

An Analysis of the Political Dynamics that Influenced the Process of Adopting the 2016
National Land Laws in Malawi: A Gender Perspective

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A minor dissertation submitted in partial fulfilment of the requirements for the award of
the degree of Master of Philosophy in Justice and Transformation

Faculty of the Humanities
University of Cape Town
2019

COMPULSORY DECLARATION

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List of Abbreviations and Acronyms

ACHPR	African Charter on Human and People's Rights (African Charter)
ALPFG	African Land Policy Framework and Guidelines
AOCL	Access to, Ownership of and Control over Land
AU	African Union
CBRDP	Community-Based Rural Land Development Program
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CLC	Customary Land Committee
CLT	Customary Land Tribunal
CFS	Committee on Food Security
CSOs	Civil Society Organisations
EEW	Economic Empowerment of Women
EU	European Union
FAO	Food and Agriculture Organisation
GBI	Government's Green Belt Initiative
GDP	Gross Domestic Product
GEA	Gender Equality Act
HBRA	Human rights-based Approach
ICCPR	International Convention on Civil, Cultural and Political Rights
IMF	International Monetary Fund
ICSCER	International Convention on Economic, Social and Cultural Rights
IPRSE	Institute for Research and Social Empowerment
LA	Land Act
LT	Land Tribunal
LC	Land Committee
MDGs	Millennium Development Goals
MGDS	Malawi Growth and Development Strategy
NGO	Non-governmental Organisation
SADC	Southern Africa Development Community
T/A	Traditional Authority

UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCSW	United Nations Commission on the Status of Women
UNDP	United Nations Development Program
UNECA	United Nations Economic Commission for Africa
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land
WFP	World Food Programme
WLRs	Women's Land Rights
WOLREC	Women Legal Resource Centre

List of Malawian Legislation and Bills Used

The Constitution of the Republic of Malawi
The Customary Land (Development) Act, 2016
The Customary Land bill, 2012
The Land Act, 2016
The Land Bill, 2012
The Lands Acquisition (Amendment) Bill, 2012
The National Land Policy, 2002
The Registered Land (Amendment) Bill, 2012
The Registered Land Act

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Abstract

The thesis interrogates how the political dynamics that emerged in the formulation of the 2016 land legislation in Malawi influenced the gendered outcomes. It highlights the complexity of the policymaking process that was shaped by divergent interests and power dynamics of the stakeholders. It argues that although the interests and agenda complicated the process, their discourses were framed and justified their positions within the development and gender equality framework. It highlights the progressive nature of the socio-legal provisions in the legislation by significantly recognising and promoting women's land rights. It contends that advances in legal institutions are essential; however, for inclusive transformation to be sustainable, changes in social and cultural practices and norms are imperative. This is because Malawian women continue to face exclusion in owning, controlling and accessing land albeit being the major agricultural producers. This is owed to the persistence of patriarchal attitudes in institutions that perpetuate contestation in the public and private spheres of women's rights to access, own and control over land. Such is persistent particularly within customary laws which remain sites of struggle between traditional leaders' claims and women's societal positions. Hence, creating enabling environments for women will allow them to articulate their political voices and agenda and as such influence policy and legal formulation.

Through a multi-faceted approach encompassing of legal pluralism, feminist perspectives on gender and development, and the theory of change, the paper discusses the complexity of policymaking that has been shaped by interests and power. For instance, most chiefs contested against their limited powers and the inclusion of women in land administration issues as stipulated in the new Land Laws, while CSOs advocated for the laws to be people-centred, gender-sensitive and responsive to women's needs. Also, International organisations were interested in ensuring that there is improved land governance framework and its implementation is in line with VGGT. Thus, apparent realities emerge from the analysis of these political dynamics within the adoption of the 2016 Land Laws: the differing stakeholders' agenda and how they all pressed on advancing their agenda. Nonetheless, gender equality and development discourse was an aspect that was apparent in the debates.

Keywords: Women's land rights, Customary Land Act of 2016, Land Act of 2016, Malawi, gender power relations, land reform

Acknowledgements

Words are not enough to express my gratitude to the Konrad-Adenauer-Stiftung (KAS) for their financial support in the pursuit of my Master's studies-I am forever grateful. I am deeply thankful to my supervisor, Prof. Tim Murithi, for his thoughtful input throughout this research- his comments and insights have been invaluable to the writing of this dissertation. Co-supervisor: Dr. Zwelethu Jolobe for administrative support and availing yourself. Moreover, I would like to express my gratitude to Dr. Samson Lembani (from KAS), Dr. Henry Chingaibe (from the Institute for Research and Social Empowerment), and Mr. Emmanuel Sulle (from the Institute for Poverty Land and Agrarian Studies) for your support. Also, I would like to thank the South African Institute of International Affairs GARP team your contributions especially at the initial stages of my research. Also, I am thankful to Samuel David Kanyika my "long-distance" classmate for your support with the research. Furthermore, thanks are due to my family and friends for believing in me and pushing me. Last, but not least I would like to express my gratitude to my mother, Esther Chindoole, who always reminds me that *sikadza kokha kamaopa kulawula*.

CHAPTER ONE: INTRODUCTION

1.1 Background and Introduction

Studies have revealed that even though women are the major agricultural producers, they own less land and are absent at different levels of policymaking (SADC Parliamentary Forum Report, 2002: 23). Evidence has also shown that on a global level, women perform 66 per cent (%) of the world's agricultural work, produce 50% of the food, but earn 10% of the income and own approximately 1% of the property (UNICEF 2011, USAID 2015, OXFAM, UN Women, 2013:4). Land is regarded as a critical means of production and central to economic development (SADC Parliamentary Forum Report, 2002: 23). In Africa, women contribute 70% of the continent's food production and constitute an average of 43% of the agricultural labour force (USAID, 2016).

In the Malawian context, of those employed in the agricultural sector, 90% are women (World Bank, 2018). However, only 39% own land (Food and Agriculture of the United Nations Guidelines, 2017). Land is the country's major asset and factor of production (Report on the Joint Parliamentary Committee on Land Related Bills: Bill Number 2 of 2016: Land Bill, 46th session, 2016). This is so because agriculture is significant to both Malawi's economy and in determining social relations among its citizens. The sector accounts for 31% of its GDP and 84% of Malawian households own and/or cultivate land (Kilic, Palacios and Goldstein, 2013:2).

These statistics reveal imbalances in terms of women's land ownership in Malawi. Therefore, one can argue that women continue to face exclusion from accessing the means to development. Such exclusion has been considered as an assault not only on women's developmental potential but also their human dignity (SADC Parliamentary Forum Report, 2002:5). Consequently, this continues to contribute to human resource deprivation which could be used in improving livelihoods in Malawi, Africa and across the world. Also, denying women to full Access to,

Ownership of and Control over land (AOCL) renders into lower productivity, continuing food insecurity, malnutrition and poverty. According to the Food and Agriculture Organisation (FAO), if female farmers had the same opportunity in accessing productive resources as men, production could upsurge by 20% to 30%, which could increase total agricultural output in developing countries by 2.5% to 4% and lift approximately 150 million people out of hunger (FAO, 2015). Thus, promoting Women's Land Rights (WLRs) can to some extent increase agricultural productivity and growth and consequently reduce poverty.

Pertaining to the reasons for women's exclusion in AOCL, some scholars and analysts have attributed such exclusion to structural factors entrenched in patriarchal cultural values and socio-economic context (Coetzee, 2001:300; Albertyn, 2010: 166; Chingaipe, 2016:6). Others, conversely, attribute the unequal treatment faced by women to institutional structures, and the legal and policy framework that are fundamentally concerned with rules (SADC, 2002: 6). Since laws can be regarded as both enabling and constraining; they can shape the positions of various groups of people within the society including women (Chingaipe, 2016:3). As such, the legal frameworks play significant roles in either promoting or hindering their women's rights to AOCL.

Moreover, the socio-economic context determines the appropriateness of diverse types of rights to land including those on individual rights, joint-titling and group rights. As such, there is a need for continued efforts aimed at promoting gender-sensitive legislation that enforces existing ones, making judicial systems more accessible and responsive to women who seek to claim their rights (UN Women, 2013:3). In light of this, the Land reform Acts of 2016 can be deemed as key to the socio-economic development of Malawi. As noted by the Joint Parliamentary Committee on Land related Bills' report, a good legal framework can uplift the welfare of Malawians if properly implemented (Report on the Joint Parliamentary Committee on land-related Bills: Bill Number 2 of 2016: Land Bill, 46th session, 2016).

Comparable to the global level, insecure land rights for women threaten progress on gender equality and sustainable development in Malawi. As stipulated by the Malawian National Land Policy (MNLP) of 2012, a clear policy that accentuates women's access to land should be considered in policy planning and implementation strategies. This is because of increasing population pressure on land and the devastating effects of HIV/AIDS. Consequently, such land pressures have led to the phenomenon of land-grabbing and commodification of land (Chingaipe, 2016:2).

Furthermore, recognising and promoting WLRs would benefit Malawi in several ways, including enabling people to “possess their development” in the sense that they are in control of their circumstances rather than being “handed it to them” (SADC, 2002:6). Thus, instead of the development experience being regarded as a “received one”, it becomes a “lived experience” making it more sustainable (SADC, 2002:6). One can hence argue that there is a sense of empowerment through such a process. Moreover, ensuring women's rights to AOCL would be good for Malawi's development at the macro-level as it supports the overall strategy to advance poverty eradication. Effectively, a broader base of Malawian citizens would be able to achieve economic growth through increased control over their productive potential.

1.2 Problem Statement

Malawi is a state party to several international human rights law instruments. Among others, it has signed and ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), International Convention on Economic, Social and Cultural Rights (ICESCR), African Women's Protocol and the African Charter on Human and People's Rights (ACHPR). These legal and normative protocols affirm the need to promote women's full access to, ownership of and control over productive resources to combat poverty. Subsequently, Malawi has enacted several laws and policies related to land and the promotion of gender equality (SADC, 2002:23). For instance, the Constitution of the Republic of Malawi provides for equality irrespective of sex. It prohibits sexual discrimination. It also provides for equality between men and women in the family and advocates for same rights and duties. Section 24 provides,

“for rights of women to equal protection of the law, non-discrimination during and after marriage... protection from violence and deprivation of property, elimination of harmful/discriminatory customs and practices” (Constitution of the Republic of Malawi, section 24).

Recently, Malawi has made considerable progress towards strengthening the legislative and policy framework on women’s rights. Consequently, Malawi has issued several new Land Acts including the Land Act (LA) of 2016, the Customary Land Act (CLA) of 2016. On this note, this research aims to assess these new Lands Laws by questioning whether they have recognised and promoted women’s rights to AOCL. By analysing the contestations among different stakeholder during the formulation process, the paper will consider how these shaped the gendered outcomes. The paper proceeds to interrogate whether this matters as far as women empowerment and development is concerned. Furthermore, the sub-theme will explore interactions among gender, legal dynamics and political structures.

This research is informed by a feminist analysis which will interrogate the socially constructed roles that men and women occupy and how this impacts their unique needs and wants. The phenomenon of patriarchy has created a social reality that values the roles of men and women differently by assigning a superior status to the former over the latter. Therefore, the research will advocate for gender sensitivity and responsiveness in resource access, ownership and control and the need to adopt a multi-faceted approach to address the multi-dimensional character of gender discrimination (SADC Parliamentary Forum, 2002:5). On this basis, the research will take a multi-faceted approach by combining the following analytical approaches: legal pluralism, feminist perspectives on gender and development and the theory of change.

1.3 Rationale of the Study

Several reasons account for the need to focus on land and women. It is essential to ensure women's rights to equality and an adequate standard of living (UN Women, 2013:2). Equal rights to land enable women to provide for their day-to-day needs and those of their families (UN Women, 2013:1). Discussions on access to land are usually linked to those around food security, sustainable economic development, fight against the HIV/AIDS epidemic, and prevention of and responses to gender-based violence. Gender inequality, with regards to land, relates to "women's poverty and exclusion" (UN Women, 2013:2). As such, land rights matter because they are fundamental to dignified life and a basis for entitlements which can ensure the adequate standard of living and economic independence and therefore personal empowerment (UN Women, 2013:2). A gender equality perspective has major implications for the achievement and enjoyment of women's rights such as "the right to equality, food, health, housing, water, work and education" (UN Women, 2013:2). Hence, women's access to land cannot be separated from a broader context of macro-economic policy and the global economic system. Therefore, for growth to be considered inclusive there is a need to allow equal access to opportunities and resources for all segments of society. (UN Women, 2013:2).

Discourses around land rights assume the form of individuality and commodification entitlement to land where access and ownership are conceived in liberal market terms and land as a property (UN Women, 2013:2). There is a need to have a more traditional, collective and indigenous understanding of rights (UN Women, 2013:3). Land should be perceived as a life-sustaining resource to be shared and protected- unlike within the economic liberalism perspective which views land as a financial commodity to be privatised and sold (UN Women, 2013:2).

1.4 Research Objectives

1.4.1 Main objective

The main objective is to analyse the political dynamics that influenced the process of adopting the 2016 Land Laws in Malawi and how these shaped the gendered outcomes.

1.4.2 Specific objectives:

1. To discuss the political dynamics that influenced the adoption of the 2016 gendered national land laws in Malawi;
2. To assess how the socio-legal provisions in the 2016 land legislation promote WLRs and how this would impact their economic empowerment through increased food security and poverty alleviation.
3. To consider the obstacles to the successful implementation of the 2016 land legislation and propose ways in which successful implementation can be ensured.

1.5 Research Question (s)

1.5.1 Main Research Question:

How were the gendered outcomes of the 2016 Malawian national land reforms influenced by the political dynamics that emerged during the formulation process?

1.5.2 Specific Questions

In responding to the broad question above, the following questions will be answered:

1. To what extent do the socio-legal provisions in the 2016 land legislation promote women's rights to access, ownership and have control over land in Malawi?
2. Why does ensuring the promotion and recognition of WLRs matter to their empowerment and economic well-being?

3. What could be the obstacles to the successful implementation of the 2016 land legislation and how could these be addressed?

1.6 Significance of the Research

Based on the shortcomings revealed in the course of the research, the research will make necessary recommendations which might be used to improve existing domestic laws and policies that impact women's ability to access, control and own land. Some of which will include the need to:

- contribute to the literature on political dynamics concerning land reform processes
- contribute to the existing literature on women's rights with a special focus on land issues and Malawi;
- propose ways in which successful implementation can be ensured and hence bringing about awareness on gender equality among women with regards to land rights;
- make policymakers prioritize the interests of women in policy formation as women are considered vulnerable groups in the society and the main agricultural and food producers' agriculture.

1.7 Methodology: Research Approach

In research, methodology entails how the study should be conducted to respond to the research questions (Beetham and Dimitriades, 2007:199). The study will take a social legal research approach and the methodology will consist of a combination of data collection and synthesis of existing international and country-level literature on women's rights, laws, policies on land and Parliamentary debates physical records (Hansards). The research will also use a comparative analysis approach whereby existing and previous legal and policy framework on land in Malawi will be compared.

1.8 Scope of the Study

The key legislation that will be analysed are: the Land Act of 2016 and the Customary Land Act of 2016. The analysis is confined to the content of the law and policies, and not its administration or practices and/or implementation. This is because the Land Laws have recently been enacted and hence it would be a challenge to find literature or studies that review successful or unsuccessful implementation and from that extrapolate how the new legislation will impact on development. Also, considering that the debates on suitable Land Laws remained unresolved from 2012 to 2016, it is worth mentioning that the political dynamics analysis will use documentation, reports, and print and broadcast media outputs within this period. This because the Bills were first presented to Parliament in 2012 and this is when most debates surrounding land laws surfaced.

1.9 Literature Review

Discussions on women's AOCL continue to dominate the sphere of women's rights activists globally, regionally and domestically. While there is no clear consensus on the Conceptualisation of access, control and ownership of land, an aspect that these activists agree on is the need to increase women's ability not only to own and access land but also to control it (Matchaya, 2009; Odeny, 2013; Peters and Kambewa, 2007). Whereas some attribute the limitations for women to AOCL to the failure in the legal and policy framework, others attribute it to the lack of implementation measures that ensure that the laws and policies are translated into reality. Similarly, the United Nations Economic Commission for Africa (UNECA) attributes the growing demands for land to population growth, degradation of agricultural land and urbanisation. Such places women at higher risk of losing their land rights (Matchaya, 2009).

Moreover, research has demonstrated that there is a positive correlation between ensuring WLRs and improved household welfare and increased enjoyment of a broad range of rights for women (UN Women, 2013:2). This has been argued to consequently lead to women acquiring more autonomy in families and communities as well as their

economic and political relationships (UN Women, 2013:3). Additionally, rural women have expressed that secure land rights increase their sense of confidence and security and it also diminishes the threat of forced evictions and poverty. Secure land rights are also important because they boost women's bargaining power in the home and improve their levels of public participation. With regards to HIV/AIDS, according to UN Women, research has revealed that women's rights to inheritance and property are a crucial factor in reducing their vulnerability to HIV/AIDS (UN Women, 2013:2). Also, women's ownership rights have been associated with reduced levels of both physical and psychological violence (UN Women, 2013:2). Moreover, countries where woman lack land ownership have on average 60% more malnourished children (UN Women, 2013:2).

