An analysis of water user associations on the implications for the transfer of irrigation management on land and water rights in Malawi

Principal author:
Chikosa M Silungwe, PhD
Law Consultant, The Mizumali Foundation, Malawi
E: c.m.silungwe@gmail.com

Co–authors:
Chisomo Gunda
IRLADP, Malawi
E: chisomogunda@gmail.com

Solomon Mkumbwa
UN-Habitat, Nairobi, Kenya
E: solomon.mkumbwa@unhabitat.org

Harold Liversage
IFAD, Rome, Italy
E: h.liversage@ifad.org

Globally, governments embark on public investment in irrigation development to promote national food security especially when the national food supply is under constant threat from the unpredictability of rain–fed agriculture. The Government of Malawi ('GoM') has recently set irrigation as one of its top priorities in order to increase and stabilize its national food supply. Between 2006 and 2015, the GoM, the World Bank, the International Fund for Agricultural Development ('IFAD') and other partners, implemented the Irrigation, Rural Livelihoods and Agricultural Development Project ('IRLADP') whose objectives were to address poor water management practices, low food productivity, and low profitability levels of smallholder farmers.

We note: The reforms towards sustainable irrigation agriculture must be located, and informed, by the wider national land law and policy reforms. The WUAs have heavily relied on the financial and technical support of the IRLADP to progress towards full operationalisation. Third, the conception of customary land delineates an understanding of ownership rights and user rights over the land where the WUAs are located. Finally, the inherent tension between traditional leadership and members of a WUA stem from competing institutional interests.

KEY WORDS: Land, Malawi, Categories of land, WUAs, Property, Rights

---

INTRODUCTION

Globally, governments embark on public investment in irrigation development to promote national food security especially when the national food supply is under constant threat from the unpredictability of rain–fed agriculture. The Government of Malawi ('GoM') has recently set irrigation as one of its top priorities in order to increase and stabilize its national food supply. Between 2006 and 2015, the GoM, with assistance from the World Bank, the International Fund for Agricultural Development ('IFAD') and other partners, implemented the Irrigation, Rural Livelihoods and Agricultural Development Project ('IRLADP') whose objectives were to address poor water management practices, low food productivity, and low profitability levels of smallholder farmers. The IRLADP complimented GoM's Agricultural Investment Plan [also known locally as the Agricultural Sector Wide Approach ('ASWAp')] where

government seeks to increase the area under sustainable irrigation from 72, 000 ha to 280, 000 ha under the Green Belt Initiative.

The IRLADP funded the rehabilitation of the physical irrigation infrastructure and the transformation of the role of farmers in the management of the irrigation infrastructure. The project targeted 196,500 rural households (827, 000 individuals) across 11 districts in Malawi. Farmers' groups were mobilized to form water users associations ('WUAs'). WUAs assumed the responsibility of managing irrigation infrastructure and water resources. The apparent logic of WUAs is that as direct beneficiaries of the irrigation infrastructure, they have strong incentives to ensure that the schemes are managed well. Under WUAs, rural poor people should be empowered to participate in managing the common property resources on which they depend. This Paper explores the national land law and policy framework and discusses the various land and natural resources tenure security features regarding WUAs under public land, private land and customary land respectively in Malawi. The exploration seeks to unpack the conceptual underpinnings of land and water rights under the various categories of land where an irrigation management transfer in favour of a WUA has taken place. The Paper also discusses the inherent tensions that have come to the fore between traditional leadership and members of WUAs over ownership and use of land under WUAs.

A number of observations may be made: First, the reforms towards sustainable irrigation agriculture must be located, and informed, by the wider national land law and policy reforms. The rationale of the national level reforms is that existing policy statements and legislation are conflicting and lack inter–sectoral linkages to enable the land sector to meaningfully contribute to economic development. Three problems, namely, poor access to land, improper land use and insecurity of tenure have been identified as major constraints to the efficient usage of land. The transfer of irrigation management of WUAs must compliment the efforts to resolve the challenges identified at the national level.

