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Assessing compensation for customary property rights in Malawi: the case of Mombera University project

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ABSTRACT

Provision of public infrastructure and services in various sectors such as agriculture, mining, transport, education, rural development, and health, among others, requires a lot of land, which government usually expropriates as it may not have the appropriate land, or available in limited quantities, or in appropriate locations. Compensation is normally required to cover expropriatory losses occasioned to expropriated people. This paper aims to deepen our understanding of the applicability of market value as a basis for valuing customary property rights for compensation purposes during expropriation. By using the case of Mombera University Project, this paper analyses how compensation is assessed for customary property rights that are dominant in Malawi. The paper demonstrates that practically compensation for expropriating customary properties is generally inappropriate because market value, as a compensation valuation basis, and the methods used for its determination, are ill-equipped for customary properties. In this regard, the paper argues that prevailing assessment practices lead to inappropriate compensation for customary property rights.

Key words: Compensation, customary property rights, expropriation, Malawi, market value

RÉSUMÉ

La mise en place d'infrastructures et fourniture de services publics dans divers secteurs tels que l'agriculture, l'exploitation minière, les transports, l'éducation, le développement rural et la santé, entre autres, nécessitent beaucoup d'espace terrain que le gouvernement exproprie généralement par manque de terres ou d'emplacement appropriés. Une compensation est normalement nécessaire pour couvrir les pertes d'expropriation occasionnées. Le présent article vise à approfondir notre compréhension de l'applicabilité de la valeur marchande, comme base pour évaluer les droits coutumiers de propriété, à des fins de dédommagement pendant l'expropriation. Se basant sur le cas du Projet de l'Université Mombera, cet article analyse comment le dédommagement est évalué pour les droits de propriété coutumiers dominant au Malawi. L'article démontre que pratiquement, le dédommagement à des fins d'expropriation des propriétés coutumières est généralement inapproprié parce que la valeur marchande, comme base d'évaluation, et les méthodes utilisées pour la déterminer, sont mal conçues pour les propriétés coutumières. À cet égard, nous défendons que les pratiques d'évaluation en vigueur conduisent à une compensation inappropriée des droits

Mots-clés: Compensation, droits de propriété coutumiers, expropriation, Malawi, valeur marchande

INTRODUCTION

Expropriation of property rights enables government to acquire much-needed land for various public infrastructures and services and achieve numerous socio-economic development goals. In addition to these public purposes, payment of compensation to project affected people (PAPs) to cover the property lost and other expropriatory losses suffered, and restore them to their previous niches, is required (Denyer-Green, 2009; Barnes, 2014). Denyer-Green (1989) emphasises that generally, expropriation without compensation may not be acceptable. As a developing country, Malawi is increasingly executing various projects in different sectors such as agriculture, education, health, rural development and transport, among others, to improve the welfare of Malawians (Malawi Government, 2012). These programmes catalyse expropriation of a lot of land, which, in Malawi, is mostly under customary tenure (National Statistical Office, 2011; UN-HABITAT, 2012).

In 2015, Malawi Government expropriated customary land in Mzimba District for the construction of a public university, Mombera University, situated about 12 kilometres to the south of Mzimba District headquarters and about 110 kilometres south west of Mzuzu City, northern Malawi. This project is part of the strategies to increase access to higher education and increase highly skilled and educated workforce in Malawi (Malawi Government, 2012). The project also addresses integrated rural development goals through employment in the project areas. In Malawi, any compensation for expropriated property is based on market value, to enable affected persons to replace lost property from the market with that compensation (Malawi Government,

1971; Malawi Government, 2002). Thus, the study aims at deepening our understanding of the applicability of market value as a basis for valuing customary property rights for compensation purposes during expropriation. Using the case of Mombera University Project (MUP), the study analyses how customary property rights are assessed for compensation purposes, and what challenges are encountered and how valuers deal with them.

METHODOLOGY

The research employed key informant interviews and focus group discussions using semi-structured questions to collect primary data. Respondents in the study included the Regional Commissioner for Lands (North Malawi), one government lands officer (North Malawi), two government valuation officers (North Malawi), one district lands officer at M'mbelwa District Council (that is Mzimba District Council), one group village headman, one village headman for the affected community, chairman of Mzimba Heritage Association and all 17 projected affected households/people (PAPs). Primary data collected were triangulated by asking the same questions to several PAPs, local leaders and government officers. Secondary data were sourced from various legal documents (including the Constitution), academic literature (books, journals, academic theses, and previous scholarly works) and other documents. The data were then classified into thematic groups such as compensation assessment basis, assessment methods, assessment challenges and techniques for dealing with encountered challenges. Finally, the data were aggregated into findings of the study.

PROPERTY RIGHTS IN MALAWI.
Property rights are ownership rights one holds

over material and immaterial things based on either statutory or customary law (Eggertsson, 1990). In Malawi, Section 28 of the Malawi Constitution (1994), assures every Malawian of the right to acquire property individually or jointly for various purposes and the protection of such rights without fearing arbitrary takings by government or any other party. Malawi operates a hybrid tenure system with customary, private, and public property classes. Customary tenure is the right to own, use or dispose of land rights based on customary laws, and legitimate to the community, enforced in the customary courts, or by social pressure and normally unwritten. Such land rights are reducible to ownership of specific rights by individuals, families and communities (Malawi Government, 2002). Paradoxically, colonial policies considered customary land rights as only occupational rights to discourage the development of land rights equivalent to freehold or concessions claimed by European settlers. This stand suffocated the development of customary land law in Malawi (Pachai, 1978; Malawi Government, 2002).

