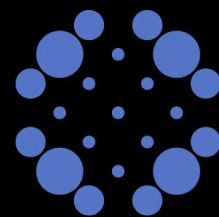


# Lineage and Land Reforms in Malawi: Do Matrilinear and Patrilinear Landholding Systems Represent a Problem for Land Reforms in Malawi?

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# Lineage and Land Reforms in Malawi: Do Matrilineal and Patrilineal Landholding Systems Represent a Problem for Land Reforms in Malawi?<sup>1</sup>

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## *ABSTRACT*

This paper is about land tenure relations among the matrilineal and patrilineal cultures in Malawi. Data from the National Agricultural and Livestock Census are used to characterize marriage systems and settlement and landholding patterns for local communities. Marriage systems correspond to customary land tenure patterns of matrilineal or patrilineal land holding. The differences between the two major ways of land holding represent a particular challenge for land reforms intending to unify rules for land tenure and land devolution.

The paper discusses the problems of formalisation and the idea of maintaining the diversity. If diversity is not respected there is a chance that some sections of society, especially communities with matrilineal land holding, might be victims of formalization. Based on analogy of the resilience of the patrilineal land holding system in Norway it is argued that a democratic system will have difficulty removing the preferential rights of lineage members and it is recommended that the existing land rights are formally recognized and circumscribed by fair procedures. In a situation of diversity one goal of a well-designed land holding system should be to ease the transitions of the diverse customary tenure systems towards systems adapted to the requirements of a modern large scale society rather than to a unified national system.

*Keywords:* matrilineal, uxorilocal, patrilineal, virilocal, land tenure, inheritance, access rights, use rights, ownership rights, Malawi

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## **Lineage and Land Reforms in Malawi: Do Matrilineal and Patrilineal Landholding Systems Represent a Problem for Land Reforms in Malawi?**

### **Introduction**

Land reforms based on customary law and providing justice and security of tenure in countries where very different cultures co-reside is an unsolved problem. One particular variant of this problem is found in several Central and East African countries. Here one may study communities, side by side, with either matrilineal or patrilineal principles for organising social systems and with matching customary land law. Malawi is particularly interesting to study in this regard since matrilineal descent and devolution of land rights is the traditional norm for a majority of the population while the formal system is modelled on the patrilineal English legislation. The central parts of the country where the majority of the population lives are dominated by matrilineal cultures. The patrilineal cultures are found mostly in the north, but also some in the south-western parts of the country<sup>3</sup>.

The primary concern for any land tenure system is security of tenure for the people actually working on the land. They must be convinced that investments in the form of labour and capital will provide returns both in the short and long term perspective. The long term perspective also includes the livelihood of any children. Usually parents want land to devolve on their children. Matrilineal and patrilineal systems discriminate systematically between male and female children. In patrilineal land holding systems land devolves on male heirs. Daughters are assumed to be married to men who inherit land. In matrilineal systems it is exactly opposite. Sons will not need to inherit land. They will get land from their wife. Whether a couple settles in the husband's village (virilocal residence) or the wife's village (uxorilocal residence) will create variations on the basic pattern of inheritance in both matrilineal and patrilineal cultures. Also scarcity of land will affect how land devolves.

Land tenure relations are governed by local customs for most Malawians, especially the small-scale farmers who comprise about 80 per cent<sup>4</sup> of the farmers in Malawi. This means that both for the matrilineal and uxorilocal<sup>5</sup> groups and for the patrilineal virilocal<sup>6</sup> groups the distribution of access to and control over land is organized according to local rules. Not everything in the local situation is relevant for the present discussion. However, it is important to know the rights and duties people believe they have and the rights and duties they believe others have. Property rights (like other rights) have this asymmetry between an "owner's" rights (and duties) and other people's (non-owners) duties (and rights). We need to understand both sides.

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<sup>3</sup> For more background on Malawi's matrilineal cultures see (Peters 1997; 2010; Kishindo 2010).

<sup>4</sup> The Statistical Yearbook for 2008, table 6.2, reports for 2007 that 77% of the population above 15 years were employed in agriculture/ mining (NSO 2008).

<sup>5</sup> Settling among the wife's matrikin.

<sup>6</sup> Settling among the husband's patrikin.

There are two problems in obtaining security of tenure. One is related to the size of the group that needs to accept and respect the current tenure situation. The other is the system of force that can be used to sanction those who in one way or another infringe on the current tenure situation. Successful land reforms have at their core a solution to these two problems at the same time as they provide rules for assuring just outcomes in contentious issues.

One of the issues high on the international agenda is gender equality. In this article the two problems of providing security of tenure will be discussed in relation to gender equality in land reforms of both matrilineal, uxorilocal and patrilineal, virilocal landholding systems in Malawi.

The article will start by establishing the strength and distribution of matrilineal and patrilineal landholding in Malawi in 2007. Examples of insecurity of tenure as recorded during fieldwork in 2007 will be presented and problems of land reform will be discussed and contrasted to the development of lineage based land tenure in Norway. The fieldwork targeted land tenure relations because of the pending land reforms where statutory law is proposed to replace customary law. Background material to the proposed reforms is found in Saidi (1999) and the Malawi National Land Policy (GoM 2002)<sup>7</sup>. Proposals for new legislation were presented to the Government in 2006 (Khaila et al. 2006). Our conclusions support the notes of caution in this process presented by Saidi (1999, Ch. 4-5).

### **The data**

The paper is based on data from the National Census of Agriculture and Livestock (NACAL) 2007, the 2008 Population and Housing Census, and the Malawi Land Tenure and Social Capital (MLTSC) Project<sup>8</sup>.

NACAL collected data from ca. 24000 households from ca 1600 enumeration areas (EA)<sup>9</sup>. The data collection comprised a total of 9 questionnaire modules. The sampling was complex and for 2 modules the urban areas of Mzuzu, Lilongwe, Zomba, and Blantyre were divided into city and rural adding 4 extra districts to the usual 27<sup>10</sup>. We shall use module 8 providing information on 5469 villages<sup>11</sup> within 31 districts.

The MLTSC project was coordinated by the Norwegian Institute of Urban and Regional Research (NIBR) in Oslo. Primary data were collected in Malawi during the period June-

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<sup>7</sup> See also Kishindo (2004) and Peters (2010).

