



# Lineage and land reforms in Malawi: Do matrilineal and patrilineal landholding systems represent a problem for land reforms in Malawi?



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## ABSTRACT

Based on government statistics and interviews with villagers across Malawi this article argues that customary matrilineal and patrilineal land tenure systems serve to weaken security of land tenure for some family members as well as obstructing the creation of gender-neutral inheritance of lands. Data from the National Census of Agriculture and Livestock 2007 and the 2008 Population and Housing Census are used to characterize marriage systems and landholding patterns of local communities. Marriage systems correspond to customary land-tenure patterns of matrilineal or patrilineal cultures. The differences between the two ways of land holding represent a challenge for land reforms aimed at unifying rules for land tenure and land devolution. Drawing on an analogy of the resilience of the patrilineal land holding system in Norway, we argue that it will be difficult to remove the preferential rights of lineage members directly. We recommend that, instead of creating a unified national system, existing land rights should be formally recognized and circumscribed by fair procedures. A well-designed landholding system should aim to ease the transitions of diverse customary tenure systems towards the requirements of a modern large-scale society.

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## Introduction

Do matrilineal and patrilineal landholding systems represent a problem for land reform in Malawi? Briefly put: yes. Both matrilineal and patrilineal ideas about landholding represent problems for land reform, in two ways. They create problems of insecure tenure for people in a modernizing economy leading to demands for reforms of the land law; and they have a persistence that makes land-law reform difficult. In this article we shall examine how informal lineage-based landholding creates insecurity of tenure for the growing group of people who settle outside their lineage lands, as well as the differential rights among members of the same lineage. Further, we consider the difficulties involved in creating gender-neutral land-tenure institutions as proposed by

official land policy, noting the persistence of gender biased rights concerning lineage lands in the case of Norway.

Land reforms aimed at replacing customary law and providing justice and security of tenure in countries where very different cultures co-reside remains a difficult problem. One particular variant is found in several Central and East African countries where some communities practise either matrilineal or patrilineal principles for organizing social systems, with corresponding customary land law. The issue of gender equality in access to land ranks high on the international development agenda and is usually an important goal for land reforms. Malawi is of particular interest in this regard since matrilineal descent and devolution of land rights are the traditional norms for the majority of the population, whereas the formal landholding system is modelled on patrilineal English legislation.<sup>4</sup> The central and southern parts of the country where the majority of the population lives are dominated by matrilineal

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<sup>4</sup> By the British Central Africa Order-in-Council of 1902 English common law, law of equity, and statutes of general applicability in force at that time (11 Aug. 1902) were received as valid law (Benda-Beckmann (1970) 2007, 56).

cultures. Patrilineal cultures are found mostly in the north, but also in some of the south-western parts of the country.

The lineage-based landholding systems in Malawi appear to be strong. At the core of the landholding system lie cultural precepts that link a particular lineage legitimately to the land they occupy. The strength of such cultural ideas is related to the size of the population holding the ideas and the homogeneity of the group claiming lineage-based rights to land. A further indication of the strength of such ideas is their ability to survive centuries of shifting historical constellations, as seen in the case of legislation on lineage-based rights to land in Norway.

The article starts by establishing the distribution of matrilineal and patrilineal landholding in Malawi in 2007. The geographical distribution of matrilineal and patrilineal villages indicates that these cultural ideas are present in large relatively homogeneous populations which would tend to reinforce the cultural ideas. Examples of insecurity of tenure as recorded during fieldwork in 2007 will be presented. One important observation based on interviews with villagers across Malawi is that the customary matrilineal land tenure is real and not a front cover for male landholding relatives as some of the literature has maintained.<sup>5</sup> Problems of land reform will be discussed and contrasted to the development of lineage-based land tenure in Norway. From observations concerning Norwegian patrilineal lineage-based landholding practice, we argue that cultural ideas about the relation between lineage and landholding do not change easily or quickly. The conclusion is that land reforms which disregard such deep-seated cultural ideas are likely to encounter formidable obstacles among people subject to the reforms.

