



Responsible Land Governance: Towards an Evidence Based Approach

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THE AMBIGUOUS STATE-TRADITIONAL RELATIONSHIP IN UGANDA AND MALAWI: REPERCUSSIONS ON GOOD LAND GOVERNANCE?

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Abstract

Today, in sub-Saharan Africa, the legal as well as the political system reflects a *mélange* of traditional and state institutions, practices, and policies. Traditional leaders, for instance, are indispensable in their function as land administrators. They oversee large shares of arable (customary) land and are an important authority to reckon with. Traditional institutions of governance are not a separate entity that exists in isolation from the state. Particularly in the area of land governance, the jurisdiction and mandates of elected politicians and chiefs overlap, compete, accommodate, substitute or complement each other.

In this paper, I address the relation between the state-traditional interface and good land governance. I present an analytical framework that distinguishes between the *de jure* state-traditional relationship and its *de facto* interface. This analytical framework is then explored in a comparative case study of Malawi and Uganda. In doing so, I scrutinize the legal framework on land and traditional governance, detecting potential legal inconsistencies. Thereafter, acknowledging the fact that legal provisions are often not translated into reality, I assess the *de facto* state-traditional relationship, drawing on a wide variety of sources such as newspaper articles, confidential and public documents as well as 125 interviews which I conducted between November 2015 and March 2016 in both countries.

Key Words

Sub-Saharan Africa, comparative method, customary land tenure, state-traditional relationship, traditional authorities

Introduction

In sub-Saharan Africa, an estimated 80 percent of the continent's arable land is held under customary tenure, where land is allocated according to non-written, customary rules, and practices (Boone 2007; Colin and Woodhouse 2010; Deininger 2003). In systems of customary tenure, traditional institutions of governance – or what is depicted as *traditional* – play a crucial role (e.g., Boone 2014; Lund and Boone 2013; Peters 2013).¹ Traditional institutions of governance can be understood as an umbrella term for traditional authorities such as chiefs, kings or village headmen or for traditional procedural rules like customary laws and norms (Holzinger et al. 2016). Unlike modern constructions of governance, which delegate authority to selected or elected representatives, leaders within a traditional governance system are mostly installed through customary rules by a relatively narrow community usually defined by ethnic criteria (Keulder 2000). In addition, the position of traditional leaders is typically hereditary, with leaders selected from within “royal families” or through lineage (Baldwin 2014). In almost all sub-Saharan states, these traditional institutions of governance are not a separate entity that exists in isolation from the (nation) state; quite the opposite is true: the legal as well as the political system reflects a *mélange* of traditional and state institutions, practices, and policies. This dualism becomes apparent in the area of land governance, where traditional institutions inherently play an important role.

The need for an effective and efficient land governance framework, where both traditional and state authorities are also factored in, becomes evident when considering that Africa houses nearly half of the world's usable uncultivated land – about 202 million hectares (Byamugisha 2013). At the same time, Africa exhibits the highest poverty rate in the world, with nearly half of its population living on less than US \$ 1.90 a day (about 388 million people in absolute numbers) (World Bank 2016a). In that respect, land governance – that is the rules, processes, and structures that determine and administer land rights (Byamugisha 2013; Palmer et al. 2009) – has become a key aspect in the development discourse (e.g., African Union 2010; Byamugisha 2013; Deininger et al. 2014). Since much of sub-Saharan Africa's land is under customary tenure where traditional leaders essentially act as land administrators, it is impossible to talk about land governance without considering the role of these traditional institutions.

¹ For a critical reflection on the notion of modernity *versus* tradition, consult Sithole (2010) or West and Kloeck-Jenson (1999: 457). Sithole (2010), for example, poses the question of why African kings and queens are labeled “traditional” whereas European royals are considered part of the modern state. In this paper, I avoid the antithesis of modernity and traditional and use the term tradition as a heuristic device without implying any normative judgments.

Dual Land Administration, (Good) Land Governance and Poverty Eradication

In much of sub-Saharan Africa, the land governance framework is a mosaic of customary and statutory laws operating and existing alongside each other (Boone 2014; Chauveau and Cotula 2007; Knight 2010; Lund and Boone 2013; Peters 2009). This dualism in the land governance arena is largely the case since formal institutions were superimposed during colonial rule on existing, customary structures, without clearly demarcating mandates and responsibilities (Chimhowu and Woodhouse 2006; Deininger and Castagnini 2006). As a result, in sub-Saharan Africa, today, the land governance system is composed of a complex web of overlapping rights, contradictory rules, and competing authorities (Chauveau and Cotula 2007; Delville 2007).

The discussion on how these “seemingly incompatible institutional structures” (Logan 2008: 23) should be blended into a coherent system is not new. In their seminal article on the interface of formal and informal institutions, Helme and Levitsky (2004) provide an initial framework on how to combine formal laws and procedures with informal institutions. Their article has been complemented by a number of scholars who investigate the consequences of legal pluralism (Benjamin 2008; Berman 2012; Griffiths 1986; Larcom 2013; Pimentel 2011; Sack and Minchin 1986; Tamanaha 2008; Woodman 2012), twilight institutions (Lund 2007) or mixed governments (Sklar 1999; 2003). While some authors argue that the dualism of traditional and state structures is inevitable or desirable and should thus be utilized by states purposefully instead of being eliminated (Pimentel 2011; Sack and Minchin 1986), others moan that there is “nothing inherently good, progressive, or emancipatory about” it (de Sousa Santos 2002: 91). Despite an abundant discussion on the duality of state and traditional institutions, most studies on the state-traditional interface are largely based on their *legal* interface (Beall and Ngonyama 2009; Forsyth 2007; Hinz 2008; Ubink and Quan 2008). In doing so, these studies mostly investigate the impact of legal dualism on (internal) conflict (Eck 2014; Goodfellow and Lindemann 2013; Williams 2010). In the area of land governance, in contrast, the discussion on the state-traditional interface is largely constrained to the question of whether or not customary land should be titled (e.g., Deininger and Feder 2009; Easterly 2008; Kapitango and Meijs 2010; World Bank 1989).

The conditions under which the state-traditional interface contributes to good land governance and hence poverty eradication, however, are largely under-researched and under-theorized. Thus, this article delves more deeply into the state-traditional relationship, accounting for both the *de facto* and the *de jure* interface. While acknowledging the fact that technical inputs are crucial to develop the land sector in sub-Saharan Africa, it is my main argument that low sector outcomes, contributing to a country’s poverty, are largely a result of deficiencies in the state-traditional interface and of governance failures. I argue that a clearly delineated, at best congruent state-traditional relationship is crucial for the productive use of the

vital resource land and for the enforcement of low-cost transactions. A misaligned or disruptive state-traditional relationship, on the other hand, can make sustainable land governance virtually impossible since conflicts over jurisdiction can raise uncertainty about which legal system prevails and can further compromise citizen's participation and institutions' accountability.

The State-Traditional Relationship: A Typology

Acknowledging the fact that both state and traditional authorities are important actors in land administration in sub-Saharan Africa, I develop an analytical framework on their interface, considering both their formal as well as their de facto relationship. I argue that both relationships can be either disruptive or non-disruptive. While conceding that there are varying nuances in the state-traditional interface, the two categories mark the extreme points at the potential state-traditional relationship spectrum.

The first dimension of my typology refers to the *de jure* state-traditional relationship. I revert to this term in order to capture whether or not traditional institutions of governance have been accorded with a formal, legal role. For instance, 23 sub-Saharan African countries, that is almost 50 percent of sub-Saharan Africa, constitutionally mention and thus legally recognize traditional institutions of governance one way or another.² More precisely, some constitutions specify the roles and responsibilities of traditional leaders (e.g., Lesotho), guarantee the non-abolition of them (e.g., Sierra Leone) or provide some clear provisions on customary land (e.g., Kenya). In addition, statutory legislation such as for example a Chiefs or Chieftainship Act (e.g., Zambia respectively Lesotho), further elucidate these constitutional roles and responsibilities of traditional leaders. In the same vein, policy-specific legislation, for instance a customary land act, regulates the roles and responsibilities of traditional authorities in a certain policy area (e.g., 2002 Communal Land Reform Act in Namibia).