<sup>8</sup> NACAL funded by the Norwegian government, Ministry of Foreign Affairs. MLTSC funded by Norwegian Research Council, Project Grant no 178757. For background see NSO (2010; 2008) and Berge et al. (2009)

<sup>9</sup> The only official report from the census (NSO 2010) provides remarkably few exact figures. In the data files we have been given access to we find 23896 households from 1614 enumeration areas. The Welfare Monitoring Survey was one of the modules of NACAL and comprised more households, particularly from the urban areas of Mzuzu, Lilongwe, Zomba and Blantyre. In the WMS module we find 29460 households in 1624 enumeration areas. Enumeration areas usually comprise more than one village. In the module on village characteristics we find 5469 villages. This is the module where we find information on ethnicity, marriage and settlement patterns.

<sup>10</sup> In 2003 Malawi created its 28<sup>th</sup> district, Neno, split off from Mwanza. Neno does not appear in tables from NACAL, but it does appear in some of the tables from 2008 Population and Housing Census. If encountered in the data used here it has been added to figures for Mwanza.

<sup>11</sup> In Malawian society "village" has the primary connotation of a lineage living together in a settlement. Households not belonging to the dominant lineage are common, but will in many contexts not be included in the headperson's evaluations. They are in Chichewa known as "obwera" (literally, those who have come) and will in some contexts be discriminated against. Our fieldwork in 2007 encountered cases of this. See Berge et al. (2009, 130).

August 2007. The conduct of fieldwork in Malawi was coordinated by Bunda College of Agriculture of the University of Malawi. The study was conducted in 6 districts: Rumphi and Mzimba in the north, Kasungu and Dowa in the central, and Chiradzulu and Phalombe in the south. In each district one Traditional Authority (TA)<sup>12</sup> was chosen where data collection took place. The choice of districts and TAs was purposively done. Three enumeration areas in each Traditional Authority were randomly selected. In each enumeration area a list of villages was made and one village was randomly selected. Hence, in each district 3 villages were selected. Research assistants were recruited and assigned to work in one of the selected villages where he or she lived for about 6 weeks after which they moved to a second district in their region.

In each village 15 households were randomly selected to participate in this study. A household questionnaire was administered to all the 15 households. For each of the participating households an in-depth interview was conducted which was aimed at understanding land tenure and social capital issues in the sampled districts and villages. In addition to this, key informant interviews were conducted with village heads (VHs), group village heads (GVHs) and others in the selected communities. A total of 266 households were surveyed (from the sample of 270). In addition 17 key informant questionnaires were completed.

### **Land holding systems based on the National Census of Agriculture and Livestock (NACAL) and the 2008 Housing and Population Census.**

Land holding systems are products of culture. Customary cultural institutions such as rules about land ownership are endogenous to language groups. Language groups are usually identified with ethnic groups or tribes<sup>13</sup>. In Malawi the 2008 Population and Housing Census (NSO 2008) collected information on 12 tribes. Eight of these 12 tribes have more than 1% of the population, 4 have more than 10%. Relying on Ibik's (1970) description of customary law of marriage we see that the 3 largest tribes are all matrilineal and comprise 63.7% of the population in 2008. In addition most of the Ngoni villages are matrilineal. The strength of the matrilineal land holding culture cannot be doubted.

The available tables from the population and housing census do not provide a distribution of the tribes across districts. The NACAL data can provide some more insight into this.<sup>14</sup> The NACAL question of module 8 asks about only 10 tribes, leaving out both Senga and Nyakyusa, the two smallest groups in the census (see table 1). For each village the NACAL records what village leaders say is the dominant ethnic group and the major system of marriage and pattern of settlement. In table 2 below NACAL data is used to show which ethnic group dominates a district with more than 50% of the villages. All 10 tribes asked

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<sup>12</sup> TA refers to both the Chief and to his area.

<sup>13</sup> We shall talk of tribes or ethnic groups, but are very conscious of their rather fuzzy meaning. Migration history, inter-marriages, and social status of names may affect how people answer a question about ethnic identity. In some contexts we should expect answers to question about tribe as a form of self-selection of tribe based for example on perceived prestige among available alternatives. Even so we believe the information provides interesting information on the cultural context of the land tenure system. In NACAL the question we use was "What is the major ethnic group in this village?" (Question V13, module 8). In the Population and Housing Census residents of the household were asked "What is (NAME'S) tribe?" (Question P10). Using language/ ethnic group as an indicator, we hope to catch in broad terms those parts of the culture that defines the link between lineage and land holding.

<sup>14</sup> The data of the National Census of Agriculture and Livestock (NACAL) from 2007 were collected during the period October 2006 to October 2007. The Population and Housing Census data were collected between 8th to 28th June 2008, and should, for the present purposes, be comparable (NSO 2008; 2010).

about in NACAL dominate one or more districts in this way. The smallest ethnic groups with local dominance are the Lambya and Ngonde (Nkhonde) in the northern part of the country.

Table 1 Relative number of people in the tribes of Malawi

Tribes in Malawi	Persons	%	Classification by Ibik (1970)	Classification <sup>15</sup> by Ibik (1970)
Chewa	4252204	32.6		Matrilineal
Lomwe	2288285	17.6		Matrilineal
Yao	1760843	13.5		Matrilineal
Ngoni	1492850	11.5	Matrilineal (not in Mzimba)	
Tumbuka	1152017	8.8		Patrilineal
Nyanja	754410	5.8		Matrilineal <sup>16</sup>
Sena	467958	3.6		Patrilineal
Tonga	270833	2.1		Patrilineal
Ngonde (Nkhonde)	129914	1.0		Patrilineal
Lambya	59452	0.5		Patrilineal
Senga	24366	0.2		
Nyakyusa	18751	0.1		Patrilineal <sup>17</sup>
Other	357615	2.7		
Total	13029498	100.0		

Source: 2008 Population and Housing Census of Malawi, Table 14 in Population Characteristics, NSO, Zomba (NSO 2008)

### *The regional distribution of land holding systems*

The NACAL data divides the country into 31 districts roughly ordered from north to south. Table 2 shows that in the northern districts<sup>18</sup> between 90 and 100% of the villages are classified as patrilineal with marriages located either in the man's village (virilocal) or in neither of the partner's villages (neolocal<sup>19</sup>). Also 2 districts in the south report a preponderance of patrilineal descent systems: Nsanje with 71% and Chikwawa with 94%. In the middle of the country around and north of Lilongwe the picture is mixed. The districts Kasungu, Ntchisi, Dowa, Nkhotakota report between 43 and 63 % matrilineal descent with virilocal settlement, and also a strong presence of patrilineal descent systems (24-39 %). Salima, Mchinji and Lilongwe rural has 36, 58 and 51 % matrilineal descent and virilocal settlement, but also report a strong presence (57, 19 and 41 %) of matrilineal descent and settlement in the wife's village (uxorilocal).