### On land tenure and reforms

Land reform is usually aimed at reallocating land to landless people in ways that will increase total productivity of the society. Productivity is linked to security of tenure for those who actually work on the land (GoM, 2002). People must be convinced that investments in the form of labour and capital will provide returns in both the short and long term. For men in matrilineal households the most basic form of security is provided by stable marital relations (Kishindo, 2010a). The long-term perspective also includes the livelihood of any children. Parents want land to devolve upon their children. Matrilineal and patrilineal systems discriminate systematically between male and female children. In patrilineal landholding systems land is passed on to male heirs: it is assumed that daughters will marry men who inherit land. In matrilineal systems it is exactly the opposite. A son will not need to inherit land, as he will get land from his wife. Whether a couple settles in the husband's village (*virilocal*<sup>6</sup>; in *Chichewa chitengwa*), the wife's village (*uxorilocal*<sup>7</sup>; in *Chichewa chikamwini*) or in some other village (*neolocal*) will create variations on the basic pattern of inheritance in both matrilineal and patrilineal cultures. This system has been running into trouble as land scarcity limits available sites of vacant land.

Landtenure relations are governed by local customs for most Malawians,<sup>8</sup> especially the small-scale farmers who comprise about 80% of the farming population. Not everything in the local

situation is relevant for our discussion here. However, it is important to know the rights and duties people believe they have and the rights and duties they believe others have. With property rights (as with other rights) there is an asymmetry between an owner's rights (and duties) and other people's (non-owners) duties (and rights). Both sides need to be understood.

### The data

This article builds on data from the National Census of Agriculture and Livestock (NACAL) 2007, the 2008 Population and Housing Census (PHC)<sup>9</sup> (NSO (2010, 2008)), and the Malawi Land Tenure and Social Capital (MLTSC) Project (Berge et al., 2009).

NACAL collected data from approx. 24,000 households from some 1600 enumeration areas (EA). The data collection comprised a total of 9 questionnaire modules. The sampling was complex, and for two modules the urban areas of Mzuzu, Lilongwe, Zomba and Blantyre were split into city and rural adding four districts to the usual 27. We use module 8, Village Facility, providing information on 5469 villages within 31 districts.<sup>10</sup>

The MLTSC project collected its data during the period June to August 2007 in six districts: Rumphu and Mzimba in the north, Kasungu and Dowa in the central part of the country, and Chiradzulu and Phalombe in the south. In each district one Traditional Authority (TA) was selected where data collection took place. The choice of districts and TAs was done to include all three regions with one peri-urban and one rural district in each. Three enumeration areas in each TA were randomly selected. In each EA a list of villages was made and one village was randomly selected. Hence, in each district three 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, before moving on to the villages in the second district in their region.

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

The fieldwork focused on land-tenure relations because of the pending land reforms where statutory law was proposed to replace customary law. Background material to the proposed reforms can be found in Saidi et al. (1999) and the Malawi National Land Policy (GoM, 2002) (see also Kishindo (2004) and Peters (2010)). Proposals for new legislation were presented to the government in 2006 (Khaila et al., 2006). Our conclusions support the cautionary notes to this process presented by Saidi et al. (1999, Ch. 4 and 5).

### Distribution of land holding systems based on the National Census of Agriculture and Livestock and the 2008 Housing and Population Census

Landholding systems are products of culture. Customary cultural institutions such as rules about land ownership are

<sup>5</sup> For example Lastarria-Corhiel: "In other matrilineal communities, as in Malawi and Mozambique, although lineage and property are traced through the mother's line, normally only men can clear land, which gives them control over this resource. Once land is in the lineage, it is handed down to a young man from his maternal uncle" (Lastarria-Corhiel, 2009, 128). This is not the case in the villages we studied (Berge et al., 2013).

<sup>6</sup> In Chichewa known as chitengwa.

<sup>7</sup> In Chichewa known as chikamwini.

<sup>8</sup> Our basic sources are Ibik (1970, 1971), also see Mkandawire (1983), Kishindo (1993) and Peters (1997).

