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Davide Chinigò

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Land Reform and Customary Authorities in Contemporary Malawi

Davide Chinigò

Introduction

The relationship between how statutory and customary law shapes land policy reforms in sub-Saharan Africa (SSA) is a topic that has been addressed from many different perspectives (Alden Wily 2011; Toulmin, Quan 2000; Basset, Crummey 1994). One view suggests that as land in rural Africa performs a wide range of social, political, and economic roles, land reform processes entail a broader restructuration of political power and authority and are central to dynamics of state building, as well as the negotiation of national and local citizenship. In contributing to this field of studies, in this article I address the case of Malawi where discussions over the role of customary authorities in land administration and management was a prominent feature of the land reform process undertaken since the mid-1990s following the transition to multiparty democracy. The role of customary law in land policy reforms is very relevant to Malawi from at least two perspectives.

First, since the colonial period the debate about the country's land policy has been dominated by the dichotomy between plantation agriculture for export and peasant

agriculture for food production and, to a certain extent, for the market (Chinigò 2016). While both in the colonial period and during the thirty years of Banda's regime the overall strategy had a clear bias against peasant agriculture, the transition to 'multiparty democracy' since 1994 reflected increasing ambiguity in how the political elite approached rural development. The very controversial legal process characterizing the new land policy – tabled in parliament in 1996 but not yet passed into law – embodies such ambiguity and constitutes the empirical object of this paper (Kishindo 2004). Second, the prerogatives of customary authorities in dealing with land issues are highly significant in the dynamics leading to access, as chiefs are placed strategically at the intersection between people, state institutions, commercial planters, and local and international civil society organizations involved in rural development (Eggen 2011, 2012). A main feature of the Malawian case, certainly common to other cases in SSA, is that customary authorities draw legitimacy from both the 'tradition' – for which they are the 'custodian of the land' – and from their active participation in the bureaucracy, considering that the 1965 Chiefs Act institutionalized their role within the formal state structure. It is no surprise that one of the reasons behind the delays in the enactment of the land law is precisely a lack of consensus in the role that the legislation should attribute to the chiefs in dealing with land matters (Berge 2006). A more peculiar – and yet quite controversial – feature of the proposed land legislation is that in formalizing the role of customary authorities dealing with land matters provides for the establishment of so-called 'private customary estates' for entire communities, families or individuals (GoM 2010). This rather ambiguous provision is the result of overlapping - and perhaps conflicting - policy priorities: formalizing customary tenure to strengthen land productivity and economic efficiency; preserving customary tenure to ensure greater equality in access to land; further institutionalizing the role of customary chiefs within state bureaucracy.

Overlapping and conflicting policy priorities also reflect ongoing debates about the actual role of customary rules in determining successful land access. While some studies have argued that customary rules today play a weaker role than in the past (Takane 2008), other studies emphasized that increasing land competition engenders dynamics of social stratification in which the chiefs play an ambiguous role (Peters 2002; Peters, Kambewa 2007; Peters 2010). Yet other scholars countered this argument by providing evidence that the intrinsic ambiguity of customary tenure have equalizing effects on rural society, rather than increasing social stratification (Jul-Larsen, Mvula 2009). The difficulty in capturing the present and future role of chiefs in determining land access stems from the ambiguity of their position in the local context, whereby they are located at the crossroad between multiple legal frameworks. Shedding light on this issue requires discussing the Malawian land law, as well as the political context of its implementation, in comparative perspective, a task that this article attempts to do

by drawing on existing secondary literature.
By reconstructing the political and social context of land policy reform in Malawi in the last twenty years, the article contributes to the debate about the role of customary authority in shaping access to land and resources. The paper locates the Malawian case in the broader literature about land policy reform in Africa in order to highlight specificities, as well as common trends. I argue that customary rule in Malawi still plays a very relevant role in national and local decision-making processes, this being embodied by the current political impasse preventing the enactment of the land legislation. The analysis of the policy reports of the different land committees that followed one another for about twenty years since 1996 prove that the powers granted to customary authorities have considerably increased throughout time, and hence highlighting that the chiefs have been very successful as a lobbying group.
Although in rural Malawi dynamics of land commoditization by means of both formal and informal land markets have been at play for several decades, their significance should be regarded in terms of how they re-shape constantly evolving customary rules, rather than replacing the actual role of chiefs in mediating and negotiating access to land. In other words while the principles legitimating land access have evolved throughout time towards being increasingly informed by market rules, the actual institutions deriving from them (the chiefs) have adapted to changing circumstances by refashioning their repertoires, and repositioning in the local political arena. A main consequence is that in contexts where legal pluralism is prevalent competition for shares of public authority induces institutional actors to be 'creative' and seek new sources of legitimacy depending on changing conditions. The other conclusion is that analysis of the potential outcomes of the new land policy in Malawi should take into account that institutions are 'sticky' and constantly reposition themselves to maximize their reach.
After discussing some analytical perspectives on the relationship between land reform and customary tenure and a selective analysis of contemporary land policy experiment in SSA, the article will provide details on the land reform process that Malawi has undertaken since the mid-1990s. Lessons for the general debate will be drawn in the concluding remarks.

