the state’s obligation to ensure that women participate in elaborating and implementing developmental planning at all levels. Article 19(b) of the Women’s Protocol also lays emphasis on the need to involve women at all levels of conceptualising, decision making, implementation and evaluation of development policies and programmes. The SADC Gender Protocol is also clear on this in article 7(1). These provisions underlie the principle of participation under the human rights based approach to development. The lack of participation in the present case showed how formalisation may not be the answer to women’s land needs as their current circumstances were not considered.

Participation has an important role not only at the consultation stage but also at the implementation stage. There is a danger of not involving communities and then bringing to them for implementation a law they did not participate or make any contributions towards.

For example, this presents a potential problem for women in patrilineal societies, where males resist extending their land ownership rights to women despite the law requiring them to do so.

Further, participation becomes crucial during the implementation phase of the law with the inclusion of women in Land Allocation Committees or Dispute Settlement Tribunals. The Customary Land Act provides quotas for ensuring that women participate at the land allocation stage through their being members of the Land Committees under section 4(2)(b) of the Bill (which provides that three of the six committee members shall be women). Participation in Land Dispute Settlement Tribunals is also provided for in sections 43 and 45 of the Bill with the former requiring inclusion three women out of six as members and two women out of three members for the latter. However, for such participation to yield results, there is a need for such women and men to be fully aware of the law which they will be implementing; hence, failing to raise awareness before adoption of the Bill could have negative effects on the realisation of women's land rights.

In addition, the study further revealed that in both districts women are more illiterate than men. For Thyolo, the average literacy rate amongst men is 66.3% as compared to the 51.6% amongst women whilst in Nsanje the average illiteracy rate is 57%, 30% of whom are women. This has a bearing on women's ability to utilise laws and claim their land rights if there are no further initiatives in place to safeguard their rights. Hence it cannot be overemphasised how prior knowledge of the law leads to the proactive enforcement of the law by its intended beneficiaries.

4.6 Preferred registration patterns between men and women

Another finding relates to the preferred form of land formalisation between men and women. It was found that should the Bill become law, many women interviewed preferred registering the land in their children's names or jointly with their husbands; only a few women opted for registering the land in their own names. Men, on the other hand, said that they would opt to register the land in their own names. A number of reasons were given for such options by the men and women.

For women, one of the reasons given for opting to register in their children's names was the need to secure the interests of future generations. They said that it would not be safe leaving it in the men's name. One woman said:

'If I had a chance to register land, I would do so in my child's name, the problem with the men is that they would end up selling that land or chasing away me and the children. I can give you an example of a woman who was chased away by her husband from land which they bought together separately from clan land.'

Thus, women's fears were mainly founded on the belief that men can easily decide to chase them away or dispose of the land. But registering as such does not guarantee women's land rights as it is not clear whether female children's rights will rank higher than those of male children.

Women opting to register land jointly with their husbands was seen as a way to claim a stake in land in patrilineal societies where they have lacked such rights. It is difficult for women to realise such an option in patrilineal societies where custom dictates that they cannot own land allocated to their husband at custom. This may be contrasted with what men in the patrilineal society chose as their preferred mode registering of land. Many opted to do so in their own name as individuals since many of them were of the view that women cannot own land belonging to their husbands' family as well as that they cannot be allocated land by their parents. One man who managed to buy land where he is staying with his wife and children, told me that even though he bought the land with his wife, there is no way in case of divorce or his death that she can stay on that land. He said that she has to go back to her home and in any case it would be his son taking that land. Thus, the study revealed the deep rooted patriarchal beliefs which continue to marginalise women. Women's transient nature in patrilineal societies leaves them at risk of not fully benefitting from titling as individuals.

This also led to the realisation that laws such as the Deceased Estates (Wills, Inheritance and Protection) Act allowing women to inherit their husbands' property were not actually achieving their intended purposes on the ground. I thus sought to understand how and what work had been undertaken to sensitise people to the law. One member of civil society told me that a major part of the work has involved engaging with traditional leaders to ensure that they apply these laws. Through the use of village volunteers, they are able to engage with the

communities, though the challenge remains ensuring that the women take active steps to press their complaints with the relevant authorities even when they are sensitised. But as one member observed, traditional leaders play a crucial role in all this and the problem they have always faced is that these leaders make promises but fail to fulfil them.

In matrilineal societies, the men opting for individual titling saw this as an opportunity for them to own land. This was in evidence when men jumped at the opportunity to move to Machinga and Mangochi under the Community Based Rural Land Development Programme (CBRLD). If not handled with caution, extending individual land rights to men in matrilineal societies by treating them as a vulnerable group whose rights have been marginalised has the potential of taking away what women have always had as a cushion.