Additionally, most literature on the gendered aspect of land ownership has been focused on its relationship with food security and production. Some identify a direct relationship between women's rights to land, economic empowerment, food security and poverty reduction (SIDA, 2015). Moreover, some claim that there is an indirect relationship between land ownership and land use (USAID, 2016). This is prevalent especially in developing countries whereby although women are responsible for most agricultural production, control and ownership of land is greater among men (USAID, 2016; SIDA, 2015). Evidence from several studies has shown that women in Africa contribute 70% of the continent's food production and account for nearly half the labour (OXFAM, 2013). Even in cases where women own and control land, research has shown that the quality and amount tends to be lower than that which is owned and controlled by men (USAID, 2015). For instance, during a study done in Ethiopia, it was observed that the average land area controlled by women was 43% smaller than that controlled by male farmers (USAID, 2016:1). However, Doss and colleagues are skeptical about such a generalisation. This is so because they believe that such generalisations lack substantiated empirical evidence and they do not reflect variations of land ownership within and across countries (Doss, Kovarik, Peterman, Quisumbing and Van Del Bold, 2013).

To bridge the gap on lack of empirical evidence on how improving WLRs empowers women, Keera Allendorf (2007), used 2001 Nepal Demographic and Health Survey (NDHS) to test the hypothesis. In her study, she concluded that women, who own land significantly, tend to have greater control on decisions made within the household (Allendorf, 2007). Allendorf argues that women's land ownership is a measure of empowerment. Furthermore, Allendorf contends that the likelihood of children whose mothers own land to be underweight is significantly lower compared to those who do not (Allendorf, 2007).

Similarly, Khushbu Mishra and Abdoul Sam (2016), confirm this hypothesis in their study whereby they used 2001 and 2011 NDHS and relevant econometric techniques (Khushbu and Sam, 2016). They observed a positive correlation between land ownership and the impact on women's empowerment and noted that an increase in women's bargaining power can, in turn, be leveraged into a redirection of resources towards women's preferences such as health and education (Khushbu and Sam, 2016). As such, Khushbu and Sam maintain that in places where agriculture is the main source of economy, increasing women's empowerment can be achieved through policies that enhance their land rights (Khushbu, 2016).

Additionally, Using the Gender, Agriculture and Assets Project conceptual framework, Ruth Meinzen-Dicka, Agnes Quisumbinga, Cheryl Doss, Sophie Theresa, also contribute to empirical evidence on how increasing WLRs could increase their well-being and reduce poverty. However, they acknowledge the lack of research investigating the relationship between WLRs and poverty (Doss et al, 2017).

Furthermore, some have argued that culture and customs play a huge role in impeding women's AOCL. These have been argued to manifest in patriarchal practices. In this light, some maintain that promoting women's AOCL will lead to improved food production and hence reduce poverty (Matchaya, 2008). Contrariwise, Henry Chingaipe and Felix Bello support USAID's claim that giving women better AOCL are unlikely to increase productivity because men continue to own most of the farm assets necessary

for production (Chingaipe and Felix, 2016). The reason increased for food production if women are given more access would be because women, as shown in a study in Malawi, tend to prioritize food crops (Chingaipe, 2016:8). Men, on the other hand, were found to prioritize cash crops (Chingaipe, 2016:8).

In their attempt to scrutinize if the Customary Land Bill (2012) made provisions for securing and ensuring women's and other vulnerable groups' rights to access and control over land in Malawi, Kainja and Dzonzi (2013) noted the clash between the constitutional provisions and the customary law. They assert that under s.20 (2) of the Constitution, the government is supposed to pass legislation that addresses inequalities in the societies and prohibits discriminatory practices and it also proceeds to state that any laws that discriminate women based on gender and marital status shall be deemed invalid.

However, this conflicts with the customary law as customary practices such as *chitengwa* and *lobola* which directly deprive women's rights to land inheritance. Kainja and colleague observe that the proposed customary Land Bill failed to make attempts for modification and outlawing such practices that hinder women's rights to AOCL (Kainja, 2013:28). In other words, they argue that the Bill was unsatisfactory in dealing with the root cause of women's lack of land rights. Nevertheless, they acknowledge that the Bill to some extent included gender provisions. For instance, it made provisions for the customary estate to be not only inheritable but also transmissible as stipulated in s.19 (3) (c) (Kainja, 2013:28). Also, another way in which women's rights were protected as seen in the Bill is by giving women the first right of an offer of any customary estate that has been surrendered (Kainja, 2013:28).

Moreover, research on land rights within the context of Malawi identifies several factors that impede women's ability to AOCL. The main factor as Gladys Mutangadura (2004) and Shawa (2002) identify is the cultural norms under the customary system. In terms of land ownership, under the old customary land tenure, women's land ownership depends on the type of marriage (Gladys Mutangadura, 2004:7). If the marriage is

under the patrilineal framework, land inheritance is through the male lineage and a woman can only access land through her husband. In the incidence of a divorce, the woman returns home and loses land ownership. Alternatively, within the matrilineal system, land inheritance is through the female lineage (Shawa, 2002). It can either be "*chitengwa*" or virilocal and "*chikamwini*" or uxori-local (Shawa, 2002). Under *chitengwa*, the wife is chased away from the village and loses her land rights and under "*chikamwini*", the husband loses his land rights in the event of his wife's death (Shawa, 2002). Hence, women experience land insecurity under both patrilineal and *chitengwa* as compared to men who only experience land insecurity under *chikamwini* (Shawa, 2002).

However, as Mutangadura notes, under the statutory tenure within the Malawian legal framework, women are not discriminated against as far as obtaining land rights is concerned. In practice, she attributes the factors that hinder land ownership, control and access to socio-economic obstacles. Such obstacles include lack of education and lack of resources to buy or lease land. She proceeds to identify cultural practices as factors that discourage women from taking part in land allocation committees and decision making (Shawa, 2002). Additionally, the notion that customary practices impede on women's rights as far as land ownership is concerned was also affirmed by Erling Berge, Daimon Kambewa, Alister Munthali and Henrik Wiig (2014), whose research was based on government statistics and interviews with villagers across Malawi. In their study, they found that customary matrilineal and patrilineal land tenure systems serve to weaken the security of land tenure for some family members and obstructing the creation of gender-neutral inheritance of lands (Berge *et al*, 2014:16).

1.10 Outline of the Paper

The paper is divided into five chapters. *Chapter one* is an introduction to the paper. It outlines the research questions that the paper aims at answering and the objectives. It provides a background to the study and the relevance of the study.

Chapter two presents the conceptual and theoretical framework in which this study is grounded on. It explores the relationship between the main concepts used in this study.

Chapter three is a discussion on the legislative frameworks on gender equality and women's rights. It dwells deep into the regional, international and domestic frameworks on gender equality with a specific focus on the protection and promotion of women's rights to bring about empowerment. It further analyses the two land laws by considering how WLRs have been promoted and the limitations therein.

Chapter four is the crux of the paper. It is more concerned with the political dynamics involved in the formulation and establishment of the new land laws. It explores the politics involved in the establishment of the laws by delving into the rationale for the 2016 Land Laws, the different stakeholders and their interests/agenda and the political atmosphere in which the laws were formulated.

Chapter five concludes the paper by stating the key findings and reaffirming the main arguments against the theoretical framework. It provides a summary of the chapters by accentuating the main arguments and findings. It proposes ways in which successful implementation of the new land laws could be pursued to ensure that WLRs are not merely promoted on paper but also in reality.

CHAPTER TWO: CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 Introduction

This chapter focuses on the conceptual frameworks which have been articulated under the rubric of women's ability to access, own and control land and other economic resources. Drawing from the premise that a multi-faceted approach is required to solve a multi-faceted problem, this paper utilizes a combination of analytical approaches: legal pluralism, feminist perspectives on gender and development [gender analysis] and the theory of change.

2.2 Conceptual Framework

Rights are claims that are bounded by law and are socially perceptible. *Land rights* focus on land as a resource and how different actors within the society utilize power in the advancement of their interests in the use, ownership and control over land (Ruswa, 2017:8). The paper categorizes land rights in terms of access, control and ownership.

Ownership rights will be conceptualized as a full bundle of rights which encompass the right to transfer or manage or make improvements in the exclusion of others and the right to control the proceeds (FAO, 2013). In this case, the main right is embedded in the individual's ability to alienate or transfer it. Thus, *land ownership* should be understood as whether or not the landholder has a title to it (Doss *et al*, 2015:4).

Control rights imply the individual's ability to make decisions on the types of crops produced and enjoy benefits from selling the products (Banda, Njikho, Malera, Mauluka, Mazinga and Ndlovu, 2011:9).

Access is the ability for one to use the land freely (Thumba, 2011:1). *Recognition* of rights should be understood as ascribed in Article 16 of the International Convention on Civil and Political Rights which declares the non-derogable right of everyone to "recognition everywhere as a person before the law" whereby an

individual “enjoys, and is subject to, rights and duties at law” (Article 16 of the International Covenant on Civil and Political Rights).

Additionally, *promotion* should be understood as measures put in place to ensure that the respective rights are being enjoyed and protected.

Women’s Land Rights in this paper will be understood in terms of the international human rights framework. These entail women’s rights to secure land tenure and their ability to meaningfully participate at all stages of land law, policy and program development (UN Women, 2013:1).

Land law denotes a system of rules enforced through institutions governing land tenure (UN Women, 2013:1).

Land reform is a process whereby the legal framework on land is restructured to improve the total societal productivity through relocating land to landless people (Berge, Kabwewa, Munthali and Wiig, 2014: 62; Silungwe, 2015:2). As Silungwe discusses the aspiration to make improvements through the alteration of existing legal frameworks has the implication of existing fundamental “problem” in a country’s land relations (Silungwe, 2015:2). She contends the problem should not be understood as relating to land for its own sake. Rather, as relating to the individual as a social being and land as a resource for a livelihood (Silungwe, 2015:2). Likewise, productivity, as argued by Berge, Kabwewa, Munthali and Wiig (2014) is linked to the security of tenure for those working on the land (2014: 62).

Gender is a highly contested concept as far as its Conceptualisation is concerned. Diana Koestor (2015) perceives this concept as not only a cause, or a consequence, but a manifestation of power relations (2015:1). For this paper, it will be defined as socially constructed attributes associated with being either male or female (Babugura, 2017:8; SADC Parliamentary Forum, 2002:100; Reddock, 2000:37). Gender is normally used to refer to men and women, girls and boys. However, because women and girls usually find themselves in disadvantaged and marginalised positions, policy frameworks tend to place more focus on empowering them. Thus, gender as a concept in this paper should be understood with the marginalised positions that women and girls occupy.

Gender equality denotes equal rights, responsibilities and opportunities for women, men, girls and boys (Babugura, 2017:10). As recognised by the UN Charter, equality entails the full and equal enjoyments of rights and freedoms for all regardless of any distinctions. In the context of land rights, this implies that both men and women should have equal rights to AOCL to bring about development and empowerment.

Empowerment accentuates the ability to have access to and control over the means of production to make a sustainable living and a recipient of the material benefits of the access and control (Amundsen, 2016:2). Accordingly, it should be understood as the social, economic, political and legal enabling of women to take action by granting, them strengthening rights, abilities and access to facilities, power and resources and equal participation formerly denied or restricted (SADC, 2002:99).

Customary law connotes unwritten law established by long practices and becomes applicable to a specific community (The Malawi National Land Policy, 2002).

Security of Tenure- Malawi has three main categories of land-holding systems under the law and these are customary land, public land and private land.

Customary land has its foundation on the traditional notion of communal land ownership within the village settings (Chingaipe and Bello, 2016:7). In this context, even though an individual has the right to use the land for cultivation and uses it as if he or she owns it, the land belongs to the community. In other words, it is regarded as communal property.

Under the new Land Act of 2016, *public land* is unallocated customary land owned by the Government and is defined as land acquired and owned by the Government (Section 3 of the Land Act of 2016).

Private land is land that is “freehold, leasehold or customary estate” which is registered as private land under the Registered Land Act (Section 3 of the Land Act of 2016). Under the Malawi National Land Policy (MNLP), there are three recognized forms of private land namely: customary estate, freehold title and leasehold title. A *customary estate* is a customary land allocated per provisions of the CLA and registered under the Registered Land Act. *Freehold title* is land that the owner holds for life and the leasehold title is land leased to a person for a long-term period (Chingaipe, 2016:8).

2.3 Theoretical Frameworks and Analytical Approach

2.3.1 Introduction

As defined by M. Patricia Connelly, Tania Murray Li, Martha MacDonald and Jane Parpart (2000), a framework is a system of conceptual structures that aid one in perceiving the social world by understanding, explaining and changing it (Connelly, Li, MacDonald, and Parpart, 2000:53). It provides a platform on which research is grounded and how the data will be collected, analysed and interpreted (Connelly, 2000:53). A framework also helps one understand how society works and the reasons people interact the way they do. Through the dissection of different facets, theoretical frameworks also aid in providing explanations on why certain phenomena occur the way they do (Leshem and Trafford, 2007 and Richard, 2013).

This paper is aimed at exploring the political dynamics in the 2016 Land Laws in Malawi and how these influenced the gendered outcomes and further how they have recognised women's rights to access, own and control land. The study will analyse whether the results of this research are aligned with the stipulations of feminist development frameworks (women in development and, gender and development), theory change and social dominance, by indicating whether recognising WLRs has an impact on their economic empowerment and consequently development (Leshem and Trafford, 2007). Additionally, the research questions whether gender-sensitive policies and legislation translate into improved livelihoods and removal of social and cultural practices that discriminate against women as far as land issues are concerned.

Gwendolyn Beetham and Justina Demetriades (2007) note that research from a gender perspective involves a combination of different methods derived from a multifaceted approach. Therefore, there is no specific method that constitutes a "feminist" approach to research (2007:199). According to Jayaratne and Stewart (1991), a critical aspect of a research framework is the use of methods that can best answer particular research questions (Beetham, 2007:200). The framework, however, has to be consistent with broad feminist goals and ideology (Beetham, 2007:200). Additionally,

since power relations between men and women are “complex, multidimensional and pervasive”, deploying diverse tools and angles in an attempt to contest them is an important element of the feminist research agenda (Beetham, 2007:200).

2.3.2 Feminism Theory

Feminism as a concept connotes the awareness of women’s oppressed and exploited positions within the society, workplace and families. It also refers to both men and women consciously taking action to change the situation (Offen, 1988: 152; Mahmood, 2006; Pati, 2006: 14). Essentially, it is the struggle for equal rights between men and women (Easton, 2012:99). Within the political and social lenses, its description is viewed in terms of “waves” (Easton, 2012:99). The first wave of feminism corresponds to the battle for women suffrage that was achieved by the 19th Amendment in 1920 (Easton, 2012:99). The second wave involved advocating for greater equality in education, workplace and the home and this was in the 1960s and 1970s (Easton, 2012:99). The subsequent wave focused on identity politics with attempts to amend the lack of attention to race, religion, class and other markers of differences among women (Easton, 2012:99).

In light of this, understanding different feminist frameworks is important as it helps in the establishment of questions that are not unique but also relevant in understanding the basis for women’s subordination. Additionally, the different frameworks also provide unique concepts that can be utilised to scrutinize women’s inequality and it further allows for recommendations of strategies for necessary change (Connelly, 2000:105). Thus, using a feminist development framework is suitable for this research because it comprises a deeper exploration of understanding the reasons for the existence of gender inequality. The reliability and usefulness of these frameworks will be determined by the extent in which they can contribute in building a better society and also on how they help in answering the research questions the study aims at investigating (Connelly, 2000:105). This is done through understanding the social roles assigned to women and men and the experiences of women and their interests.

2.3.3 Feminist Perspectives

2.3.3.1 Liberal Perspective

Rooted in the liberal philosophical tradition of the sixteenth and seventeenth centuries, liberal feminism's focus is equality and liberty (Connelly et al., 1996:99). Liberty connotes governance of people only through their consent and within certain parameters- public and private (Connelly et al., 1996:99-100). As expressed in the works of Alison Jaggar (1977; 1983), Rosemarie Tong (1989) and Valerie Bryson (1992), the main thrust of the liberal feminist's argument is that women should have the freedom of determining their social roles in the same way men do. Based on the perception that men are liberal beings with the potential to change, liberal feminists believe that exploitation, oppression, and discrimination faced by women can be combated in a rational manner (Connelly et al., 1996:99-100). As argued by Mary Wollstonecraft, women's reasoning capacity is equal to that of men (Connelly et al., 1996:100). As such differences based on sex should be deemed irrelevant in the process of granting political rights and freedoms (Connelly et al., 1996:100). In her argument, Wollstonecraft contends, women's intellectual inferiority can be attributed to a lack of equal opportunity to education (Connelly et al., 1996:100). Liberal feminists believe that sex discrimination is unjust as it dispossesses women of equal rights in their pursuit of self-interests (Connelly et al., 1996:101). They go further to point out that men are judged based on their merits - interests and abilities- as opposed to women who are judged based on their assumed merits as females (Connelly et al., 1996:101). As such, for justice to be attained, equal opportunities and considerations should be provided to everyone irrespective of their sex (Connelly et al., 1996:101). On this note, sex is regarded as an "accidental" or non-essential feature of human nature and hence, it should only be taken into consideration when it is relevant to someone's ability to perform certain functions (Connelly *et al*, 1996:100).

As far as AOCL is concerned, continuous awareness about the difficulties faced by women should be analysed and understood. Women's role in both the household and outside with regards to productivity should be highly acknowledged. As Ngomane

(2016) argues, priority should be placed on ensuring that there is an equitable share of household labour because unequal share burdens women and limits their ability to fully participate in the economy (2016:34).

2.3.3.2 Intersectionality Perspective

With its emergence in the late 1970s and further development in the 1990s, intersectionality denotes the outcomes of the interaction between gender, race and other categories in individual lives, social practices, institutional arrangements and culture (Davis, 2008; Ngomane, 2016:37). It is aimed at examining the interconnections that exist between “systems of domination and oppression” and how they intersect in the production of specific experiences encountered by marginalised groups of people (Bunjun, 2010:116). Within this theoretical perspective, is grounded in the holistic outlook of gender rather than the notion that focuses on male dominance and female subordination (Ngomane, 2016:37).