There are several reasons why the *de jure* state-traditional relationship might be disruptive. To start with, a nation's laws or policies might simply be poorly designed, ambivalent or inconsistent in delineating the area of jurisdiction for state and traditional institutions respectively. This might be the case since some policies are quickly implemented to take advantage of a favorable political climate that suggests easy passing of certain laws. Further, nations' laws and policies might simply be inconsistent due to the involvement of (too) many stakeholders who demand their rightful legal space. In addition to law-inherent difficulties, there might also be inconsistencies across different laws touching on traditional governance. This might be the case since some laws are amended and updated, while other acts are rather

² Data collected by the German Research Foundation (DFG) Koselleck research project on "Traditional Governance and Modern Statehood" (HO 1811/10-1).

anachronistic but still in operation. Finally, the *de jure* interface might be disruptive since customary and statutory (modern) laws simply exist next to each other without proper rules of precedence.

In a non-disruptive *de jure* state-traditional relationship, on the other hand, I assume that a nation's legal framework encourages convergence between traditional and state institutions of governance. Thereby, a nation's legal framework is coherent in its provision on traditional governance across all policy areas. Further, a non-disruptive *de jure* state-traditional relationship ensures that there are no overlapping mandates of traditional and state institutions. Thus, the rules for rulemaking clearly constrain the behavior of the relevant actors and undeniably outline the mandates and jurisdictions of state and traditional authorities respectively.

The second dimension of my typology refers to the *de facto* state-traditional relationship. I refer to this term to describe a situation where traditional and state authorities in practice overlap, influence, affect, interact, and thus, in fact, relate to each other. The *de facto* state-traditional relationship is important to consider since *de jure* provisions might in fact only be "worthless scraps of paper", without actual impacts on the ground (Howard 1991: 4). For example, while the legal framework might not provide for a formalized role of traditional leaders in land administration, in many nations, over 90 percent of land transactions are governed by customary rules where traditional leaders play an important role (Knight 2010). Acknowledging the fact that there might be a gap between a country's legal system and the rules and norms that are actually governing citizens' realities, I consider non-formalized rules on the state-traditional relationship, including behavioral codes, informal arrangements or "ways of doing things" that are not mirrored in the countries' legal framework.

Analogous to the *de jure* state-traditional relationship, I assume that the *de facto* interface can be either disruptive or non-disruptive. First, the *de facto* state-traditional relationship might be disruptive if there is a rather fragmented local governance arena in which the various actors rather struggle about preponderance of authority instead of cooperating and collaborating. Second, in a disruptive state-traditional relationship state and traditional authorities might reciprocally block their activities as for example law-making or project implementation.

In a non-disruptive *de facto* relationship, on the other hand, the various actors have arranged working relations, divided mandates and clearly regulated tasks. In addition, they might have blended their structures to a coherent whole using each other's expertise. There might be informal information sharing, representation of the other authority in certain meetings or cross-referencing to the other institution. One such example are for instance formal courts, which apply customary law to adjudicate land conflicts or which refer minor cases like theft or encroachment back to traditional leaders.

The proposed framework on potential combinations of the de jure and de facto state-traditional interface is displayed in Figure 1 below.

De Jure State-Traditional Relationship

		Disruptive	Non-Disruptive
De Facto State-Traditional Relationship	Disruptive	Antagonism	Resentment
	Non-disruptive	(Legal) Dissonance	Concordance

Figure 1: A simple typology on the state-traditional relationship

In a situation of antagonism, I assume the consequences for good land governance and thus poverty eradication to be dreadful. If both the de jure and the de facto state traditional relationship are disruptive, there are uncoordinated, coexisting or even overlapping bodies of law within the same legal system. Within this disordered system, there are competing claims of authority and conflicting demands or norms which both contribute to a rather high uncertainty within the society (Tamanaha 2008). In the context of land governance, this uncertainty over which legal regime will be applied to a certain situation might increase the risk of land loss, decrease investment incentives, and finally augment land owners' resources that they would otherwise spend on protecting their land rights (Besley and Ghatak 2010). Some individuals might further use the situation of uncertainty to opportunistically select among the antagonizing legal authority that best fits their purposes, offering a fertile background for land grabbing. Thus, the uncertainty inherent in a situation of antagonism increases transaction costs, exacerbates the enforcement of contracts, and creates potential information gaps and as such might hinder poverty eradication.

In a setting of resentment, outcomes for good land governance and hence poverty eradication will be less challenging. The de jure state-traditional relationship is rather clear-cut providing a setting of legal certainty. This legal certainty again enhances tenure security and thus improves the welfare of the poor (Deininger 2003). Yet, despite the legal certainty, there is a situation of structural disconnect between the legal framework and the practices and policies on the ground. This disconnect might create legitimacy and accountability issues that have negative effects on the performance of public administration, good land governance, and thus eventually poverty eradication.

In instances of (legal) dissonance, it is not the de facto state-traditional relationship which is causing confusion, but the de jure interface. While state and traditional authorities get along quite well on the ground, the legal system on the state-traditional interface is ambiguous. This might be the case since there is still anachronistic and outdated legislation in place which needs to be updated. Yet, the common rules are widely accepted on the ground thus leading to a functioning governance framework that allows for citizen participation and accountability – both important prerequisites for good land governance and thus poverty eradication.

In a situation of concordance, where both the de jure and the de facto rules are clearly delineated, I assume the consequences for good land governance and poverty eradication to be best. Either, the spheres of authority are clearly demarcated between traditional and state institutions and each institution is de facto reverting to its own sphere or they are concordantly blended into a coherent whole. In such a situation, state and traditional institutions act in harmony, providing for legal certainty, high accountability and participation.

Country Context and Procedure for Case Comparison

In the following section, I will analyze the state-traditional interface in Malawi and Uganda. I selected both countries for comparison by making use of a new matching algorithm introduced by Nielsen (2016). On a number of pre-defined covariates, Malawi and Uganda turned out to be the best match to investigate the state-traditional interface in detail: colonial history, share of rural population, land suitability for agriculture, development assistance, land tenure system, constitutional recognition of traditional institutions of governance.³ Both countries are medium-sized, landlocked states with a similar colonial history. In addition, both countries are among the ten African states with the highest share of arable land. Further, and central for this research, in both countries, the dominant land tenure system is customary land, where traditional institutions of governance play an important role. However, as opposed to Malawi, Uganda's economic situation can be considered a "success story" (Apter 2013: xxxix). The country has a rather diversified economy with coffee constituting an important export sector and further has a growing industrial sector in the country's capital Kampala (Booth and Cammack 2013). While Malawi is lacking behind on almost all development indicators, Uganda is on the route towards middle income status by 2020 (Republic of Uganda 2014). Even though Uganda was suffering from decades of civil war, it is one

³ Nielsen's (2016) algorithm is based on the Mahalanobis distance, a generalization of Euclidean distance that accounts for correlations between variables (Rubin 1973). This measure is particularly useful when exact matching is impossible to perform. The matching algorithm generated over 700 possible combinations of sub-Saharan countries on these covariates. Malawi and Uganda, on the 11th place on that list of countries, provided a stable security situation that allowed for extensive fieldwork (as opposed to Central African Republic, CAR or Sudan).

of the most successful countries on the continent to reduce poverty. Malawi, on the other hand, is one of the poorest countries in the world with an economy that is highly dependent on foreign aid (Chauwa 2016). Figure 2 below contrasts the poverty trends of both countries to its share of arable land.