Land policy and customary tenure: analytical perspectives

What determines successful land access in SSA is a topic that has been debated extensively in academia, among policy makers, as well as development practitioners (Boone 2014; Lund, Boone 2013; Lund 2013; Toulmin 2007). The root of the debate is that as African land tenure systems are informed by different and overlapping politico-legal principles, *i.e.* legal pluralism (Benda-Beckman 2007), the process that from the formulation of a claim leads to actual access is complex, uncertain, and difficult to

generalize. Hence, the outcome of such a process is highly dependent upon a negotiation between actors, a topic that recent studies have analyzed from two different perspectives (Boone 2014; Lund, Boone 2013; Vandergeest, Peluso 1995). On the one hand, aspiring users attempt to validate claims to the land through multiple strategies and by seeking endorsement from different politico-legal actors. On the other hand, by drawing on different legitimating principles - such as tradition, the market, and statutory law - politico-legal actors compete for shares of authority over land by validating certain claims and rejecting others (Hagberg 2010). Land users selectively seek validation to their claims to gain access depending on their relative position and where they find it more convenient. This perspective on the process that leads a claim to amount to actual access highlights two important features. First, social relations over land remain highly significant to discuss the constitution and dissolution of authority and power in rural areas, and at a broader level to highlight how inequalities shape political, economic, and social rights (Sikor, Lund 2009; Hagmann, Péclard 2010). Second, the relationship between statutory and customary law in land policies, the central topic of this article, is a relevant empirical object to study the constitution and dissolution of public authority, and the negotiation of citizenship at national and local level.

The role of customary tenure in land policies – as well as its problematic and evanescent definition – is a topic that has been debated for a long time in African studies and beyond (Alden Wily 2011; Toulmin, Quan 2000; Basset, Crummey 1994; Bruce 1993). From a very broad perspective the terms of such debate have been shaped by the legacy of colonialism – which actively constructed and reproduced African customary tenure by means of its opposition with formal statutory law of the western legal tradition – and more recently by the contradictory impacts of neoliberal market liberalization policies since the 1980s. While each individual country's experience is largely dependent upon specific historical and political conditions, customary land tenure is still today a main regulatory principle of land access throughout the continent (Palmer 2003). However, customary rules are constantly shaped and redefined by statutory laws, as well as by increasing land commoditization by formal and informal land markets (Cotula, Mathieu 2008).

Against this background, the indeterminateness and fluidity of the processes leading to successful access has had historically important reflexes on the formulation of land policies throughout the continent (Cotula, Toulmin 2006). The current debate is dominated by the role of policies reforming land tenure in strengthening the productivity of agriculture, as well as sustaining based rural development, and sees three opposing views. A central matter of contention is the different perspective on the role performed by customary tenure systems and their trajectory, especially considering that estimations account that still today only less than 10% of all land in SSA is held under freehold titles (Boone 2014: 22).

A first and mainstream position advocates for the registration of customary rights on the ground that negotiability and flexibility of African traditional tenure systems are among the main determinants of low productivity in agriculture. This position is championed by the World Bank and heavily draws on the work of De Soto (2000), who contends that as land cannot be used as collateral in access to formal credit, productivity-enhancing investments are heavily constrained under customary tenure systems. Hence, the result of the lack of clearly defined land rights is the proliferation of endless land litigations that subtract financial and material energies from work in agriculture (cf. Deininger 2003). More broadly, the lack of enough security of tenure of traditional land regimes provides little incentive to promote investments paying off in the long run, because individual users have no certainty they will be able to enjoy the long-term benefits of their initial investments (World Bank 2008: 139-141).

A second perspective argues that registration of customary rights in the long run deepens existing inequalities between a minority of well-off farmers and the majority of the rural land users (Kingwill *et al.* 2006). By using their privileged position in dealing with bureaucratic procedures, as well as information and market knowledge, this well-off stratum of farmers will exploit opportunities provided by registration by means of various mechanisms of land concentration at the expense of the majority of peasant farmers. Conversely, the development of a land market creates the conditions for the poorest farmers to give out their land as soon as a crisis or other external shocks take place, *i.e.* distress sales. This view contends that mainstream theory advocating for registration largely ignores how power dynamics unfold and reproduce mechanisms of social and economic exclusion (Sikor, Lund 2009). It is also contended that registration is likely to exacerbate social stratification and landlessness, and hence deepening the very structural roots of rural poverty (Kingwill *et al.* 2006). Furthermore, studies embracing this perspective contend that there is little empirical evidence supporting the correlation between investments in productivity-enhancing measures and registration. Finally, land titling programs often disregard secondary rights to land, such as grazing and collection of firewood (Cotula 2007). As a result marginal groups such as herders, or informal firewood collectors, will be among those losing the most from registration, as they will automatically lose their land rights.

While the first two positions highlight positives and negatives of registration of customary rights, a third field of critique contends that both depart from a largely misleading conception of customary tenure systems. For instance Chimhowu and Woodhouse (2006) contend that regarding access to land under customary tenure systems as working exclusively through non-market dynamics misses much of the reality on the ground. The argument supporting registration and the argument against it depart from the very same assumption – customary systems do not pertain to the domain of the market – and differ only when it comes to drawing consequences in favor

or against registration. Indeed a growing body of literature highlighted the extent to which formal and informal market dynamics have played an important role in shaping access to land for a very long time (Lund 2000; Hagberg 2010; Takane 2008). These 'vernacular' land markets highlight that increasing dynamics of commoditization that take place under customary or traditional tenure systems in different ways. Informal and often illegal land markets are widespread in current customary tenure systems, and the very notion that they would operate through non-market principles is to a large extent a colonial construction. Informal dynamics of commoditization leading to 'vernacular' land markets are driven by increasing competition for land and resources throughout the continent, and particularly competition over so-called communal land such as grazing land (Peters 2004). Commoditization is historically driven by expanding export markets for agricultural produce, as well as labor migration into specific areas to satisfy the demand of an emerging economic sector, such as plantation agriculture. Another important driver is urbanization. Peri-urban areas in particular are characterized by multiple fluxes of people and fast transformation and they are the sites where vernacular land markets emerge with much strength.