<sup>9</sup> The NACAL and PHC data were collected by Malawi's National Statistical Office (NSO), partly in collaboration with Statistics Norway. The NSO is known for producing statistics of professional quality. This may be the reason for the somewhat unusual fate of the NACAL data. The discrepancies between the NSO numbers on agricultural production and the Ministry of Agriculture's own figures resulted in the President prohibiting NSO to publish these data. The data we are using are not affected by this, however.

<sup>10</sup> More details on the modules are found in NSO (2010) page 2 and Appendix 1.

**Table 1**  
Relative number of people in the ethnic groups of Malawi.

Ethnic groups in Malawi	Persons	%	Classification <sup>a</sup> by Ibig (1970)
Chewa	4,252,204	32.6	Matrilineal
Lomwe	2,288,285	17.6	Matrilineal
Yao	1,760,843	13.5	Matrilineal
Ngoni	1,492,850	11.5	Matrilineal (not in Mzimba)
Tumbuka	1,152,017	8.8	Patrilineal
Nyanja	754,410	5.8	Matrilineal <sup>b</sup>
Sena	467,958	3.6	Patrilineal
Tonga	270,833	2.1	Patrilineal
Ngonde (Nkhonde)	129,914	1.0	Patrilineal
Lambya	59,452	0.5	Patrilineal
Senga	24,366	0.2	
Nyakyusa	18,751	0.1	Patrilineal <sup>c</sup>
Other	357,615	2.7	
Total	13,029,498	100.0	

Source: NSO (2008), Table 14 in Population Characteristics.

<sup>a</sup> Ibig (1970) in chapter 8 lists “The Matengo and Mtumba” as matrilineal.

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

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

endogenous to ethnic groups.<sup>11</sup> In Malawi the 2008 Population and Housing Census (NSO, 2008) collected information on 12 such ethnic groups identified by speaking a common language. Eight of these 12 ethnic groups have more than 1% of Malawi’s population, and four have more than 10%. From Ibig’s (1970) description of customary law of marriage we see that the three largest ethnic groups are all matrilineal; and in 2008, they comprise 63.7% of the population. In addition most villages of the Ngoni group are matrilineal. The strength of the matrilineal landholding culture cannot be doubted.

Available tables from the population and housing census do not show the distribution of ethnic groups across districts, but the NACAL data can provide some insight. The NACAL question of module 8 asks about only 10 ethnic groups, 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.

Table 2 uses NACAL data to show which ethnic group dominates a district with more than 50% of the villages. All 10 ethnic groups surveyed 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 Malawi.

### 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 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 areas, while some lie to the south both east and west of Lilongwe in mainly matrilineal areas. In some ways the landholding practice in these districts seems to lie in-between the pure forms found to the north of Mzuzu and to the south of Zomba.

<sup>11</sup> Terminology is difficult. The primary stipulation is that language usage among native speakers conveys ideas about legitimate land tenure. The primary focus is the ideas shared by means of the common native language. A group sharing such ideas is in this article referred to as an ethnic group.

In the northern districts between 90% and 100% of the villages are classified as patrilineal with married couples settling down either in the man’s home village or in neither of the partner’s villages. Also two districts in the south report a preponderance of patrilineal descent systems.

In the centre of the country around and north of Lilongwe the picture is mixed. The districts of 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 have 36%, 58% and 51% matrilineal descent and virilocal settlement, but also considerable (57%, 19% and 41%) matrilineal descent and settlement in the wife’s village.

The remaining districts, except the urban areas of Blantyre City, Zomba Municipality, Lilongwe City, and Mzuzu City are predominantly matrilineal varying between 81% and 100%. Patrilineal descent dominates Mzuzu in the north with 61%, and matrilineal is largest in Blantyre and Zomba in the south with 42% and 71%. The four urban areas and Nkhotakota, are the most mixed in terms of marriage and descent systems.