Second, and from a political economy perspective, the WUAs have heavily relied on the financial and technical support of the IRLADP to progress towards full operationalisation. This has the challenge of State system inertia and raises the query of the longevity of the WUAs without the support of the State and its development partners. Indeed, the political economy of land relations in Malawi is shaped by the interaction of the State, the bilateral and multilateral partners of the State, big estate farmers, smallholder farmers, and the land less. Indeed, at the national level, the statistics show that there is increased land pressure in the country with the average land holding for the poor as low as 0.22 hectares.

Third, there is need for clarity of the conception of 'public land', 'private land', and 'customary land'. This clarity is important especially in relation to customary land because it delineates an understanding of ownership rights and user rights over the land where the WUAs are located. Keep in mind that the definitions of the categories of land under Malawi's land law entrenched colonial capitalism. Hence, this Paper argues that a combination of the Property Rights Transfer ('PRT') model and the Irrigation Management Transfer ('IMT') model is ideal for the WUAs whereby the rights in the property in the land of the schemes are transferred to the WUAs.

Finally, the inherent tension between traditional leadership and members of a WUA stem from competing institutional interests. It is important to note that a WUA set up under customary land requires the generation of social capital. This is the case because traditional chiefs wield power over customary land for various incentives including political patronage. Hence, where a WUA is set up within a customary land regime, there is need for deliberate efforts to attain the (political) buy–in of the traditional leadership in the area. Otherwise, in the absence of such buy–in, it is unlikely that the necessary social capital can be achieved for the operationalization of the WUA.

THE CONSTITUTION AND LAND

The Constitution of Malawi, 1994 (the 'Constitution') is largely premised on liberal democracy. The Constitution is the supreme law of the land; provides for a Bill of Rights under Chapter IV; states that the authority to govern is derived from the people of Malawi as expressed through equal and universal suffrage in an election; proceeds on a very fundamental principle and states that all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with the principles of the Constitution; and creates a 'public' trust and 'social' trust where all persons exercising powers of State shall do so to the extent of their lawful authority and in accordance with their duties and responsibilities to the people of Malawi.

The Constitution advocates the development of a free market economy in section 13(n). Section 28 of the Constitution provides as follows:

(1) Every person shall be able to acquire property alone or in association with others.

(2) No person shall be arbitrarily deprived of property.

The Constitution further provides that 'expropriation of property shall be permissible only when done for public utility and only when there has been adequate notification and appropriate compensation, provided that there shall always be a right to appeal to a court of law.' Existing rights of persons in property at the coming into force of the Constitution were entrenched under section 209 of the Constitution. The property clauses in sections 28, 44(4) and 209 of the Constitution are the definitive references to land.

Turning to the actual property clauses: Section 28 of the Constitution is as similarly worded as Article 17 of the Universal Declaration of Human Rights. A notable difference is that the operative word under the Constitution is 'acquire' as opposed to 'own' under the Universal Declaration. The wording under the Constitution is broader and may encompass expectations of acquisition of property. However, there is need to reconcile the reference to 'arbitrary deprivation' in section 28(2) of the Constitution and 'expropriation' in section 44(4) of the Constitution and there implications for land reform in the polity.

The proscription of arbitrary deprivation under the Constitution relates to the exercise of police powers of State without due process or a reasonable relationship between the means of the exercise and the purpose of the deprivation. No compensation is ordinarily available for the exercise of police powers. Expropriation relates to the exercise of powers of eminent domain by a State. Section 44(4) of the Constitution lays down three scenarios where property can be expropriated: the expropriation shall be for public utility, there must be adequate notification and appropriate compensation. In turn, the scenarios raise the following question: what is 'public utility', 'adequate notification' and 'appropriate compensation' under the Constitution?

The Constitution provides no answers. Commentators and indeed the courts have concluded that 'public utility' or 'public purpose' must confer a public benefit or advantage. There need not be actual physical use of the expropriated property by the public. It is enough that the expropriation confers a discernible direct or indirect benefit or advantage to the public. Finally, expropriation invokes compensation. In view of the trends in comparable jurisdictions, 'appropriate compensation' under the Constitution will mean the market value of the property. A compensation regime based on market valuation poses significant financial challenges for political economies such as Malawi with weak macro–economy.