The rest of the districts, except the urban areas of Blantyre City, Zomba Municipality, Lilongwe City, and Mzuzu City are predominantly matrilineal varying between 81 and 100%. The 4 urban areas and Nkhotakota, are the most mixed in terms of marriage and descent systems. It is worth noting that in the city districts 15-28% report that they do not know what the descent system in the area is<sup>20</sup>. For the other 27 districts the number of "do not know" varies between 0 and 3,6%. Patrilineal descent dominates Mzuzu in the north with 61%, and

<sup>15</sup> Ibik (1970) in chapter 8 also surveys "The Matengo and Mtumba" listing them as matrilineal.

<sup>16</sup> Table 1 page 2427 in Holden and Mace (2003)

<sup>17</sup> Based on Wilsons description of the Nyakyusa in Radcliffe-Brown (1950, 111-139) patrilineal and neo-local might be an approximation. Table 1, page 2427, in Holden and Mace (2003) classifies them as patrilineal.

<sup>18</sup> Chitipa, Karonga, Rumphu, Nkhata Bay, Likoma, and Mizimba.

<sup>19</sup> Neolocal households are in general very few. In NACAL only 5.7% of the villages (matrilineal and patrilineal) were classified as such.

<sup>20</sup> A reasonable interpretation would be that the sheer variety of origin plus the considerable proportion of marriages/ liaisons cutting across linguistic /ethnic groups mean that people in the towns both know the 'system' varies considerably and are unsure of which type – if any – can be considered as typical or usual for the area.

matrilineal is largest in Blantyre and Zomba in the south with 42 and 71%.

Table 2 Distribution of descent and settlement systems in the villages of Malawi's districts in the 2007 National Census of Agriculture and Livestock

District	Lineage system with more than 50% of villages	Matrilineal (uxorilocal + neolocal)	Matrilineal and virilocal	Patrilineal (virilocal + neolocal)	Do not know	Total (N = villages)	Ethnic group with more than 50% of villages
Chitipa	Patrilineal		0.6%	98.3%	1.1%	174	Lambya
Karonga	Patrilineal			98.6%	1.4%	147	Ngonde (Nkhonde)
Rumphi	Patrilineal		0.5%	99.0%	0.5%	197	Tumbuka
Nkhata Bay	Patrilineal	1.4%		96.5%	2.1%	144	Tonga
Likoma	Patrilineal			100.0%		13	Nyanja
Mzimba	Patrilineal	0.3%	9.2%	90.4%		292	Tumbuka
Mzuzu City	Patrilineal		9.5%	61.9%	28.6%	21	Tumbuka
Kasungu	Matrilineal/virilocal	10.9%	55.0%	33.8%	0.3%	340	Chewa
Ntchisi	Matrilineal/virilocal	11.3%	63.2%	24.3%	1.3%	239	Chewa
Dowa	Matrilineal/virilocal	9.4%	61.3%	28.6%	0.8%	266	Chewa
Nkhotakota		16.4%	43.2%	39.7%	0.7%	146	Chewa
Salima	Matrilineal	57.1%	36.3%	6.6%		212	Chewa
Dedza	Matrilineal	92.7%	6.8%		0.5%	220	Chewa
Ntcheu	Matrilineal	84.2%	15.8%			133	Ngoni
Lilongwe Rural	Matrilineal/virilocal	41.3%	51.6%	6.9%	0.2%	525	Chewa
Lilongwe City		30.0%	40.0%	7.5%	22.5%	40	Chewa
Mchinji	Matrilineal/virilocal	19.9%	58.8%	19.9%	1.3%	226	Chewa
Balaka	Matrilineal	83.5%	15.7%	0.8%		127	Yao
Mangochi	Matrilineal	83.0%	15.7%	1.3%		159	Yao
Machinga	Matrilineal	96.8%	2.8%	0.5%		218	Yao
Zomba Rural	Matrilineal	94.7%	3.3%	1.0%	1.0%	302	
Zomba Municipality	Matrilineal	71.2%	1.7%	11.9%	15.3%	59	Nyanja
Chiradzulu	Matrilineal	99.5%	0.5%			211	
Blantyre Rural	Matrilineal	83.7%	13.7%	0.7%	2.0%	153	
Blantyre City		41.7%	22.2%	11.1%	25.0%	36	
Thyolo	Matrilineal	96.0%	2.0%		2.0%	101	Lomwe
Mulanje	Matrilineal	100.0%				121	Lomwe
Phalombe	Matrilineal	81.7%	18.3%			82	Lomwe
Mwanza	Matrilineal	98.0%	2.0%			102	Ngoni
Chikwawa	Patrilineal	21.8%	2.7%	71.8%	3.6%	110	Sena
Nsanje	Patrilineal	3.6%	1.5%	94.9%		137	Sena
All Missing		45.1%	23.7%	29.9%	1.2%	5253	
Total						216	
						5469	

Source: National Census of Agriculture and Livestock (NACAL) 2007, Module 8. ZOMBA, NSO

Overall 45% of the villages are matrilineal and 30% patrilineal. The group with 24% matrilineal and virilocal is the smallest. Some of these districts lie north of Lilongwe in predominantly patrilineal context while some lie to the south both east and west of Lilongwe in a mostly matrilineal context. In some ways the landholding in these districts seems to lie in between the pure forms found to the north of Mzuzu and to the south of Zomba.

Information on the ethnic composition in the villages is added in the last column of table 2. The ethnic groups are distributed in a rather self-contained pattern. There are very few districts without an ethnic group dominating more than 50% of the villages. It is seen that marriage and descent systems follow the ethnic groups. The districts where matrilineal descent systems dominate are basically the districts where the Chewa, Lomwe, Ngoni, and Yao cultures dominate.