Interestingly, in the city districts 15% to 28% report that they do not know what the descent system in the area is. A reasonable interpretation would be that the sheer variety of birth origins plus the considerable proportion of marriages/ liaisons cutting across linguistic /ethnic groups mean that both people and village leaders 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. For the other 27 districts “don’t know” varies between 0% and 3.6%.

Information on the ethnic or linguistic composition of 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 where one ethnic group does not dominate more than 50% of the villages. Marriage and descent systems follow the ethnic groups. Districts where matrilineal descent systems dominate are basically the districts where the Chewa, Lomwe, Ngoni, and Yao cultures dominate.

Only in four districts is there no ethnic group with more than 50% of the villages. And only for three districts is there no dominant marriage and descent system. For behaviour determined by cultural norms, 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. Forces for change are found in the cities where 15–28% of those surveyed do not know what the most common marriage system is. If one does not know (or does not care) what the norm is one will not use that as a guide for behaviour. Except for Mzuzu City the urban areas are dominated by matrilineal ethnic groups, either as majority (Chewa, Nyanja) or as the largest group(s), 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 and Forde, 1950; Peters, 1997, 2010; Mitchell, 1952; Benda-Beckmann [1970] 2007; Ibig, 1970, 1971). For studies in relation to landholding 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 landholding across Malawi seems to be even more neglected. Based on Peters’ observations it would seem reasonable to assume that if people were left to themselves changes to the matrilineal descent system would come very slowly if at all. The regional concentration of the ethnic groups will facilitate the propagation of

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

Region	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
Northern	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
Central	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
Southern	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		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			45.1	23.7	29.9	1.2	5253
Missing							216	
Total							5469	

Source: NSO (2010), Module 8.

the landholding values. But many forces are acting on the various ethnic groups, often linked to landholding and devolution of land. People are not left to themselves in this issue and the land-tenure system responds in other ways than by questioning the matrilineal principle (Kishindo, 2010b).

### Matrilineal landholding systems seems to be understudied

Landholding systems in patrilineal social systems are better known than those where matrilineal social systems dominate. A common belief 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 et al., 2005, 51). We have been unable to find any valid documentation of this inheritance pattern. In another paper we have shown that it is not valid for all matrilineal societies (Berge et al., 2013). 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, amongst the Bantu of Central Africa (Richards, 1950) and within Malawi (Kishindo, 2006). And we should note how men have been in a position to increase their power through commercial agriculture.<sup>12</sup> This is a force for change even if the few men who were buying land maintained that they did it on behalf of their daughters (and not their sister’s daughters). Traditionally, land acquired by men directly from the village head could be passed on to the man’s own children (Mkandawire, 1983, 113).

During the last 30–40 years research has increasingly started to examine the impact of the patrilineal-biased world view that researchers as well as colonial administrators brought with them to Africa (Lewellen, 2003; Kaarhus, 2010).<sup>13</sup> Kaarhus (2010) finds such tendencies for the Lilongwe Land Development Programme (LLDP), which had been designed to introduce titles to land in a district west of Lilongwe as stipulated by the land laws of 1967.<sup>14</sup> Stephen Carr conducted an audit of the LLDP project for the World Bank in the early 1990s and found a patrilineal bias among the project staff.<sup>15</sup> According to the Saidi report (1999) the strength of Malawi’s established customary landholding 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”<sup>16</sup>. 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 landholding in matrilineal and patrilineal regions of Malawi (Saidi et al., 1999, 92–100). For both systems of land devolution it was found that the continuous subdivisions entailed by the systems create an increasing number of problems in terms of economic results and conflicts among those who inherit. In areas with matrilineal landholding 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 the Commission found gender discrimination in land inheritance. The widow 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 found that the growing scarcity of land was making disputes among family members more common and evictions of non-lineage residents (*obwera*) more frequent (Saidi et al., 1999, 41–42). This was also evident in our observations.

### Insecurity of tenure in current matrilineal landholding

The story below that we heard during the fieldwork of the MLTSC study in 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. Table 2 shows that in Chiradzulu 99.5% of the villages surveyed by NACAL (211 villages) were either matrilineal and *uxorilocal* or matrilineal and *neolocal*. Matrilineal sentiments about land and lineage are probably as strong as they can get. The location in between Blantyre and Zomba should also indicate the 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 character of security of land tenure in this village.