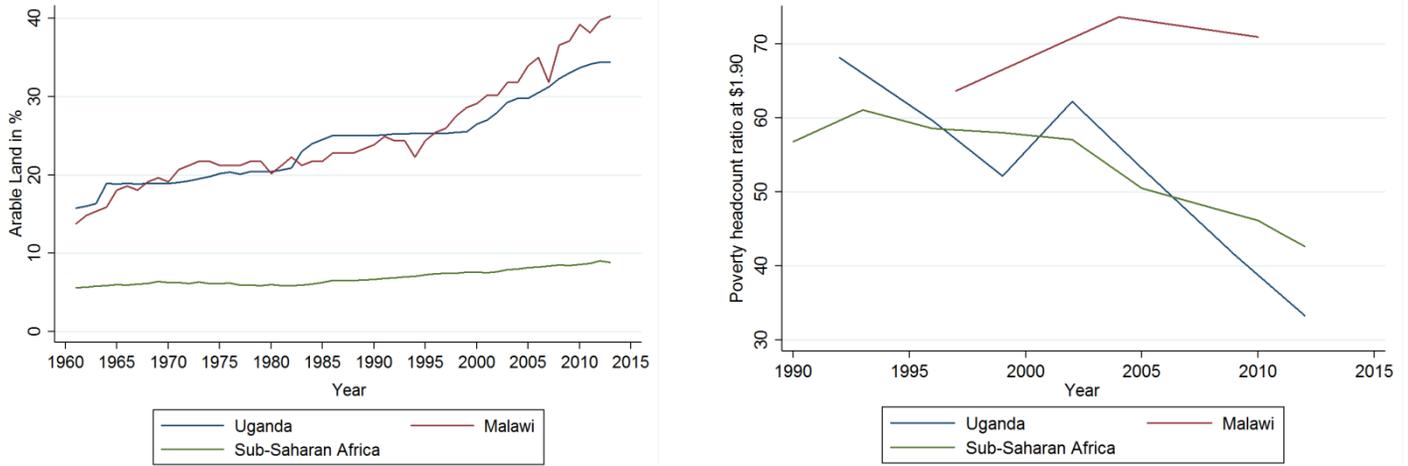


Figure 2: Arable Land and Poverty Headcount Ratio in Malawi & Uganda compared to Sub-Saharan Africa⁴

I expect that there are differences in the land governance framework that could potentially explain why Uganda seems to be much better at translating its land abundance into genuine poverty reduction. While acknowledging the fact that issues like technical input, declining foreign investments or HIV rates are much more pronounced in Malawi than in Uganda, I argue that differences in the state-traditional interface also contribute to diverging accomplishments in the land sector.

Evaluating the land governance framework in both countries, I make use of the above presented typology on the state-traditional interface. Data are drawn from the countries' recent laws and policies (on the de jure interface) as well as from newspaper articles, confidential documents, and from 125 interviews which I conducted between November 2015 and March 2016 in Malawi and Uganda (on the de facto interface). Among those interviewed were (1) government officials at national, regional and local level as well as members of parliament and political party officials (gov), (2) traditional authorities (trad), (3) activists in civil society and non-governmental organizations (civil), (4) scholars, advisors and experts (exp) as well as (5) ordinary village members (citiz).⁵

⁴ Data retrieved from World Development Indicators (World Bank 2016); for poverty headcount, data were only availability from 1990 onwards.

⁵ All interviews are anonymized; however, to attribute the categories of the respective respondents, I make use of the abbreviations presented in brackets. In order to denote the country I make use of the denotation u_ for Uganda and m_ for Malawi.

The State-Traditional Relationship in Malawi: A Situation of Antagonism

Within Malawi, a country of roughly 17 million people, there are about eleven different ethnic groups (WDI 2016). In Malawi, among these ethnic groups, traditional institutions are considered to be a very important authority (m_pop1). Traditional institutions of governance are rather homogenous⁶ and hierarchically organized with the paramount chief, who is the head of a certain tribe, leading the chain of authority. The paramount chief⁷ is seconded by traditional authorities (TAs) who oversee a different number of lower ranking chiefs, so-called sub-traditional authorities (sub-TAs), group village headmen (GVH), and village headmen (VH). All traditional leaders have their own council, where they amalgamate a number of advisors (mostly relatives of the extended families) commonly referred to as *ndunda* (m_trad12).

The land question is an increasingly hot topic in Malawi. Even five decades after its independence in 1964, the country is predominantly agrarian and land remains the most productive asset for most people (Chinsinga and Chasukwa 2012). The agriculture sector in Malawi employs about 85 percent of the country's workforce and generates roughly 90 percent of foreign exchange earnings (Republic of Malawi 2012). Recent estimates suggest that about 70 to 80 percent of the country's land area is held under customary tenure where traditional leaders play an important role (m_gov9). Precise information on Malawi's contemporary share of customary land, however, is largely absent since official numbers are not made available by the government (GoM 2012).

Malawi's current laws and policies as well as the de facto state-traditional relationship, I argue, have created a situation of antagonism in the area of land governance. Most generally, the legal framework fails to provide a coherent legal underpinning for the respective roles and responsibilities of state and traditional authorities, while the de facto state-traditional relationship is characterized by a lot of mutual mistrust, overlapping jurisdictions, and antagonism over rightful mandates and responsibilities. This situation has negative effects on good land governance and poverty eradication.

De Jure State-Traditional Interface in Malawi

To start with, Malawi's constitution, which was promulgated in 1995, compared to other African constitutions, is rather conservative regarding its provisions on traditional governance in general and on land in particular. It recognizes traditional leaders' existence rather indirectly, by referring to them as important actors in two policy areas: conflict resolution and local governance. In terms of land

⁶ While there is certainly variation between the country's ethnic groups (e.g., political affiliation, inheritance issues, power of traditional leaders, rituals, customary rules), the organizational patterns of traditional institutions of governance remain largely the same across the country.

⁷ Historically not having a paramount chief does not imply that a certain ethnic group is without a paramount chief; the Tonga group, for instance, only recently planned to establish a paramount chief among themselves (m_trad55).

governance, Malawi's constitution is fairly restrained. On customary land, the constitution is completely silent and its only relevant land provision is article 207 which vests land in the republic (Constitution of Malawi 1995, Art. 207). This article has created much confusion since it does not specify any tangible institution that can practically be held accountable in cases of ambiguity or conflicts over land (m_civil22).

Originally, Malawi's constitution was more outspoken on traditional governance. It planned for a senate as a second chamber of parliament which was meant to be composed of traditional leaders and of representatives from different interest groups. However, the senate, scheduled to be established subsequent to the local elections that were held after years of delay in November 2000, never became operational as it was abolished by the 2001 Constitution (Amendment) Act. Senior government authorities argued that the government wanted to confine their preponderance since traditional leaders became too powerful in the country (m_gov23). With the abrogation of the senate, chiefs in fact never received the chance to play any significant role at national level. Ever since the abolishment of the senate, traditional leaders advocate for its reintroduction or for the establishment of a chief's council. They argue that while all other stakeholders are entitled to their own house – MPs have their parliament and local councilors the council – chiefs have no means to coordinate themselves at national or regional level (m_gov21).