Only in 4 districts are there no ethnic group with more than 50% of the villages. And only for 3 districts are there no dominant marriage and descent system. It is known that for behaviour determined by cultural norms the majority norms have a very strong impact on the choices of individuals (Henrich and Henrich 2007). The separation and concentration of ethnic groups will tend to enforce the local norms of the majority culture. The forces for change are found in the cities where 15-28% of the villages do not know what the most common marriage system is. If one does not know (or do not care) what the norm is one will not use that as a guide for behaviour. But except for Mzuzu City the urban areas are dominated by matrilineal ethnic groups, either as majority (Chewa, Nyanja) or as the largest group(s)<sup>21</sup> and they are located in areas where matrilineal cultures dominate the surrounding districts.

Matrilineal and patrilineal descent systems have been studied in Malawi for a long time (Radcliffe-Brown 1950; Peters 1997; 2010; Mitchell 1952)<sup>22</sup>. For studies in relation to land holding Pauline Peters comments “while most of the people in other parts of the southern region (outside the Lower Shire) and Central region follow matrilineal descent and inheritance, there is greater variation in (i) whether sons receive land, and (ii) residence after marriage. Unfortunately, there is a dearth of research on these basic issues.” (Peters 1997, 207, Note 2). Information on the volume and extent of matrilineal land holding across Malawi seems to be even more neglected<sup>23</sup>. Based on Peters observations it would seem a reasonable guess that if people were left to themselves changes to the matrilineal descent system would come very slowly if at all. But many forces are acting on the various ethnic groups. Many of them are linked to land holding and devolution of land.

### **Matrilineal land holding systems seems to be understudied**

Land holding systems in patrilineal social systems are better known than those dominating matrilineal social systems. The standard belief among policy makers about matrilineal communities in Malawi is that “Under matrilineal marriages land is inherited by sons from their mother's brother and women do not have full ownership and control of it because uncles control the land owned by the women.” (Hatcher, Meggiolaro, and Santonico Ferrer 2005, 51; see also Voegelé, Villarreal, and Cooke 2009, 128). In another paper we demonstrate that this is not valid for all matrilineal societies (Kambewa et al. 2009)<sup>24</sup>. In the communities we visited there was no doubt that land devolved from mother to daughters. Both mother's brothers and their husbands were quite certain of this. But it is also clear that the situation varies from region to region both amongst the Bantu of Central Africa (Richards 1950) and

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<sup>21</sup> In Zomba rural for example Nyanja, Lomwe, and Yao, all matrilineal, dominate in 91.2% of the villages.

<sup>22</sup> Pauline Peters surveys the literature. In Radcliffe-Brown (1950) Monica Wilson writes about the Nyakyusa and A. I. Richards writes about “The Yao-Chewa Group” among the central Bantu (page 230-246); Mitchell writes about the Machinga Yao.

<sup>23</sup> The Population and Housing Censuses collects data on language groups that may, in combination with anthropological studies, yield an approximate geographical coverage of the distribution of decent systems like done in table 1.

<sup>24</sup> See also Peters (1997; 2010). To tell the truth: we have not seen any valid documentation of the inheritance pattern described by Hatcher, Meggiolaro, and Santonico Ferrer (2005) and Voegelé, Villarreal, and Cooke (2009).



within Malawi<sup>25</sup>. And we should take note of how the men were in a position to increase their power by way of commercial agriculture. This is a force for change even if the men we talked to were buying land on behalf of their daughters.

During the last 30-40 years research has increasingly started to look at the impact of the patrilineal biased world view that researchers<sup>26</sup> as well as colonial administrators brought with them to Africa (Lewellen 2003; Kaarhus 2010). Kaarhus (2010) finds such tendencies for the Lilongwe Land Development Project (LLDP) that had been designed to introduce titles to land in a district west of Lilongwe as stipulated by the land laws of 1967. Stephen Carr did an audit of the LLDP-project for the World Bank in the early 1990s and found a patrilineal bias<sup>27</sup> among the project staff<sup>28</sup>. According to the Saidi report (Saidi 1999) the strength of Malawi's established customary land holding system is well expressed by a quote attributed to a Nigerian Chief: "I conceive that land belongs to a vast family of which many are dead, few are living, and countless members are yet unborn" (quoted by Saidi et al. (1999, 63) after Brooke-Taylor (1977, 5)). The quote points to the link between a lineage and the land. It says nothing about whether the link goes through the male line or the female line.

The Saidi commission reviewed the land holding in both matrilineal and patrilineal regions of Malawi (Saidi 1999, 92-100). For both systems of land devolution they find that the continuous subdivisions that are entailed by the systems create an increasing number of problems both in terms of economic results and conflicts among those who inherit. In areas with matrilineal land holding and virilocal residence the rule that the rightful heirs of land are a man's sisters' children creates practical problems as well as conflicts with the man's wife and children. In both systems they find gender discrimination in land inheritance. The widow

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<sup>25</sup> Kishindo (2006) describes how the history of a Yao-settlement is shaped by succession disputes and population growth leading to splits in the group of sisters (mbumba) with subsequent migrations and creation of new villages. The paper also details conditions that may permit men to obtain land in their maternal village.

<sup>26</sup> "Very broadly one might distinguish three overlapping phases in a distinctly anthropological view of women with regard to power and politics. The first "revolutionary" phase, which began in the early 1960s, is marked by the belated recognition of a pronounced male bias in ethnographic writing and anthropological theory." Lewellen (2003, 131).

<sup>27</sup> It has proved impossible to track down this audit, but in 2006 Carr writes "I worked with another Bank retiree to carry out the audit of LLDP in the early '90s and spent some weeks on the job. Our first concern with the land registration was why titles were issued to males in a matrilineal society. I was lucky enough to track down the one senior Malawian who had been on the staff when it was initiated (all the other senior staff were expatriates). He gave me an instantaneous response: "The first Project Manager (an Englishman) had been convinced that the reason why men did not work as hard as he would have liked on the land was because the land was in the hands of the women and so he sought to change the situation dramatically". We found no evidence whatever of the fact that the change in nominal ownership had any impact on men's attitude to farming.

The government gathered some 50 TA's and Headmen together who had been in position when the Project began and I spent four hours with them trying to establish what difference titling had made. In the end the only concrete suggestion was that the people who had title were compensated for their land when the railway to Chipata was being built and those who had no title did not get compensated, hardly the global impact which the designers had in mind. What did come out of that meeting was that the TAs had, immediately upon the issue of titles, lain down that no land could be sold to any person outside of the community in which the land lay. This immediately killed off the main purpose of the exercise which was to create a market in land which would favour its more intensive use. Project management had never envisaged using land as collateral for credit but always intended using group credit with draconian action against defaulters.