THE LAND POLICY FRAMEWORK

In 2002, Malawi adopted the National Land Policy. The Policy is the national framework for land reform. The Policy is a result of a number of agrarian studies commissioned between 1996 and 1998; including the 1999 Report of the Presidential Commission of Inquiry on Land Policy Reform. In the Report, the

Commission recommended the development of a comprehensive national land policy. The rationale was that existing policy statements and legislation were conflicting and lacked inter–sectoral linkages to enable the land sector to meaningfully contribute to economic development. Three problems, namely, poor access to land, improper land use and insecurity of tenure were identified as major constraints to the efficient usage of land. While the Commission noted the nature of the land question under the colonial State and the Kamuzu Banda Administration, it recommended that 'for reasons mainly of political and economic expediency', the postcolonial State under the Bakili Muluzi Administration should 'refrain' from overturning the existing land relations (Government of Malawi, 1999).

The postcolonial State has stated that a land policy must reflect the changes in the economic, political and social factors in a country. Hence, the key guiding principle of the Policy is that it must lead to a comprehensive land law 'with immense economic and social significance.' The Policy encompasses ten guiding principles: secure land tenure; sustainable land management; productive and efficient land use; effective land administration; protection of vulnerable groups (these are women, children and persons with disabilities); development of an institutional framework for land management, land information system, and optimum utilization of land (Government of Malawi,2002).

The postcolonial State further states that the '[f]ailure to reform and secure the tenure rights of smallholder [sic] [farmers in Malawi]' has had a causal link with 'under–investment, reliance on primitive technology and […] low wages in rural areas.' A legal framework is meant to 'institutionalize, once and for all, a land administration system at the local and district government level' (Government of Malawi, 2002). The guarantee of security of tenure shall be 'without any gender bias [or] discrimination to all citizens' under section 28 of the Constitution. Further, security of tenure is meant to 'curb land encroachment, unapproved development, land speculation and racketeering'. The Policy urges for 'formal and orderly arrangements' of titling (Government of Malawi, 2002).

The postcolonial State under the Muluzi Administration equally acknowledges the nature of the land question under the colonial State and the Banda Administration and its entrenchment through law and policy. In this respect, there are three categories of land proposed under the Policy as a means of redress; government, public and private land. Government land shall comprise 'land owned by government and dedicated to a specified national use or made available for private uses at [its] discretion' (Government of Malawi, 2002). This category shall encompass land reserved for government schools, hospitals or offices etc. Public land shall comprise 'land held in trust and managed by government or [a] traditional authority and [shall] be openly accessible to the public'. This category shall cover national parks, forest reserves, or unallocated land within an area of a traditional authority. Private land shall comprise land held under freehold, leasehold or under the 'customary' estate. The categories of land under the Policy are yet to be translated into law (Government of Malawi, 2002).

THE CURRENT LAND LAW FRAMEWORK

A comprehensive legal framework for land use and tenure was developed under the Land Act, 1965 that redefines the categories of land under colonial land law into public, private and customary land respectively.

Public land is defined as:

> All land which is occupied, used or acquired by the Government and any other land, not being customary land or private land, and includes-
>
> (a) any land held by Government consequent upon a reversion thereof to the Government on the termination, surrender or falling-in of any freehold or leasehold estate therein pursuant to any covenant or by operation of law; and

(b) notwithstanding the revocation of the existing Orders, any land which was, immediately before the coming into operation of [the Land] Act, public land within the meaning of the existing Orders.

Private land is defined as:

All land which is owned, held or occupied under a freehold title, or a leasehold title, or a Certificate of claim or which is registered as private land under the Registered Land Act.

Finally, customary land is defined as:

All land held, occupied or used under customary law, but does not include any public land.