The three perspectives highlight important aspects of the current debate about land policy reforms in Africa. Nonetheless, while registration is simply a technical tool its actual social, economic and political outcomes depend very much on the context of implementation, as well as on the actual rights that registration is meant to cover. For instance, many legislations ruling registration since the 1990s contained specific provisions protecting customary rights, particularly those of minority groups, such as pastoralists, or groups that were considered as more vulnerable, such as youth and women (Cotula, Toulmin 2004). Protection of customary rights by means of providing or allowing for their registration was ruled under the 1999 Tanzania's Village Land Act, the Namibia's Communal Land Reform Act of 2002, the 1997 Mozambique's Land Act, the 1993 Niger's *Code Rural*, and the 1998 Uganda's Land Act (Alden Wily 2003). In cases like Ethiopia, Rwanda, Mozambique and Namibia, usufruct rights over state-owned land have undertaken registration in recent years. Where customary rights are protected by law, holders of such rights are not always required to obtain a title, for instance in Mozambique, Tanzania, Niger (Cotula, Toulmin 2006). Depending on the context, the protection of customary rights through registration can or cannot be initiated from specific right holders. In the case of Mozambique for example, the Constitution provides directly for the protection of customary rights regardless of whether they have been registered or not. Some legislations attribute equivalent legal status to both customary and statutory land rights (Alden Wily 2003). Therefore, in case of mandatory land acquisitions for public purposes or other cases ruling expropriation, equal compensation is due for land under customary and statutory tenure systems. A greater recognition of the legal status of customary systems notwithstanding, some

other countries adopted policies abrogating them, for instance Burkina Faso's 1996 *Réorganisation Agraire et Foncière*, and 1994 Eritrea's Land Proclamation (Alden Wily 2003).

A particular concern of many registration processes has to do with provisions ruling the protection of 'secondary rights', a topic that is particularly significant when it comes to customary tenure. In some countries titles are issued not only for individuals, but also for groups or entire communities. For instance, the 1997 Mozambique's Land Law rules for the protection of the land rights of entire communities. The registration of land use rights in Ethiopia grants protection to households by means of joint titles provided in the name of both the spouses. The 1996 Communal Property Associations Act in South Africa recognizes group rights for associations (Cotula, Toulmin 2004). In South Africa a number of secondary legislations rule the protection of farmers from eviction in the former homelands, as well as land rights of tenants employed on white-owned farms: the 1996 Interim Protection of Informal Land Rights Act, the 1997 Extension of Tenure Security Act, the 1996 Land Reform Act (Borras 2003).

Recent years have also witnessed a growing emphasis on implementing mechanisms of registration of land rights by means of decentralized bodies. This is the case of recent registration programs implemented in Ethiopia and Rwanda, where local bodies were vested of important land administration prerogatives in the process of registration of land-use rights. More broadly, bodies of decentralized land administration are common throughout the continent, and examples are for instance the District Land Boards in Uganda, the Communal Land Boards in Namibia, the Land Boards in Botswana, and the Land Commissions in Niger. As far as the role of customary institutions is concerned decentralized land administration raises important questions with policy options differing considerably from context to context. Hence, transforming and regulating the role of customary institutions is a complex issue and the outcomes of a specific policy are difficult to predict. While policies encouraging the formalization of land rights are often advocated for their developmental outcomes, registration processes are in many ways difficult to implement and outcomes are often uncertain (Palmer 2003). For instance, plot demarcation may exacerbate existing tensions around land and resources, especially when it comes to the rights of minority groups such as linguistic or ethnic minorities. From this perspective involving customary authorities in the process of registration may mitigate some of the contradictions and potential tensions of the registration process (Cotula, Mathieu 2008). However, customary law is often rooted in inequitable rules and procedures – for instance on gender equality – and therefore a mere legalization of the role of customary authority runs the risk of strengthening existing inequalities of resource access, as well as reinforcing inequitable practices and norms (Alden Wily 2003). Progressive perspectives on the protection of land rights in Africa such as that of the International Institute for Environment and Development

(IIED) therefore recommend a flexible and integrated approach taking into account the importance of building on existing and representative institutions governing land as well as on constitutional provisions building on human rights, local democracy, and gender equality (Cotula 2007; Cotula, Mathieu 2008). Yet each land policy intervention must be tailored around the characteristics of existing customary institutions, and should be flexible enough to provide for changing circumstances depending on specific features. The extent to which local communities will consider certain practices as legitimate largely depends on whether specific policy options are flexible enough to adapt to different scenarios and local needs (Cotula, Toulmin 2004).

One important aspect of the relationship between policy reform and the role of customary institutions has to do with how registration regulates mechanisms of dispute resolution (Lund, Juul 2002; Lentz, Kuba 2006). While the outcome of regularization policies can never be predetermined, studies highlighted the extent to which policies promoting the formalization of land tenure often engender contextual dynamics of informalization, land disputes constituting a prominent example in this regard (Benjaminsen *et al.* 2009). However, sometimes formalizing informal mechanisms of land dispute resolution may constitute a cost-effective policy option. Registration ruling out new bodies of land dispute resolution may be more effective in levying taxes, in cases of resettlement schemes in new areas, and in cases where high land value makes competition particularly fierce. However, the harmonization between customary and statutory law is not always easy in practice. The extent to which individual will attempt to gain or defend access by referring to different statutory and customary bodies depends on their relative position and on circumstantial convenience (Lund 2013).