#### *An Obwera from Naphini*

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 for MKW3000. 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) of the one who had sold the land (sister of the village head). Mai EF took the matter to the village head but he failed to stop the adult children from taking possession of the field and the matter was referred to the group village head, who 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 Mai EF to give back the field and asked the person who had sold the field to repay 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 had been 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 away from the village. It was the final plan after the village head and relatives had bewitched and killed her two daughters. However, she was not ready to leave the village: she had nowhere to go as she had left her natal village many years ago and she would not be welcomed there and her fields had been shared among her sisters. At the time of the interview Mai EF did not have any land and she lived by renting.

We note of the following points 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

<sup>12</sup> The aggregate consequences of market-based agriculture will obtain in a context where business as usual will fashion formal rules adapted to patrilineal precepts and tailored to large-scale estate agriculture. The result may be at odds with the wishes of the men who were buying land for their daughters. But business as usual is not the only way.

<sup>13</sup> It may be worth investigating whether the patrilineal biased world views of early administrators forced the construction of the mother’s brother as the “real” landlord onto the matrilineal communities in the early years of the colonial administration.

<sup>14</sup> LLDP was funded by the World Bank. Its predecessor, established by the International Development Association in 1968/69, was the Lilongwe Rural Development Project (LRDP).

<sup>15</sup> Letter to Øystein Botillen, Norwegian Embassy, Lilongwe, 26 November 2006.

<sup>16</sup> Quoted by Saidi et al. (1999, 63) after Brooke-Taylor (1977, 5). Mkandawire (1983, 110) says much the same “Possession of land transcended an individual’s lifetime, for it was held to belong to the living, the dead and the unborn.”

- generation later those who felt they had too little land resorted to questionable means in order to evict non-lineage landholders.
- 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 *obwera* woman, holding that the sale had been illegal from the start. The Chiefs judgement might at least partly be determined by the sales procedure. Perhaps the sale of land to Mai EF's second daughter had not followed the required procedures. In principle land cannot be sold but if proper procedures are followed, it is done (Kishindo, 2006). We do not know what 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* landholders are not allowed to rent out land according to law. Those who have to rent to survive and those who rent out would be better served by a legal system that allowed – and regulated – 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 newcomers (*obwera*) are excluded by the established villagers (members of the lineage) are probably becoming more frequent and more intense. 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 *obwera* try to find ways to justify and legitimize their membership in 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. Seeking to justify their claims over land, members shift from one institution to another for justice. However, the formal system of justice is often prohibitively expensive. Some resort to violence; others think they can secure their right by claiming that the land has been bought. However, all claims are contested. The 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 instance where male children use claims such as having insufficient land at the wife's place or having made investments in the land in order to continue using borrowed land in their birth village.

What is needed is a mechanism that can protect 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. One way to do this is to distinguish between the land as a productive asset and land as wealth and then delimit inheritance as being concerned with wealth, with other rules (for example, lineage-based) to 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 system of customary land tenure where the dominant mode of access to land is inheritance from the 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 land but not the right to own and inherit it. Men are recognized as users and borrowers. It therefore appears that the power of women over land is strong in matrilineal, uxori-local societies contrary to what is widely believed about matrilineal societies. In Chiradzulu and in Phalombe, we observed men buying land and sharing it among their daughters. None of the sons got any land. The same pattern of principles and practices is found in the neighbouring Zomba district (Peters, 1997; Peters and Kambewa, 2007).

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, our study found that, at least in land-scarce areas, lineal groups of women and not the *mwini-mbumba* or TAs allocate land to members of the lineal group. Therefore the pattern that should be recognized is one where women are in control of land issues. These patterns have existed for a long time. The chiefs, women and men all 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. Such convictions do not change easily, and are certainly not changed by enacting standard rules about equality and gender-neutral devolution of land.