One of the reasons why there have been so few success stories in Africa of banks lending to small scale farmers against land title has been the attitude of local people to having a neighbour dispossessed by an outside company. In Uganda when agriculture was really thriving on high commodity prices Barclays Bank lent money to larger smallholders using their land as collateral. When the bank went to take over the land from defaulters they were met by large numbers of villagers armed with spears. The experiment was short-lived." (personal communication to Øystein Botillen, Norwegian Embassy, dated 26<sup>th</sup> November 2006, used here with the permission of S. Carr).

<sup>28</sup> Kettlewell (1964) in an address delivered at a joint meeting of the Royal African Society and the Royal Commonwealth Society on July 2, 1964 demonstrates this kind of attitude in arguing for land consolidation and individualization of farm land.

in patrilineal systems seems to be slightly better off than the widower in matrilineal systems, but both are seen as a problem for their communities. The commission finds that increasing land scarcity has made disputes among family members more common and the evictions of *obwera/ akudza*<sup>29</sup> more frequent (Saidi 1999, 41-42). This was also evident in our observations.

### **Insecurity of tenure in current matrilineal land holding**

The story below that we heard during the fieldwork of the MLTSC study during 2007 illustrates several aspects of the issue of security of tenure for a female *obwera* in a matrilineal village. The village studied lies in Chiradzulu. From table 2 we see that in Chiradzulu 99.5% of the villages surveyed by NACAL (211 villages) were either matrilineal and uxorilocal or matrilineal and neolocal. The strength of matrilineal sentiments about land and lineage are probably as strong as they can get. The location in between Blantyre and Zomba<sup>30</sup> should also indicate influence of modernizing forces such as the formal justice system and education provided by the state. If modernization means formal justice and equality of citizens, its influence is difficult to detect in the security of land tenure in this village.

#### *An Obwera from Naphini*<sup>31</sup>:

Mai EF came to Naphini village in 1977 with her two daughters to live with her eldest daughter who had married in the village. This was after her husband died in 1974. When she came to Naphini village the village head allocated her a field in the same year. In 1998 the second daughter of Mai EF bought a field from a sister of the village head Naphini for MKW3000.<sup>32</sup> In 2001 the second daughter died and Mai EF inherited the field. However, in 2004 adult children of the sister of the one who sold the field claimed back the land, saying that it was their land and they did not recognize the sale. The claimants were the nieces (sister's daughters) to the one who sold the land and to the village head. Mai EF took the matter to the village head but he failed to stop the children from taking the field and the matter was referred to the group village head, who also ruled in favour of Mai EF. But the nieces ignored the ruling and continued to threaten to take the field. The group village head referred the matter to the Chief, who ordered that Mai EF should give back the field and asked the one who sold the field to pay back the money (MKW3000). Other key informants revealed that Mai EF was told to surrender the field because it is believed that no one could sell the land. So, Mai EF surrendered the field but to her surprise the nieces also took the field which she was allocated by the village head. Mai EF explained that she lost all the fields and she felt that the village head did not protect her because she was *obwera* in the village. She added that the argument about the field that her daughter bought was a conspiracy by the village head and his relatives to chase her from the village. It was the last plan after the village head and relatives had bewitched and killed her two daughters. However, she was not ready to leave the village because she had nowhere to go as she left her natal village many years ago and she would not be welcomed and her fields had been shared among her sisters. At the time of the interview Mai EF did not have any field and she lived by renting.

We take note of the following facts here:

- 1 Selling land out of the lineage was not quite legitimate. As long as there was enough land for all nobody minded. But one generation later those who felt they had too little

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<sup>29</sup> This is what non-lineage residents with land rights are called. Lentz (2010) provides an interesting discussion of land conflicts in a district in Ghana between the first settlers, who claim inalienable allodial title and those who came later.

<sup>30</sup> Blantyre is the largest urban concentration in Malawi with more than 1 million people. Zomba is also counted as an urban concentration but fell on hard times when the capital was moved to Lilongwe in 1974. Still, more than 600 000 people live in the area.

<sup>31</sup> Personal records: \R3 Naphini Village\CZFE00KA45.doc

<sup>32</sup> This would be about USD22 in 2007.

- land resorted to questionable means in order to evict the non-lineage land holders<sup>33</sup>.
- 2 The traditional system of justice, the village head (VH) and group village head were unable to provide justice as they interpreted the case. The Chief (TA) supported the rights of the lineage members against the non-lineage woman, holding that the sale had been illegal from the start. The Chiefs judgement might at least partly be determined by the sales procedure. Maybe the sale of land to Mai EF's second daughter did not follow the required procedures. In principle land cannot be sold. But if proper procedures are followed it is done. We do not know how the procedures were in this case. The result was that the woman lost all her lands.
  - 3 Currently the woman survives by renting land. But bona fide land holders are not allowed to rent out land according to law. Both people who have to rent to survive and those who rent out would be better served by a legal system allowing – and regulating – land leases.

In Malawi land is clearly seen as family property. And it has become a highly contested asset when it is inadequate. The processes of exclusion whereby the immigrants (*obwera*) are excluded by the bona fide villagers (members of the lineage) are probably increasing in frequency and intensity. Some *obwera* have insecure rights although they live together and in the same village with bone fide members and have done so for a long time. The immigrant members try to find ways to justify and legitimize their membership to the family or to identify themselves with the village so that they can have access to land but their rights are not always protected by the existing institutions. In an effort to justify their claims over land, members move from one institution to another for justice. Some resort to violence. Others think they can secure their right by claiming that the land has been bought. However, all claims are contested. Use of violence might be an example of how people use extra-legal means to enforce their claims and interests. Kambewa et al. (2009) tell the story of Mr JC of Naphini village in Chiradzulu. It is an example where male children use claims such as having insufficient land at the wife's place or having made investment in the land in order to continue using borrowed land in their birth village. What is needed therefore is a mechanism that can protect both the ownership of land by the current user and distribute inheritance fairly so that both female and male children will get a fair share after their parents. To do this one need the ability to distinguish between the land as a productive asset and land as wealth and then reserve inheritance to be concerned with wealth, while other rules (for example lineage based) determine who will continue to use the productive capital in the land. Below we shall discuss how this has been done in Norway.