The relationship between formal and informal land markets and customary institutions is another important issue defining the processes through which specific claims to land lead to actual access. From a formal perspective, while under existing arrangements the state is vested of the control over land in both the form of ownership – as is the case of Ethiopia, Eritrea and Mozambique – or trusteeship – like for example Tanzania – a recent tendency of land tenure arrangements is to allow various forms of land transfers. In Ethiopia, land may be leased out for certain periods of time, depending on the arrangements provided by regional land laws; in Uganda land certificates may be sold, mortgaged or leased; in Tanzania right holders may transfer their right to other villagers freely and, for non-villagers, they need the approval of the Village Council (Alden Wily 2003). In countries like Kenya under the 1967 Land Control Act, at least formally government still holds a strong power controlling land transactions and transfers. In recent years the increasing interest of local and international private sector actors in land investment throughout the continent, alongside a growing concern over environmental issues, has brought a generalized interest in devising policy reforms regulating land transfers (Cotula 2007). This is very pertinent to the question of the

role of customary institutions and access to land, as in many cases policies provide for the allocation of land under customary or communal tenure, *i.e.* the land that is ostensibly considered to be the less productive. Regulations vary depending on the context, however in some cases investments need approval from different customary and statutory bodies. For instance on top of government authorization in Namibia foreign investors need to obtain approval from the District Land Board for transfer of leaseholds rights, and from the chiefs for customary land (Cotula 2007). In Malawi land transfers for private local and foreign corporates are regulated under the Green Belt Initiative (GBI), a government program implemented since 2009 meant to overtake the existing impasse in the implementation of the land law since the 1990s (Chinsinga 2015). In Ethiopia depending on the amount of land federal, regional or local bodies regulate leases to private sector actors. Federal regulations ruled the establishment of Land Banks at regional and district levels, serving as inventory for existing land eligible for private concessions (Makki 2012).

The extent to which different mechanisms of registration best support land tenure security is still very much debated (Cotula, Mathieu 2008; Kingwill *et al.* 2006; Sikor, Lund 2009). The terms of such debate obfuscate the potential role of mechanisms other than registration in providing additional or alternatives avenues for effective land administration. Yet as registration and legalization not always translate in actual formalization, there is urgent need for revisiting the very terms of the debate about the role of customary land tenure in determining successful land access. In the next section the paper will discuss the historical and political conditions underpinning such debate in Malawi since the transition to the multiparty system in the 1990s. In very broad terms it seems that while informal strategies to secure access are given little recognition by policy implementation, some studies highlight how such arrangements are in practice very common, and are usually meant to reach the same objectives of formal land registration. Studies point out that dynamics of 'informal formalization' of land rights are very common throughout Africa, and particularly in several Francophone countries in West Africa (Benjaminsen, Lund 2002; Lavigne Delville 2002). Land transactions are recorded on written documents and validated by witnesses. Even if these documents have no or little legal value, farmers use them when it comes to validate specific land claims from state and customary institutions. In order to increase the effectiveness of these informal arrangements to secure land rights, some authors point out the need to grant them a clearer legal background (Toulmin 2007).

Customary authorities and the new land policy in Malawi

Malawi is one of the least industrialized countries in Africa. The country is almost entirely dependent on agriculture and transfers from international donors. While 90% of the population lives in the rural areas and is engaged directly or indirectly in agriculture,

only few are believed to grow enough to meet their livelihoods (Record *et al.* 2015). This situation is deeply rooted in the historical trajectory of the country, and specifically in the legacy of colonialism and the impacts of market liberalization policies since the 1980s. Malawi was the first country in Africa to implement a structural adjustment program in 1981. The complexities of the Malawian agrarian history reflect current hurdles connected to supplies of fertilizers and agricultural inputs, productivity enhancing technologies, as well as land availability (Chirwa, Dorward 2013). The colonial and postcolonial legacy of migration from neighboring Mozambique and Tanzania together with a land policy biased against small-scale peasant agriculture, aggravated existing land shortage tendencies and yet contributed to politicize the question of access (Kanyongolo 2005). More recently, the increasing interest of national and international corporates in private land investments has further increased competition for land, thus producing complex dynamics of formalization and informalization (Chinsinga 2015).

Increasing land competition engenders pressures on customary law and transforms the ways in which people access to land through the chiefs (Peters, Kambewa 2007). The extent to which the changing role of customary law reflects its decreasing importance in providing access to land is nonetheless debated. On the one hand, some studies highlight the transformative nature of customary law, and argue that the redistributive values underpinning it have not lost significance in mediating access to land (Jul-Larsen, Mvula 2009). On the other hand, other scholars tend to associate increasing land competition with the decreasing ability of the chiefs to provide land in their communities, this having relevant negative implications for the most vulnerable strata of the rural population (Takane 2008). Against this background the land legislations currently tabled in parliament for approval provide for important institutional changes, such as formal land titling and village land committees, and introduce the peculiar and yet ambiguous notion of 'private customary estate'. A controversial aspect is the future role of chiefs in land management and administration. A good way of looking at this issue is analyzing the debate that from the initial establishment of the Presidential Commission of Inquiry on Land Policy Reform in 1996, led to the formulation of the National Land Policy in 2002, the conclusions of the Special Law Commission on the Review of Land Related Laws in 2007, and finally, the discussion in parliament of the 2013 Land Bill and the 2013 Customary Land Bill. The analysis reveals that the prospected powers granted to the chiefs have considerably increased since the initial proposal, with two consequences. The first is that chiefs and customary rule in Malawi still play a very relevant role in national and local policy making. Second, this is indicative of the ability of the chiefs to influence and change the proposed legislation through lobbying, and hence represents an important example of how customary authorities constantly reposition themselves to maximize authority and power.