The constitutional provisions are further specified in statutory laws. However, these laws are rather ambiguous, contradictory, and inconsistent on traditional leaders' role and responsibilities in general and in land governance in particular. The disruptive de jure state-traditional relationship becomes particularly apparent when considering Malawi's land-related laws. Until the adoption of the land bills in late 2016, land laws in Malawi actually did not consistently regulate customary land tenure. Since the 2016 land act has only recently been adopted and since its implementation is still pending, it is important to also consider the laws and policies that are practically governing Malawi's land issues since its independence in 1964. First and foremost, while customary tenure has been acknowledged in the 1965 land act, it did not come along with proper tenure rights for customary landholders. Instead, customary land was rather understood as a sub-set of public land which could be used by the state without adequate compensation and re-allocated as leasehold estates (GoM 2002). Furthermore, provisions in the 1965 land act deliberately contradicted the country's constitution. For example, while land ownership is vested in the republic by the constitution, the 1965 land act ascribed ownership rights to the president and the responsible minister. This was particularly challenging since the land act transferred jurisdiction over customary land from communities (and their traditional leaders who view themselves as part of the republic) to the minister of land. This provision entailed that the minister of land could autonomously

make decisions over customary land without consulting with the affected communities and their leaders. At the point in time when those leases expired, the land, however, was not transferred back to its initial customary tenure system but rather became public land that might be leased again. In practice, the exercise of these ministerial powers led to an increase of tobacco estates on customary land and to the transfer of large chunks of customary land to leasehold (Msisha 1999; World Bank 1987). These legal ambiguities existed until new land laws were adopted in 2016. The 2016 land act vests land in the republic (Land Act 2016, Section 8) – a provision which is now brought in line with the country’s constitution. Further, the act constrains the powers of the minister to acquire customary land for public use since he has to give notice to the traditional authority in the respective area where such land should be acquired (Section 17). Next, as opposed to provisions in the 1965 land act, land temporarily used for public purposes will remain under customary tenure throughout its temporary public use (Section 17).

In a nutshell, despite allegedly providing some legal backing for customary land, the 1965 land act which was operational until late 2016 facilitated land grabbing and large amounts of customary land have been lost for local communities (Kishindo 2004).⁸ The legal framework in place until late 2016 could be considered a central source of insecurity for customary land holders as the provisions did not grant full tenure rights to customary landholders. Instead, customary land was in practice used as a reservoir from which further public and private land can be obtained without properly reimbursing customary land owners (GoM 2002). Some even critique that the only difference of the law to its colonial predecessor is “the changing of the word queen to president” (m_trad60). As a result of the ambiguous and insufficient legal framework that existed until very recently, customary land never really had a genuine legal backing. Thus, any efforts to secure customary rights were feckless since the legal situation was too confusing. Customary land owners were in the unfortunate situation of being subjected to laws that brought about large uncertainty and arbitrariness (GoM 2002: 8). How the legislation adopted in late 2016 will change this insecurity is yet to be seen.

In addition to this land-related legislation, other laws that touch on traditional governance further blur the picture. For instance, the 1998 local governance act, providing the legal foundation to Malawi’s decentralization efforts, is very unspecific on the state-traditional relationship in land governance. While there are quite detailed provisions on the duties and functions of local governments (e.g., make by-laws for the good governance of the local government (Section 6f)), the actual roles and responsibilities of the local governance *actors* (MPs, councilors, and traditional leaders) are not stipulated. Furthermore, the

⁸The land market that resulted from these laws was highly problematic since the laws only provided for a one-way transferability of land from the small-holder to the estate sector, therefore resulting in a highly skewed distribution of land (Chinsinga 2015: 23).

local governance act fails to clarify the role of state and traditional actors in land governance, as it only very generally touches on land transactions (Section 34-36).

The 2010 amendments to the local government act, which curtailed the power of the local governments and changed the rules of the game at local level, complicate matters even more. The amendment act re-centralized powers, removed the policy-making function of the council, and further introduced MPs as voting members in the local councils (Local Government (Amendment) Bill 2010). As a result, Malawi's local governance arena is truly fragmented as it bears a bizarre mélange of the local and national decision-making sphere. Not only are members of parliament (supposedly the main *national* legislators) part of the decision-making body at local level, they also have a right to vote. This significantly dilutes the powers of traditional leaders who remain *ex-officio* members in the local council without any voting powers.

In addition, the 1967 chiefs act, Malawi's leading legislation on traditional governance, which provides general regulations on the appointment, removal, remuneration, duties, and sanctions of traditional leaders, adds to the disruption in the state-traditional relationship. For instance, the act recognizes the existence of traditional leaders and formally subjugates them to the office of the president (Chiefs Act 1967, Section 3 (3)). Thus, even though the institution of chieftaincy is hereditary, the president retains rather large formal authority over traditional leaders, practically making them an extension of the executive arm of government (m_gov16). Since the persistence of a traditional leader is dependent on the goodwill of the president, chiefs will always act in a manner that shows loyalty to the current president and, thus support the "government of the day" (m_civil3). Further, the act is "old, limited in coverage, and thin in content" and can be considered an anachronistic piece of legislation without any application to contemporary (land) governance challenges (m_exp37). While amended several times, the act did not change the essentials governing the relationship between traditional and state authorities in the country. For instance, though Malawi introduced multi-party democracy in 1994, the act has not been brought in line with the democratic principles like transparency or accountability which are set out as important values in the country's current constitution (Constitution of Malawi 1995, Section 13 (o)). In addition, while the 1998 decentralization policy and the 1998 local government act devolve powers from the national level to the local level, in particular to the local councils where chiefs are *ex-officio* members, the chiefs act has not specified any of these responsibilities. Thus, traditional leaders do not have any legal basis to really fulfill their (constitutionally endowed) role as local government authorities.

Next, it is quite striking that the term traditional authority (TA) – irrespective of constituting an important authority in the hierarchal chain of chiefs in Malawi – does not appear in the chiefs act. The only term that is used is chief or senior chief, thus significantly blurring the legal status of TAs. This inconsistency

is exacerbated by the fact that TAs are endowed with important responsibilities in other laws such as in the 2002 land policy, in the 1998 local governance act, and in the 2016 customary land act. Yet, the main legislation on traditional governance fails to even recognize traditional authorities.

Addressing some of these issues, in 2007, the ministry of local governance mandated the Malawi law commission to review the chiefs act. The ministry wanted to align the chiefs act with democratic principles and constitutional orders, to clarify the chiefs' role in supporting the social and economic activities in the districts, and to depoliticize the role of chiefs (m_gov21). The law commission released a series of short papers in 2015 making some few recommendations on how to amend the chiefs act. An actual amended version of the law, however, is not publically available. The ministry of local governance pointed out that the amended version would evoke simmering conflicts between traditional and state authorities and is therefore currently locked up in the responsible ministry until tensions over recently adopted land legislation have eased (m_gov21).

Finally, there is a large ambiguity regarding the jurisdiction of traditional authorities in urban areas. Section 3 (5) of the chiefs act, for example, only allows chiefs to exhibit jurisdiction in cities, municipalities or town, if they received a written approval from the appropriate council. This prohibition is backed by the local governance act, which vests cities and municipalities with the exclusive authority to make decisions in the area of *their* jurisdiction and therefore denies chiefs to have any jurisdiction in towns. However, the 1965 land act, which was virtually governing land until new land bills were eventually signed in late 2016, under section 26, allows traditional leaders to allocate customary land. Thus, traditional leaders view land administration as one of their responsibilities in towns and therefore consider themselves a legitimate authority therein. Whether this perception is going to change under the newly adopted 2016 customary land bill, which establishes so-called land committees where VHs are installed as the headperson to govern customary land, is yet to be seen.

De Facto State-Traditional Interface in Malawi

Particularly Malawi's fragmented local governance arena contributes to a conflicting state-traditional relationship. Between 2005 and 2014, Malawi suspended local elections and local councilors ceased to exist for nine years. The absence of local councilors resulted in a power and administrative vacuum at the local level which was partly filled by traditional leaders. Since the 2014 tripartite elections, local councilors are back in the local governance arena. Ever since, there is quite some struggle between MPs, local councilors and traditional leaders fighting a headship fight to maintain their hegemony of power, influence, and authority (m_exp38). Tensions of the various local governance actors become particularly apparent in the area of land governance.