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

Accounts of *obwera* men in patrilineal and virilocal villages are not fundamentally different from the female *obwera* in matrilineal and uxori-local villages. The story below that we heard during the 2007 fieldwork of the MLTSC study illustrates aspects of the issue of security of tenure for a male *obwera* in a patrilineal village. The village in question lies in Rumphu, where 99.0% of the villages surveyed by NACAL (197 villages) were either patrilineal and virilocal or patrilineal and neolocal (see Table 2). The strength of patrilineal sentiments as to land and lineage are probably very strong offering maximum contrast to the case from Chiradzulu.

In this case we also see how migration and urban occupations interfere with the model career paths of traditional villagers. One important social fact to be noted 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.

#### An *Obwera* from Kunda

Mr was born to Mr and Mrs Chi. WChi's grandfather came from Mphere in 1938 and opened a shop at B. The father of WChi married in 1963. WChi's 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 went to live in 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 given land only if they are divorced or widowed, and have returned from where they lived when married. The land was given to WChi in the presence of his brother KChi as a witness. WChi said that it would be difficult for his wife or children to take over the land because the land belongs to his uncles, and they would definitely come to take possession of the land. WChi explained that since his father came from Mphere in Mzimba, and as is the culture in the north, he will be required to go back to Mphere where his father came from. Mr WChi 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 are certain to take the land away from him.

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 WChi was not yet born. WChi took the matter 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 lay claim to owning the land. He said that he never thought of registering the land because he was certain that the land does not belong to him. It will be taken away from him when his mother dies.

We should take note of three features in this story:

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

The main features of patrilineal landholding are quite similar to the matrilineal landholding system, but with gender preferences reversed. There are some differences in terms of the marriage system and its consequences for inheritance of land. But the basic problems of how to deal with divorces and equity in inheritance of the discriminated sex 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: firstly, declining access to unallocated land, and, secondly, the concomitant urbanization of the surplus population.

The force of increasing population density has a local impact, currently best observed in the south of Malawi. But also here people remember a time when a section of a village might split off and go into the countryside to establish a new village. Today this is becoming difficult also in the north. Large-scale estates are now using lands that could have been used by people with too little land. When those who are set to inherit land realize that there will be too little if everyone inherits equally they may react in various ways. Some will leave quietly for an urban area trying to find a living there. Those who remain will see, that through continuous subdivisions, each plot becomes smaller and smaller, and that plots are scattered around in the village lands, resulting in inefficient production conditions and an increasing number of quarrels with neighbours. Rather than quarrelling with competing descendants, sisters or brothers as the case may be, an easier 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*.

It is more difficult to find out about those who leave for the urban areas. But both logic and some indirect observations indicate that they do worry about being excluded from the system of inheritance. The few unsuccessful migrants we spoke with were clearly harbouring unrealistic hopes of being able to return to their village to get the plot of land that custom promises the returned divorcee or widow/ widower.

From this we conclude that a land reform must make efforts to address the linked problems of land scarcity and justice in inheritance. There are, as usual, no panaceas available. That said, ideas to discuss and test out might be found in accounts of how similar problems have been tackled elsewhere in the world. Let us take a brief look at Norway.

### Patrilineal land holding in Norwegian history: Some observations on the belief in a relation between lineage and land holding in Norway

In Norway the idea that the lineage of the current landholder should have the first right to take over the land in case of transfer of the land, has been a social reality for more than a thousand years, despite various efforts to have it removed from the law books. This concept came to be known in formal legislation as the right of *odel*. Until 1974 this system included preferential treatment of men before women. The earliest known formal rules of the *odel* right were written down at the end the 12<sup>th</sup> century in the regional law codes known as Gulating law and Frostating law (Skeie, 1950; Robberstad, 1950, 18–29; Sivillovbokutvalet, 1972; Falkanger, 1984), but the rules themselves are older. Icelandic texts tell that their legal code originated with the Gulating law before 930 (Anon., 1980, 2000, 1–52).