The definitions of the categories of land under the Land Act entrench the land alienation that took place during the colonial period. There is no attempt to question the legal validity of Certificates of claim issued by the colonial administration to white landholders in 1902. The definition of customary land is tautological. Further, while the definition of customary land implicitly underscores the inalienability of that land, it does not take into account the land that was alienated from indigenous communities during the colonial period and was converted into Crown or private land. The law further states that customary land is 'undoubted property of the people of Malawi'; the land vests in 'perpetuity in the President.' Hence, the legal title in customary land does not vest in the people of Malawi; it vests in the President as a symbol of the postcolonial State. The declaration that customary land is the undoubted property of the people of Malawi is one of principle without any legal significance under the Land Act (cf. Msisha, 1999:30-31).

Section 5 of the Land Act does not grant the people of Malawi any enforceable right at law. The people of Malawi only have the right of use and occupancy over customary land. The postcolonial State has powers to dispose of customary land as private land under leasehold. The postcolonial State may also declare customary land as public land in which case it is possible for the land to be converted into freehold. While it may be argued that section 25 of the Land Act purported to create a trust over customary land where the President is a trustee of the people of Malawi, the comprehensive powers reposed in the postcolonial State 'destroys any notion of the existence of a trust' (Msisha, 1999:32). Customary land can be alienated by the postcolonial State without any compensation for the land itself. Hence, the postcolonial State treats customary land as having no owner other than itself.

Having noted the lack of legal ownership of customary land under received law on the part of the indigenous communities, the postcolonial State incipiently recognizes legal title to land held under customary law. In this vein, in 1967, the postcolonial State put in place a legal framework for the conversion of customary land to privately-held leaseholds. This framework is embodied under the Customary Land (Development) Act. Customary land converted under this Act can be registered under the Registered Land Act as private land vested in an individual or a family unit. The application of the Customary Land (Development) Act is subject to the declaration of a particular customary land area as a 'development area'. The rationale is that registered title is the basis for greater agricultural productivity. The classic customary landholding regime is anathema to development since it does not guarantee access to credit or attract capital–intensive investment (Nankumba, 1986:57; Ng'ong'ola, 1983: 39).

THE WIDER REFORMS UNDER MALAWI'S LAND QUESTION

The current land reform programme in Malawi was initiated in the context of a new constitutional order heralded in 1994, and a new donor consensus on the nature of land reform which has supposedly re-aligned its focus to humanity and pro-poor economic growth. The point to be made here is that the rhetoric on land reform and redistribution that marked the campaign for multiparty politics between 1992 and 1994 was not followed by concrete policies and implementation strategies in the aftermath of the first democratic elections. The advocates of multiparty politics in the run up to the referendum of 14 June 1993

and the general elections of 17 May 1994 – particularly the United Democratic Front and the Alliance for Democracy – promised that they would implement a land reform programme based on fair redistribution of land to the landless. This promise was particularly made repeatedly in southern Malawi where land pressure is most acute. The rhetoric of a fair distribution of land to the landless continued in the Legislature after the general elections of 17 May 1994. There was an exuberant tone regarding land relations: the emphasis was on the urgent need for 'fair distribution' or 'equitable distribution' of arable land for 'economic use' in favour of the landless. Thengo Maloya, a Member of Parliament for Machinga North East (United Democratic Front), pitched the rhetoric when he observed that the landless have had no assistance for their 'degradation' and 'servitude' through the 'selfishness of the wealthy.' He observed: "[The] labouring class" are [sic] tenants at the mercy of the landlords' and work in conditions 'at the pleasure of the then party leaders and estate owners' who considered themselves the supreme law.