#### *Main features of matrilineal landholding*

The story of Mai EF comes out of a customary land tenure system with differential access to and control over land among women and men living in a culture where descent and inheritance are matrilineal and post-marital residence is uxorilocal. The dominant mode of access to land in matrilineal society is inheritance from mother or grandmother.

On the one hand female children have the rights to use, own and inherit the land - women are owners of the land. On the other hand male children have the right to use and borrow but not the right to own and inherit land. Men are recognized as users and borrowers. It therefore

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<sup>33</sup> The emergence of “customary transfer” of land where money is involved, or emergence of land markets, is discussed for Sub-Saharan Africa by Sjaastad (2003) and for Côte d’Ivoire by Colin and Ayouz (2006) and Chauveau and Colin (2010). But this process is not an issue for discussion in this paper.

appears that the power of women over land is strong in matrilineal uxori-local societies contrary to what generally is believed about matrilineal societies. Even in cases where men were buying land, they did so for their daughters. In Chiradzulu, in Naphini village, Che LU bought a piece of land. He shared it among his daughters. None of his sons received any piece of land. In Phalombe, in Katundu village, it was observed that Che GU bought a piece of land and shared it among his daughters. None of his sons got any land. This is also the pattern of a well-established set of principles and practices found in the neighbouring Zomba district (Peters 1997; Peters and Kambewa 2007).

In light of these findings, any attempt to give equal rights to men and women as owners of the land would cause conflicts. Any attempt to make equal rights would make male children have more secure rights, while female children would inherit less. Already women face threats from their brothers who borrow the land but also want to take it by force. In some cases those who rent the land have a tendency to claim full ownership by saying they have bought the land. In order to enhance tenure security for women, matrilineal systems need legal recognition of their de facto joint ownership, for example to provide protection against any lenders or borrowers of land who afterwards claim the land is theirs.

For a long time traditional leaders as well as *mwini-mbumba* (the head of the family/ lineage) have been seen as custodians and allocators of the land. However, this study has revealed that, at least in land-short areas, lineal groups of women and not the *mwini-mbumba* or traditional leaders allocate land to members of the lineal group. Therefore the pattern that should be recognized is one where women are in control of land matters. These patterns have existed for a long time. The Chiefs, women, and men agreed that their ancestors practiced the same pattern, that they do it, and that they expect their children to do the same. In other words, it is part of their culture that land belongs to women, and that men cannot own or inherit the land belonging to their mothers. They can only use it, and they have the right to be buried in this land.

The matrilineal-uxori-local systems make women ‘owners’ and land is conceived to belong to the matrilineal group. Therefore any debate on land matters has to take into consideration the members of the wider matrilineal group, beyond the person using the land. In the same way, the problems over land have to be understood in the context of the existing relations between an individual and the wider network. Simplistic and technical solutions that focus on the immediate land user without paying attention to the wider lineal network, and simplistic understandings of matrilineal society that blame lack of “development” on men’s lack of formal land rights (for which there is no evidence) or see men as victims, would only exacerbate the problems instead of reducing them.

### **Insecurity of tenure in current patrilineal land holding**

Stories about obwera men in patrilineal and virilocal villages are not fundamentally different from the female obwera. The story below that we heard during the fieldwork of the MLTSC study during 2007 illustrates aspects of the issue of security of tenure for a male obwera in a patrilineal village. The village studied lies in Rumphi. From table 2 we see that in Rumphi 99.0% of the villages surveyed by NACAL (197 villages) were either patrilineal and virilocal or patrilineal and neolocal. The strength of patrilineal sentiments about land and lineage are probably as strong as they can get.

In this case one may also see how migrations and urban occupations interfere with the model

career paths of traditional villages. One of the important social facts that we need to note is the firm belief of most obwera that the land they cultivate really belongs to the main lineage of the village, here represented by the village head (VH).

*An Obwera from Kunda*<sup>34</sup>

Mr WChi was born to Mr/Mrs Chi. WChi's grandfather came from Mphere in 1938 and opened a shop at B. The father of WChi married his mother in 1963. His mother came from H and stayed at Kunda with her father who was married to one of the VH Kunda's daughters. In 1963 his parents settled in B. In 1971 they divorced and his mother came to stay at Kunda where her parents were. In 1972 she got the land which WChi is now cultivating. He inherited the land from his mother in 2006. She was given this land in 1972 by her uncle because she was divorced. Women are only given land when they have divorced or their husbands are dead and have come back from where they were married. The land was given to WChi in the presence of his brother KChi as a witness. WChi said that it will be difficult for his wife or children to take over the land because the land belongs to his uncles, and definitely they will come to take over the land. WChi said that since his father came from Mphere in Mzimba, and as is the culture here in the north, he will be required to go back to Mphere where his father came from. The respondent said that his elder brother had already gone to Mphere and he is also thinking of going to Mzimba or else he wants to get money to buy land somewhere for cultivation. Should his mother die his uncles will definitely take away the land from him. The land will go to his uncles like Mr M. A typical threat to his tenure is that of the VH who came to him in December 2006 and claimed that the land belonged to him and he wanted to take it. He said he used to cultivate on this land a long time ago when the respondent was not yet born. WChi took the issue to his mother who told him that the VH was lying and had never cultivated on this land. WChi is afraid that this VH might come back and claim to own the land. He said that he never thought of registering the land because he was assured that the land does not belong to him. It will be taken away from him should his mother die.

We should take note of 3 features in this story:

1. The family history of Mr. WChi is rather complicated. But modernization and urbanization is creating an increasing number of similar stories.
2. His mother could get land since she had grown up in the village and returned from a failed marriage. Mr. WChi got land from his mother and could go on using it.
3. He was very sure that the land belonged to his uncles, the male line, and he had considered moving to his father's village like his brother had done.

The main features of patrilineal landholding are quite similar to the matrilineal but with gender preferences reversed. There are some differences in terms of marriage system and its consequences for inheritance of land. But the basic problems of how to deal with divorces and the equity in inheritance of the sex being discriminated against are the same.

### **Structural forces creating imbalances in the system of landholding**

There are two intertwined forces working to unbalance the systems of landholding both in matrilineal systems and in patrilineal systems. These forces are firstly, declining access to vacant land, and, secondly, the concomitant urbanisation of the surplus population.