In challenging the boundaries of gender as a singular analytical category and entry point of analysis, Kimberle Crenshaw (1991) and Patricia Hill Collins (2002), developed intersectionality to highlight the inclusion of indigenous women and women of colour (Bunjun, 2010: 116). This is mainly because such groups were excluded by the first wave of feminism. Thus, while recognising the commonalities among women, intersectionality offers holistic lenses that acknowledge the women are not a homogenous a group and the same can be stated for their experiences. Intersectionality is a direct contestation of hegemonic feminism’s investments in “essentialism and exclusion” (Bunjun, 2010:116). It discloses the interaction between the diverse positions of marginality and dominance as a social process is regarded as one of its major contributions to the discourse of feminism (Bunjun, 2010:116). Additionally, it further exposes how such process becomes invoked within and across power relations (Bunjun, 2010:116). As Benita Bunjun (2010) contends, in its attempt to account for the complexity of systems shaping the diversity of the lived experiences of women, intersectionality shifts beyond one singular relationship of power such as patriarchy (Bunjun, 2010:116).

Since traditional theories of feminism such as radical, socialist, Marxist, fail to include such aspects in analysing the relationship between men and women, intersectionality is hence relevant in analysing the power dynamics in the land reform process in Malawi. Building on the notion that women are not a homogenous group, this research highlights how women from the different socio-cultural context in Malawi have different ways of owning, controlling and accessing land. For instance, those from the central and southern part of Malawi, under customary law are entitled to inheriting land, while those from the northern region do not have such entitlements. Thus, it would be unfair to assume that their experiences of owning, controlling and accessing land would be similar.

2.3.2.1 The Evolution of Feminist Perspectives on Gender and Development and their Evolution

As Connelly contends, one of the ways to understand the evolution of development thinking and policies is to use a historical approach (Connelly, Li, MacDonald, and Parpart, 2000:55). In the 1970s, economic development projects continued to disregard women and technologically sophisticated one undermined women's economic opportunities as well as autonomy (Connelly et al., 2000:56). To influence the United States Agency for International Development (USAID) policies, the term Women in Development (WID) - leading into the Percy Amendment in 1973- was introduced (Connelly et al., 2000:57). Some of the requirements in the Amendment included gender-sensitive social-impact studies for all development projects aiming at integrating women into the national economies of their respective countries (Connelly et al., 2000:57). However, radical feminist opposed this integration because of the patriarchy that exists in all societies and it the main source of inequality (Connelly et al., 2000:57). As such, some academics and activists called for projects separate from men that aim at protecting women from patriarchal domination (Connelly et al., 2000:60). Parpart (1989), Rathgeber (1990) and other authors have referred to such an approach as Women and Development (WAD) (Connelly et al., 2000:60).

Although the WID and WAD approach was the wildly recognised approaches, some feminists and development theorists have remained unconvinced by the

approaches. Their main argument is that the approaches are in short in addressing the “fundamental factors that structure and maintain gender inequalities” (Connelly *et al*, 2000:62). As a result, a third approach emerged in the 1980s known as the Gender and Development (GAD). Some refer to the approach as the empowerment approach or gender-aware planning approach (Connelly *et al*, 2000:62). This approach is mainly concerned with the politicization of women’s practical needs and their transformation into interests that are strategic and hence bringing about empowerment. In the period from the 1990s onwards, the GAD approach was widely adopted as an “improvement” from the WID and WAD approach, in policies and development programs. This was mainly because it goes further to challenge patriarchal structures (Connelly *et al*, 2000:62).

As envisaged in the discussion above, the GAD approach seems more plausible for this study because it provides a way to analyse policies and organizational efforts to determine which ones will both meet short-term practical needs and help in changing the structures of women’s subordination.

2.3.4 Principles of Feminism

2.3.4.1 Patriarchy

Considered as one of the strongest ideologies entrenched in cultures worldwide, patriarchy can simply be defined as a system of male dominance (Coetzee, 200:301). By “ideology” Daniella Coetzee (2001) borrows PJ Visagie’s (1999) Conceptualisation to connote a societal system of belief permits for one social group to exert some form of domination over another (Coetzee, 200:300:3). Patriarchy as an ideology is also regarded as attributing to unfair practices associated with wife-inheritance whereby a widow is given to the deceased brother or a male relative (Ngomane, 2016:38). This is a form of control that is exerted on women. As Kambarani (2006), Huntington and Chopra (2010) note, even if a woman might be against the arrangement, for her it is a form of security. This is in the sense that, accepting the arrangement does not make her prone to ostracization from a society based on not conforming to cultural expectations (Ngomane, 2016:38). Such practices regard women as being less human as they are

transferred from one man to another as if they are objects or property. A similar case whereby women are perceived as a property is that which has to do with the payment of *lobola* (dowry) which some see it as a buying the woman. This in effect makes it easier for the man to exert control on the woman in all issues within the family. It can be argued that such practices can only be curbed only if men and women are regarded as equal human beings. Women's low status in their society causes them to encounter constraints such as taking part in politics, decision-making process and be able to access productive resources such as land.

2.3.5 Social Institutions and Dominance

Since gender is a first-order structural variable that affects all social processes and the organisation of the social-economic system at the macro, *meso* and micro levels (Orozco, Paiewonsky and Domínguez, 2011:20). As such incorporating a gender perspective into this analysis of the potential impact of promoting WLRs on development is important. There are certain roles and responsibilities that women and men acquire which are specific to them for being either male or female. These are learnt through socialisation and so men and women are not born with them- meaning they are not biological (Orozco et al., 2011:21). They are, however, reinforced by certain institutions like socio-cultural, political and economic institutions (Orozco et al., 2011:21). Since these roles and responsibilities have been shaped over the years, society regards them as norms and hence, do not question them. These roles and responsibilities are the cause of the subordination of women which makes it difficult for women to access and control resources. This contributes to low value being given to their economic and social contributions. In light of this, a framework that considers the power dynamics is essential. This will be important in helping one understand the influence that institutions have in empowering and/or hindering women's ability to AOCL.

2.3.5.1 Political-Economy

The economy, as defined by Pouw (2009), is a system that constitutes human activities focusing on resource allocation-production, distribution, exchange- by economic agents over economic agents (Pouw, 2009:9). Economic agents denote individuals studied by economists to solve an economic problem (Pouw, 2009:10). As an institution, the economy emphasizes the process of decision-making through authority and power relations (Pouw, 2009:10). According to Pouw, attempts aimed at solving gender-related economic problems should consider both the identity and role of economic agents (Pouw, 2009:10). This is mainly because of the identity of economic agents matters as to how scarce resources are used and to whom they are allocated (Pouw, 2009:10). The other reason is attributed to the different roles played by economic agents and their different economic interests (Pouw, 2009:10). Echoing Raewyn Connell 1987, Pouw maintains that power relations have a great influence on both identity and roles played by different agents within the economy and such consequently produce inequities in economic decision-making and outcomes (Pouw, 2009:10).

Similarly to other institutions, economic institutions are inherently gendered. The unequal distribution of power within the economy is manifested in a way that one group is excluded from economic decision making as such putting it on at a disadvantaged position (Pouw, 2009:10). Such limits their ability to equally own, control and access resources such as land. Such has been reflected in Diane Elson's micro-*meso*-macro framework which aims at explaining how gender imbalances in economic structures, process and policies tend to exacerbate existing inequalities within the different domains of the economy (Pouw, 2009:10). With regards to AOCL due to gender imbalances in economic structures, women do not have the same privileges as men. These confines their full participation in decision-making processes on land-related issues continues to perpetuate. As such, there is a need to provide women with the same opportunities on all levels of the economy- micro, *meso*, and macro.

2.3.6 Theory of Change

Theory of change as a conceptual model for achieving a collective vision aims at addressing the linkages among “the strategies, outcomes and goals” supporting a wider mission and the fundamental assumptions related to the linkages (Stachowiak, 2013:2). In this paper, the theory of change will be related to confronting the underlying causes of poverty and the exclusion faced by women in their society and development arena. This will be based on the premise that progressive legislative environment is a prerequisite in providing the capacity to women know their rights, tackle rights’ violation and generate an empowering environment that offers women the support they need. Thus, the theory of change postulates that if women are empowered with equal land rights to allow them to have the same opportunities, then this will allow them to provide for their livelihood and that of their family as well as enable them to contribute to the economy to as curb food insecurity. It suggests that if women are allowed to access land, then it will give them a voice in decisions made on the land, agricultural produce as well as the family and but also it will enhance their bargaining power at household levels.

2.3.6.1 Capacity

It is argued that for women to be able to fully perform their roles and responsibilities, skills, knowledge as well as self-confidence are essential (UN, 2012 and USAID, 2010). As envisaged within the literature, women’s contribution to the economy is limited by lack of skills as well as limited education especially with regards to knowing the land-related laws. This, hence, makes it difficult for them to voice out any infringements of their rights. Some women remain landless because of lack of knowledge about the law. In light of this, as some have proposed, forming groups that advocate for WLRs, help in resolving land disputes and related organisations, will benefit women in several ways. For this to be achieved, consultation processes should be carried out and in doing so, making women active and not passive agents in their development agenda. It is indeed essential for landless women to be given the capacity to know their rights.

2.3.6.4 Enabling Environment

The need to acknowledge the impact that formal policies, informal cultural norms as well as expectations on the potential of women is essential to bring about women's transformation and empowerment. Government policies and laws create a supportive environment that counters barriers to women's empowerment (Kanyongolo, 2011:2). As Reeves and Baden (2000:3) note, a change in behaviour, attitudes and norms, and practices fueling discrimination against women is needed to create an enabling environment for women in AOCL (2000:3). One of the ways to ensure this is to empower women's involvement in important structures determining resource distribution, the establishment of laws and also cultural norms that negatively impact their progress in all domains of their lives. For instance, giving them opportunities to partake in decision-making positions will allow them to voice out matters specific to women.

2.3.6.5 Productivity

As Moghamad (2005) argues, women's shift to commercial farming will be more beneficial to them as compared to small-scale farming (Moghamad, 2005: 15). However, it is the barriers manifested in both the legal framework and customary practices that continue to limit women's capacity to fully succeed in their productivity.

2.4 Legal Pluralism Approach

Legal pluralism as a central theme in reconceptualising the interaction between law and society denotes a situation wherein there is a coexistence of two or more legal systems in the same social field (Merry, 1988: 870). In this context, legal systems should be understood as the system of courts and judges that are supported by "the state and non-legal forms of normative ordering" (Merry, 1988: 870). In other words, it conveys how state laws shape other normative orders. As Sally Merry argues, the implication of focusing on legal pluralism helps one to view sociological phenomena as plural and in essence expanding the research framework. This is because of legal

pluralism shifts from the ideology of legal centralism to other forms of ordering and interaction with the state law (Merry, 1988:889-892).

In reality, women are in disadvantageous positions especially in countries whereby customary law prevails concerning property laws and inheritance (The World Bank, 2013:3). Thus, there is a need for women to be empowered through the law. Thus, by definition, legal empowerment is a process of systematic change which involves using the law as an instrument to empower the poor and marginalized ((Kanyongolo and Malunga, 2016:23). Therefore, it enables the poor and excluded to the law to utilize the legal system and services in protecting and advancing their rights and interests (Kanyongolo, 2016:23). In light of this, applying a pluralist approach in this analysis will allow for an examination of not only the formal but also informal law as it affects women on different levels (classes) and contexts as far as ownership, ownership, access and control over land is concerned.

2.5 Conclusion

This Chapter has presented a conceptual and theoretical framework upon which the dissertation will be based on. The subsequent chapter explores the legislative framework on gender equality and women's rights on the international, regional and domestic level.

CHAPTER THREE: LEGISLATIVE FRAMEWORK ON GENDER EQUALITY AND WOMEN'S RIGHTS

3.1 Introduction

This chapter aims at exploring legislative frameworks on gender equality and women's rights at different levels. Malawi is bound to protect and promote women's rights to property through legislation and related institutions. This section provides an analysis of whether the 2016 land legislation recognises the intersectionality of gender and land rights by making provisions for women to AOCL. The analysis is confined in analysing the CLA of 2016 and the LA of 2016. It also interrogates how these laws align with gender-related policies and legislature as stipulated in the Constitution of Malawi and also considers the limitations therein. It further explores how the legislative framework in Malawi aligns to international and regional provisions on WLRs and gender equality in the promotion of women empowerment. The chapter outlines some of the barriers faced by women in AOCL and responds to the question of why promoting WLRs matters.

3.2 International Perspective

Lack of access to productive resources such as land has been argued to harm women's ability to enjoy their entitled human rights (UN Women, 2013:4). Violations of human rights such as the right to information, participation, association, freedom from violence and education prevent women from accessing land (UN Women, 2013:4). International legal framework are international human rights bodies and mechanisms that States are obliged to respect (refrain from interfering with the enjoyment of the right), protect (prevent others from interfering with the enjoyment of the right), and fulfil (adopt appropriate measures towards full realisation of the right) (UN Women, 2013:5).

On the international level, specific standards have been set in different legal foundations related to gender and land rights. For example, Article 7 of the Universal Declaration of Human Rights (1948) recognizes the equality of all persons and the right to equal protection of the law without discrimination. Article 2 sets out the principle of

non-discrimination including based on gender, in the enjoyment of rights guaranteed in the Declaration. It recognises the right to property, food, housing and education. Moreover, another international instrument that emphasizes equal rights and promotes an end to discrimination is the International Convention on Economic, Social and Cultural Rights (1966). It calls on State parties to “undertake equal rights of men and women to the enjoyment of all economic, social and cultural rights to food, housing, education, health, culture, work and association (Article 3). Moreover, Article 3 of the International Convention on Civil and Political rights guarantee equality between men and women. Article 2 of the Convention prohibits discrimination based on sex (UN Women, 2013:5). It goes on to recognise equality before courts, the right to life, equal protection of the law and equal participation in public affairs.

Similarly, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Additionally to defining what constitutes discrimination against women, it further goes on to set up an agenda for national action to end discrimination (CEDAW, 1979). The convention also provides the foundations for the realization of equality between men and women especially in accessing resources and opportunities and brings together all conventions and treaties that protected and promoted the rights of women into a single instrument (CEDAW, 1979). It calls on State parties to put a halt to discrimination against women in laws, policies and practices (UN Women, 2013:6). Article 2 obligates States to take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” (UN Women, 2013:6; CEDAW, 1979). Additionally, Section 2 of article 14 demands states parties to take all appropriate measures in eliminating discrimination against women in rural areas on a basis of equality of men and women that they practice in benefit from rural development (UN Women, 2013:6; CEDAW, 1979). It also guarantees equal treatment in land and agrarian reform and land resettlement schemes. Furthermore, Article 12 section 2 proclaims that States are obliged to accord women equal legal capacity in civil matters particularly “equal rights to conclude contracts and administer property” (UN Women, 2013:6; CEDAW, 1979). Article 16 obligates states to ensure that the same rights for

both spouses with regards to “ownership, acquisition, management, administration, enjoyment and disposition of property” (UN Women, 2013:6; CEDAW, 1979).

Additionally, committees overseeing the protection and recognition of women’s rights have been established. For instance, in 1990, the human rights committee underscored that during the marriage the spouse should have equal rights and responsibility in the family (Comment number 19 (1990) on the protection of the right to marriage and equality of spouses). An example can be cited from the views expressed by the Human rights committee in 1988 in *Avellanal v. Peru* whereby the application of Article 168 of the Peruvian Civil Code was challenged (UN Doc, 1986). This article stipulated that when a woman is married, only her husband is eligible to represent their matrimonial property before the Courts, the HR committee contravened Peru’s obligations under the ICCPR (UN Women, 2013).

Furthermore, the CEDAW accentuated the right to own, manage, enjoy and dispose of the property as central to a woman’s rights to enjoy financial independence and critical to her ability to earn a livelihood to provide adequate housing and nutrition to herself and her family. CEDAW also made commented on how several countries continue to have laws and practices concerning inheritance and property that result in discrimination against women (UN Women, 2013:6). It emphasized on the issue that women are granted limited and controlled rights and receive income only from the deceased’s property (UN Women, 2013:6). Inheritance rights for widows do not reflect the principles of equal ownership of property acquired during the marriage. Such provisions contravene the convention and hence should be abolished (UN Women, 2013:6).

Moreover, the Beijing Declaration and Platform for Action (BDPFA) is deemed as a reflection of international commitment to achieving equality, development and peace for all women in the world (SADC Parliamentary Forum, 2002:39). It identifies twelve critical areas of concern regarded as the main obstacles to women’s advancement. Additionally, it defines strategic objectives and actions that governments, the

international community, non-governmental organisations and the private sector should take to remove obstacles faced by women. Some of the areas of concern include insufficient mechanisms aimed at promoting women's advancement, inequalities between men and women in power-sharing and decision-making at all levels, and inequalities in economic structures and policies of productive activities (SADC Parliamentary Forum, 2002:40). Another area of concern included "lack of respect for, inadequate promotion and protection of human rights of women and the girl-child" (SADC Parliamentary Forum, 2002:40).

Likewise, States adopted the Voluntary Guideline on the Responsible Governance of Tenure of Lands, Fisheries and Forests in the Context of National Food Security under the auspices of the FAO Committee on World Food Security in May 2012 (UN Women, 2013:10). These were the first guidelines on the governance of land negotiated by States on an international level. They reiterate the principle of gender equality calling upon all States to "ensure that girls and women have equal tenure rights and access to land, fisheries, forests independent of their civil and marital status" and provide guidance on various aspects of the governance of tenure with reference to the gender equality principles (UN Women, 2013:10). The general principles of FAO include: States must recognise and respect all legitimate tenure right holder and their rights, safeguard tenure rights, promote and facilitate the enjoyment of rights, provide access to justice and prevent tenure disputes (FAO, 2012).