Key elements

The National Land Policy was adopted under the Muluzi administration in 2002 as the national framework for land reform. It is a result of a number of agrarian studies commissioned between1996 and 1998, including the 1999 Report of the Presidential Commission of Inquiry on Land Policy Reform. In this report, the Commission recommended the development of a comprehensive national land policy. The rationale was that existing policy statements and legislation were fragmented and inconsistent, lacking in inter-sectoral linkages. Poor access to land, improper land use and insecurity of tenure were identified as major constraints to the efficient use of land. However, the Commission recommended that 'for reasons mainly of political and economic expediency,' the state should 'refrain' from overturning the existing land relations. The government has maintained that land policy must reflect the changes in the economic, political and social factors in the country. Hence, the key guiding principle of the Policy is that it must lead to a comprehensive land law 'with immense economic and social significance.' The Policy is underpinned by ten principles concerning secure land tenure; sustainable land management; productive and efficient land use; effective land administration; protection of vulnerable groups (women, children and persons with disabilities); development of an institutional framework for land management, land information system, and optimum utilisation of land (Government of Malawi, 2002).

The government has linked the failure to reform and secure the tenure rights of smallholder farmers in Malawi to 'under-investment, reliance on primitive technology and [...] low wages in rural areas. Thus, it believes that a legal solution to these problems would be necessary to 'institutionalise, once and for all, a land administration system at the local and district government level.' The guarantee of security of tenure shall be 'without any gender bias [or] discrimination to all citizens' under section 28 of the Constitution. Further, security of tenure is meant to 'curb land encroachment, unapproved development, land speculation and racketeering' (Government of Malawi, 2002).

Categories of land under the Policy

The National Land Policy calls for 'formal and orderly arrangements' of titling. It proposes three categories of land: government, public and private land. Government land shall comprise 'land owned by government and dedicated to a specified national use or made available for private uses at [its] discretion.' It shall encompass land reserved for government schools, hospitals or offices, etc. Public land shall comprise 'land held in trust and managed by government or [a] traditional authority and [shall] be openly accessible to the public.' It shall cover national parks, forest reserves, or unallocated land within an area of a traditional authority. Private land shall comprise land held under freehold, leasehold or under the 'customary' estate (*cf.* Government of Malawi, 2002).

Assessment of the wider land reforms

Here, we will only proffer a fleeting assessment of the wider land reforms in Malawi. The implementation of market-based land reform models as is the case in Malawi is beset by three issues: The privileged treatment of land owners in the estate sector; particularly under the land redistribution model based on a willing seller/willing buyer approach has led to the conclusion that the model amounts to a seller's market. Second, the lack of post-redistribution support services has meant that land distributed to the land deprived is amenable to distress sales. Third, the nature of programme financing disfavours weak economies such as Malawi since the implementation of the models requires heavy capitalisation which, in the case of those weak economies, often is only possible through intensive external capital (see Brink *et al*, 2006).

WATER USER ASSOCIATIONS IN MALAWI

As already pointed out above, the IRLADP funded the rehabilitation of the physical irrigation infrastructure and the transformation of the role of farmers in the management of the irrigation infrastructure. Farmers' groups have been mobilized to form water users associations ('WUAs'). WUAs have assumed the responsibility of managing irrigation infrastructure and water resources (cf. Kainja & Dzonzi, 2014). The apparent logic of WUAs is that as direct beneficiaries of the irrigation infrastructure, they have strong incentives to ensure that the schemes are managed well. Under WUAs, rural poor people should be empowered to participate in managing the common property resources on which they depend.

GOVERNANCE STRUCTURE OF WUAS

The Narrative from South Rukuru in Rumphi district, Northern Malawi

In December, 2014, and with technical assistance from IRLADP, the South Rukuru WUA was formed. The WUA covers an area overseen by three traditional chiefs. Even though there is a committee in place, the WUA has not been formally registered as a legal entity under the Laws of Malawi. The formal registration of the WUA remains. It emerged from the focus group discussion that the formal registration is in abeyance.

The proposed site of the South Rukuru WUA's irrigation scheme is presently under customary land regime. There will be need for the conversion of the customary land into a private land holding under the title of the WUA, if at all, to operationalize the irrigation scheme. The status quo is against a backdrop that a technical team from IRLADP surveyed the land for the proposed site of the scheme in 2014.