The force of increasing population density has first a local impact, currently best observed in the south of the country. But also here people remember a time when a section of a village might split off and go into the countryside to create a new village. Today this is becoming difficult also in the north<sup>35</sup>. Large scale estates are now using the land that could have been

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<sup>34</sup> Personal records: \R3 Kunda Village\RUMA00MA14.doc

<sup>35</sup> One of the villages studied in Rumphu was started after the people there had been chased out of Nyika National Park when this was created.

used by people with too little land<sup>36</sup>. When those who are about to inherit land see that it will be too little if everyone inherits equally they will react in many different ways. Some will leave quietly for an urban area trying to find a living there. Others will quarrel with competing descendants, sisters or brothers as the case may be. The easiest target is probably the obwera. It is their stories that stood out in the interviews we conducted. But if that system continues most villages will run out of obwera.

Those who leave for the urban areas are more difficult to find observations on. But both reason and some indirect observations suggest that they do worry about being left out from the system of inheritance. The few unsuccessful migrants we talked to were clearly harbouring unrealistic hopes of being able to return to their village to get the piece of land that custom promises the returned divorcee or widow/ widower.

From this we conclude that a land reform have to make efforts to counter the problem of land scarcity and justice in inheritance. There are as usual no panaceas in this work. But ideas to discuss and test out might be found in stories of how similar problems were solved in other parts of the world. We shall briefly take a look at Norway.

### **Patrilineal land holding in Norwegian history: Some observations on the relation between ideas of lineage and land holding in Norway<sup>37</sup>**

One of Norway's oldest institutions concerning land tenure is called "odel right"<sup>38</sup>. In Norway right of "odel" has since medieval times been concerned with the rights of the members of the lineage of the current holder of the land. The earliest known rules of the "odel" right were written down at the end the 12<sup>th</sup> century in the regional law codes called "Gulatingsslova" and "Frostatingslova" (the law books of "Gulating" and "Frostatings") but are assumed to be much older, certainly from before the Norwegian state stabilized during the 12-13<sup>th</sup> centuries (Skeie 1950)<sup>39</sup>.

In Orkney and Shetland they have a land tenure form based on udal<sup>40</sup> law. Udal has the same old cultural origin as the Norwegian "odel" since the islands were colonized by Norwegians in the 8-9<sup>th</sup> century and ruled from Norway until 1468 and 1469. The primary meaning of the term udal in Scotland is "inherited land held by a form of freehold tenure involving absolute ownership, not subject to a superior." (Jones 2012, 389). Some observations indicate that this was part of the original concept also in Norway<sup>41</sup>. Today this meaning is not part of the Norwegian concept of "odel" right. One aspect of the udal right in Orkney and Shetland was

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<sup>36</sup> One respondent from a village in Mzimba commented: "that he has no fears of losing his land except for the Kabwafu scheme whom they fear of taking over the land any time they need it since there is still disagreement as to where the boundaries of the Kabwafu scheme are."

<sup>37</sup> The information on the Norwegian odel right is primarily here taken from Skeie's (1950) monograph, the 1972 report of the commission on Civil Law (Sivillovbokutvalet) of 1953-99 (Skeie 1950; Sivillovbokutvalet (Gaarder) 1972), and the survey of the legal situation on this topic by Falkanger (1984).

<sup>38</sup> "Odel" is sometimes it is translated as allodial, meaning "inalienable; owned freely and clear of any encumbrances such as liens or mortgages", see <http://en.wiktionary.org/wiki/allodial>. This is also the meanings of "odel" as applied to ownership of land in Norwegian history. The link between the rights of the lineage and the "odel" lands may be a consequence of taken for granted facts of everyday life rather than etymological.

<sup>39</sup> The oldest fragments of the written law code are dated to about 1200. But other sources refer to written law codes more than 100 years older than that (Olav\_Den\_Heilage and Erlingsson [1180 ca] 1994; Rindal 1997). Icelandic texts tell that their law code originated with the Gulating law before 930 (Anonymous 1980).

<sup>40</sup> Sometimes it is spelled "odal".

<sup>41</sup> Hellesnes (1948, 73) quotes a letter from 1693 written by Ulrik Fredrik Gyldenløve, the Governor-general (or viceroy) of Norway. In the letter he talks about "Odelsbonden", the odel-farmer, clearly meaning the owner of a farm without any tenure obligations to any kind of overlord (other than the King).

that a title deed was not necessary to prove and protect ownership. The same is true for Norway. In disputes oral testimony was sufficient.

For the present discussion the primary interesting thing about the odel right as found in contemporary Norway is the fact that it gives preferential treatment to members of a lineage if the lineage has owned their land for the period of time stipulated by the law<sup>42</sup>. The odel right ranks a circle of close kin and gives the one with better rank the right of purchase of the odel lands for a special valuation procedure<sup>43</sup> if ownership of the land is transferred by sale or devolution to a person with less rank among those who can exercise the right or to anyone outside of this circle. The right can be exercised only at the point in time when the transfer occurs and for a short period<sup>44</sup> after. It is important to note that the right applies to ownership, not to actual use of the land. Rules of inheritance (see below) as well as many other forces made it necessary to develop separate systems for ownership and actual use of the land. Owners were entitled to land rent and various other incidents<sup>45</sup> but could only under certain circumstances, such as not having access to any land at all<sup>46</sup>, evict current users of the land (tenants). According to the Act on odel from 1821 a person who did not have a farm and who exercised his right of odel could evict the current tenant only if the right of odel was established before the tenancy was established.

A second interesting feature for us is the fact that it clearly was a “he” that should hold the land. This was so all over Europe. In Norway the formal legislation on odel rights assumed that men went before women until 1974 when men and women born after 1964 were put on equal footing with their age as the single criterion for ranking.

A third interesting fact, not tied to the odel right, is that from very early on in the 13<sup>th</sup> century there was a distinction between right to inheritance and actually taking over the use of land as part of the inheritance. The inheritance was in all cases divided among descendants according to a will<sup>47</sup> or the default rules of the law book. The actual farm land could in such situations be taken over undivided for the use of one of the heirs<sup>48</sup>. The one taking over the land then had to pay his co-inheritors in money (usually in the form of other valuable hereditaments or in the form of land rent) for their share of the heritable wealth (that of course included the land owned).

A fourth interesting feature of the Norwegian system of kinship based rights are the many unsuccessful efforts to remove the odel rights from the Norwegian law book<sup>49</sup>. Preferential

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<sup>42</sup> The length of time has varied from the 6 generations necessary according to the Law book of the Gulating by way of 3 generations or 60 years in Magnus Lawmender’s law book of 1274 to 10 years in 1811. Today it is 20 years.