3.3 Regional Perspective

On the regional level, several conventions and instruments inform the need for the implementation of laws that promote women's rights; examples include the African Charter on Human and Peoples' Rights (1981) and the Southern Africa Development Community Declaration on Gender and Development (1997). Most recently, the land policy conference held in Addis Ababa with the theme: "Ensuring that women and young people have access to land", is an important development, but it remains to see whether African leaders will convert their rhetoric into reality that shows Africa's commitment to providing for equal rights to access to land. At this conference, African countries

pledged greater land rights for women and they adopted a resolution to grant documented land rights to at least 30% of their female populations by 2025. Additionally, it was also recognized that there is the need for gender-sensitive legal frameworks to allow women to use, control, own, inherit and dispose of their land and other natural resources.

Moreover, the African Union Declaration on Land Issues and Challenges in Africa (2009) resolved that African Heads of States and Governments need to strengthen the security of land tenure for women and ensure that land laws provide for equitable access to land and related resources. Also, it recommended that governments should embark on reviewing their policies to ensure gender-sensitive and responsive legal framework and protection WLRs.

Furthermore, the African Charter on Human and People's Rights is another important regional instrument that informs the need for the implementation of laws that promote women's rights. The African Charter is the human rights instrument within the African continent with the intentions of reflecting the history values and development within the region (Parliament, 2002:30). Its main purpose is to combine African values with international norms through the promotion of internationally recognized individual rights. The Charter also seeks to proclaim collective rights and individual duties (Parliament, 2002:30). With regards to women, it recognises the significance of their rights through the three main provisions.

Firstly, Article 18(3), is concerned with the protection of the family and it further goes on to advocate for the elimination of every discrimination against women and also ensure that women's rights are protected (the African Charter on Human and People's Rights, 1981). In addition, Article 2, entails the non-discrimination clause which provides that the rights and freedoms enshrined in the charter shall be enjoyed by all regardless of race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status (the African Charter on Human and People's Rights, 1981). Moreover, another clause within the Charter that ensures the

recognition and protection of women's rights is Article 3. This clause is mainly concerned with equal protection and calls on states to make sure that every individual is regarded as equal before the law and is entitled to the equal protection of the law-including women (the African Charter on Human and People's Rights, 1981).

However, critics of the provisions assert its inadequacy to fully address the women's rights. For instance, while Article 18 prohibits discrimination against women, it is confined in the family setting. Such can be argued as restrictive as women experience discriminations and oppression in different spheres of their lives. Also, a lack of explicit provisions that guarantee the right to consent to marriage and equality within the family setting is another within the provisions that can be identified as a limitation particularly because the family is considered as the first institution of socialisation.

Moreover, the Protocol to the African Charter on Human Rights and People's Rights on the Rights of Women in Africa (2003) is an important provision with regards to the promotion and protection of women's rights. As ascribed in its Article 15, state parties are obliged to ensure that women have the rights to nutritious and adequate food. In this regard, states are expected to take appropriate measures to provide women with access to productive resources such as land (Chingaipe, 2016:10).

Furthermore, within the SADC region, some of the provisions that should be noted with regards to women in the area of development are the 1997 SADC Declaration on Gender and Development, the SADC Programme of Action and Community Building Initiative which is recognised as crucial to sustainable development in the region. Also, the 1998 SADC addendum on the Prevention and Elimination of Violence against Women and Children is an important provision. The provision stipulates that violence against women is a reflection of the unequal power relation between women and men, which is a consequence of domination and discrimination (Parliament, 2002: 27). Recognising the inadequacy of state parties to ensure the protection of women's rights, the SADC Protocol on Gender and Development (2008) under Article 18 (a) set out an obligation reviewing all policies and laws that determine

access to, control of, and benefit from, productive resources by women (Chingaibe, 2016:10). This was done mainly as an attempt to ending all discrimination against women and girls concerning property such as land (Chingaibe, 2016:10).

On this note, it is important to maintain that even though on a regional level, efforts have been made on the legislative level to ensure that state parties recognise women's rights and gender equality, the gap between *de jure* and *de facto* protection of women's rights to own, access and control land persists. Thus, women's rights may legally be protected but in practice, women are socially and economically disadvantaged and face *de facto* discrimination in the areas of land and inheritance rights.

3.4 Malawian Perspective on Gender Equality and Women's Rights

3.4.2 How Women Access, Own and Control Land

Within the context of Malawi, obtaining and inheriting land is determined by lineage systems. The patrilineal and matrilineal systems are the main customary systems that govern women's access to land (Thumba, 2012:17). According to USAID (2010), an estimated 52% of the land is obtained through inheritance and 18% through marriage (USAID, 2010). Through the matrilineal system which is predominant in the central and southern regions of Malawi, the land is inherited through the female line (Chirwa, 2008). Upon marriage, the husband is expected to move to the wife's village and in the incident of divorce or the death of the wife; the husband loses his land-use rights (Chirwa, 2008). In the northern region, the land is transferred to the male line under the patrilineal system. In this case, the father hands down the land to the son and upon marriage, if the woman moves to her husband's village and the husband dies or they divorce, she loses her rights of usage of household land (Thumba, 2012:17).

Furthermore, other ways in which land is accessed is through land allocations carried out by traditional leaders (Thumba, 2012). As noted by USAID (2010), 20% of landholders obtain land from traditional authorities (USAID, 2010). Approximately, 1% is

obtained through purchasing including land leasing, resettlement programs are done by governments and purchased land is estimated (USAID, 2010; Thumba, 2012:17). Specifically, the Local Assemblies and agencies such as the Malawi Housing Corporation also allocate land within urban areas (Thumba, 2012:18).

3.4.3 Barriers to Women's AOCL

Firstly, echoing that the socio-economic context determines the appropriateness of diverse types of rights to land including those partnering to individual rights, joint-titling and group rights. In light of this, women empowerment requires addressing structural issues including unfair social norms and attitudes and developing progressive legal frameworks that promote equality between women and men. As such there is, therefore, the need for continued efforts aimed at promoting gender-sensitive legislation that enforces existing legislation and makes the judicial systems more accessible and responsive to women seeking to claim their rights (UN Women, 2013:3). As this paper contends, laws and institutions have a significant impact on WLRs, in Malawi as elsewhere. Even though legal and policy frameworks can uphold or strengthen WLRs, some legislation can also lead to discriminatory practices. In some cases, lack of clarity or a “lack of fit” between the different legal systems contributes to exacerbating discriminatory practices that hinder women's equal access to land rights- *de facto* existence of statutory and customary laws.

Moreover, another limiting factor in women's ability to have full AOCL is the lack of implementation and enforcement of the law in practice. Malawi is illustrative of this phenomenon in the sense that even though the new land laws have allowed for the promotion of WLRs on paper, in practice, customary practices and this largely affects the application of statutory law. Thus, it can be argued that the constraints within customary systems especially those concerning patrilineal practices, limits the effective application and implementation of the statutory law.

Another barrier is entrenched in the constraints presented by customary systems; societal expectations' of women to perform gender-specific roles and responsibilities

within the households is a hindering factor. The domination of the male gender is indeed apparent in land-related issues within the context of Malawi affirms the consequence of patriarchy. In this regard, even though women might have their land, the ability to fully develop it is limited by their reproductive and roles and household chores and assisting the husband. As such women are unable to fully explore their productive potential. Also, insecure land rights for women presents a challenge for them to fully enjoy their rights to access, own and control over land. For instance, as established by research in Southern Ghana, women's reduced certainty to maintain their land rights may result in them not being able to fallow their land which renders it less productive (Goldstein and Udry 2008: 1017).

Moreover, another limiting factor in women's ability to have full AOCL is the lack of implementation and enforcement of the law in practice. This is illustrative in most African countries whereby although the laws have progressively allowed for the promotion of WLRs, in practice, customary practices and this largely affects the application of statutory law. For instance, as envisaged in the discussion, patriarchal norms continue to perpetuate women's subordination particularly through the T/As from patrilineal societies claiming that women are incapable of making sound decisions. Efforts aimed at changing mind-sets of community members should be made to ensure successful implementation. Thus, it can be argued that the constraints within customary systems especially patrilineal practices, limits effective application and implementation of the statutory law which continues to negatively impact WLRs.

3.4.4 Why Does Promoting and Recognising WLRs Matters to their Empowerment and Well-being

As discussed in the preceding chapters, there is overwhelming evidence that albeit women being the major agricultural producers, they own less land. Such limits the realisation of their full productive potential. Consequently, several reasons account for the need to focus on land and women. It is essential to ensure women's rights to equality and an adequate standard of living (UN Women, 2013:2). Equal rights to land enable women to provide for their day-to-day needs and those of their families (UN

Women, 2013:1). Discussions on access to land are usually linked to those around food security, sustainable economic development, fight against HIV/AIDS epidemic, and prevention of and responses to gender-based violence. Gender inequality within the land discourse relates to “women’s poverty and exclusion” (UN Women, 2013:2). Therefore, this section evaluates the impact of women’s AOCL on their economic status concerning poverty alleviation and increasing food security.

There is, therefore, a need to devise policies that places emphasis on women’s AOCL. This is because of increasing population pressure on land and the devastating effects of HIV/AIDS in Africa. The land pressures due to population growth have led to the phenomenon of land-grabbing and commodification of land (Chingaipe, 2016). Furthermore, recognising and promoting WLRs matters in several ways. On the international level, there have been several efforts to work towards achieving SDG 5 which calls on states to work of achieving gender equality and empower all women and girls. In light of this, several conventions and agreements have been signed and enacted to provide for gender equality. Some include CEDAW, ICSCER, African Women’s Protocol, and the African Charter. Several states are a party to these conventions; however, challenges with regards to implementation continue to persist.

Furthermore, land rights matter because they are vital to life with dignity and a basis for entitlements which can ensure the adequate standard of living and economic independence and therefore personal empowerment (UN Women, 2013:2). From a human rights’ perspective, land rights have major implications for the achievement and enjoyment of women’s human rights such as “the right to equality, food, health, housing, water, work and education” (UN Women, 2013:2). Essentially, women’s access to land cannot be separated from a broader context of macroeconomic policy and the global economic system. Therefore, for growth to be considered inclusive there is a necessity to allow equal access to opportunities and resources for all segments of society, both men and women (UN Women, 2013:2). Discourses around land rights assume the form of individuality and commoditizing entitlement to the land where access and ownership are conceived in liberal market terms and land as a property (UN Women, 2013:2).

There is a need to have a more traditional, collective and indigenous understanding of rights (UN Women, 2013:3). Land should be perceived as a life-sustaining resource to be shared and protected, unlike the liberal market view whereby land is perceived as a financial commodity to be privatised and sold (UN Women, 2013:2).

Moreover, ensuring women's rights to AOCL would be good for development in that it will respond to the needs of the poor of whom the majority are women. Effectively, drawing closer to achieving economic growth through increased control over their productive potential (SADC, 2002:7). Thus, gender equality and women's empowerment are indeed integral to achieving the SDGs.

3.5 The Malawian Legal and Policy Perspectives on Gender Equality and WLRs

This section offers an overview of the Malawian legal and policy framework on gender equality and WLRs. The section examines how the laws protect and promote and/or hinder individual rights from a gender perspective. The focus is on women empowerment and how the legal and policy framework has worked on paving a way for such to be recognised and achieved. At the domestic level, in an attempt to address issues related to gender equality, Malawi has enacted several legislatures that aim at protecting the rights of women particularly with regards to the land access, ownership and control. The study will be informed by a review of the following source documents: the Constitution of Malawi, Marriage law and the Gender Act. In discussing the rights, it is important to acknowledge that laws on paper do not automatically translate into reality. This is so in the sense that what is written on paper is usually constrained by several factors with regards to implementation and certain practices and hence making it difficult for the rights to be fully achieved.

Firstly, the 1994 Constitution of the Republic of Malawi is regarded as the supreme law of the land (Kachika, 2013:3). As such for any provision of any law in Malawi to be considered valid, it must be consistent with the Constitution (Kachika, 2013:3). It sets out the fundamental principles including gender equality and non-discrimination. Chapter II protects the right to life, from genocide, right to liberty, human

dignity and personal freedom, property, economic activity, development, labour, equality, privacy, family and marriage, political activity and opinion, access to justice and legal remedies, fair trial and administrative justice. Moreover, the Constitution makes a provision that land is vested in the State (USAID, 2012:5). All citizens under the Constitution have the right to obtain property and economic activity engagement (The Government of Malawi, 1994). With regards to gender sensitivity, Section 20 prohibits discrimination based on sex. Within the context of the Constitution, anti-discrimination denotes a certain set of circumstances that afford unfair differential treatment to certain categories of persons. Such a denotation is significant in interpreting within the context of women's rights as it directly responds to alleviating their subordinate status (SADC Parliamentary Forum, 2002: 58). Thus, discrimination based on sex is prohibited under the Constitution. On this note, it is also important to note that as compared to other Constitutions; Malawi specifically prohibits discrimination based on sex of which is an aspect it should be commended for (SADC Parliamentary Forum, 2002: 58). Such specification minimizes the jeopardy of manipulation to the disadvantage of women (SADC Parliamentary Forum, 2002: 58).

The Constitution of Malawi, to some extent, addresses the traditional and contemporary categories of rights namely: civil and political and economic, cultural and environmental. It recognizes the inherent dignity of the person, including personal security (SADC Parliamentary Forum, 2002: 57). It prohibits torture, inhumane and degrading treatment or punishment. The Constitution also has provisions that recognise the legally binding nature of international law make it subject to domestication through acts of Parliament (SADC Parliamentary Forum, 2002: 57). It has an equality clause which speaks to the issue of equal treatment before the law. It also provides for the right to development. For example, Section 30 (1) asserts that all persons have a right to development and therefore to the enjoyment of economic, social, cultural and political development (Kainja, 2013:7). It specifically states that women, children and the disabled shall be given special consideration in the application of this right. It goes on to declare that the state shall take all necessary measures for the realisation of this right

including equality of opportunity for all in their access to basic resources (Kainja, 2013:7).

Additionally, within the family, Section 22 of the Constitution makes a provision for full and equal respect of individuals. Section 24 provides for rights of women to equal protection of the law, non-discrimination during and after marriage, capacity to enter into legally binding agreements, individual property, protection from violence, discrimination at work and deprivation of property, elimination of “harmful/discriminatory customs and practices” (SADC Parliamentary Forum, 2002: 53). Sub-section 24 (2) underscores that any law that discriminates against women based on gender or marital status shall be considered as unenforceable and henceforth, legislation may be passed to abolish customs and practices that discriminate against women. A specific practice identified is the right to inherit which falls under the protection of property rights (Kainja, 2013:7). Additionally, another legislative framework that is concerned with issues related to gender equality and women’s rights in Malawi is the Marriage law. Marriage law comprises “the nature of the marriage contract, access to and control of property rights, sexual and reproductive rights, guardianship of children divorce and other forms of dissolution of marriage” (SADC Parliamentary Forum, 2002: 68).

3.6 Limitations in the Legal and Policy Frameworks on Gender Equality

Even though attempts have been made to ensure equal rights for women, several limitations within the domestic framework constrain women’s full enjoyment of their rights. For instance, the equality clause as stipulated in the Constitution is restrictive. That is to argue that the danger of this neutral equality clause is that social, economic, cultural and political circumstances necessitating legal protection impact differently on different categories of people. In this regard, being treated the same, as the equality clause implies, may not deal with the particular historical or social disadvantage that category of persons continues to endure. This is particularly the case in circumstance affecting the status of women in respective societies in the region whose status is unequal in several sectors. This rehashes Catharine MacKinnon’s (1989) consideration of the state as being “male jurisprudentially” (MacKinnon, 1989:238). By referring to the state as being male jurisprudentially, she connotes how

its adoption of power is derived from the perspective of male power on the relation between law and society (1989:170). She supports her stance by accentuating the neutrality embedded in the content of policy legislation (MacKinnon, 1989: 221). As she maintains, the footing for its neutrality is by assuming that conditions among men based on gender equally apply to women (MacKinnon, 1989:221-231). The implication of such a pervasive assumption is the absence of sex inequality in society (MacKinnon, 1989:243). Thus, ignoring women's disadvantaged positions.

Moreover, the area of personal law is a critical one requiring harmonization of inter and intra-gender relations, since it addresses questions of marriage, devolution of property and other matters of importance to family and social harmony. It is thus, important for the constitution make provisions for the protection of the family, as well as equality of men and women, which is a grave flaw because it excludes opportunities for regulating intra-family problems that have a more negative impact on both male and female, for example, domestic violence. Such a selective approach to promoting and protecting human rights is argued as going against the spirit of the universal standards of promoting the inherent dignity of all persons (SADC Parliamentary Forum Report, 2002: 58). This is because there is no provision protecting women's rights considering their historically and socially disadvantaged position. As such at the level of substantive equality, it remains problematic (SADC Parliamentary Forum Report, 2002: 53). Also, this ignores intersectionality feminist perspective as it does not take into account that women are not a homogenous group.

In light of the limitations within the Malawian legal and policy framework on gender equality and women's rights, a review carried out by the SADC Parliamentary Forum on gender proposed the need for reforms of certain laws. For instance, the Marriage Law needs to be amended particularly to the law concerning women's rights to Asiatic marriages to ensure equality between (or among) spouses (SADC Parliamentary Forum, 2002: 57). Within Asiatic marriages, women are subordinate to men and the fact that individual property rights are not legislated makes matters worse for women. Also, as pointed out by the Forum, legal ambiguity confines the full exercise of rights and fails to conform to the Constitutional guarantee of equality within the marriage. The

Inheritance law is another legal framework that was suggested as requiring amendment. It was proposed that a provision allowing for equitable share by the wife of the deceased husband's estate should be made (SADC Parliamentary Forum, 2002: 58). Additionally, the Forum also suggested the need for Malawi to enact a law on Domestic Violence. Furthermore, the absence of regulation of customary law and practice continues to infringe women's rights in several spheres including land ownership, access and control.