Related to this point of choice of registration is the issue of sale and disposal of the land. The study found that between men and women, when asked whether they would sell their land, the women would say no whilst men were open to the idea. Women's response both to formalisation patterns and disposal reflected their relational nature in that that women do not exercise autonomy as compared to men who are often more individualistic. Section 27 of the Bill provides the procedures to be followed when disposing off customary estates. For instance, it provides that any disposal of customary estates during the first five years of registering and titling shall be approved by Land Committees and the Traditional Authority. Subsection 2 puts a limitation on the disposal of customary estates to people outside immediate family during the first five years of titling. However, it is necessary to consider the gendered power relations and their effect on women's ability to challenge such disposals in situations where they do not want to do so. The concept of the man as being the head of the family was prevalent during the study and many respondents showed that the final decision usually lies with the man. It is further important to exercise caution on this provision as section 27(3) provides for situations when the limitation on disposal outside the family can be waived in cases of emergency or where it is established by all members of the land committee that all dependants or named members of the family unit, who are above eighteen years of age have agreed to the disposal. Of concern is what would amount to an emergency as well as whether the other members, especially women, would be agreeing to do so freely.

For instance, considering the sentiments expressed by the respondents in patrilineal settings that it is the men who are the decision makers, there is no doubt that the consent, if given by

the women or other members of the family, would not be free. In addition to this, the ability to challenge such sales would require women who are proactive, who know the provisions of the law and this is quite challenging for women, for example, where their knowledge of the law is limited or which, due to customs, restrict them into the private sphere. In such prevailing circumstances, the Bill might act to reinforce the gendered stereotypes amongst societies in relation to who has the power to make final decisions, amongst others.

4.7 Conclusion

This section has examined the prevailing situation in land rights in both matrilineal and patrilineal societies. That men and women experience land problems differently due to the prevailing customs governing land rights in either society and so too their ability to utilise alternative land access methods. In addition to this, it has also been seen that women are not a homogenous group in the way that they access land.

CHAPTER FIVE

5.0 CONCLUSION AND INTERVENTIONS

5.1 Conclusion

This study sought to critically analyse the Customary Land Bill and the land reform programmes' potential to secure women's land rights. It sought to understand how the formalisation/privatisation of land rights will affect women's land rights through an appreciation of the prevailing land access circumstances in matrilineal and patrilineal societies. This was done by assessing how the equality clause in the Bill and the operation of customary law amongst other factors will affect women's land rights in both patrilineal and matrilineal societies and it led to the following conclusions.

5.1.1 Effect of formalisation of land on women's access to land

Women's ability to register land and have primary land rights will be limited under the formalisation process. For instance, in matrilineal societies, the gender equality clause in the Bill will result in these women losing some of their rights as men are allowed to own and register land. This will result in these women's access to land being under threat as they may now end up holding secondary land rights, with the primary rights being with the men. In addition to this, formalising land rights as clan/family land will have differing effects on these women depending on the kind of influence that male relatives have. With the male relatives exercising control over such land at present, the formalisation process will act as a reinforcement of this situation.

Whilst for women in the patrilineal societies, men and women are currently not experiencing the land problem in similar fashion since many women do not own land and access the same through their male relatives. Thus women in these societies are currently at a disadvantage in that as it stands many of them do not have interests in land which they can secure as individuals due to the prevailing customs that do not allow allocation of land to women. The Bill provides them with an opportunity to register and own land. Though, if these customs subsist, the Bill may not benefit women as owners of land and hence not change their current disadvantaged position. These women would also have to rely on land held by the community or family landholding. Community landholding and family landholding will continue leaving

the control and ownership of land in men's hands as it will only allow women access rights. However such access rights will not be secure due to women's lack of ownership and control over the land. Hence the gender neutral stance adopted by section 21 of the Bill has the potential of enforcing existing inequalities between men and women resulting in women not benefitting from the law.

5.1.2 The Bill and Reform Programme treat women as a homogenous group

In addition, it was found that women are not a homogenous group in their relations to land access, control and ownership, not only as a result of being from patrilineal or matrilineal societies but also because of other factors such as their marital status, age and economic status. As a result of this, they are subjected to multiple forms of discrimination not only as women but also as women belonging to the above categories. Availability of land whose interests can be secured by women is very important and some women's ability to own such land is minimal. Their ability to register land will be dependent on their ability to have land in the first place. Formalisation will lead to the further marginalisation of these women who do not have any land which they can secure as their own, leaving their access rights insecure as it is dependent on others who own the land.