The tense relationship between state and traditional authorities, for instance, erupted over the issue of urban chiefs. Despite a prohibition in the law, many chiefs claim that they are still a legitimate authority in areas declared as cities, municipalities or towns since they are important administrators of customary land (m_gov59). In the Southern city of Zomba, for example, traditional leaders residing in towns did not want to relinquish their powers; thus, city authorities approached the ministry of local governance for further guidance (m_gov38). The ministry reacted promptly and issued a directive to all councils in 2014 stressing that traditional leaders are by law prohibited from exercising any powers in urban areas (ibid.). The former minister was very outspoken on the role of chiefs in towns, making a number of announcements on the radio that chiefs should relinquish their powers in urban areas (m_exp37). As a response to this demand, chiefs publicly protested against this undertaking, lobbying the president to declare that directive void (ibid.). As a reaction to the protest, president Mutharika suspended the ministry's directive and set up a ministerial task force on urban chiefs (m_gov38). In addition, the minister of local government lost his position over this issue: "although he was following the law, he had not been careful enough to deal with the politics of it and therefore the president decided he would be the fall guy on that matter" (m_exp37).

Furthermore, the disruptive state-traditional relationship becomes apparent when considering Malawi's efforts on land reform. First serious attempts to reform land-related laws and policies started already in 1994, when a number of land utilization studies were commissioned and the Presidential Commission of Inquiry on Land Reform (PCILR) released its report. That report set the basis for the adoption of the 2002 national land policy, which was lauded a progressive and comprehensive policy by many experts and government officials (e.g., m_civil47). For the proper implementation of the policy, however, a number of land laws had to be drafted in order to substitute the outdated land legislation of the mid-1960s. After a series of consultations took place, first drafts on a new land bills were officially published in 2012, approved by cabinet, and sent to the parliament for reading in June 2013 (m_gov19).

Despite allegedly being consulted throughout this process, traditional leaders heavily opposed the passing of these land bills in 2013 (m_gov9). They lobbied against the laws at highest level arguing that the land bills would contravene cultural norms and values which attribute the ultimate power to decide on land issues to the chiefs (m_trad60). In 2013, Malawian chiefs ganged up against the customary land bill, handing over a petition to several MPs and to then-president Joyce Banda asking her not to assent to the bills (m_trad60). Since traditional leaders already felt that their importance is diminishing in Malawi, they were afraid that the government in fact wants to abolish traditional structures in the country through the issuing of the land bills (m_trad50). The petition they handed to the president summarizes this fear "How

does the bill guarantee that it does not intend to abolish chieftainship?” (Petition Against Customary Land Bill, 2013).

Since land laws adopted in the 1960s bestowed the chiefs with noteworthy powers, customary leaders were reluctant to accept any changes to that set up, irrespective of the fact that the existing land legislation was completely insufficient in dealing with contemporary land governance challenges (m_civil22). A major *bête noire* to traditional leaders were the so-called land committees introduced in the customary land bill, which should be chaired by a group village headman and not by traditional authorities (Draft Customary Land Bill 2013, Section 4). This committee raised the anger of the higher ranking traditional leaders who feared that the establishment of such committees would be used as a backdoor to weaken their overall position in the country (m_trad60). Government authorities, on the other hand, deliberately introduced these land committees to take “responsibility out of the hand of one, powerful traditional leader” (m_gov9). Further, chiefs were also highly against the introduction of a land clerk who should be an employee of local government. The traditional leaders feared that the “institutional memory on land issues” of the traditional authority will be lost and will bring about a lot of land wrangles (Petition Against Customary Land Bill, 2013). As a reaction to the fierce resistance of the traditional leaders, who were literally “up in arms, the government began to chicken out about the law” (m_gov23). As a result, then-president Joyce Banda declined to assent to the land bills in August 2013. The common wisdom of this move was that Banda did not want to risk her re-election in 2014 by antagonizing the traditional leaders in that critical pre-election period (m_gov17).

Towards the end of 2014, with a new government in place, land-related issues gathered again pace in the country. In late 2014, the drafted land bills underwent further revisions. However, promises to table the land-related bills in parliament were postponed several times due to alleged issues about the laws’ content and other irregularities (m_civil22). Eventually, in July 2016, the cabinet approved four of the eleven land-related bills. On 14 September 2016, president Mutharika assented to these land-related bills including the general land bill and the customary land bill. It is quite striking that almost all points quarrelled in the traditional leaders’ petition against the customary land bill were not taken into consideration in the new law. For instance, the customary land committees as well as the land clerk, institutions that were heavily opposed by traditional leaders, persisted in the newly adopted customary land bill. It seems that this time, the land laws were sorted out “well before election time” because both MPs and the president would otherwise not be willing to pass legislation that is against the traditional authorities’ will (m_civil22).

Despite the formal assent of the president, the protest of traditional leaders did not cease. Ever since Mutharika assented to the land bills, traditional leaders voiced their dislike. In December 2016, chiefs from various parts of the country have filed yet another petition to the Malawian parliament demanding that the assented customary land bill should not come into effect. One of their main arguments was again that the passed bill annuls the powers of traditional leaders (The Nation 2016). Tensions over the customary bill were quite high as about 300 traditional leaders from a traditional authority close to the capital were blocked in their march to the district council to protest against the bill. Furthermore, chiefs were obstructed by the police, when trying to march towards the parliament to present their petition (ibid.).

The disruptive state-traditional interface, which is particularly apparent in the area of land governance, I argue, steered Malawi in a situation of antagonism, with severe repercussions on the efficient governance of the vital resource land. The lack of consistency and uniformity in Malawi's legal framework on the role of traditional and state authorities in general and in land administration in particular has led to a large scope of legal discretion, fragmentation, and coordination issues on the ground. These issues have created a high uncertainty over the jurisdiction of the respective authorities. This uncertainty over who is responsible for what is exacerbated by the fragmented local governance arena, where there is a bizarre and uncoordinated *mélange* of traditional leaders, MPs and local councilors. It is yet to be seen whether the 2016 adopted land bills will move Malawi out of the situation of antagonism and will help to overcome the uncertainty issues which compromised proper land governance and poverty eradication.

The State-Traditional Relationship in Uganda: A Situation of Resentment

Uganda, like many African states, is a multi-ethnic society. With a population of about 35 million people, almost all Ugandans subscribe to one of the 56 different indigenous ethnic groups. The largest of these groups are the Baganda, making up almost 17 percent of the nation's population⁹; smaller groups include the Acholi (4.4 percent) or the Iteso (7 percent) (Republic of Uganda 2014). Today, while abolished in 1966 after a military coup for a period of almost 30 years, traditional institutions of governance are indispensable in the country (Green 2010; Quinn 2014). As opposed to Malawi, where traditional institutions of governance are rather homogeneous, in Uganda, they vary significantly regarding political leverage, wealth, and power.

The Buganda kingdom, for instance, which stretches along Lake Victoria and which includes the whole of Kampala, combines many attributes of a nation-state: It has fairly effective institutions with clear chains

⁹ The people of Buganda are referred to as the Baganda, Ganda or Waganda; singular Muganda.

of commands with the Kabaka (king) heading that hierarchical structure followed by a large number of chiefs at different levels: the Saza (county), Gombolola (sub-county), Muluka (parish), and the Mutongole (village) chiefs (u_trad28). In addition, the Buganda kingdom has a parliament called Lukiiko, several ministers responsible for different sectors, a “national” anthem (*ekitibwa kya Buganda*), strong traditions and customs as well as a strong sense of belonging (u_pop1).

The Acholi chiefdom, located in the North of the country, on the other hand, is not as hierarchically organized as the Buganda kingdom and its political leverage is rather limited (u_trad21). The Acholi sub-region, where the chiefdom is located, is infamously known for its decades-long brutal conflict between the Lord’s Resistance Army (LRA) and the National Resistance Movement (NRM) government. While historically rather decentralized, the Acholi chiefdom today has a fairly structured organization headed by the Ker Kwaro Acholi¹⁰ which is composed of the paramount chief, his two assistants, the prime minister, a 22-member council of chiefs, a cabinet of 15 ministers, and the full council which is comprised of all 55 chiefs of the seven districts (u_trad35). The 55 chiefs organize themselves independently and the level of organization might differ across the chiefdom (u_trad3).