3.7 A Critical Gender Perspective Analysis of Land Act of 2016 and the Customary Act of 2016

This section utilises a gender perspective to reveal whether WLRs have been promoted, recognised and respected within the 2016 national Land Laws in Malawi. It aims to examine how the CLA and the LA of 2016 have responded to issues relating to dynamics that perpetuate inequality in land matters within Malawi.

3.7.1 How WLRs have been promoted within the CLA and the LA of 2016

As asserted in the previous sections discussing the Malawian legal framework as far as the promotion, recognition and respect of women's rights and gender equality, there are specific constitutional provisions that offer guidance on how legislation should be passed in combating inequalities and the prohibition of discriminatory practices. For instance, as highlighted in Section 24 (2) (c) of the Constitution of Malawi, any law leading to the discrimination against women based on their gender or marital status shall be deemed as invalid and therefore, legislation shall be passed to bring about eliminating customs and practices discriminating against women. An example of such discriminatory practices includes those relating to deprivation of property obtained through inheritance. In light of this, the CLA can be argued to have significantly made attempts in entrenching WLRs in several ways.

Firstly, under the CLA, any person regardless of gender can be registered as the owner of the land of which he or she can use or can create a lease or sub-lease. In addition to this, as stipulated in Section 20 of the CLA, individuals can register their land

as joint tenants or tenements in common (Kainja, 2013:20). Joint ownership works to the advantage of the widow or widower in the event of the death of the spouse. This is because the survivor is set to automatically take sole ownership of the property without the need to apply for Letters of Administration. In doing so, widows, who were previously stripped of their land and property are protected (Kainja, 2013:20). Also, in this regard, poor women are provided for considering the cost incurred during the process of obtaining Letters of Administration. The process requires payment of estate duty to the Government and legal fees to the Legal Practitioner by the personal representative.

Moreover, the Act has made specific provision with regards to the estate that is inherited and transmitted by will. As Section 19 (3) (c) of the Act asserts, customary estate shall be inheritable and transmissible by will (Kainja, 2013:20). It further provides guidelines on how the Land Committee (LC) should grant the customary estate. Section 21 (2) (c) provides that in deciding whether to grant a customary estate, a land committee is expected to have special regard in respect of equality of all person (Section 21 (2) (c) of the Customary Land Act).

Additionally, section 29 seeks to protect women's right to inherit the land by offering them the first right of any customary estate that has been surrendered. As provided in Section 29 (1) before the land committee publicizes the availability of an estate surrendered by a man, the land will be offered to the following persons in the following order his wife, in a polygamous marriage; his wives in order of seniority and in cases where he has no wife or all wives have declined to accept the offer, any of his children over the age of eighteen will be offered the estate (Section 29 (1) of the Customary Land Act of 2016). On this note, it can be proclaimed that the provisions that the Act has made progress in the recognition, respect, promotion and protection of WLRs. This is especially with regards to protecting women from being denied occupancy of the customary estate in accord with customary law which risks widows and divorced women land loss. Thus, in providing for inheritable and transmittable customary estate, the Act can be argued to promote and protect WLRs as previously

women risked their property being stripped of specifically in the event of the husband's death and divorce. Also, by providing guidelines which prioritise women in determining the distribution of customary estate land, the Act should be commended for such because it recognises women's marginalised position within the society.

Furthermore, the establishment of CLC and LT which includes women is another aspect of the Act that can show how progressive it is with regards to providing for WLRs. These Committees and Tribunals provide for the management of customary land. The Act makes provision for the inclusion of women in decision making bodies responsible for land management by setting a quota on its representation (*Section 4(1) & (2)*). To ensure women's voice within the committees on land-related issues, its membership is comprised of six persons of which at least who are women. The same composition applies to the customary land tribunals whereby as specified in section 43 (6) "the quorum of a meeting of a CLT shall be satisfied by the attendance of at least four members of whom two shall be women" (*Section 43 of the Customary Land Act*). It is important to note that the membership is not by appointment but election. It is the community that elects the members. Doing so ensures that there is equal opportunity among women of different social class. As such one is compelled to argue that that there is recognition of intersectionality. Therefore, it can be argued that the Act has made progressive efforts in the inclusion of women in administrating and managing customary land. Indeed as Kainja highlights, allowing women the opportunity to be part of the administrative position in land-related issues, does not solely promote their land rights, but also puts women in charge of these rights too (Kainja, 2013:20). Such is an important element because women's lack of opportunity to have a voice on issues impacting them has for so long been the root of their continued subordination and enjoyment of their rights.

Moreover, another provision with regards to the promotion, respect and recognition of WLRs is that with specifically prohibits non-discrimination by the Land Committee of an application by a woman or a woman's group (3 Section 21(2)(c)(i)). Additionally, the Act forbids the Committee from adopting or applying hostile

discriminatory practices or attitudes towards any woman who has applied for a customary estate (Section 21(2)(c)(ii)). Such is an important aspect as it reduces the fear that women applying for a customary estate with regards to being discriminated against. This hence will ensure that they have the same ease to own land.

3.7.2 Limitations of the Acts

3.7.2.1 The Land Act of 2016

Firstly, a general criticism of the Act is on its focus on legislating Government powers over land and less focus on making actual provisions on land issues. Some have criticised the Act for the laws placing more emphasis on those implementing and formulating the laws. Such is in opposition to the modern principles of the legislative formulation. As stipulated by modern principles of legislation, laws are required to take into consideration the people whose lives will be regulated by, rather than more focused on the officials formulating and implementing the laws (Kainja, 2013:20).

Moreover, as far as the realisation of WLRs is concerned, the neutrality in its use of gender is a limitation that can be identified. The missing gender provision within the Act that guarantees equal land rights for women can be considered problematic as a progressive Land Act should be firm on issues related to discrimination against men or women as far as land matters are concerned (Kachika, 2013: 8). This is a way of challenging the reality of inequalities that the county is yet to combat in land-related matters, and other gender-related issues. A progressive Land Act should aim at facilitating such positive strides to combat gender inequality rather than expediting their prevalence.

Additionally, the Act lacks to specify the recognition, respect, promotion and protection of women land rights (Kainja, 2013:20). By doing so, it fails at fulfilling the requirements of section 13 of the Constitution which stipulates that legislation should aim at taking deliberate measures in promoting the rights of women, children and other vulnerable groups as emphasized in paragraph 1.3.7 of the National Land Policy

(Kainja, 2013:20). The application of the customary land laws is disadvantageous to women as it fails to recognise the different experiences that men and women go through. As such the Land Act inadequacy in addressing the social and cultural prejudices has the effect of perpetuating the inequalities that exist between men and women. Also, doing so is in opposition to the cardinal principle of equity which stipulates that treating unequal's equally simple propagates inequality (Kainja, 2013:20). As Kainja points out in her review of the Land Bill and the Customary Land Bill, positive steps should have taken positive steps in making provisions for women empowerment to promote their tenure rights and access to land (Kainja, 2013:20).

Thus, it could be argued that the Land Act does not adequately rectify the *status quo*- pervasive inequality but rather perpetuates it. In this regard, Kachika suggests that the country could be enthused by the 1999 Land Act of Tanzania, as amended in 2004, which could be reformed in a manner that makes provision the every adult woman to have the rights of acquiring, holding, using, controlling, and dealing with land in a similar extent and subject to the equal restrictions as men (Kachika, 2013: 8). Thus, doing so will ensure that legal institutions do not constrain women to have full enjoyment of their rights to own, access and have control over land. This will effectively allow for equal opportunities for personal development.

Furthermore, another limitation of the Act as far as promoting, recognizing and protecting WLRs is concerned is that its lack of a provision that directly speaks to issues on gender and inheritance as stipulated in Paragraph 5.7 of The National Land Policy. The Policy recognises the problem caused by conflicts and competition on property rights and access to land due to the replacement of extended families with nuclear ones. As such, it proposes the policy priority should be placed on promoting the registration of individual and family title to customary land (Kainja, 2013:20 *cited from* The National Land Policy). Even though this is stipulated in the National Land Policy, the Land Act does not provide for attempts on implementation of the requirements of the Policy. Such is considered a substantive legislative gap portraying a lack of consideration for the entrenching WLRs by involved in the Law reform process

(Kainja, 2013:20). This is problematic because the Land Act is supposed to be the principal statute and the other land laws are merely sub are merely subservient (Kainja, 2013:20). In her critique on the drafted Bills, Kainja pointed out that there was the need for the Bills to be organised in a way that it clearly and substantively makes provision for guidance on land matters in the country (Kainja, 2013:20). An example is its omission of a chapter or a section dealing specifically with the different forms of lands, their importance, as well as a substantive law that governs them. Also, the fact that customary land was mentioned only once (in Section 16) in the Act is disconcerting considering that it makes up approximately 90% of the total landmass in Malawi (Kainja, 2013:20).

Moreover, another limitation of the Act is how some of the provisions within the Act fail risk discriminating against some classes of women- women married to foreigners. This is mainly because the provisions within the Act are interpreted in the context of the discriminatory provisions of the Malawi Citizenship Act (Chapter 15:01) (Kachika, 2013: 8). The Malawi Citizenship Act (Chapter 15:01) strips Malawian women married to foreigners of their citizenship “if they do not renounce their husbands' citizenship at the first anniversary of the marriage” (The Malawi Citizenship Act, Chapter 15:01). However, there is no comparable provision for men (Kachika, 2013: 9). Therefore, it can be argued that the Malawian legal provisions risks married women of being stateless upon their first anniversary of marriage to foreign husbands, and stripping them of rights as Malawian citizens (Kachika, 2013: 9).

Linking this to the new Land Act, non-citizens are excluded from ownership of freehold; they are entitled to limited terms of their leases to 50 years, and they are subjected to stringent processes when purchasing land of which effectively leads to giving citizens the right to first refusal (Kachika, 2013: 9). It should be noted that the existence of such a provision is because Malawi does not allow for dual citizenship. As Kachika notes, most female nationals who have been arbitrarily deprived of Malawian citizenship because of the discriminatory provisions of the Citizenship Act may succumb to being non-citizens whose land interests are being subjected to scrutiny and

restrictions consistent with the Land Act's provisions (Kachika, 2013: 10). In light of such a limitation on female married to foreigners, it should be proposed that the definition of non-citizens in the context of the Land must bear a reflection notwithstanding the provisions of the Malawi Citizenship Act (Chapter 15:01) which could stipulate "a non-citizen as a person not born in Malawi, and/or who is a citizen of another country, whether as a native or by way of naturalisation" (Kachika, 2013: 10). In doing so, both men and women married to foreigners and have intentionally been naturalised as citizens of their spouse's country of origin would rightly be classified as non-citizens, as this is by choice and the fact that the current laws do not allow for dual citizenship (Kachika, 2013: 10). Therefore, women particularly those married to foreigners shall equally be protected by the legal provisions of which will improve their access, ownership and control of reproductive resources including land.

3.7.2.2 Limitations of the Customary Land Act in Promoting WLRs

Firstly, some of the critiques relating to the new Land Laws in Malawi have been centred on the disregard to the context within the laws are to operate. As Kachika maintains, for the provisions within the customary land law to be effective, there is a need to contextualise them within the Malawian setting (Kachika, 2013: 12). Thus, a lack of contextualisation deems the provisions ineffective. Within the context, for instance, customary practices such as *chitengwa* and *lobola* (dowry payment) are prevalent and continue to undermine WLRs. This is mainly in cases where the husband dies without leaving any children with the wife (Kainja, 2013:27). Such portrays how certain customs and practices which directly deny women of the right to inherit the land and other property. With regards with limitations of the CLA is its failure in outlawing or modifying these practices to ensure that the right to access and control over land concerning women had been provided for and entrenched (Kainja, 2013:27). It can hence, be argued that the Act falls short of addressing the root causes to women's inability to access land rights as cultural customs and practices have a greater influence on the society. Additionally, the failure to outlaw such practices will arguably challenge the implementation of positive strides in promoting WLRs. Thus, even though the laws

entrench WLRs, disregarding the context in which they are to be implemented makes them ineffectual.

Another limitation of the Act as far as the entrenching of women's rights is concerned is that which is concerned with its omission of gender equality and non-discrimination in the guiding principles of the Land Tribunals. The Act outlines the principles that should guide Land Tribunals. The Mandate of a CLT is mediating on any disputes arising from customary land (Kachika, 2013: 13). The guiding principles for the CLT are "objectivity, fairness and justice" (Kachika, 2013: 13). It considers rights and obligations of parties; customary laws, statutory laws and traditional practices while bearing in mind constitutional provision, and it also considers the circumstances surrounding the matter (*Section 48(1)(a)*). However, the problematic nature surrounding the guiding principles for the CLT is its omission of gender equality and non-discrimination (Kachika, 2013: 13). Such fails to acknowledge the subordinate and marginalised position that women find themselves in which the society. An emphasis on gender equality as well as non-discrimination would have indeed depicted the seriousness of institutional frameworks in the recognition of women's rights.

Moreover, the Act's omission in defining a woman's right of occupancy of the customary estate in circumstances whereby she is faced with threats by malevolent surrendering of land by a customary estate titleholder should not go unmentioned. Again, this portrays how the Act does not fully recognise the vulnerability of women which is usually attributed to customs and practices. In light of this, some have noted that provisions on applications for a customary estate are not resolving, and could consequently complicate the difficulties that underline land dynamics, particularly in matrilineal and patrilineal societies. Thus, the Act's failure in criminalizing discrimination of males or females originating from such societies can be deemed problematic.

Also, another limitation as far as the promotion and recognition of WLRs is concerned is its omission in redressing existing land ownership and control disparities. Such portrays inconsistency in affirmative actions within land-related structures. Also,

although the Land Committees and Land Tribunals have a 50 per cent women composition, a guarantee for practical and meaningful representation of women in land structures is absent. This is appalling particularly because women continue to be denied voices on issues related to them and their marginalised positions creates more difficulty.

Similarly, the Act does not have a provision for pro-poor and vulnerable groups mitigating adversities faced by the poor in raising money to pay as fees a customary estate and the same can be stated about its omission in catering for civic awareness and education. This is problematic because most women in Malawi are imperiled by economic challenges and as such being able to acquire finances to buy land would be difficult.

Moreover, with regards to education and civic awareness, as identified in the previous sections lack of knowledge about their rights as entitled rights is one of the prevalent challenges faced by women. This constraint their ability to fully enjoy their rights and benefits and as such the Act's inability to provide for civic awareness and education depicts its failure in recognizing the challenging reality faced by women. Therefore, it can be asserted that the legal pluralism within the CLA presents a danger as the consequence of such legal pluralism on gender equality is the generation of uncertainty.

3.9 Conclusion

This chapter has provided international, regional and domestic perspectives on gender equality and WLRs. It has identified barriers faced by women in AOCL and why promoting WLRs matters. The section has argued that even though the analysed land laws can be considered progressive in ensuring the recognition and promotion of WLRs, there are several limitations. The succeeding chapter considers the political dynamics that shaped the outcomes of Malawi's 2016 land legislation.

CHAPTER FOUR: The Politics and Dynamics in Establishing the New Land Laws

4.1 Introduction

The complexity and sensitivity of issues related to land reform processes necessitate an examination of the politics and dynamics involved in the formulation of the 2016 Land Laws in Malawi. It is important to be aware that the relationship between Statutory and Customary Law in determining land policy reforms echoes the broader reconstruction of political power and authority, and constitutes state-building dynamics, as well as the negotiation of national and local citizenship. As discussed in the preceding chapters, even though WLRs have to some extent been promoted within the 2016 land legislation, the persistence of patriarchal attitudes in institutions perpetuates the continued contestation in the public and private spheres of these rights.

Through exploring the processes and political dynamics involved in formulating the 2016 Land Laws, this chapter will show how the different stakeholders shaped the gendered outcomes. The controversy surrounding the 2016 Land Laws has mainly around been the politics and power dynamics among the stakeholders as the legislation was being formulated. In this context, politics should be understood as the political factors and debates surrounding the formulation of the new Land Laws and how they influenced the outcomes (Stachowiak, 2013:2). Such include campaigns by stakeholders- proponents and opponents.

4.2 The Context of Land Reform in Malawi

4.2.1 The Political Economy of Land Reform and Processes in Malawi

Although Malawi has to some extent managed to make some changes in its legal framework as far as land governance is concerned, some aspects continue to reflect a product of colonial practices and interests. The consolidation of such interests and practices of the settler community happened between 1891 and 1964 (Chingaipe, 2018:1). The land reform agenda between 1964 and 1993 focused on practices on agricultural and development of the one-party state (Chingaipe, 2018:1). Within this

period, one notable effort in addressing land issues was launching Community-Based Rural Land Development Program (CBRDP) by the World Bank and other donors. It is one of the prominent initiatives in an attempt to addressing the land question in Malawi since the 1967 land reforms (Thumba, 2012:19). It was the most important intervention implemented to combat unequal land ownership patterns in postcolonial Malawi. The vernacular version of the initiative is the *Kudzigulira malo* program which translates into “buying land for yourself”, and its pilot implementation was rolled out in Thyolo and Mulanje districts in 2004 (Thumba, 2012:19). The main objective of this framework was to increase the incomes and support the use of market mechanisms in helping farm households short of land to secure larger acreages (Thumba, 2012:17). This was done by helping them purchase estate land that was under-utilized and/or un-cultivated, which was estimated by a USAID (2010) analysis to be approximately 600,000 hectares of land (Thumba, 2012:17).