<sup>43</sup> The valuation procedure has varied throughout history.

<sup>44</sup> The period has varied throughout history. Usually there is a default rule of a short period that may under certain conditions lead to considerably longer periods.

<sup>45</sup> In Norwegian “bygsel”, “førsteårstake”, and “tredjeårstake”.

<sup>46</sup> In Norwegian “buslitsmann”.

<sup>47</sup> It should here be noted that the act on inheritance contain rules of restriction for the testator.

<sup>48</sup> In Magnus Lawmender’s law book from 1274 a first form of the rule is found. In an executive order (in Norwegian called “Recess”) from 1539 it is elaborated (Skeie 1950, 39-40). The rule came to be known as the right of “aasete”. It is assumed to be a consequence of land shortages. Where land shortages were not seen as a problem the rule was usually not applied.

<sup>49</sup> The first serious effort came in 1548 when a group of noblemen wanted to have it removed, complaining about the difficulty it posed for their buying farms burdened with odel. In the second half of the 18<sup>th</sup> century there were several efforts to remove the odel right or at least reduce its impact on market transactions. The wealthy class had now been joined by ideologically inspired law scholars and civil servants believing in the benevolent consequences of free market transactions as stipulated by the “lex naturalis” philosophy at that time. Not all civil servants believed that the consequences of the odel right were all bad and it was not removed from the law book. However in 1811 changes were enacted that were supposed to

treatment of a lineage in the form of a right to purchase for land being sold or to redeem it within a short period after the transaction had taken place was also present in Denmark and Sweden during the 11<sup>th</sup> to 13<sup>th</sup> centuries. The last remnants of such rights were removed in Sweden in 1863 and in Denmark in 1926 (Jones 2012, 392-393).

It should also be noted that the sentiments linking lineage to land still run strong among Norwegian landowners (Flemsæter and Setten 2009). In a recent investigation 54% of landowners who have stopped farming and moved away from the land say it is “very important” and 21% say it is “pretty important” that the land remains in the family; 12% say it is somewhat important, and only 5% say it is not important, while 9% say it is irrelevant (See table 6.1 in Flemsæter, Storstad, and Kroken 2011). Among landowners who still work the land 61% supports the act on odel rights (See table 6.12 in Flemsæter, Storstad, and Kroken 2011).

The resilience of the ideas and the strength of sentiments behind the odel right is remarkable<sup>50</sup>. But it should be noted that without the introduction of parliamentary democracy in 1814 the odel right probably would have succumbed to capital interests and academic ideological beliefs also in Norway. Throughout the centuries the details of how to understand the right and how to interpret it in practice have changed continuously. As the society grew more complex the number of conflicts originating with the right increased. Given the unwillingness to remove the right, the law maker had to amend the rules to meet the challenges of a growing modernizing economy.

## Conclusions

We started by discussing a customary land tenure system with differential access to and control over land among women and men in a society where descent and inheritance are matrilineal and post-marital residence is uxorilocal. We have also taken a look at the land tenure system where descent and inheritance are patrilineal and post-marital location is virilocal. In important ways the two systems of landholding are mirror images of each other. In both systems beliefs in the rights of the lineage are strong, and the concerns about just devolution of assets are present even if this does not include gender equality as yet. We have to conclude that gender equality in land rights is incompatible with respect for cultural precepts about lineage rights to land.

The dominant literature focuses on land as a productive asset but this study has shown that the major concerns among the people are unequal access and lack of security of tenure<sup>51</sup>. The major driving forces in the everyday land tenure are the daily actions and interactions of the

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make it disappear. But in 1814 the ties between Denmark and Norway were severed. Norway got its own parliament and during the constitutional assembly that year the odel right was written into the constitution. It was feared that capital interests might buy up farms. In the years after 1814 both capital interests and ideologically motivated beliefs continued to attack the odel right. After 3 attempts to change the constitution between 1845 and 1860 these efforts subsided and the efforts went into adapting the rule to a modernizing economy (Sivillovbokutvalet (Gaarder) 1972, 7-11). Also today there are discussions about how one may reduce the friction in our economic system attributed to the odel right (Landbruks og matdepartementet 2009; NOU 2003).

<sup>50</sup> Voyce (1994) discusses the link between family and farm properties in Australia and finds a strong sentiment that the land should devolve on sons. He concludes that “In rural societies, farmers have had little regard for enacted or codified laws emanating from national or state capitals and the concern of legislators for rationalization, administrative convenience or egalitarian idealism.”(page 79). After considering some reforms intending to improve on gender equality in inheritance he concludes “that as in the past, farmers will work around the reforming impulse of such judgments to the extent the law continues to rub against patriarchal notions of land ownership and inheritance.” (page 80).

<sup>51</sup> On this point see also Kishindo (2004).



people and their common practices. This view entails that land means more than just being a productive asset. In everyday life the land has a social value linking people who in many ways both are and feel related. The challenge for lawmakers is therefore to combine productive concerns such as food provision and social concerns such as distributional justice and the security of personal identities.

The patterns of access and control identified in this study have to be understood before proper decisions can be made on how to organize access to and control over land, especially in a country where livelihoods to such a high degree are dependent on agriculture or are land based in nature. Failure to recognize the historical, cultural, and emotional realities would result in policies that would create distributional injustice as seen both from the local community perspective and from the perspective of modern society.

The resilience of the idea of a strong and legitimate link between land and lineage seen in Europe should be carefully considered by those who think that transforming the customary lineage rights in Malawi can be accomplished easily. In particular this difficulty needs to be seen in conjunction with the problem of making the law of inheritance neutral in relation to gender. A key step in accommodating lineage rights with equity in inheritance was in Norway to exploit the idea that if the value of land can be measured in monetary terms, rules about inheritance of wealth can be differentiated from physical possession of the land. Even so it took some 800 years to accomplish gender equality of inheritance in Norway and that with only a patrilineal tradition to overcome. In Malawi both patrilineal and matrilineal traditions are strong. The difficulties can hardly be less than in Norway. But awareness of the difficulties is probably higher.

The forces originating with land scarcity and urbanisation are not created by cultural beliefs. They work on all cultures, and cultures have to adapt. Land reform in Malawi needs to consider carefully how a just system of land inheritance can respond to these forces. One approach is to create conditions that may allow one person to take over family land while dividing the inheritance justly among the descendants either in a will or by default legislation in case of intestate devolution.

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