In Uganda, land issues have often contributed to tensions and even conflicts within the country. Uganda’s four main systems of tenure – freehold, leasehold, mailo, and customary land – are largely a product of colonial policies. The Uganda agreement of 1900, for instance, gave rise to a new tenure system which is still in existence today: mailo. Today, the mailo land tenure system, a Uganda-specific tenure system which resembled freehold tenure, is only applied in the Buganda region. Ever since the 1900 agreement, the nature of land rights on mailo land has been a vexed question. Customary land rights, on the other hand, apply to about 8 million landholders largely residing in the Northern and the Western part of the country (Byamugisha 2014: 57). On customary land, individuals, families or clans hold land rights where “traditional leaders have an upper hand when it comes to land administration” (u_civil4).

Uganda’s current laws and policies as well as the de facto state-traditional relationship, I argue, have created a situation of resentment in the area of land governance. While the legal framework provides for a fairly consistent demarcation of roles and responsibilities of state and traditional authorities respectively, the de facto situation is a bit more complicated and varied. Over the years, the de facto state-traditional interface, particularly between the powerful Buganda kingdom and the nation state, has seen some ups and downs but of lately seems to have eased a bit.

¹⁰ In Uganda, Ker Kwaro Acholi is also referred to as Ker Kal Kwaro or KKA.

De Jure State-Traditional Interface in Uganda

First and foremost, analogous to Malawi, traditional institutions of governance today are officially recognized by the country's current constitution. This, however, has not always been the case. After having received federal status in the country's independent constitution of 1962, traditional institutions of governance were officially abolished and their lands and assets were confiscated by the Obote government and his new 1967 republican constitution. In 1971, Idi Amin overthrew Obote, dissolved the parliament, forbade any political activity, and instituted a totalitarian regime in Uganda (Okoth 1987). In 1975, his government passed a land reform decree, which declared all lands in Uganda to be publicly owned and centrally vested with the Ugandan Land Commission (Land Reform Decree 1975, Section 1(1)). In 1979, in a counter-invasion, Tanzanian troops overthrew Amin and the resulting political vacuum was filled by reinstating Obote. Yoweri Museveni, at that time a young activist from the Ankole region, refused to accept the re-installment of Obote. The Baganda supported Museveni's guerilla warfare against the Obote regime. After Museveni seized power in 1986, they demanded the full restoration of the monarchy, the return of Buganda's property (*Ebyaffe*), and the return to federalism (Nsibambi 2014). In 1993, Museveni restored the cherished kingdoms and endowed them with a full chapter in the country's constitution (Constitution of Uganda 1995, Chapter 16). By the same token, Museveni made sure that the powers of traditional leaders were constrained. He constitutionally prohibited all traditional and cultural leaders from engaging in partisan politics (Constitution of Uganda 1995, Art. 246 (3e)). Further, confiscated properties were not fully restored and Museveni introduced regional governments instead of the demanded federal system. Both issues became a political headache and are a constant companion in contemporary politics in Uganda since the Buganda kingdom wants to fully restore "the Buganda kingdom that existed prior to the 1966 crisis" (u_trad5).

When formulating the 1995 constitution, land was one of the most contested issues (Marquardt and Sabina-Zziwa 1998: 182). Today, the constitutional provision on land, which vests all land in the citizen of Uganda (Constitution of Uganda 1995, Art. 237), is unique on the continent, since land is usually vested in the head of the state or in the republic. Further, the constitution restores the land tenure systems that were in existence at independence: customary, freehold, mailo, and leasehold tenure. In addition, the constitution sets up a new system of land administration establishing land boards at district level and entitling all citizens to acquire so-called customary certificates of ownership (Constitution of Uganda 1995, Art. 237 (4)).

A number of statutory laws specify these constitutional provisions on land governance. Particularly the 1998 land act and the 2013 land policy provide elaborate regulations on the land tenure system set out in the constitution. The 1998 land act provides for a comprehensive legal framework governing land tenure,

land administration, and land dispute settlement. It meticulously outlines the roles and functions of statutory, decentralized institutions of land governance including district land boards, which are appointed by the district council and which are responsible for the allocation of public land and the facilitation of land registration activities (1998 Land Act, Art. 57-64). In addition, the act provides for land committees at sub-county level which are supposed to play an advisory role for the district land board (1998 Land Act, Art. 65-69). Finally, the land act provides for the establishment of land tribunals which may be created both at district and sub-county level (1998 Land Act, Art. 75-90).

It was the main purpose of the land act to stipulate land administration by transferring key functions from central to local governments. Along with its ambitious decentralization plans, the land act specifies the procedures for the expansion of customary land rights registration and related services for formalization of customary rights, which have already been stipulated in the 1995 constitution. While quite ambitious, the land act was not been accompanied by a coherent policy framework until 2013, when the cabinet eventually fully approved the national land policy. The policy consolidates the various legal acts and policies associated with land and natural resource management and provides a coherent framework for “arguably the most emotive, culturally sensitive, politically volatile and economically central issue in Uganda” (GoU 2013). Aiming at using land resources for poverty reduction, wealth creation, and socio-economic development, the national land policy’s goal is to disentangle the multiple and conflicting tenure rights that are often overlapping over the same piece of land (ibid.). Furthermore, the land policy stipulates measures to “enable traditional customary institutions to operate as the tiers of first instance in respect of land held under customary tenure” (ibid.).

Next to these land-related laws, there is the 2011 institution of traditional or cultural leaders act which outlines the general state-traditional relationship in Uganda. The bill operationalizes article 246 of the constitution on the institution of traditional or cultural leader. In doing so, the bill specifies the jurisdiction, benefits and privileges of traditional leaders as well as the channels in case conflicts cannot be resolved within the community. Further, and most notably, the bill reinforces the restrictions imposed on traditional leaders (prohibition to exercise legislative, administrative or executive powers; to join in partisan politics; to have relations with foreign governments) that are already partly spelled out in the constitution (The Institution of Traditional or Cultural Leaders Act 2011, Part V).

To conclude, Uganda’s legislation governing the state-traditional relationship in general and the land sector in particular has provided for a fairly clear demarcation of spheres: Traditional leaders are prohibited from performing roles that the state claims an exclusive right for. Largely, they are considered to be responsible for cultural matters, while state authorities are the political authorities and legislators of

the country. In sum, “their hands are tied by the law” (u_civil13) and their jurisdiction and powers are legally constrained. Further, as opposed to Malawi, traditional leaders’ jurisdiction is not scattered across different legislation blurring the picture due to inconclusive provisions. The only piece of legislation that in fact reverts to cultural and traditional leaders (apart from the traditional or cultural leaders act, of course) is the land act, which recognizes the administration of customary land under customary law and which allows traditional authorities to settle disputes over customary tenure. Other statutory legislation, like the local governance act of 2011, in contrast, does not at all refer to cultural or traditional leaders and purely outlines the functions and jurisdiction of the decentralized local government authorities (LCI-LCV). While in practice, the laws have surely evoked protests among traditional leaders, particularly from within the Buganda kingdom, the de jure set up provides for an unambiguous, clearly demarcated legal framework and a non-disruptive de jure state-traditional relationship.

De Facto State-Traditional Interface in Uganda

Analogous to Malawi, the state-traditional relationship in Uganda is described as a love-and-hate relationship (u_trad50). Particularly the relationship between the state and the rather powerful Buganda kingdom has often been beset with rivalries and has seen a number of (violent) conflicts. A traditional leader explains that there “are abundant struggles between the state and the kingdom. The central state sometimes perceives the kingdom as a threat, particularly because of the loyalty the subjects show to the Kabaka. Once the Kabaka has spoken, his words are like a law” (u_trad50). I argue that the abundant struggles between the state and the traditional leaders, which often erupt over land issues and which are largely but not only inherent to the Buganda kingdom, have left Uganda in a disruptive de facto state-traditional relationship.