To reduce poverty and hunger, the government of Malawi landed the Green Belt Initiative (GBI) in 2009 (Gausi, 2015:2). Studies have, however, shown that since its inception, rising incidence of land grabs fostered by elites through lease arrangements with Multi-National Corporations (MNC) continue to escalate (Gausi, 2015:2). The GBI is aimed at utilising water from lakes and perennial rivers to enhance the country’s production of a variety of crops, livestock and fisheries (Gausi, 2015:2). It also “seeks to open up large-scale irrigated farms within 20 to 30 Kilometres of the country’s large lakes and rivers” (Gausi, 2015:2). GBI zones have been advertised by the government to both local and international investors of their availability for large-scale agricultural investment (Gausi, 2015:2).

Moreover, on a regional level, it subscribed to the G8’s New Alliance for Food Security and Nutrition in Africa which was launched in December 2014 (Gausi, 2015:2). The Government of Malawi (GOM), pledged to “improve large-scale investors, access to land, water and basic infrastructure” (Gausi, 2015:2). Additionally, Malawi pledged to release 200 000 hectares of land for large scale commercial agriculture by 2015 (Gausi,

2015:2-3). Its rationalization for such a radical commitment is its ill-conceived metaphor of the presence of idle land (Gausi, 2015:3). Idle land is land used by indigenous people to graze their livestock or to cultivate their crops (Gausi, 2015:3). This makes one question how the government will be able to find such hectares of land considering the existing land scarcity and “growing fragmentation of landholding without risking alienation of the land user (Gausi, 2015:3). In questioning these initiatives, civil society has expressed skepticism as to whether the “fruits” will trickle down to the poor people (Gausi, 2015:3).

Furthermore, the post-colonial period to the present has been characterized by traditional chieftaincy in broadcasting state’s power in addition to political regimes in land management and governance issues (Chingaipe, 2018:1). Also, some features manifested by the indirect rule conceived by colonialism are reflected in cultural and tribal rule (Chingaipe, 2018:1). Based on the 1979 Constitution land administration was divested from the state, enabling the government-recognised T/As in substantiating and gaining government backing of their claims to land (Lund 2004; Jönsson 2007).

4.2.2 The Political Challenges in Land Reform Efforts in Malawi

The transition from a one-party state to a democratic state in 1994 paved a way for a new lease in land reform within Malawi. However, progress has been slow. There have been several challenges associated with the land reform process. As Blessings Chinsinga and Corrado Tornimbeni (2016) note, land reform efforts in Malawi have mainly been affected by selfish interests among the elites (2016:30). For instance, tracing back to the one-party administration, it was the political elites who instigated the debate about land reform. Their argument was premised on the fact that implementing land reforms would signify the dawn of a new socio-economic order in the country (Chinsinga and Tornimbeni, 2016:30). However, the elite did not act on the land question as most of them benefited from the 1967 land reforms (Chinsinga: 2016:30). Land reform was used as a campaign tool by the elites to gain support. But, once in power, they eschewed the idea of a swift service of land tenure and ownership patterns

(Chinsinga, 2016:30). As such, land reform efforts since 1994 reveal a coalition of elites spanning the political divide strategically slowed efforts about land reform (Chinsinga, 2016:31). This challenge, as it will be discussed in the subsequent sections persists in the formulation of the new land laws- particularly within the phenomenon of large-scale land acquisition.

Additionally, another challenge that is prevalent in Malawi's land reform efforts is the dominance of informality. This informal or tradition-based element is not limited to the Malawian context. As Bratton (2007) points out, it is a common aspect across most African countries (Chinsinga, 2016:31). For instance, within the context of Malawi, the 1967 Land Act vested traditional leaders with guardianship of customary land with the implication that in the absence of a definitive legislative framework over-ruling this Act, all land was owned by traditional leaders on behalf of their subjects (Chinsinga, 2016:31). As Chinsinga, argues, even though this was regarded as a nominal role for the traditional leaders, with time, it led to their empowerment in distributing land, facilitating transactions and presiding over disputed about land (Chinsinga, 2016:32). Essentially, according to the traditional leaders benefit and rents hence, making it impossible for them to support any land reform efforts that would threaten their dominance in land matters and transactions (Chinsinga, 2016:32).

Moreover, corrupt administrative practices have been identified as another challenge facing Malawi as far as land administration is concerned. Corrupt traditional T/As and government officials duplicitously dispose customary land and by doing so, they deny access to the land of those that are most in need of it (Government of Malawi, 2006:3). This challenge can be linked to insecure land rights. The increase in land pressures has consequently increased insecure tenure and uncertainty over land rights (Government of Malawi, 2006:5). This places vulnerable groups such as women and the poor in disadvantageous positions whereby their ability to access land is constrained. Even though attempts in consolidating access rights - physically and legally - have been made by communities, certain socio-legal constraints persist.

Furthermore, the inception of large scale land acquisition phenomenon in the past decade has threatened access, control and ownership of customary land by some Malawians especially those from rural areas (Gausi and Mlaka, 20015:1). Land grabbing is a phenomenon that involves the commercialization of agriculture in the interest of elites (Gausi, 2015:1). This process also involves privatization of customary land. This is achieved through land-grabbing by foreign investors and their local partners acquiring customary land without local people's consent has been made possible due to weak legislation on land (Gausi, 2015:1). GBI aimed at promoting large-scale irrigated farming and its commitments to the G8's New Alliance for Food Security and Nutrition has had the effect of accelerating land concentration among local elites and exposing several poor and vulnerable groups especially women to landlessness and food insecurity (Gausi, 2015:1). One of the reasons the phenomenon of land-grabbing has been made possible is weak-legislation governing land administration in Malawi.

The other reason can be traced back to the post-independence era whereby the government decided to privatise customary land by introducing freehold tenure. Such was done based on the assumption that customary land was inherently insecure (Mlaka, 2015). In its argument, freehold tenure would have the impact of stimulating agriculture development and hence, national development.

In addition to the aforementioned land-related issues in Malawi, another issue that can be identified is ignorance and insensitivity among community members on land-related issues. A lack of sensitization among community members on the need for proper land management practices continues to negatively impact the country. This results into damaged land resources and hence, increased levels of poverty considering that 90% of the country's population depends on agriculture as their source of living and subsistence (the Government of Malawi, 2016). As such, there is the need to sensitize the community members through education on the proper ways to manage land resources.

4.3 The Politics and Dynamics Involved in Establishing the New Land Laws

4.3.1 Background to the 2016 Land Law Reforms

Leading up to the political transition from a one-party state to multiparty democracy in 1994, the government under President Bakili Muluzi, set up a Presidential Commission of Inquiry on Land Law Reform in 1996. The Commission was aimed at promoting scholarly discourse, compiling opinions from the private sector, ordinary citizens and NGOs (Chingaipe, 2018:2). Its objectives were centred on ensuring tenure security and equitable land access and facilitation the attainment of social harmony and broad-based social and economic development (Gausi, 2015:2). All these were to be achieved through “optimum and ecologically-balanced” use of land and land-based resources (The Republic of Malawi, 2002). Thus, the provisions were aimed at democratizing land management and protecting land tenure rights. However, due to the lack of a strong legal framework, the policy has been ineffective, even 16 years after its adoption (Gausi, 2015:2).

In 1999, the Commission submitted its report that reviewed land-related laws. Based on their submission, the Malawi National Land Policy (MNNP) was adopted by the Cabinet in February 2002. This was the preliminary step in an attempt to revise the legal framework on land governance, tenure security improvement and the decentralisation of land administration in the country (International Land Coalition, 8). In 2003 a special Law Commission was instituted with the task of reviewing existing land-related legislation and developing new legislation that would ensure effective land administration (Chingaipe, 2018:2). Over 14 years post the adoption of the Land Policy, several land bills to facilitate the smooth implementation of the land policy were drafted they were no further action was taken (Chingaipe, 2018:2). An example is the Land Law (Amendment) Bill of 2006 formulated based on the MNLNP.

However, the Act was not adopted (International Land Coalition, 8). One of the reasons for the unsuccessful procession with the bills is attributed to competing interests among different political, economic and social stakeholders. The National

Assembly's decision to withdraw the draft bill was owing to opposition from Civil Society Organisations (CSOs) who contested that it was an inadequate response to the legislative requirements of the MNLP (ILC, 14). This made it problematic for the government to bring about reconciliation (Chingaipe, 2018:2). This, hence, led to confusion within the legal and policy atmosphere related to land administration, management and ownership particularly between the land policy provisions and those stipulated in the statutory laws.

Owing to ineffective policies, the Government of Malawi introduced four land-related bills including the Land Bill and the Customary Land Bill of 2012. The Bills made provisions for secure land tenure for existing occupiers and smallholder farmers. However, they were faced with opposition from traditional T/As and civil society organisations. In what was in effect a limited victory for civil society and tradition-based leadership, their opposition compelled President Peter Mutharika to withdraw his assent from the Bill (Gausi, 2015:2). However, in spite of opposition and objections on the Bills, particularly the Customary Land Bill, Parliament enacted several Bills and the president assented to four of the ten land-related bills in September 2016 (Chingaipe, 2018:2).

Over the past 18 years, there have been attempts at reform and decentralisation, including the MNLP of 2002, which was an initial step towards revising the legal framework governing land rights, improving the security of tenure, and decentralising land administration to the local and district levels. The MNLP also advocated the introduction of land tribunals, better access to land records, and improved public participation in land governance. The policy led to the formulation of the Land Law (Amendment) Bill of 2006, though this was not adopted.

The process culminated in the Land Bill of 2012, which was one of 11 land-related bills drafted and presented to Parliament on June 2013. These bills aimed to harmonize the existing legal framework with the aspirations of the MNLP. Three of the bills, including the new Land Bill, were debated and approved, but presidential assent was withheld due to the divergent views of various CSO groups, in particular, traditional T/As (concerning customary land) and CSOs working on gender. Since then, LandNet

Malawi has played a pivotal role in consolidating and harmonizing divergent views to establish a common advocacy agenda, in preparation for obtaining the passage of the amended bills.

4.4 Politics.... Power.... And Competing Interests

Addressing the Parliament during the second meeting in March 2016, the then Minister of Lands, Housing and Urban Development, Honourable Atupele Muluzi, summarised the foundation upon which the Bills were drafted. The main rationale behind the formulation of the Bills was to align Malawi's laws on land to the 2000 MNLP. As he proclaimed, for the past 14 years, the Bills had gone through rigorous consultations and in March 2016, they were presented to Parliament for review and input (Nyondo, 2016). Thus, the need to align the Bills to the MNLP was mainly because for over a decade, the country had a policy in play but no laws aligned to it. As the Minister claimed, the Customary Land Bill (2012) aimed at repealing the Customary Land (Development Act) chapter 59:01 and replacing it with new legislation on the management and regulation of customary land as advocated by the MNLP (The Nation Online, 2013c). Moreover, the other aim of the Bill was to provide for land in Malawi and all land-related matters. Additionally, with regards to aligning with the Malawi Constitution, the Bill entrusted all land deemed necessary for national development in the Republic (Daily Debates Hansard Second meeting- 46th session, 18th March, 2016 Bill No. 2 of 2016: Land Bill, 780).

As identified by Silungwe, the land question in the context of Malawi is embodied by four dimensions. These include:

“the nature of colonial capitalism; the state's nature of neo-patrimonialism; the normative issue of the notion of the customary space; and the multifaceted interests different stakeholders involved in the process” (2015:5).

For the purposes of this paper, the section will focus on the politics that emerged in the formulation of the 2016 Land Laws and how they influenced the outcomes. Concerning the stakeholders, as established in the preceding section, elected parliament and

executive and Traditional Authorities (T/A) are the main actors involved in the land administration process and, as has been discussed in previous sections, they are integral to an analysis of the politics of formulating the land legislation. Additionally, considering the influence that international organisations and civil organisations have on democratic processes and institutions, their interests and political dynamics will also be discussed. Furthermore, the gender perspective requires one to also assess the role of women's lobby groups and advocates for gender equality in advocating for the land legislation.

4.4.1 Parliamentary Debates

To begin with, it is important to note that the Parliament of Malawi as a single federal legislative body responsible for regulating Malawi's presidential democracy (Basurto, Dupas and Robinson, 2018:5). For this reason, considering the debates within the House that emerged in the formulation of the new land Laws would help in assessing how they influenced the outcomes. However, it should be noted that Executive dominance constrains the achievements of Members of Parliament (MPs) (Kanyongolo, Wales, and Mkandawire, 2016:32). Such powers were bestowed by the 1995 Constitution in the Office of the President (Kanyongolo, 2016:32). For this reason, even though Parliament approved the Land Bills in 2012/2013, the President's refusal to assent led to a delay to enactment. In February 2016, the House referred Bill No. 9 of 2016: Customary Land Bill to four committees of Parliament to be considered together with Bill No. 2 of 2016: Land Bill. Therefore, a Joint Committee was established under Standing Order 154, to deliberate on the various Land-related Bills. Five members from each of the following three committees: the parliamentary Committee on legal affairs, the Parliamentary Committee on Agriculture and Irrigation, the Parliamentary Committee on Natural Resources and Climate Change and the Parliamentary Women's Caucus. The Joint Committee deliberated on the Bill and produced a report that highlighted major issues that were raised during the meeting. The Committee was established through a consultative meeting held on June 2016. During the meeting, the Committees accentuated the major issues in the Bills to be reported back to the House through the Joint Committee which was chaired by Honourable Werani Chilenga. The

Committee endorsed that a clause should be included in the Bill clearly stating that non-citizens should not acquire land in the country.

In addition to inputs from women's rights groups, the Committee observed that the Bill had remained inconspicuously silent on the status of customary law and how it has infringed on the rights of some vulnerable groups in as far as the administration of customary land is concerned. Therefore, the Committee recommended that the Bill should precisely accentuate aspects of customary law that work against women's rights and tackle with them accordingly (Joint Committee Report N. 2).

Moreover, another issue that was raised as far as WLRs are concerned is that of joint ownership between spouses. In their debate, most of the MPs pointed out that Joint ownership of land by spouses will be advantageous to women in the sense that when the husband dies, the widow will automatically take over land and any property without applying for letters of administration which are costly to obtain. Also, there will be no need to pay for estate duty. This, hence, would mean that women's land ownership, access and control are secured in the event of their husband's death (Joint Committee Report No. 2).

Additionally, by further considering the gendered perspective the Joint Committee noted that Clause 23 of the Land Bill, was inappropriately drafted, specifically in terms of its lexicon which referred to "his" when attempting to all gender's when interpreting legal provisions. In this regard, the Joint Committee expressed the view that gender issues must clearly be defined to avoid deliberate discrimination or misinterpretation of the provisions (Joint Committee Report No, 2). It, hence, recommended that the word "his" in Clause 23 ought to be revisited to provide for a situation which may not be misinterpreted to mean men only or take in due advantage of vulnerable groups depending on the situation on the ground. Emphasis was made on the need to use gender-neutral language unless in specific cases when particular sex is referred to (Joint Committee Report No. 3).

Furthermore, another issue for contestation was that which relates to economic empowerment of Malawians. The Committee was of the view that there is need to review laws that conflict with the current proposal in the Land Bill as a way to economically empower local Malawians particularly women (Joint Committee Report No. 3). Also, to take care of principle of equality, non-discrimination and affirmative action which at the time of the Bill were not been clearly and consistently provided for, the 50% representation in Land Committees and tribunals was proposed to extend to the Central Land Board as well (Joint Committee Report No. 3).

On this note, it is important to specifically discuss issues raised by some members of the Women's Parliamentary Caucus group (WPC). These are defined as "stable, public allegiances identifiable to members and non-members" (Chiweza, Maganga and Wang, 2016: 2). Some of their activities include advocating for policy, networking, and capacity-building (Chiweza, 2016:2). As identified by Asiyati Chiweza, Vibeke Wang and Ann Maganga (2016), women's parliamentary caucuses usually are established "to bring female legislators together, across party lines, ineffective alliances around a common goal" (Chiweza, 2016:2). Although they are not officially part of the parliamentary standing orders, they have a formal recognition by Parliament, their engagement of women's parliamentary and the collaboration with women's activists in civil society have been argued as of essence for achieving pro-women legislature (Chiweza, 2016:2-3). Evidence from South America has endorsed this assertion by proclaiming the significance of providing space of inter-party dialogue and the promotion of unity and collective action on women-related issues (Chiweza, 2016:2). Doing so ensures substantive representation.

In their study of the Malawian cross-party parliamentary women's caucus in the enactment of women-friendly legislative between 1996 and 2014, Chiweza and her colleagues observe that the caucus' success and effectiveness were dependent on unison between the members and their ability to work in synergy with other actors (Chiweza, 2016:1). As noted by Chiweza and colleagues, the cross-party parliamentary women's caucus in Malawi has contributed to legislation improving women's rights.

However, its efficiency as a collective entity has been noted to differ from one parliamentary period to the other (Chiweza, 2016:3). One of the reasons has been attributed to the changing composition of women in Parliament. For instance, after Joyce Banda's lost the Presidential elections in 2014, women parliamentary representation dropped to 16.7 per cent from 22.3 per cent in 2009 (Amundsen and Kayuni 2016:4). Nevertheless, it is important to highlight some of the issues raised by representatives from the WPC. For example, during the House's Debate on Bill No. 9 of 2016: Customary land 46th session, an Independent female MP, Hon. Dzimbiri expressed major concerns arguing that the Bill did not address gender issues. In section 4, 43, 48, there is an omission to guarantee practical and meaningful gender representation inland structures. She asserted that the Bill did not go "beyond theatrical female representation, to include provisions that could strengthen their practical representation" (Debate Bill No. 9 of 2016: Customary land 46th session, 803).