The 1996 Presidential Commission and the formulation of the 2002 New Land Policy

The 1994 transition to the 'multiparty system' in Malawi came after thirty years of one party rule under the Life President Kamuzu Banda, in office since the country achieved independence from British colonial power in 1964. The political transition came together with increasing expectations for comprehensive land reform, a topic raising considerable interest in the rural areas, and which became central to the electoral campaign for the 1994 elections (Phiri 2010). More broadly, since then the debate about land reform became tightly connected to expectations for democratic reforms (Chinsinga 2011). However, the extent to which the question of land reform was used to leverage political support, especially in the rural areas, reflected the populist nature of the political debate about land under the multiparty system. While claims for radical reforms intensified in times of electoral campaigns, concrete actions to amend existing land legislations proved very slow (Kishindo 2011). Nonetheless, this was also due to complex negotiations over the future institutional framework of land administration in a country where land constituted the main resource. A main topic of contention was the future role of customary authorities in land administration, and more broadly of the relationship between customary and statutory law. The transition to the multiparty system was also marked by a rise in the land invasions on the tea and tobacco estates, a phenomenon particularly significant in the Central and Southern regions of the country (Kanyongolo 2005; Chinigò 2016). While the rise in land invasions can be explained as an outcome of the increasing politicization of the land issue following the political transition, in the Central region encroachments came also as a result of the liberalization of the market for tobacco, which brought many landowners to abandon inefficient and little lucrative estates (Kishindo 2011). The forcible removal of encroachers from estate land was a source of potential social and political unrest that the new government, led by the United Democratic Front (UDF) of President Bakili Muluzi, could certainly not ignore.

It is against this background that the first Presidential Commission of Inquiry on Land Policy Reform was established in 1996 as an attempt to provide a solution to increasing uncertainty and instability around the issue of land (GoM 1999). As noted by Kishindo (2004: 213) "[t]he commission was mandated to undertake a broad review of land problems throughout the country and recommend the main principles of a new land policy which would foster a more economically efficient, environmentally sustainable, and socially equitable tenure system". A main point of departure of the commission was to acknowledge that the existing land legislation – and specifically the 1965 Land Act and its 1967 amendment – constituted a fundamental source of insecurity for users in customary land. Insecurity stemmed from the presidential prerogative to allow indefinite conversions of customary land into leasehold land for the development of commercial plantation agriculture. Under the 1965 Land Act chiefs were the custodians

of customary law and held in trust customary land. From an institutional perspective, above the chiefs authority over land was vested only in the President and the Minister of Lands on his/her behalf. Under the system provided by the 1965 Land Act the Presidential and Ministerial powers over land was absolute. The land law recognized the three categories of freehold, leasehold and customary land, and ruled that customary land could be declared public and leased to commercial farming for periods of up to 99 years. The fact that President Banda made an extensive use of this prerogative reflected the high modernist ethos underpinning his rural development policy, whereby smallholder agriculture in customary land was believed to constrain the full development of modern commercial farms (McCracken 2012). The legislation provided no limits to the amount of land to be converted as long as formal approval from the local chief certified that the land was not either claimed or currently in use. Some studies report that over 1,200,000 ha of land were converted between 1977 and 1997 (Gossage 1997: 7). Chiefs were often pressurized by party officials and political elites, and land was a prominent aspect of broader mechanisms of redistribution through patronage (Mhone 1987: 63). As expired leases reverted to the state, conversion of customary land to lease was also an important mechanism through which the ruling party consolidated power in the rural setting. Yet, this system generated inefficiencies and, unless with the express permission of the owner, leased land could not be accessed by landless farmers even when, as frequently happened, it was left idle. The stagnation of international tobacco prices in the 1970s was one reason behind this, thus leading Banda to implement the first Structural Adjustment Programme in 1981. A further effect of this unbalanced land policy was to create an artificial scarcity of land for the smallholder sector (Kishindo 2011: 6). Estimations showed that the estate sector made a productive use of only about half of the land acquired under lease and freehold (World Bank 2007: 156). One of the conclusions of the Presidential Commission was that "[land] concessions were essentially frauds perpetuated on indigenous communities and remain a source of legitimate land grievances particularly in Southern Region of Malawi" (GoM 1999: 40). Given this background, the role of chiefs was a central element in the redefinition of the trajectory of land reform. For instance, the Presidential Commission acknowledged that the role of chiefs was essential in ensuring equitable distribution of land for current generation, while preserving a sustainable use to guarantee future generations the same possibility (GoM 1999: 62-64). The Commission also recognized that customary chiefs often played an important role in the formation and reproduction of vernacular land markets, this reflecting important tendencies in the new land policy. The Commission found evidence of illegal land transactions operated by some chiefs, especially in relation to the administration of unallocated land that was held in trust on behalf of the communities (GoM 1999: 65). This position was later endorsed in the 2002 National Land Policy, which acknowledged that "fraudulent disposal of customary

land by headpersons, chiefs and government officials often deny critically needed access to people most desperate for land" (GoM 2002: 18-19). The emergence and consolidation of vernacular land markets was confirmed by studies as well. For instance Takane (2008) provided empirical evidence on the increasing imbrication of chiefs in land transactions. One of the ways in which the Presidential Commission inspired the New Land Policy – and specifically the formulation of the notion of private customary estates – stemmed from the attempt to formalize and legalize existing informal land transactions.

The 2002 National Land Policy was informed by three main principles outlining the country's land reform process (GoM 2002). First, the policy recommended the introduction of a new land classification system distinguishing between 'Government Land', 'Public Land', and 'Private Land'. Second, the policy stressed on the need to formalize, democratize and make land administration more transparent by means of the decentralization of land-related prerogatives to chiefs, clan leaders, village headmen, and family heads. The third principle inspiring the policy was the modernization of land administration system through trainings and capacity building activities in surveying and management. This was to ensure adequate professional support and advice to the implementation of land registration, including environmental management and land use decisions at all levels of government.