The farming community in the proposed site operates small scale irrigation systems at an individual level. The community use motorized pumps which are expensive to run and unsustainable in the long term. Hence, the community has decried the slow pace at which the operationalisation of the WUA, with the support of the postcolonial State is progressing.

The Narrative from Limphasa in Nkhata Bay district, Northern Malawi

The site of the Limphasa WUA sits on erstwhile public land which run as a State-operated irrigation scheme from 1969 to 12 December, 2011; the date it was handed over to the community. The site covers 467 hectares. From the 1990s, the erstwhile scheme was abandoned by the State. At its lowest ebb, the scheme was run with a labour force of six (6) labourers against 467 hectares.

In 2004, the World Bank conducted a feasibility study to assess the revamping of the scheme under the management of the community in the area. In 2010, the scheme was rehabilitated under the IRLADP and handed over to the community in 2011. The total land area of the scheme after the rehabilitation is 520 hectares.

Parallel to the rehabilitation of the scheme, IRLADP provided technical assistance to the community in the catchment area of the scheme on the setting up of a WUA. Several workshops were conducted on the establishment of a WUA; water management; conflict resolution; financial management; and formal registration of a WUA under the Laws of Malawi.

In August, 2010, the Limphasa WUA was established under a formal constitution. The WUA is registered as a trust under the Trustees Incorporation Act. It has a Board of Trustees, an Executive Committee (which reports to the Board), and 900 members. The WUA also has a valid water right – which is a requirement for use of water from a public water body – under the Water Resources Act. At the time of writing, the WUA was finalizing the process of converting the land covering the scheme from public land to private land under the title holding of the WUA.

A number of governance structural points may be noted here:

a) Members of the WUA pay an annual membership fee and an annual plot fee to the Board to obtain a licence to cultivate a parcel of land during a growing season;

b) A member who has not paid their fees during a particular growing season is barred from cultivating a parcel of land under the WUA;

c) At the end of a particular growing season, all rights over parcels of land that had accrued to members who had paid their fees lapse and the Board assumes control over all parcels until a new cycle of payment of fees and allocation of parcels to members ensues;

d) Presently, the WUA sanctions the cultivation of rice only; and

e) The WUA has a 'water jury' which resolves all conflicts among members in accordance with the WUA's constitution.

SOME POLITICAL ECONOMY CONSIDERATIONS FOR THE WUAs

The political economy of land relations in Malawi are shaped by the interaction of the postcolonial State, the bilateral and multilateral partners of the postcolonial State, big estate farmers, smallholders farmers, and the land less. Indeed, at the national level, the statistics show that there is increased land pressure in the country with the average land holding for the poor as low as 0.22 hectares (Government of Malawi, 2007).

In the case of the WUAs, two political economy considerations may be highlighted here. First, the WUAs have heavily relied on the financial and technical support of the IRLADP to progress towards full operationalisation. In the case of the South Rukuru WUA, this support has dissipated because the IRLADP was in the process of winding down. In the case of the Limphasa WUA; its operations positively progressed as most of the set up processes were done at the height of the life of the IRLADP. This raises the query of the longevity of the WUAs without the support of the State and its development partners.

The second political economy consideration – albeit tentative at this point – relates to the generation of social capital relating to a WUA that may have to be set up under customary land. Traditional chiefs wield power over customary land for various incentives including political patronage. To the extent that the South Rukuru WUA will be set up within a customary land regime, there will be need for deliberate efforts to attain the (political) buy–in of the traditional leadership in the area. Otherwise, in the absence of such buy–in, it is unlikely that the necessary social capital can be achieved for the operationalization of the WUA.

GENDER CONSIDERATIONS RELATING TO LAND GENERALLY AND THE WUAs

The history of the cultural norms and values relating to land ownership and inheritance in Malawi is marked by gender inequality whereby land ownership and inheritance is skewed in favour of men at the expense of women (*cf.* Ngwira, 2007).