The Buganda kingdom’s relationship to the central state has seen some great ups and downs since the reinstallation of the kingdoms in 1993. While they strongly supported Museveni after he re-established the king- and chiefdoms (u_gov47), relations deteriorated gradually. The peak of the deterioration was reached in 2009, when violent riots erupted in Kampala after security forces prevented a royal delegation from travelling to Kayunga district, which is traditionally seen as part of the Buganda kingdom. Immediately after the Kayunga riots, the above described traditional or cultural leaders act, which banned traditional leaders from active participation in partisan politics and from providing direct support to a political party, was quickly drafted and discussed in parliament. In 2011, the act, considered to be a “white elephant” was ushered in by the Museveni government to send a “clear message to the kingdoms, the Buganda kingdom in particular” (u_civil59). This act was meant to operationalize article 246 of Uganda’s constitution, clearly enforcing the principles of separating traditional institutions from political institutions. Since “the government was afraid that cultural leaders might become politicians themselves,

they quickly had to come up with a law” (u_trad21). Some traditional institutions even refer to the bill as the “Kayunga Bill”, making reference to its fast adoption subsequent to the 2009 Kayunga riots (u_trad37). This bill has caused some severe disruptions in the state-traditional relationship and was the second battle over a government bill – after the land act which I will discuss below – fought between the government and the Buganda kingdom.

While the status of cultural chiefs and kings promulgated in that law applied equally to all traditional institutions in the country, some considered the introduction of this law a “collective punishment” for the political conflict over “who is who” was predominantly fought between the Buganda kingdom and the state authorities (u_trad43). From within the Buganda kingdom, there was a lot of resistance against this law; it was perceived as a piece of legislation which was implemented to deprive the kingdoms of their powers (u_trad35). Complaining about the act, the Buganda kingdom disparaged it as unconstitutional and filed a petition to the speaker of parliament to denounce the proposed act (civil_59). They argued that the bill is both bad in law and spirit which will bring about costly litigations. “We have an outcry and the government needs to open its ears to us”, complains a traditional leader of the Buganda kingdom (u_trad21). Some leaders argued that while Obote was using a gun to destroy the Kabakaship, Museveni was using that bill to do so (Nsibambi 2014). The relationship between the traditional leaders and the government was at the lowest ebb after the enactment of the law.

Just in time before the general elections in 2016, when Museveni was voted in for his fifth term in office, however, the relationship between the traditional leaders and the government seemed to have eased a bit. For instance, in August 2013, a so-called memorandum of understanding (moU) has been signed, promising to return some assets, particularly lands, to the Buganda kingdom. This memorandum of understanding is considered part of president Museveni’s efforts to reconcile with the Buganda kingdom after some years of antagonism. The memorandum, which was signed by Museveni and the Kabaka of Buganda, obliges the government to “return to the Kabaka the former estate of Buganda Kingdom”. By the same token, the memorandum also obliges the Kabaka to “execute his mandate and responsibilities in accordance with the laws of Uganda” (Memorandum of Understanding 2013). The tenor of the moU is cordial since it for instance reads that “both parties undertake to totally refrain from engaging in hostile propaganda against each other which has tended to sour relations between the parties in recent years” (Memorandum of Understanding 2013). It was largely considered a political move prior to the general elections according to the rationale “if the Buganda kingdom gets back its property, maybe we shall get support from their subjects” (u_trad51).

The state-traditional relationship has also seen some great ups and downs in the land sector. While the formal system of land governance is fairly clearly spelled out in Uganda laws and policies, the practice of land governance is less clear. Particularly the lack of resources and capacity has made the complete implementation of Uganda's land laws difficult, thereby increasing the role and significance of customary law and traditional leaders (u_civil4). For instance, even though land tribunals have been rolled out in the 1998 land act, they were phased out in 2004 due to inadequate funding and are thus not any longer operational at the local level. Yet, most conflicts, particularly in Northern Uganda revolve around the issue of land and land dispute mediation has become a daily routine for many traditional leaders (u_trad37). While important to solve communal conflicts over land, traditional leaders are also highly prone to corruption. Estimates suggest, that about 80 percent of those who seek land justice are asked to pay un-receipted payments (MOJ 2008). In addition, the intersections of land disputes institutions have created overlaps and conflicts in the processing of land disputes. For instance, the traditional institutions though not legally sanctioned to handle land disputes are usually the first institution to approach when a conflict occurs and the state-sanctioned local councils are highly dependent on their structures and services (u_civil29).

Contributing to a rather disruptive state-traditional interface was the issue of mailo land in the Buganda kingdom. The land tenure system is regulated in the 1998 land act and is further specified in the 2010 amendment. Many traditional leaders were very suspicious about amending the land law as they were afraid that the amending is used as a back door to "confiscate some of the kingdom's properties as already been done in 1966" (u_gov32). Within the 1998 land act, occupants of mailo land are clearly defined as so-called "lawful occupants" and "bona fide" occupants. This angered many traditional leaders since the occupants of mailo land now had a clear legal standing enabling them to pursue claims which they previously had lacked. Additionally, the law enabled the tenants to gain greater control over their land by applying for a so-called certificate of occupancy. With the amendment of the 1998 land act, the powers to fix the annual ground rent rate (*busuulu*) to be paid by the tenant to the landlord, which was initially considered to be the pivotal prerogative of the landlords, were put in the hands of the ministry of lands (Land Amendment Act 2010, Section 1). The landlords considered this as an affront and complained that the law favors tenants over landlords and "tenants are singing praises to president Museveni and his government" (New Vision 2012). In the same vein, a number of traditional leaders within the Buganda kingdom protested against this law since they were unhappy about the ground rent which was set to 1,000 shillings regardless of the size of the land (u_gov54). Since this law has been amended about the same time that the above mentioned traditional leaders bill was ushered in, many traditional leaders viewed the

land laws as an attack on the traditional institutions as a whole. As a result, the Buganda kingdom officially denounced the 1998 land law and started to stage protest against the bill.

Further, in terms of operational administration of the land, the Kampala city council and the Buganda land board, an institution responsible for administering land within the kingdom, frequently fight over jurisdiction over land. While the Buganda land board claims that it has the ultimate jurisdiction regarding the administration and titling of mailo land (u_trad21), the government authorities argue that the only authority legally allowed to issue titles is the ministry of land with its subsequent institutions (u_gov49). Particularly since the above-mentioned 2013 moU, which promised to return some lands to the Buganda kingdom, it has become quite uncertain which institution is responsible to control land within the boundaries of the kingdom. This “disorganization is causing quite a challenge in land management” in general and is further discouraging investors (u_gov49).

Other issues in the de facto state-traditional relationship become apparent in areas where customary land is the predominant system of land tenure. The constitution and the 1998 land act outline how customary land can be registered in order to increase tenure security. Both laws provide for a so-called certificate for customary ownership (CCOs), which can be obtained by customary landholders in order to demand for collaterals or to counter abundant land conflicts (u_exp58). De jure, the right to obtain these certificates is clearly spelled out in the laws and modalities and fees are unmistakably stated. In practice, however, the number of issued CCOs is very low. In some rural areas not even one CCO has been issued (u_gov10). Particularly in the Acholi sub-region, the titling of land is still perceived as “a new thing” that people need to get accustomed to (u_trad35).