The national land policy ruled the demarcation and registration of all customary land under 'traditional land management areas'. Under each traditional land management area customary landholdings were to be registered as 'private customary estates' for individuals, households, and entire communities. Nonetheless this notion was very ambiguous, and yet reflected the attempt to introduce provisions towards increasing tenure security within existing customary tenure arrangements. From a legal perspective the registration of a customary estate encompassed the full transferability of the resulting land titles, which could be leased or used as collateral (GoM 2002: 14). However, the National Land Policy did not specify in whose name the title was to be registered, this having very complex repercussions depending whether registration intervened in a patrilineal or matrilineal context (Peters 2010). Similarly, the Policy ruled that land and property inheritance had to be divided among all the children equally. However, this provision could have very different outcomes depending on whether existing inheritance rules were based on matrilineal systems of land tenure and uxorilocal marriage, or patrilineal systems and virilocal marriage. As noted by Kishindo (2004: 221) a main concern was whether and how existing customary norms governing land continue to influence land use in actuality, and the extent to which the formalization provided by the new land policy reproduces old and create new inequalities. It was contended that those in a position of power were likely to benefit the most from formalization, as they would use their influence to benefit in terms of

land allocation. In this regard the rationale behind the legalization of land transfers was intended as an attempt to incentivize a more productive use of land, from less efficient to more efficient producers. Nonetheless, this notion was very controversial, with distress sale being a major risk. In contexts of poorly integrated markets, resource-poor households are sometimes compelled to sell land not necessarily because they are inefficient, but because they might need cash in the short term. Conversely, those with enough financial resources are not necessarily the most efficient as they might find convenient to buy land depending on the dynamic of prices.

The ambiguity of the National Land Policy was that the transferability of private customary estates was subject to a number of limits, precisely to avoid uncontrolled land transfers to occur indiscriminately from poorer to wealthier households. From a legal standpoint these 'checks and balances' were stipulated under the very controversial notion that "the rights in customary estates shall be 'usufructuary in perpetuity'" (GoM 2002: 25). One interpretation was that as private customary estates originated from the formalization of usufruct rights their transferability had to be subject to limits provided by both statutory law, as well as the custom. However, as the notion of private customary estates was quite unique and the National Land Policy did not provide additional details on the full legal significance of the property rights attached, the concept was widely criticized (Silungwe 2009, 2015). The registration of sales, mortgages, and leases was not absolute and had to comply with the "overriding interests of the community and sovereign rights of the state" (Kishindo 2004: 221). Another layer of complexity was that the state could act as a trustee on behalf of customary landowners in granting leasehold rights to third parties. However, contrary to previous dispositions, at the end of the lease the land right did not revert to the state but to the original customary owner. Following Kishindo (2004: 222), this provision was meant to phase out disputes arising from encroachments and boundary-related conflicts. However, what was considered particularly challenging was the initial process of demarcation and attribution of specific competences to a number of statutory and non-statutory bodies. In fact, under the New Land Policy the boundaries over the competences of land administration were increasingly blurred and split among a plurality of institutional actors and committees. While the spirit of the Policy was to create a system of collective responsibility that would guarantee some degree of democratization in land administration, the overlap of several institutional bodies constituted a potential source of confusion and inefficiency. According to the Policy, Land Clerks were in charge of recording customary land transactions in a Traditional Land Index. Customary Land Committees in each traditional land management area were in charge of land administration and to oversee land transactions. Customary Land Committees were mixed bodies composed of three elected community members and the community traditional chief (GoM 2002: 26). This village-level of land administration had correspondents at the higher level of the

Traditional Authority (T/A). Nonetheless, the policy was rather unclear when it came to establish how all these institutional bodies had to relate to each other, as well as interact with higher levels of the state apparatus.
In general it is clear that the principles outlined in the New Land Policy provided the chiefs with very important prerogatives on land administration. In addition to their power of distribution and control over land transfers, the Policy empowered them with prerogatives pertinent to the enforcement of environmental regulations.

The Special Law Commission and the 2013 Land Bills

The parliamentary approval of the National Land Policy in 2002 did not have particularly significant practical repercussions: the document was only one step of a long and difficult land reform process that at the time of this writing has not yet ended. The National Land Policy constituted the basis for the Malawi Land Reform Programme Implementation Strategy (2003-2007), meant to translate the policy principles into practice. A key body in the formulation of such strategy was the Special Law Commission on the Review of Land Related Laws, appointed in January 2003. The Commission had the task to review existing bodies of legislation dealing with land-related matters and formulating specific recommendations on how to amend them based on the principles set by the National Land Policy, and on the basis of consultation with relevant civil society stakeholders. After two years of work, in 2005 the Special Law Commission produced a new comprehensive document titled "Report of the Law Commission on the Review of the Land-Related Laws", also known as "Khaila Report" deriving from the name of the Commission's Chairperson, Dr. Stanley Khaila. The report reviewed sixteen existing acts dealing directly or indirectly with land-related issues, and recommended the amendment of ten of them. Among the ten, the Commission proposed to abrogate three acts, merging two acts into one, and re-writing almost entirely two of them. The works of the Commission were followed by a long period of paralysis, which roughly coincided with the presidency of Bingu Mutharika and the Democratic Progressive Party (DPP). In June 2013, under the new President Joyce Banda, two acts were tabled in Parliament, the Land Bill 2013 and the Customary Land Bill 2013 (GoM 2013a; GoM 2013b). The Parliament endorsed the two bills for enactment, but President Banda did not give final approval and the two bills are yet to be promulgated into laws. Chinsinga (2015: 25) argues that "[t]he President declined to sanction the draft Land Act Bill into law due to strong resistance against it particularly from traditional leaders and civil society organizations largely due to its predominant neoliberal orientation". The fact that national elections were scheduled within less than a year since the land bills were tabled in parliament was probably another reason behind the decision of President Banda to decline assent. At that time Banda's political base was still very fragile and the support of traditional chiefs was essential in keeping alive her chances to win

the elections. Although Banda came only third in the May 2014 tripartite elections, many studies document the important role played by the Chiefs in mobilizing political support (Chiweza 2007; Eggen 2011).