In an understanding of the WUAs, it is observed that the constitution of the Limphasa WUA, all paid up members – men and women – have equal rights in theory to perform any role under the WUA and indeed transcend to leadership roles. However, the composition of both the Board of Trustees and the Executive Committee of the WUA respectively revealed that the role of women and the possibility of ascendancy to leadership positions remains a challenge. Both the Board and the Executive Committee had a women representation of less than 10 per cent. There has to be deliberate mechanisms put in place to encourage greater women inclusion in leadership roles for enhanced gender equality.

THE IMT MODEL AND PRT MODEL DEBATE AND WUAs

There is an 'either–or–debate' as to the suitability of the IMT model and the PRT model in the operationalization of WUAs in Malawi and elsewhere. The short – albeit tentative – contribution to the debate is that it is important to focus on what a WUA framework in a particular political economy context is set to achieve.

There are observations that were made at Limphasa WUA regarding the two models rather than South Rukuru WUA. Indeed, the two models ought to be looked at as two parts of one entity. For the present analysis, first, we look at the PRT model. In turn, we discuss the IMT model.

The PRT Model

The PRT model relates to the holding of a right in property by a natural person or legal person. Prior to the establishment of the WUA, Limphasa was a Government–owned scheme. At law, all the rights in property at the Scheme belonged to the State. Keep in mind that the scheme operated on public land. Hence, Government had full management control of the scheme, full ownership and entitlement of the physical infrastructure, full scope of water rights (both the use rights and the selling rights), and full scope of rights in the property in the land comprising the scheme.

To the extent that Government has relinquished legal ownership to the Board of Trustees of the Limphasa WUA, the Board assumes full management control of the scheme, full ownership and entitlement of the physical infrastructure, full scope of water rights (both the use rights and the selling rights), and full scope of rights in the property in the land comprising the scheme. Under the Trustees Incorporation Act, a board of trustees assumes legal title under a trust. In the case of Limphasa WUA, therefore, the Board, and not the Executive Committee, assumes legal title across the spectrum of the WUA's property.

The IMT Model

The IMT model developed under IRLADP created agreements between the Government and the WUAs for the transfer of 'equipment and property' from Government to the WUAs. The specific equipment and property that were to be transferred will be an outcome of negotiations between Government and a particular WUA. We note that some, and not all, of the WUAs were to sign the 'IMT Agreements' (Kainja & Dzonzi, 2014). The agreements specifically provide for a mandatory obligation that each WUA must create an Operations and Maintenance Fund for the repair and maintenance of the scheme under a particular WUA. Prior to the transfer, Government was to carry out rehabilitation works and provide financial and technical support to each WUA for a period of 24 months from the date of the transfer.

The possibilities: A combination of the PRT and IMT models respectively

The IMT model under the establishment of the WUAs in Malawi works better in order to negotiate the transfer of rights from Government to the WUAs. The PRT model works better in entrenching the rights of the WUAs under a trust model. Under the PRT model, the WUAs are set up under a trust where the board of trustees of the WUA guarantees greater management control of the scheme, full ownership and entitlement of the physical infrastructure, full scope of water rights (both the use rights and the selling rights), and full scope of rights in the property in the land comprising an irrigation scheme.

CONCEPTION OF THE 'CUSTOMARY' SPACE

The worldview regarding 'customary' tenure is that it is communal in nature. The proponents of the reform of the 'customary' space under a land reform programme base their arguments ostensibly on the economic inefficiency of the communitarian *ethos* of the 'customary' tenure. This worldview remains unresolved at the wider national land reform programme in Malawi (see for example Ng'ong'ola, 1983). This poses significant challenges for the establishment of the WUAs especially those that are under parcels of land categorised as 'customary land'. As noted above, there is need for complementary social capital from the traditional leadership to militate against the power this constituency yields over customary land for various incentives including political patronage.

CONCLUSION

We further note as follows: First, the reforms towards sustainable irrigation agriculture must be located, and informed, by the wider national land law and policy reforms. So far, the reforms towards sustainable irrigation agriculture are operating outside the reforms at the macro level. Second, and from a political economy perspective, the WUAs have heavily relied on the financial and technical support of the IRLADP to progress towards full operationalisation. Third, there is need for clarity of the conception of 'public land', 'private land', and 'customary land'. This clarity is important especially in relation to customary land because it delineates an understanding of ownership rights and user rights over the land where the WUAs are located.