Adding to that, she pointed out that in section 47 there is a lack of consistency in affirmative action in land-related structures. The land Bill provided for quotas for women's' representation in some of the structures that have been created, but this is not the case in the composition of the membership of the central land board (Debate Bill No. 9 of 2016: Customary land 46th session, 803). Likewise, she was concerned with the omission of a pro-poor provision in section (20) (2) (C) on the Customary Land Bill, mitigating hardships for the poor to raise money to pay fees for a customary estate. She asserted that the requirement to pay fees to obtain customary estate directly excludes the poor from owning customary land, the majority of who are women (Debate Bill No. 9 of 2016: Customary land 46th session, 803).

Another female MP, Hon. Nyalonje, supported her point on the legislation insufficiency in addressing problems that women in Malawi face particularly in accessing and owning land. She proclaimed the land-related bills did not sufficiently incorporate the principles of gender equality and proceeding with enacting the bills will risk women being dispossessed of land. To emphasized her argument she stated that evidence has shown that if agricultural-based countries would make provisions for

gender equality in the agriculture sector productivity would improve by up to 30% or more (Debate Bill No. 9 of 2016: Customary land 46th session, 804). As such, she proclaimed:

“the cry for engendering these laws or these bills in front of us not just because women like to talk but it is our right as women and also because it makes economic sense”

(Debate Bill No. 9 of 2016: Customary land 46th session, 803).

Commenting on the same issue of the need to engender the legislation to ensure women’s access, control and ownership of land, Hon. Dr Kabwila, member of the Women Caucus group, by stressing on women’s lack of access and control over land. Her rationale for the concern from the Women’s Caucus group was mainly relating to food security. She asserted that as far as half of the country, of which are women, do not have access to and control over land, achieving food security will continue to be a challenge. She questioned if the bill institutionalised women’s access to and ownership of land. She proclaimed that institutionalising women’s access to and ownership of land is crucial because ownership is an aspect is found at the intersection of culture; mainly the way matrilineal and patrilineal is constructed (Daily Debates Hansard, Second meeting- 46th session, 18th March, 2016 Bill No. 2 of 2016: Land Bill, 785).

In light of this, there is the need to consider cultural traits and how they intersect with the bills, particularly because food security is connected to land and one cannot count on that which you cannot control (Daily Debates Hansard, Second meeting- 46th session, 18th March, 2016 Bill No. 2 of 2016: Land Bill, 785). She asserted that for as long as women are not in control over reproductive resources, improving their welfare will continue to be a challenge (Daily Debates Hansard, Second meeting- 46th session, 18th March, 2016 Bill No. 2 of 2016: Land Bill, 785).

Another highly contested issue that emerged in the parliamentary debates with regards to the Land Bills, especially the Customary Land, is that relating to the powers of the traditional leaders. Most of the contestation was from MPs from the Northern part of the country where patrilineal practices are prominent. As voiced by a female MP,

Hon. Nyalonje, for generations the way her district has managed land has worked well for the people of Mzimba. As such, *Inkosi ya Makhosi M'mbelwa* and his *Makhosis* and the MPS of Mzimba had two days of deliberation to consider the implications of Customary Land Bill and the other land-related bills (Debate Bill No. 9 of 2016: Customary land 46th session, 804). She argued that it is their belief and conviction that most of how the land has been managed, needs to be looked at and appreciated because it has been an effective way of doing things. For this reason, she appealed to the House that when the land bills are referred to the Parliamentary Committees, the T/As of Mzimba to be recognised as an interested party to present their view on how they can see the effective management of these laws and what changes might be needed. On that note, the T/As required for the land bills to incorporate a schedule for land management in Mzimba District (Debate Bill No. 9 of 2016: Customary land 46th session, 804).

4.4.2 “You Are Stripping-Off Our Powers”: Traditional Authorities (T/As)

In Malawi, the Traditional Authority’s Act of 1967 is the main legal framework regulating the traditional system of hereditary T/As. Even though T/As have little formal power and do not directly control public funds and raise local taxes, they have been fundamental to the social fabric of the country since precolonial times (Institute of Public Opinion and Research (IPOR) Report, 2016:8 and Basurto, 2018:5). Each village in Malawi has a village head, with a layer of traditional authority above the village head (IPOR Report, 2016:8). In other words, traditional authorities bring together groupings of group village heads and a group village head controls a group of villages (IPOR Report, 2016:8). Though the functions of traditional leaders are deemed abstruse, chieftainship continues to be a prominent feature of rural areas of the country. (IPOR Report, 2016:8). Hence, in analysing law and policy reform within an African context, one cannot disregard the role that informal institutions play. For this reason, in agreement with Adam and Dercon (2009), it is indeed relevant to systematically understand the interface between formal and informal institutions to dissect the formal structures as a way of revealing the underlying interest, incentives and institutions that allow change or frustrate it (Chinsinga, 2016:31). As far as land governance is concerned, traditional

authorities have, for a long time, been regarded as the custodians of customary land (The Nation Online, 2013c). As such, the role played by traditional leaders is vital in land reforms mainly because they are vested with the guardian of customary land as declared in the Land Act of 1967 (Chinsinga, 2016:31).

At the time when the Bills were first debated and approved by Parliament in 2012, T/As were amongst the prominent groups opposing the bills particularly concerning customary land. As such presidential assent was withheld (ILC, 8). One of the main criticisms from those in opposition when the new bills were introduced is that with them, the T/As no longer have authority over the land. As noted by a report prepared by the IPOR on land governance in Malawi, there has been a decline in the role that T/As play because a village land committee can now approve land transactions (2016:9). This was not the case in the previous land legislation whereby T/As had practically total control over land-related matters (IPOR Report, 2016:9). In the previous years, T/As were responsible for handling all land-related disputes; however, the new laws require that them to preside over land disputes informally before referring the disputes formal courts (IPOR Report, 2016:9). The main reason for the T/As' objection was the fact that the Bills would weaken their administrative powers over customary land (Gausi, 2015:2). The 2016 CLA presents a new structure of power and authority about customary land. There is a minimisation of the *de facto* power of traditional leaders in the sense that they have to share the exercise of power and authority with elected committees (Chingaipe, 2018: 31-32). Even though their power and authority has been minimised, their formal and legal recognition as custodians of customary land has been enhanced (Henry Chingaipe, 2018:31-32).

Some T/As who were part of the consultation process turned around and claimed that were not consulted. Some speculated that the change in position has been influenced by politicians (The Nation Online, 2013). Those who were part of the consultation process turned around and claimed that they were not consulted. Some speculate that the change in position has been influenced by politicians. As claimed by one of the T/A, consultations were done and some of the T/As were taken to Tanzania,

Mozambique and Zambia to appreciate how similar laws are working. Some of the T/As expressed that they had problems with the laws at first but they negotiate for example with the inclusion of women at every level of the Land Tribunals (LT). Also, the issue of compensation has been addressed within the new land laws. Some of the T/As who were consulted acknowledged that the lack of sensitization on the matter.

However, those in support of the laws have disputed the argument pertaining to lack of consultation pointing out that the 2010 Law Commission Report on reviewing of the Land Related Laws which was signed by President Peter Mutharika and the minister of Justice and Constitutional Affairs revealed that the 19 member Special Commission that produced it “had a representation of all sectors of the society.” Some of which included traditional leaders and senior T/A Kanyenda of Nkhotakota represented the T/As.

Additionally, according to the GOM, the Land Bills are a hallmark of decentralisation as they reduce government interference over land matters since powers to administer and manage land have been transferred to the T/As (Chimjeka, 2016). Critics, however, argued that the government intends to strip the T/As of their powers, especially over customary land (Chimjeka, 2016). The Mzimba Heritage Association (MZIHA) has rejected the new land law, by asserting that their district is a kingdom and his majesty *Inkosi ya Makhosi* M’mbelwa the fifth remains the administrator of his territorial jurisdiction (Chimjeka, 2016). One of the supporting arguments for such a bold assertion is that Mzimba has always been headed by Mbelwa as its king and based on a copy of land tenure, the district only joined Nyasaland (now Malawi) through a 1904 treaty as a development partner (Chimjeka, 2016). That is to assert that Mzimba is merely a partner to the Republic of Malawi as a kingdom within Malawi.

However, this is in opposition to the fact that Malawi is a unitary state with Parliament recalling the competence to legislate for the whole country (Chimjeka, 2016). Hence, this would compel one to argue that their justification for opposing the Bills is

unsound. This can be attributed to the fact that the Mzimba district is a patrilineal society. A study conducted by the Institute for Policy Research and Social Empowerment, in Mzimba on the communities' attitudes towards on promoting WLRs revealed that those in opposition of WLRs expressed that there is no need for women to have access to and control over land because they solely come to the village for marriage and that land belongs to the husband (Chingaipe, 2016:31).

On a similar note, since the new land laws require that women should be part of the Customary Land Committees (CLCs) and Customary Land Tribunal (CLTs), most T/As would be in opposition because of their patriarchal beliefs of women not being allowed to occupy leadership positions. Some argue that women are incapable of making sound decisions as compared to men (Chingaipe, 2016:31). To illustrate this, in some instances where women attempt to express their stance during meetings, some T/As would command them to sit declaring that "no woman would speak in front of men as women had no cultural standing to give an opinion on the matter" (Koester, 2015:3; Tilitonse, 2013). Therefore, it could be argued that patriarchal values and beliefs continue to infringe women's roles in decision-making and leadership positions.

However, those some contend that those opposing the laws had legitimate concerns, including the limited efforts to address access to land by Malawians in general and vulnerable groups. They claimed that the land laws have left the skewed distribution of land in the hand of the rich and elites. The Traditional Land Management Areas strengthen the control over customary land that traditional leaders have. However, each person of the family holding customary land will the entitlement of registering they are going as a customary estate which means after registering the land, it will no longer be regarded as customary land but as private land governed. This implies that T/As will no longer have a say over land, which will significantly diminish their political influence.

Additionally, stressing on the reasons for opposing the Bills, the PP Spokesperson on Land Matters, Hon. Munthali on the issue of chieftaincy he asserted

that there are several complications particularly with the interpretation the roles of T/As concerning group village headmen. He pointed out that there are also senior group village headmen and principal group village headmen, whose roles have not been specified in the Bill. (Debate Bill No. 9 of 2016: Customary land 46th session, 802). Building upon Munthali's points, Hon. Chidanti Malunga of the Democratic People's Party (DPP) recalled how when the Bills were first brought to the House in 2013 did not get the President's assent because of opposition from some of the T/As (Daily Debates (Hansard) Second meeting- 46th session, 18th March, 2016 Bill No. 2 of 2016: Land Bill, 783).

4.4.3 Singing from Everyone's Hymn Book? International/Regional Organizations' Influence

One aspect that cannot be disregarded in the discussion around the political dynamics involved in the 2016 land reform is the role and influence of international actors. Considering the complexity of the international system with regards to the broadening of actors, analysing the role and influence played by non-state actors is imperative in this paper. Additionally, one should not disregard the donor consensus which advocates for human-centred and pro-economic growth land reform agenda. This is evident in the context of Malawi especially with its adoption of the National Land Policy in 2002. The Policy's aim was centred on guiding Malawi's land reform processes as well as contributing to economic growth. In light on this, essential questions that one should ask are to what extent was the establishment of the new land laws influenced by the international community? What role did international actors play? (Or continue to play in the implementation process) Lastly, what were their agenda?

As discussed in previous chapters section, Malawi's new cycle of land reform process officially started in 1996. As it will be argued in the subsequent sections, since then its land reform processes have been carried out in the context of what some refer to as a "new wave" in development discourse. This is will reveal in how development is understood within gender and women empowerment discourse. As noted by Jackson and Cecile Pearson (1998), one of the major developmental goals and desirable aspect

of policymakers and agencies has been focused on attempts to understand gender (1998:4). Particularly concerning issues of representation, of positionality and practice transform old questions of integration, interests, struggles for resources and well-being, but do not replace them (Jackson, 1998:5). As Verhoog asserts, in response to the developments in the international land policy discourse, regional and national initiatives surfaced.

Given the above background, the main international donor organisations that can be considered as influential in outcomes of land reform processes include the European Union (EU), the World Bank Group (WBG), UN FAO, the AU and others. From the early 2000s, these organisations and others have taken initiatives to develop global land policies particularly related to large-scale land acquisition in the governance of global land. As Suzanne Verhoog (2015) maintains, this type of “soft power” instrument has continued to face criticisms (2015:2). She claims that their policies and so-called voluntary principles have been entrenched in a theoretical framework of “effectiveness, soft law, and interrelations with transparency, accountability and legitimacy” (Verhoog, 2015:1). In 2004 the Commission of the European Communities developed the EU Guidelines to support land policy design and reform processes in developing countries (EU, 2004; Verhoog, 2015:7). In association with FAO, IFAD and UNCTAD (FAO et al., 2010), in 2009 the WBG developed their principles for Responsible Agricultural Investments) (Verhoog, 2015:7). The FAO-Committee on Food Security (CFS) Voluntary Guidelines and the AU Framework and Guidelines were implemented in 2015. The CFS together with the African Union Framework and Guidelines also endorsed Voluntary Guidelines (VG) on the Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO, 2012; Verhoog, 2015:7). One of the incitements for the development of the 2009 AU continental framework and guidelines on the land policy was prompting and inspiring African countries to develop and implement comprehensive land policies that address the serious problem of gender discrimination in access to land resources (Kachika, 2013:28).

Malawi's country's land reform processes have been carried out in the context of what some refer to as a "new wave" in development discourse, and more specifically within the framework of gender and women empowerments. As such it is relevant to consider the extent to which the establishment of the new land laws was influenced by the agendas of the international community, the role of international actors played, and their contribution to the implementation process. As noted by Jackson and Cecile Pearson (1998), one of the major developmental goals and desirable aspect of international policymakers and agencies has been focused on attempts to understand gender and development (1998:4). Such an attribute is present in Malawi's land reform process. The country's land reform agenda has arguably been proliferated with the involvement of international organisations and as such compelling one to argue that these might have had a significant influence on the outcomes of the 2016 land-related laws.

Firstly, this is evident in the country's signatory to Framework and Guidelines on Land Policy in Africa (ALPFG) devised and adopted in 2009 by the African Union (AU) in collaboration with the African Development Bank (AfDB) and the UN Economic Commission for Africa (ECA) which were aimed at strengthening land rights, enhancing productivity and securing livelihoods (Verhoog, 2015:7; Kachika, 2013:28). Thus, ensuring that land-related laws make provision for equitable access to land and related resources among all land users, including the youth, the landless and other vulnerable groups particularly women, is one of the main resolutions (Mzale, 2013b).

Additionally, the International Land Coalition (ILC) in collaboration with FAO has been the main organisations championing the ALPFG in Malawi's legal and policy frameworks (ILC, 10). Moreover, in 2009, in part to assist the government in enacting a new land law, the WBG requested an extension of its CBRLD, which had launched in 2004 to 2011 (ILC, 14). FAO and the WBG funded meetings and workshops organised by the ministry of sensitizing stakeholders to understand the importance of land reforms (Kumbani, 2016).

Furthermore, another specific example to illustrate the role and influence of international organisations in the adoption of the Malawian legislation on land is the

EU's financial assistance. In 2014 – approximately two years after the adoption of the land-related bills - Malawi was amongst ten African countries that earmarked with 3 million Euros each (Chikoko, 2014). The main aim of the program was to improve land governance and food and nutrition security of family farmers and vulnerable groups in Sub-Saharan African (Chikoko, 2014). Within Malawi, the financial assistance was aimed at contributing to an improved land governance framework and its implementation in line with VGGT, with particular emphasis on gender-sensitive compliance regarding land tenure rights (Chikoko, 2014). Additionally, another aim was to seek to enhance cooperation between the government and CSOs to ensure that they put more efficient land governance mechanisms in place and share lessons learnt for improving government policies and strategies (Chikoko, 2014).

4.4.4 Civil Society Organisations and 'Gender Progressive Groups'

The Conceptualisation of civil society as an analytic concept has been regarded as complex, porous and vague (Chakib, 2014:5; Nkosi, 2015:14). Some borrow Karl Marx's definition which perceives it as the corporate bodies with the capability to free themselves from the "dominant system" (Nkosi, 2015:14). Others consider civil societies as a "third section from the State and the market" (Chakib, 2014:5). The WBG considers civil society as a wide range of non-governmental and not-for-profit organisations present in public life, with the aim of expressing the interests and values of their members or other, based on ethical, cultural, political, scientific, religious or philanthropic considerations (World Bank, 2010; Chakib, 2014:5).

Gender progressive groups as coined by Agarwal connote organisations focused on the reduction and elimination of inequalities faced by women about men in their social, economic and political arenas (Manji, 2006:4). Such groups entail women's advocacy groups and NGOs (Manji, 2006:4). When the land-related bills were debated and approved in Parliament, CSOs particularly those working on gender were among the leading parties to advocate for President Joyce Banda to withhold her assent (ILC, 2003:8). Their opposition was grounded on the Bills' omission of provisions enhancing

WLRs (Gausi, 2015:2). While others argued that the government did not consult stakeholders on the laws (Nyondo, 2016:3). One of the prominent CSOs involved in the consolidation and harmonisation of divergent views in establishment “a common advocacy agenda” preparing a passage for the amendment of the bills was LandNet (ILC, 8). It spearheads the National Engagement Process (NES) in Malawi. NES is a strategy instituted by the International Land Coalition. (ILC, 2003:10). NES’ an objective in Malawi is strengthening the CSOs’ collective voice in their influence and engagement with the national policy space on issues relating to the land (ILC, 2003:10). As a way to realise these objectives, in partnership with other stakeholders, LandNet defined several strategic objectives for the implementation of the NES, to be attained over three years (mid-2014 to mid- 2017). One of them includes leading an advocacy platform in association with CSOs in implementing existing tools such as the VGGT, as advocated for by ILC and FAO, in country’s policy and legal frameworks (ILC, 8). Also, ensuring that the 2012 Land Bill was “people-centred, gender-sensitive and responsive to the needs of women”, and ensuring its enactment (ILC, 8).