5.1.3 The role of customary law in securing women's access to land

Furthermore, the study also revealed that customary law has a role to play in securing women's access to land but that the same must be positive customs and practices which guarantee women's land rights. Formalisation will result in land being concentrated in the hands of the elite few leaving out women who would have benefitted from positive customs. Hence customary law as provided for under the Bill, if not interpreted to mean positive customary law, risks acting to the disadvantage of many women, especially those in the patrilineal system who cannot be allocated land in the same way that men are.

5.1.4 The effect of lack of participation in the reform process

To achieve substantive equality, there is a need to ensure that government involves people in the reform process. It must also put mechanisms in place aimed at ensuring that men and women have equal opportunities and equal results in the process. The lack of participation has ended up ignoring the immediate needs that women have related to land which, for many of them, is the availability of land.

5.1.5 Women's failure to fully benefit from existing land markets

The emergence of land markets in both societies has presented the people with the opportunity of claiming land rights that are independent of family allocations/transfers. However women's ability to benefit from these informal markets is limited. The most relied on path by women being land rentals, does not adequately assist them as a result of lack of money and also the lack of control and ownership over such land. Unless women own and control under the formalisation process, their participation in the formally recognised markets will not act to their benefit. Their economic status will among other factors restrict their ability to fully participate due to their having no land or resources with which to engage in these markets. Hence, though gender neutral, the Bill will not achieve substantive equality for men and women.

Hence, the following suggested interventions/recommendations are outlined below.

5.2 Interventions

5.2.1 Land reform process should not be solely focussed on formalisation

Considering that women are more likely to lose out in the formalisation process, it is crucial that government land reform initiatives are not only concerned with formalisation. It is important to recognise what type of reform programmes will act to safeguard women's land rights and not lead to their further marginalisation. For instance, without having regard to the landless women, they will have no land to formalise. The question that must be dealt with is the availability of land which can be secured.

5.2.2 Research/data disaggregated by sex to understand the current situation

Since the Bill has been sent back to the drawing board, it is necessary that the government ensures that there is adequate research on access, control and ownership land by both men and women. Particularly important is that data collected must be gender-sensitive as well as disaggregated by sex with the aim of appreciating women's position. Lack of data disaggregated by sex for example has led to a failure to appreciate how many women are 'owners' of land under the existing systems which would crucially help in understanding their position in matrilineal societies. Further, considering the use of land rental/sale markets, data collected must reflect the number of women able to participate as well as to what extent their land rights are being protected.

This will require government to ensure meaningful gender responsive budget allocations towards this cause are adequate to allow for meaningful research which takes all citizens into consideration. The research must also consider the experiences of different women to avoid generalising women's experiences.

5.2.3 Active participation by members of the society in the reform process

It is also important that government engages with communities, both men and women, with the aim of soliciting their views on the Bill as well as later in the implementation process. Such participation must ensure that different groups of women's views are sought for purposes of ensuring that measures are put in place which secure their interests. This will also require Government's full financial commitment. Women's input will ensure that the land reform programme reflects a bottom up approach to the programme with a focus on what the communities want.

Communities need to be aware of the Bill and policies both at the planning and implementation stages. Involvement at the latter stage will ensure that women are aware of their rights and how they can claim and enforce the same from the relevant authorities.

Hence, this process must be centred on achieving successful legal literacy initiatives not only on the land related laws but also other laws such as the Deceased Estates (Wills, Inheritance and Protection) Act. Such legal literacy will assist in ensuring that women who, for instance, get to participate in the process through the Land Committees or Tribunals are fully aware of the law which they will be dealing with.

5.2.4 Promotion of positive customary law

Positive customary law plays a vital role in safeguarding women's land rights especially as was seen in the matrilineal societies. Hence upholding of the same will assist women in securing their land access rights. For women in patrilineal societies, regard must be had to those customs and practices which also ensure the protection of women's rights. A blanket reference and application of customary law risks disadvantaging women if not focussed on the positives.

It is therefore crucial, for instance, to ensure that there is active engagement with traditional leaders who are the custodians of culture with the aim of raising awareness on the need to ensure that customs and practices are those which are responsive to the protection of human rights for all.

5.2.5 Affirmative action/temporary special measures for women

The land scarcity problems as shown by the research require state-led initiatives towards allocation of land to the landless such as land resettlement programmes. As previously done under the Community Based Rural Land Development Programme, the same can be used to secure the land interests of those women who are completely landless so that they have land to which their access can be secured. Lessons must be learnt from the pilot project to ensure that it benefits those in real need and not the elite. Implementation must also ensure the availability of social services and other resources to ensure that they do not overburden women due to their gendered roles.

In addition to this, such an initiative must be accompanied by programmes aimed at ensuring access to credit/loans so that women whose economic status is enhanced. This will in turn enable women to utilise other land access mechanisms as have emerged in the communities.

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