The draft bill was probably inspired by the implementation of the Community Based Rural Land Development Project (CBRLDP), a pilot land reform program based on the 'willing-seller, willing buyer' model, which entailed mechanisms of land redistribution through resettlement, and was implemented in six districts in the Central and Southern regions of Malawi between 2005 and 2011 (World Bank 2013). The CBRLDP had the World Bank as its main sponsor and politically was conceived as an attempt to overcome the impasse of the land reform process in the country by creating a best practice to be scaled-up beyond the areas of implementation (Chinsinga 2011). While the extent to which the project constituted a success or not is still heavily debated, the demarcation and registration of 'private customary estates' provided by the land reform process was definitely inspired by neoliberal market liberalization ideas underpinning the CBRLDP. Therefore it was by little surprise that criticisms to the 2013 land bills came precisely from the perspective of the potential risks embedded in an increased marketization of the land relations. For instance, some civil society organizations warned that the implementation of the bills would have added layers of confusion, and potentially leading to large-scale dispossession of poor households' landholdings, *i.e.* would have deprived the weakest strata of the rural population of their most valuable asset (CEPA 2013). Conversely, traditional leaders were wary of the registration of customary land into customary private estates on the ground that this would have reduced their powers over land administration, and *de facto* abolished the category of customary land as soon as registration was completed. The coming into force of the draft land bill would have transformed customary land into 'unallocated land', from the perspective of the chiefs this hampering equitable access to land for vulnerable groups at the advantage of powerful rural elites. These kind of criticisms to the proposed land policy reforms – especially those coming from the chiefs – have played a significant role in harnessing the land reform process in Malawi. The lobbying of the chiefs to counter the land reform process had not only the effect to delay the implementation of the land reform process and the land bills, but also to bargain increased powers over land administration. This can be further illustrated by briefly comparing the powers granted to chiefs in the 2002 National Land Policy and the 2013 land bills. The analysis shows that powers over land administration granted to the chiefs have increased considerably under the 2013 land bills, this further confirming their ability to promote successful lobbying in parliament. This has also an important implication for the broader debate about land policy reform and customary rule in Malawi. While recent studies on customary tenure emphasized expanding dynamics of marketization and the potential risks arising from it – especially in relation to the creation of new inequalities – the fact that chiefs reproduce their

power in such context by repositioning themselves in the local context have captured relatively less attention (Takane 2008; Peters 2010; Jul-Larsen, Mvula 2009).
A first difference between the national land policy and the proposed 2013 land bills is that the latter provide for the subdivision of land under two categories only, private and public land, each of which encompassing sub-classes, as summarized in the table below.

<table>
<tr><td>Public Land means land held in trust for the people of Malawi and managed by government or a Traditional Authority and includes as sub-classes:</td><td rowspan="2">Private land means all land which is owned, held or occupied under a freehold title, or a leasehold title, or as a customary estate and is registered as such under the Registered Land Act Sub-classes;:</td></tr>
<tr><td rowspan="2">a) any land held by the government or local government authority consequent upon a reversion thereof to the government or local government authority, as the case may be, on the termination, surrender or falling in of any freehold or leasehold estate therein pursuant to any covenant or by operation of law;</td><td rowspan="3">a) ‘freehold’ means an estate in land, inherited or held for life. Freehold tenure shall be the exclusive purview of citizens of Malawi. Freehold land acquired by a person who is not citizen prior to the amendment of this Act shall be converted to leasehold interest unless the person currently in possession of such land shall have acquired Malawian citizenship in accordance with the Malawi Citizenship Act within a period of seven (7) years;</td></tr>
<tr><td rowspan="2">b) land acquired and privately owned by government or a local government authority used for dedicated purposes such as government buildings, schools, hospitals and public infrastructure;</td></tr>
<tr><td rowspan="2">c) land gazetted for national parks, recreation areas, forest reserves, conservation areas, historic or cultural sites;</td><td rowspan="2">b) ‘leasehold’ includes an agreement for a lease, and any reference to a lease shall be construed as a reference to a lease granted under this Act or any other written law;</td></tr>
<tr><td rowspan="2">d) land vested in government as a result of uncertain ownership, abandonment or land that cannot be used for any purposes;</td><td rowspan="2">c) ‘customary estate’ means any customary land, which is owned, held, or occupied as private land within a Traditional Land Management Area and is registered as such under the Registered Land Act.</td></tr>
<tr><td>e) unallocated and communal land within the boundaries of a Traditional Land Management Area.</td></tr>
</table>

Table prepared by the author with information obtained from GoM (2010, 2013a, 2013b)

The innovation introduced by the Special Law Commission as incorporated in the 2013 land bills is that customary land is conceptually divided between ‘public customary

land' – encompassing communal and unallocated land – and 'private customary land' – including private customary estates (GoM 2013a). This categorization aims to acknowledge the *de facto* evolution of customary tenure in the local context, an evolution that sees an increasing role of informal market dynamics, and which the proposed legislation attempts to capture through formalization. The other important aspect of the proposed legislation is the exclusion of non-citizens from the possibility to enjoy freehold rights over land. If these rights are pre-existent they have to be converted into leasehold, or the holder has to obtain Malawian citizenship within seven years (GoM 2010: cCap. 15.01). The notion of 'citizenship' underlying this disposition is nonetheless very controversial, and constitutes one of the obstacles to the process of land reform and its parliamentary discussion. The terms of such debate is the extent to which the notion of 'nationality' should be instead replaced with 'national origin' to remark a stronger sense of ownership for Malawian nationals (CEPA 2013). As remarked by the Special Law Commission the latter is nonetheless very controversial as the Constitution prohibits discrimination on the basis of nationality (GoM 2010).