While some people agree that CCOs might provide tenure security as they stop encroachment and land grabbing (u_gov38), there are still many unresolved issues with CCOs. Many traditional leaders complain that customary law, under which customary land is administered, is not respected in these CCOs. For example, traditional leaders, particularly in the Acholi chiefdom, oppose CCOs since they regard them inappropriate in capturing that customary land belongs to “the living, the dead and those to be born” (u_gov41). Further, in order to demarcate boundaries on customary land, trees or other distinctive objects like stones are used – a custom that is not mirrored in the CCOs (u_gov41). Additionally, some people are reluctant to pursue a CCO since the area land committees (ALCs) have advised to only register up to five names on the certificate (u_civil41). Since some parcels of land, however, belong to a clan or an extended family, many people are discouraged to obtain a CCO, because “the mere fact that your name does not appear on that certificate implies that you are not the owner of that land” (u_exp4). Furthermore, in order to obtain a CCO, the land has to be formally surveyed. The fees that come along with surveying the land

are a deterrent to those who wish to apply for CCOs. Since surveying land is organized through private companies, prices might raise to several million shillings for large chunks of land (u_gov2). Even if the land is small, the costs for surveying might still significantly exceed the costs for actual registration since allowances have to be provided to the surveyors (u_civil13). Thus, some people who thought about registering their land are actually discouraged to do so.

De jure, the land laws provide for synergies between the state and traditional institutions since it allows for the registration of customary land. It opens the doors for mutually reinforcing interactions with the community-level institutions (area land committees) to manage land under custom. However, there is some clarification needed since the national land policy foresees traditional leaders as “mechanisms of first instance in respect of land rights allocation, land use regulation and land dispute for land under customary tenure” (GoU 2013: 18). Some traditional leaders, however, complain that they are neglected in these community-level institutions, since they are not allowed to be part of the area land committees (u_trad43). It seems that these community-level institutions, which do not include traditional leaders, have created alternative power centers that impinge on the traditional Acholi land management structures (u_trad37).

In a nutshell, in Uganda, the issue of land is a hot topic which de facto contributes to some hiccups in the state-traditional relationship. Fights over who has the ultimate jurisdiction to govern mailo or customary land in fact distract from the more fundamental question of how to properly use the vital resource land in the country.

Comparing Malawi and Uganda

As outlined above, Malawi and Uganda both have rather favorable conditions for agriculture as compared to other countries in the region; however, Uganda seems to be much more successful in using its viable resource land to reduce its poverty headcount ratio. I argue that differences in the state-traditional interface relate to the differences in the land sector outcomes.

To start with, the legal framework on traditional and land governance is a lot clearer in Uganda than in Malawi. Uganda’s 1995 constitution already sets the parameters for the state-traditional interface, which were then specified by the 1998 land law as well as by the 2011 traditional leaders act. The 2013 land policy further provided clear-cut principles to legislators on how to enact the land law. In Malawi, on the other hand, the rules for rulemaking set out in the constitution are fairly ambiguous leaving a lot of room for legal interpretation. In addition, the subsequent acts and policies do not provide for a coherent legal framework on land governance and traditional governance respectively. As shown, until the enactment of

the 2016 land bills, the legal framework on land – customary land in particular – was highly conflictual leaving a lot of room for arbitrariness, uncertainty, and unpredictability.

In addition, with the attainment of independence, in both Uganda and Malawi, land became a prominent policy issue and in both countries commissions were established to re-write the existing colonial laws on land. While Uganda was rather quick to adapt its legal situation on land after independence (with the disrupting 1975 land decree in between) to today's land governance challenges, Malawi's land laws were largely based on colonial constructions and did not change significantly over a long time. In Uganda, the legal framework on land changed significantly with the 1995 constitution and the 1998 land act, that both provided for the legal protection of customary tenure systems. In Malawi on the other hand, customary land was missing a coherent legal basis for a very long time, since constitutional provisions on customary land are still absent and coherent land legislation has only been introduced in late 2016. Thus, fundamental changes in terms of land governance in Malawi only came after 14 years of laborious negotiations with traditional leaders and other stakeholders. As such, it seems that Uganda has much earlier than Malawi recognized the duality of the land governance systems and has made an effort to address the two parallel land governance systems by providing for procedures for the registration of customary land and by providing legal measures to overcome the overlapping tenure systems. Customary certificates of ownership, while admittedly not perfect in its implementation, thereby provide a viable way of offering tenure security to customary land holders.

Next, there is a striking difference in the local governance arena between Uganda and Malawi that possibly also contributed to the differences in the land governance outcome. While Ugandan president Museveni made a lot of efforts to introduce a multi-tiered local governance structure and a decentralized land administration system, Malawi had great problems to implement its decentralization efforts outlined in its 1998 policy. Further, while Malawi's local governance arena is very fragmented with state and traditional institutions of governance constantly struggling about their rightful space therein, Uganda's efforts to decentralize were rather successful providing for a clear-cut framework of local governance. In Malawi, the absence of local councilors, important actors in the local governance arena, contributed to the fragmented and disorganized local governance arena, as traditional authorities largely started to fill this space that they are now reluctant to surrender. In Uganda, on the other hand, traditional institutions of governance still vividly remember that they were abolished for a period of almost 30 years and thus are at least formally rather reluctant to overstep their boundaries of jurisdiction. While there is certainly protest against laws and policies that affect their powers, it is quite clear that nobody wants to return to a situation of conflict experienced in 2009.

In addition, it seems that citizens in Uganda have very well adapted to the different spheres of authority, largely drawing on traditional institutions for cultural matters and on the local governance structure for administrative purposes. This matter is in fact also mirrored in the Afrobarometer data which shows that Ugandans turn three times more often to their local government authorities than to their traditional leaders when feeling the need to voice their issues and concerns. The opposite is true for Malawians (Afrobarometer 2016). It seems that most Ugandans learnt how to survive without the guidance of their traditional leaders (particularly since strong local governance structures were in place). This might also be the case since many “people forgot about the culture” when traditional institutions were abolished (u_pop1). As a result, the clear-cut local governance arena in Uganda has provided for clear rules of jurisdiction for traditional leaders and the local government authorities. In Malawi, on the other hand, there is a miasma of incomprehension between traditional and state institutions of governance. The multiplicity of institutions, that exist without clear rules of preponderance, create a lot of choices for both citizens and institutions in land governance. Further, there is sectoral conflict regarding administrative decisions which both lead to (administrative) conflicts, bureaucratic competition as well as an inefficient use of the resource land.

Conclusion

In this paper, I argued that a disruptive state-traditional interface can make good land governance virtually impossible – with severe repercussions on a country’s efforts to reduce poverty. I argue that the existing multiplicity of actors in the land sector, including the pivotal role of traditional authorities, has to be embraced rather than ignored in order to create meaningful policies in the area of land governance.

Offering a first simple typology on both the de jure and de facto state-traditional interface, I argue that Malawi has recently been situated in a condition of antagonism where both the de jure as well as the de facto interface are disruptive. Uganda, on the other hand, is in a situation of resentment, with a rather clear-cut legal framework on traditional and land governance and a de facto interface which has seen some great ups and downs. I argue that the institutional deficiencies surrounding the state-traditional relationship in Malawi have caused a lot of legal uncertainty and arbitrariness and have eventually contributed to an ineffective use of the vital resource land. In Uganda, on the other hand, the legal system tries to synergize institutions providing for a clear-cut legal framework on land. The overlapping tenure systems as well as issues that come with the certification of customary land, however, still have to be addressed.

Within this paper, I discussed two of the four potential ideal types of the state-traditional interface. Future research might want to investigate the de jure and de facto state traditional relationship in other countries

and their relationship to good land governance and poverty eradication respectively. In addition, future research might want to evaluate what impact the new land bills in Malawi have on land governance and on poverty reduction. In the same vein, the long term effects as well as within country differences in the de facto state-traditional relationship have only briefly been touched in this paper and should be addressed in more detail in further contributions.

Nevertheless, this research has important implications for policy-makers apt to design, change or adapt land policies. I highlighted the pivotal role traditional institutions of governance play as institutions managing land rights at the local level. Disregarding them for too long can have harmful effects for a country's poverty reduction efforts. A keener understanding of the state-traditional interface and whether or not the legal as well as the de facto interface is disruptive or non-disruptive could help to identify indications for good land governance in the future.

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