As the irrigation agriculture transitions under PRIDE, we note as follows: The overly reliance of the WUAs on the financial and technical support of the IRLADP to progress towards full operationalisation raises the query of the longevity of the WUAs without the support of the State and its development partners. Indeed, this observation becomes more critical in respect of WUAs who will not have entered into IMT Agreements with the Government. Further, there must be a capacity assessment exercise of each WUA. The exercise should establish whether proceeding with the PRT model without the IMT model is feasible in the long term. Limphasa WUA is a well–established WUA. However, the scheme also requires a minimum level of technical support from the State. Third, the ideal framework for the WUAs under PRIDE must combine the PRT model and the IMT model whereby the rights in the property in the land of the schemes are transferred to the WUAs. Further, the Government and its development partners should provide either financial or technical support or both to the WUAs.

A PROPOSAL FOR A 'UNIVERSAL' MODEL OF WUAs IN MALAWI

A 'Trust model' for the formal registration of the WUAs as legal entities will be ideal. This provides for roll out of the PRT model. However, there are preliminary processes that may be taken based on the present category of land that a particular WUA will be set up on. The IMT model should be addressed under the IMT agreements. The formal registration of the WUAs must precede the IMT agreements between the Government and the WUAs.

WUA under Public Land

The community should be mobilized as a WUA and proceed to be registered as a trust under the Trustees Incorporation Act. Further, the public land ought to be converted from public land to private land – with the Board of Trustees as the title holder – under the process of conversion under the Land Act.

WUA under Private Land

The community should be mobilized as a WUA and proceed to be registered as a trust under the Trustees Incorporation Act. Further, the private land ought to be transferred from the incumbent title holder to the Board of Trustees as the new title holder – under the process of conversion under the Registered Land Act.

WUA under Customary Land

The community should be mobilized as a WUA and proceed to be registered as a trust under the Trustees Incorporation Act. Further, the customary land ought to be converted , first, from customary land to public land; and second, from public land to private land – with the Board of Trustees as the title holder – under the processes of conversion under the Land Act and the Registered Land Act respectively.

THE CASE FOR THE TRUST MODEL

In the end, the Trust model seems to be the most suited for the operationalisation of the WUAs in Malawi. The observation stems from the (relative) success of the establishment of the Limphasa WUA under that model. While there are potential political economy challenges that may exist, these may be mitigated at the project design stage going forward.

REFERENCES

Government of Malawi, (1999) *Report of the Presidential Commission of Inquiry on Land Policy Reform, Volume 1* Zomba: Government Printer

Government of Malawi, (2002) *Malawi poverty reduction strategy paper* Lilongwe: Ministry of Finance

Government of Malawi, (2002) *National land policy* Lilongwe: Government Printer

Government of Malawi, (2007) *National Statistical Report* Zomba: NSO

Kainja, G & J Dzonzi, (2014) *Report on the Finalisation of WUA Instruments (Constitutions, Leases, IMT Agreements and Regulations)*, Lilongwe

Msisha, M, (1999) 'Land law in Malawi' in Government of Malawi *The final report of the Presidential Commission of Inquiry on Land Policy Reform, Volume III* Zomba: Government Printer

Nankumba, J, (1986) 'Customary land tenure and rural development: The case of Lilongwe ADD' 13 *University of Malawi Journal of Social Science* 57

Ng'ong'ola, C, (1983) *Statutory control of land and the administration of agrarian policies in Malawi*, unpublished PhD Thesis, University of London

Ngwira, N, (2007) 'Women's Property and Inheritance Rights and the Land Reform Process in Malawi', Lilongwe

Van den Brink, R; *et al*., (2006) *Consensus, confusion, and controversy: Selected land reform issues in sub-Saharan Africa* Washington DC: World Bank