When it comes to devolution of powers, the Special Law Commission recommends that the presidential prerogative on public land should be subject to judicial review. While the National Land Policy vested all public lands in the President, the commission recommended this to be amended with 'republic' as a way to conform to existing constitutional dispositions. Similarly, proposed amendments to a number of articles of the land bills provide for a stronger decentralization of land administration to relevant local government authorities, including the chiefs. Particularly significant for the argument presented here is an amendment to section 26 of the 2013 Land Bill, ruling that the ministerial power of administration and control over customary land shall be taken away and vested in the chiefs, except for the prerogatives concerning the administration and control of mineral extraction in customary land (GoM 2013a). It appears that the amendments proposed by the Special Law Commission to the dispositions proposed in the national land policy go in the direction of curtailing presidential and ministerial powers for a more relevant role of local government authorities and traditional chiefs.

A similar picture emerges from the analysis of the 2013 Customary Land Bill. The bill is to replace the "Customary Land Development Act" and the "Local Board Act" (GoM 2010: cCap.59:01-02). The Bill goes in the direction of formalizing the power of traditional chiefs, by providing for the establishment of Customary Land Committees and Land Tribunal (GoM 2013b). The former are standing committees that are mandated to oversee the demarcation and registration of customary land, to stipulate and execute grants, leases and other dispositions on customary land, as well as to validate other land transactions – including sale of private customary estates – within a Traditional Land Management Area (GoM 2010: Cap.57:01-04). Their prerogatives in land management and administration extend up to functions of land dispute resolution, by constituting

an informal court of first instance. Land Tribunals are the bodies formally in charge of land disputes adjudication in each Traditional Land Management Area, and encompass several hierarchical levels that yet mirror the state administrative structure (GoM 2010: Cap.57:01). The chiefs play a very significant role in the Customary Land Tribunals. At the levels of Traditional Authority (T/A) and Village Headman (V/H) chiefs are mandatory chairs of the Tribunals, while at the level of the Central Tribunal they team up the Resident Magistrate.

Similarly, the proposed legislation provide for the establishment of Land Clerks in each Traditional Land Management Area in charge of the prerogative to prepare basic maps, and hence constituting as a first step towards land registration (GoM 2010: Cap.57:07). Given the complexities of titling processes this disposition empowers the chiefs with extremely important land administration prerogatives, and potentially with considerable arbitrary powers over registration. It is therefore evident that the chiefs are provided with very significant powers when it comes to the dispositions of the proposed legislation ruling the creation of a land management bureaucracy. The proposed legislations grant the chiefs a very relevant role not only in daily land administration, but also in management, transfer and dispute adjudication, a role that is certainly larger than it is today. While on the one hand it seems that chiefs have been successful in lobbying for increased powers over land administration, what can be concluded is that their role is by no means marginal and the prerogatives that the proposed legislation grant to customary authorities have increased since the initial debate in the 1990s. Some studies even question the extent to which their position as mandatory chairs in Land Tribunals and Committees give them too much power (Berge 2006). Nonetheless forecasting the impacts of the proposed legislation is very difficult. The formalization of the role of customary authorities may go in the direction of improving their accountability to the people, strengthening individual and collective sense of tenure security, and the transparency of land administration or, conversely, creating the conditions for indiscriminate use of power.

Conclusion

Since the 1990s Malawi has undertaken a long and controversial land reform process that is still ongoing at the time of this writing. This paper has contributed to the debate about the role of customary rule in contemporary land policy reforms by reconstructing the most significant legislative steps of such process and by locating the Malawian experience into the broader African context. The Malawian land reform process elucidates the tensions and contradictions of contemporary land reform processes, but also highlights considerable innovative aspects. The proposed 2013 land bills outline the notion of 'private customary estates', which is meant to achieve a number of overlapping and yet conflicting policy priorities, including strengthening land tenure security to improve agriculture efficiency, preserving the role of chiefs to guarantee

equitable land access, as well as progressively harmonizing statutory and customary provisions on land administration. While predicting the actual effect of legislation is difficult, neither customary nor statutory property rights work properly without a high degree of legitimacy.

The case of Malawi also shows that chiefs very seldom play a passive or secondary role in formal and informal bargaining processes of complex land policy reforms. Lobbying of chiefs is one important determinant of the delays and hurdles that the process land reform encountered in Malawi. The chiefs have been successful in lobbying for increased powers over land allocation, distribution, management, and dispute resolution, as demonstrated by the evolution of the land reform process since the 1990s. More broadly, considering a trend of increasing competition over land and natural resources - driven by population pressure, absence of alternative job opportunities, and the interest of international and national private sector actors - it is likely that in the future pressures towards commercialization will increase rather than decrease. However, future research will need to consider customary authorities as active players, constantly repositioning themselves in the local arena to maximize power. An important conclusion is that in contexts where public authority is fragmented institutional actors are 'creative' and 'sticky' and constantly construct and reproduce new and old political narratives to maximize legitimacy depending on changing circumstances (Boone 2014).

Davide Chinigò has been Research Fellow at the Department of Political and Social Sciences of the University of Bologna within the MIUR research project PRIN 2010/2011 'State, Plurality and Change' and is now Postdoctoral Research Fellow at the Department of Sociology and Social Anthropology, Stellenbosch University, South Africa

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