The *odel* right as practised in Norway today gives preferential treatment to members of a lineage if the lineage has owned their land for a period of time stipulated by the law. The *odel* right ranks a circle of close kin and gives the one with higher rank the right to purchase the *odel* lands by a special valuation procedure if ownership of the land is transferred by sale or devolution to someone of lower *odel* ranking 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 thereafter.

One important feature to note is that the right of *odel* 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 ground rent and various other incidents of ownership but could only under certain circumstances, such as having no access to any land at all, evict current tenants.

Second, it was clearly a “he” that was to hold the land - as was the case all over Europe. In Norway, 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 age as the single criterion for ranking (the first born ranking the highest).

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

A fourth noteworthy feature of the Norwegian system of kinship-based rights concerns the many unsuccessful efforts to remove the *odel* rights from the Norwegian law books.<sup>17</sup> The persistence of the rule is a testimony to the strength of sentiments linking

<sup>17</sup> The first serious effort came in 1548 when a group of noblemen sought to have it removed, complaining about the difficulties it posed for their buying farms burdened with *odel*. In the second half of the 18th century there were several efforts to get the *odel* right removed, or at least reduce its impact on market transactions. The wealthy class had now been joined by ideologically inspired legal scholars and civil servants who believed in the positive consequences of free market transactions as stipulated by the “*lex naturalis*” philosophy of the time. However, not all civil servants believed that the consequences of the *odel* right were uniformly undesirable and it was not struck from the books. Then in 1811, changes were enacted that some hoped and others feared would 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 new Constitution. It was

land and lineage. Preferential 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).

In Norway the sentiments linking lineage to land still run strong among 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 “fairly 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. Among landowners who still work the land 61% support the act on *odel* rights (see Tables 6.1 and 6.2 in Flemsæter et al., 2011).

The resilience of the ideas and the strength of sentiments behind the *odel* right are remarkable. Throughout the centuries the details of how to understand and interpret it in practice have changed continuously. As society grew more complex the number of conflicts concerning the right increased. Given the widespread unwillingness to have the *odel* right removed, legislators 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* contrasting this to a 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 belief in the rights of the lineage is strong, and concerns about fair devolution of assets are present, even if justice does not yet encompass gender equality. We must conclude that gender equality in land rights is currently incompatible with respect for cultural precepts about lineage rights to land in Malawi.

The dominant literature has focused on land as a productive asset but our study has confirmed that the major concerns among the people are unequal access to land and lack of security of tenure (Kishindo, 2004). The major driving forces in everyday land tenure are the daily actions and interactions of the people and their common practices. In everyday life, land has a social value linking people who in many ways both are and feel related. The challenge for lawmakers is therefore to combine concerns about productivity (security of tenure), concerns about distributional justice (gender neutrality), and concern about security of personal identities (cultural precepts about legitimate allocation of lands).

The resilience of the idea of a strong and legitimate link between land and lineage seen in Europe should be borne in mind 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 inheritance laws neutral in relation to gender. In the case of Norway, a key step in accommodating lineage rights with equity in inheritance involved exploiting the idea that if the value of land can be measured in monetary terms, rules about inheritance of wealth can

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 three attempts to amend the Constitution between 1845 and 1860 these efforts subsided and the focus was placed on adapting the rules to a modernizing economy (Sivilløvbokutvalet (Gaarder) 1972, 7–11). Also today there are discussions about how to reduce the frictions in the economic system attributed to the *odel* right (Landbruks og matdepartementet, 2009; NOU, 2003).

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 are unlikely to be any less than in Norway, but awareness of the problems is probably higher. The forces originating with land scarcity and urbanization are not created by cultural beliefs. They affect all cultures, and cultures have to adapt. Current customary practices are bound to change, with or without land reforms. Land reform in Malawi will need to consider carefully how the forces for change can be used to transform formal landholding to include a more equitable system of land inheritance. Instead of creating a unified national system, one might consider granting formal recognition to existing land rights, and then start transforming them by circumscribing them by fair procedures. A well-designed land tenure system should aim to ease the transitions of diverse customary tenure systems towards the requirements of a modern large scale society.

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