One of the reasons LandNet was pressing for an immediate enactment of the laws was due to its concerns on land being sold to foreigners and local elites. It expressed concern on Malawi possibly the only country that allows for ownership of land by non-citizens” (Mzale, 2014). Also, as noted by LandNet in 2013, most Malawians were not aware of their land rights despite the country’s adoption of the framework and guidelines on Land Policy in Africa (Mzale, 2013a). In most cases when they fight for their land rights, the focus in on protecting their survival and not necessarily that they are fully aware of their rights (Mzale, 2013a).

Speaking during an interview, LandNet’s Spokesperson expressed that the organisation’s desire was “to have a nation that understands their rights, especially for women, a government that is responsive to the land needs and protective of the land for its citizens” (Mzale, 2013a). LandNet “urged parliamentarians to treat the land and related bills with the urgency they deserve” (Mzale, 2013a). According to a study done by the Land Governance Assessment Framework (LGAF), some of the challenges

faced by Malawi concerning land governance include lack of tenure security for customary landholders, including women and continuous fragmentation of land due to population growth (Mthawanji, 2016). The 2016 Land Laws address this issue by “proposing” land titling and registration to guarantee security which is arguably beneficial for women as it provides tenure security (Mthawanji, 2016). Also, LandNet realised the importance of having progressive land laws in Malawi as a key element in achieving the development of the county. The organisation’s concern was mainly on how the country before the enactment of the land-related bills, had a Land Policy but no legal framework. This view has been shared among other different stakeholders advocating for the enactment of the Bills.

Moreover, another organisation that pushed for the enactment of the bills was The National Smallholder Farmers Association of Malawi (Nasfam). When the Bills were first approved by parliament, Nasfam insisted on the government to “speed up” the enactment of land tenure laws to empower women and “facilitate smooth land inheritance” (The Nation Online, 2012). The T/A Executive Officer at the time appealed to the government by asserting that the Bills were ready and the government should enact them (The Nation Online, 2012). He stated that “women are oppressed due to some cultural beliefs which marginalise them on land ownership and puts them at risk, of losing land when the spouses die. He also, called for the integration of women in agricultural activities to enable them to participate in the national development agenda (The Nation Online, 2012).

Additionally, another call for concern was the fact that the number of foreigners owning land in Malawi was described as “alarming”. The laws stipulated that the land should first be offered to a Malawian, but the problem is that most Malawians cannot afford the land. Also, due to poverty in the country, most villagers “who are offered a million kwacha for a piece of land think they have enough money to last them a lifetime” (Mzale, 2013a). Foreigners take advantage of such and are dispossessing poor Malawians of their land (Mzale, 2013b).

Some CSOs such as ActionAid Malawi were advocating for former President Joyce Hilda not to assent to the Land-related Bills asserting that she was their only hope. ActionAid Malawi “called on President Joyce Banda not to assent the Land Bill” contending that it disempowers women and the landless (The Nation Online, 2013b). Citing that they were relying on the President who is female and has worked with women before, they believed that she understood the plight faced by women as far as land is concerned (The Nation Online, 2013b). In their statement, the organisation argued that the Bill was not aligning with Constitutional provisions that guarantee equality claiming that it does not empower women to own land (The Nation Online, 2013b). They argued that the Bill did not address issues relating to landlessness and the fate of idle land (The Nation Online, 2013b). Thus, their refutation was based on their views that the Bills disempowered women and the landless.

Additionally, they contested that substantive principles of land acquisition and maintenance were not spelt out in the Land Bill. This is because the majority who have accumulated land and no principle says that they cannot and in the end, it disadvantages the landless” (The Nation Online, 2013b). Also, asserting that everybody has equal access to land and without changing the law that favours men is merely perpetuating the *status quo* of gender inequality. As such, some suggested that the new land-related bills should have come with an affirmative strategy that sought to correct inequalities on the ground (The Nation Online, 2013b).

Furthermore, land activists such as Vincent Wandale “petitioned the Speaker of Parliament” expressing their anger over the laws claiming that the enactment was done without public input. However, those in support of the laws pointed out the 2010 Law Commission Report on reviewing of the Land Related Laws which was signed by President Peter Mutharika and the minister of Justice and Constitutional Affairs revealed that the 19 member Special Commission that produced it “had a representation of all sectors of the society” (The Nation Online, 2013b). Some of which included traditional leaders and senior T/A Kanyenda of Nkhotakota represented the T/As

4.5 Discussion: Contesting Interests and Agenda but Same Destination?

As envisaged in the discussion above, it is evident that the process of formulating the 2016 Land Laws in Malawi was not a technically neutral exercise. Particularly in the sense that the process was highly entangled with politics and contesting interests and agenda of the stakeholders involved. It can indeed be argued that these political dynamics influenced in determining the outcomes of the land reform. However, it must also be noted that some stakeholders were more influential than others and on this note, it is important to highlight some aspects of the interactions. These could be attributed to power imbalances and power dynamics. To borrow, Clay and Shaffer's (1984) description, the policy formulation process can be characterised as a "chaos of purposes and accidents" (1984:192). This paper highlights that, in 2016 land reform process, the prevailing interests of the different stakeholders and the advancement of their discourses, can be considered as the chaos of purpose. Echoing Clay, Silungwe observes that due to the competition that exists amongst the social, economic and political perspectives to land reform has indeed led to the disorderly nature of land reform discourse and practice (Silungwe, 2015:124). Indeed, in the case of Malawi the multiple stakeholders, who were involved in influencing process leading up to the 2016 national legislation, illustrated how divergent interests complicated the process.

On this note, some aspect of the debates and process portrayed in the political dynamics need to be highlighted. Firstly, three distinct discourses were evident debates surrounding the adoption of the 2016 Land Laws in Malawi: WLRs, powers of T/As and the number of foreigners owning land. T/As were mostly concerned with their powers being limited within the new land legislation. CSOs were mostly advocating for the laws to be people-centred, gender-sensitive and responsive to the needs of women. While international organisations such as FAO, AU, OXFAM, EU, and WBG were interested in ensuring that there are an improved land governance framework and its implementation in line with VGGT. The gender equality and development discourse was an aspect that

was apparent among most of the stakeholders, particularly NGOs, Parliament and CSOs.

One of the issues apparent in this discussion is how power constituted the debates. As Latour (2005) maintains, power should not be perceived as a reservoir that explains, but rather it should be perceived as the final result of a process (2005:64). As shown in this analysis, different interests and power of the stakeholders coupled with their discourse, shaped policy particularly the gendered aspect. Thus, apparent realities emerge from the analysis of these political dynamics within the adoption of the 2016 Land Laws: the different stakeholders and their agenda, and how they all pressed on advancing their agenda. Conformations of power do not regulate outcomes, and with hindsight nor can power be incidental (Hall, 2011). The process was driven by different stakeholders in pursuit of different interests of which led to the adoption of discourses that were influenced by competing.

The role of PWC is of particular interest in this analysis. Even though there has been a significant increase in parliamentary composition since 1994, as Chiweza et al. argue an increase in the number of female representatives in parliament does not necessarily translate into women-friendly policies (Chiweza *et al*, 2016). Nevertheless, this does not mean that their influence should be disregarded. For instance, their interaction with donors and civil society organizations on issues about outstanding bills that required lobbying as illustrated in the discussion above. However, the PWC group had a limited role in driving the process leading to the adoption of these acts; rather they were driven by donors and women's organizations with the help of individual actors in Parliament (Chiweza, 2016:2). As argued by Chiweza *et al* (2016) the PWC has indeed been able to advance women-friendly policies and advance pro-women legislation, but its effectiveness has varied from one parliamentary period to the other.

However, constraints such as party politics, intraparty leadership wrangles, and a shift in the interests of the caucus members towards re-election and retaining of their parliamentary seats, have been observed to be prominent (Chiweza et al, 2016).

Generally, the lack of reputable women's movement is an important limitation on political action in advancing gender equality (O'Neil, 2016:38). Echoing Chiweza, Ambreena Manji (2006) argues that that such gender progressive groups have seldom confronted the emphasis placed by international financial institutions, donors, governments and technical legal consultants on the law as the solution to the problems of land relations" (Manji, 2006). Resonating with Manji, it can be argued that the engagement of groups such as the PWC in the land reform process has affirmed rather than questioned the use of law to bring about development. In doing so neglected to confront the difficult distributional choice entailed in any discussion of land relations (Manji, 2006).

Writing on the influence that donor organisations have on policy advocacy in Malawi, Lindsay Benstead, Ragnhild Muriaas and Vibeke Wang (2018), observe that these organisations aim at improving support for gender reforms (2018:1). External actors supported government ministries in the development of position papers, drafted bills, organized meetings with caucus members and male legislators to make them understand and appreciate the issues, and lobbied for their support in parliament (Chiweza, 2016:2). The view that international NGOs set the agenda by pushing and advocating for the enactment of the new Land Laws has been portrayed in how the legislative reform has been done through the discourses of gender equality as a means to an end [economic empowerment]. Thus, the process of ensuring the promotion of women's access to, ownership of and control over land should be perceived as a way to empowering women and alleviate poverty.

Additionally, another aspect of the process that is worth highlighting is the interface that exists between formal and informal institutions within the context of land reforms. This has been conveyed particularly among issues raised by T/As relating to their limited powers within the new land laws. Considering the interaction between such institutions rehashes the relevance of using a legal pluralism approach in analysing the laws. Indeed, looking at the institutions in isolation would be insufficient in predicting how they can shape the outcomes of policies. As O'Neil (2016) contends, ideas and

incentives are moulded through the interaction of different rules, in both formal and informal settings (2016:38). As evident from the land reform process in 2016 legislation gender norms are a particular type of informal norm that shapes how other institutions work in practice and how that benefits men and detriments women (O’Neil, 2016:38). For instance, constraints encountered by women MPs working with and around the gendering of political rules and practices (O’Neil, 2016:48).

However, this does not mean that male MPs were not championing for the recognition and promotion of WLRs within the new land legislation. As illustrated in the Parliamentary discussions, they were equally concerned with the limitations of the legal framework in recognizing the equal right to land access, control and ownership. This affirms the roles played by pro-feminist men who have embarked on establishing men’s workplace and community forums aimed at creating awareness on gender equality and equity.

4.6 Conclusion

In conclusion, it can be stated that the discussion has underscored how land reforms are sensitive issues threatening men’s interests (Benstead *et al*, 2018). This has been conveyed in the T/As’ contestations especially those from the Northern Region, whereby patrilineal practices are dominant. Furthermore, the debates also demonstrated the challenges of mainstreaming gendered policies to transform the prospects for women to access land rights. Also, it has highlighted that even the different stakeholders had different interests and agenda, a shared aspect was that which patterns the advancement of WLRs to facilitate their economic empowerment and food security. Chapter five presents recommendations and conclusions.

CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSIONS

5.1 Introduction

This chapter outlines some possible obstacles that could be encountered in implementing the new land in ensuring women's economic empowerment. It then offers some recommendations for successful implementation of the 2016 Land Laws. Finally, it presents chapter summaries and a conclusion emphasizing the main findings and arguments.

5.2 Possible Obstacles to Implementation and Recommendations for Successful Realisation of WLRs

Based on the assessment of the 2016 Land Laws, one might argue that to some extent, women's rights have been recognised and promoted within the legal framework. This has been achieved by paving way for women to utilize the legal system and legal in their protection and advancement of their rights to land and interests (Kanyongolo and Malunga, 2016:23). However, one should not be swayed to argue that this automatically translates into practice and successful implementation. Several obstacles could hinder the successful implementation of the 2016 land laws. On this note, the recommendations will be made based on the factors hinder women's ability to access, own and control over land.

Firstly, the perused body of literature identifies the main factors include: patrilineal inheritance practice, customs and local traditions, attitudes and perceptions, marital status. Some elements of customary law, religious norms and cultural practices continue to undermine women's equal enjoyment of their rights. As such, there is a need to continually challenge such aspects through public debates and test court cases (Kanyongolo, 2011:32). Moreover, there is a need to engender Land Committees and Customary Land Tribunals to strengthen women's ability to defend their land rights (Chingaipe, 2016:33). To ensure the promotion of gender equity in land access, control and ownership, there is the need to sensitize both men and women especially T/As on

the importance of equal land rights regardless of culture or tradition (Chingaipe, 2016:33).

Additionally, considering that some women do not have access to education and as such have lower literacy levels, a simplified civic education module should be prepared. The module should be in both English and vernacular languages. This will address the obstacle related to women's inaccessibility of the law and/or lack of understanding or misunderstanding of their rights. As Kanyongolo (2011) notes, it not adequate that equitable laws exist, but that people are aware of them is relevant (2011:2). Thus, ensuring awareness will ameliorate the implementation process.

Similarly, in advocating for change within the policy framework and law implementation, the theory of change provides the lenses in which one can argue that the barriers faced by women in AOCL can be combated by providing an enabling environment and access to resources. Thus, the creation of an environment where women can articulate their needs and participate in decision making structures is essential for their empowerment. Doing so will assist in addressing the underlying causes of poverty and women's exclusion by ensuring a transparent distribution of power dynamics and actions to be taken to address inequality.

Also, there is the need for the GOM and stakeholders to integrate the broad national regulatory framework on the guiding principles for gender equality- equality, non-discrimination and affirmative as envisaged in the 2016 Land Laws such as action by operationalizing such principles through continued law reform. Capacity building of various implementers is also imperative (Kanyongolo, 2011 and Chingaipe, 2016:33).

As discussed above, the 2016 Land Laws should be commended for being progressive in incorporating several gender-sensitive provisions. However, implementation proves difficult mostly due to the cultural impediments. That is to note that advancements in legal institutions are important, however, sustainable

transformation and empowerment of women, changes in social and cultural practices and norms are vital.

5.3 Chapter Summaries

Chapter one presented background about the aim of the study which was to analyse the political dynamics that influenced the adoption of the 2016 land laws in Malawi and further assess how these shaped the gendered outcomes. It also aimed to assess how the socio-legal provisions in the 2016 Land legislation promote WLRs and how this would impact their economic empowerment through poverty alleviation and increased food security. The paper was sought to consider the obstacles to the successful implementation of the 2016 land legislation in Malawi and propose ways in which successful implementation can be ensured.

Chapter 2 defined main concepts used in the paper concerning land and provided a theoretical framework which the study was grounded on, legal pluralism, feminist perspectives on gender and development [gender analysis] and the theory of change.

Chapter 3 provided international, regional and domestic perspectives on gender equality and WLRs. It analysed the new land laws on how they have made provisions for WLRs and identified limitations. It has identified barriers faced by women in AOCL. It also justified the reasons for the need to promote WLRs on their economic status in terms of poverty alleviation and increasing food security. The section has argued that even though the analysed land laws can be considered progressive in ensuring the recognition and promotion of WLRs, there are several limitations.

Chapter four explored the different political dynamics that emerged in the formulation of the Land Act (2016) and the Customary Act (2016). It highlighted the complexity of policymaking that has been shaped by interests and power, but also by discourses that have framed and justified their positions within the development and gender equality discourse.

Chapter 5 (and the remainder of the paper) presented the conclusion drawn from the research based on the literature reviewed and the findings of the study.

5.4 Conclusion

This dissertation has analysed how the gendered outcomes of the 2016 Malawi land reforms were influenced by the political dynamics that emerged from when the Bills were presented to Parliament to when the President assented to them. The paper also sought to question the extent in which the socio-legal provisions in the 2016 land legislation promote WLRs and further consider how the promotion and recognition WLRs matter to their empowerment and economic well-being. Additionally, it has proposed ways in which successful implementation of the new land laws could be achieved.

A presentation of the different debates and discussions that emerged in the formulation of the legislative framework on land reform helps in interpreting social action and in providing a sociological explanation (Hall, 2010:373). Such an explanation is deemed both discursive and contextual, at the same time withdraws claims to being conclusive or the only possible explanation (Hall, 2010:373). Thus, there is no all-encompassing framework that elucidates everything (Hall, 2010:371). As such land policy reform must be understood in its terms while positioning it within a broader context, but not assuming context determines the process (Hall, 2010:371). For this reason, the paper applied a multi-faceted approach by combining legal pluralism, feminist perspectives on gender and development [gender analysis] and the theory of change.

The feminist perspective on gender and development framework conveyed the transformative discourses on women and/or gender in development. The different challenges encountered by women's movement in the quest for inclusion and recognition were explored through the progression from the three feminist approaches: from Women in Development WID to WAD, and GAD. Intersectional feminism perspectives rendered how the places occupied by women within their social and political spheres by drawing upon theories of social institutions and dominance. To illustrate how reforming institutions could contribute to ameliorating women's lives, the

theory of change was applied. The legal pluralist approach helped to articulate the interaction between law and society by considering the actual lived experiences of women and how they are shaped by state laws.

As argued in the paper, advances in legal institutions are essential, however, for transformation to be sustainable, changes in social and cultural practices and norms are imperative. The persistence of patriarchal attitudes in institutions perpetuates the continued contestation in the public and private spheres of these rights. WLRs, particularly within Customary Law, remain sites of struggle between traditional leaders' claims and community members, women inclusive. Creating enabling environments will allow for women to articulate their political voice and agendas. This was portrayed in the role played by gender progressive groups.

Also, as shown in the case of Malawi the multiple stakeholders involved in influencing process leading up to the 2016 national land legislation, illustrated how divergent interests complicated the process. Thus, the paper has highlighted the complexity of policymaking that has been shaped by interests and power, but also by discourses that have framed and justified their positions within the development and gender equality discourse. Furthermore, it has also demonstrated the challenges of mainstreaming gendered policies to transform the prospects for women to access land rights. Nevertheless, the progressive nature of the new land laws on women's land rights should be commended.

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