Customary tenure dominates in Malawi and remains essential to cultural identity and social organisation (Malawi Government, 2002). It is transferable through inheritance following matrilineal or patrilineal practices (Berge *et al.*, 2014; Tschirhart *et al.*, 2016), allocation by chiefs (Malawi Government, 1965; Chipeta, 1971) and direct purchasing under customary institutions (Takane, 2008), which mostly go unrecorded. Because customary property rights are rarely registered, information relating to the nature of the property, ownership, location, and any transactions, is hardly available and therefore, not conducive for competitive property markets. Technically, properties with inadequate or no documentation are invisible beyond their own system or markets (De Soto, 2000).

Section 25 of the 1965 Land Act provides that

all customary land is the lawful and undoubted property of Malawians, vested in perpetuity in the President, and administered by the Minister for Lands for the common use and benefit of Malawians, while Section 26 considers customary land as public property, thereby contradicting the preceding section. This consideration leaves customary land holders as occupiers or users only, a stand taken by colonial perceptions. Contrariwise, people holding land customarily consider it as their own. Customary land rights are recognised and protected to some extent by some laws and the Malawi Constitution. In a case involving customary land used as a cattle ranch the Courts of Law explained that the guarantee in section 28 of the Malawi Constitution applies to all rights in property including customary land rights, and that property denotes everything which is the subject of ownership (Chirwa, 2005). Furthermore, subsection 209(1) of the Constitution recognises that all property rights that existed when it came into force and it reads: *“All persons who have rights in property at the date of the commencement of this Constitution shall continue to have such rights under this Constitution and any other law.”*

Broadly, customary property rights, as other property rights that were in existence in 1994, are legally recognised and protected by the Malawi Constitution, despite being unrecorded (Kabanga and Mooya, 2017).

Alternatively, private land is all land exclusively owned, held or occupied under freehold tenure or customary estate by a clearly defined community, corporation, institution, clan, family or individual (Malawi Government, 2002). Private land rights are guaranteed and protected by statutory laws. Largely, private land in Malawi has the same characteristics as anywhere else and can be used for financial facilities and freely exchangeable (Besley and Ghatak, 2009), subject to prevailing laws. This exchangeability supports competitive property

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markets that provide necessary information on ownership, land details, prices, and rentals; and indicate state of the market. These aspects support valuation for different purposes (Mooya, 2009), impersonal market transactions (Furubotn and Richter, 1998), and compensation assessment (Baum *et al.*, 2008). Private land in Malawi accounts for less than 3.0% of the land holdings (Pachai, 1978; National Statistical Office, 2011).

Public land accounts for less than 20.0% of all land holdings in Malawi (National Statistical Office, 2011). According to the Malawi National Land Policy (2002), public land is strictly reserved for land managed by government agencies and in some cases by Traditional Authorities in trust for the people, and openly accessible by the public. This class includes land used for national parks, conservation, historical issues, and defence purposes, among others. For customary land managed by Traditional Authorities, common access land like dambos and communal woodlots and forests, exclusive to members of the Traditional Authority, fall under public land (Malawi Government, 2002). However, public land suffers encroachments and squatting in many cases, both in urban areas (UN-HABITAT, 2012) and rural areas (Malawi Government, 2002). Further, the land policy laments that the Malawian property law remains rudimentary and undeveloped to date (Malawi Government, 2002).

Property rights in Mombera University project area. Customary land tenure dominates in the project area and government expropriated about 432 ha of customary land from 17 owners in 2015, of which 71.0% had homesteads in the project site while 29.0% had only farmlands. As discussed elsewhere, customary land is considered as a public asset, and this deprives holders of any compensation for the land, as they do not own it and end up being landless. Alternatively, the owners emphasised that land

belongs to their ancestors, the dead, those holding it now and future generations. This was explained during interviews with PAPs and Chairman of Mzimba Cultural Heritage, in September and October 2016. The Chairman said:

“My understanding or context: land is the first property that each and every one possesses. First property, why first property? It is because when you are just born, anything that you are introduced to the world is around your area. You know water, water is coming from our own river, you have eaten food, there is firewood, it has come from our area, you have green maize from our garden. If I am a village boy, I will take my parents’ livestock to the bush. And there is no other property that we say, this is our property. And I remember when I said let me go home, I remember the trees that were there when I was young, the rivers, each, and everything, so that is Property number one [Emphatic]. And this property number one has got the interest of the ancestors, interest of the dead, interest of the living and interest of the unborn. Very, very precious property.”

About 94.0% of the 17 respondents got the land from their parents while 6.0% got the land free of charge from other customary owners. Apart from inheritance, allocation by chiefs and relatives, economic exchanges, and acquisition through marriage for females are other acquisition modes for land in the project area (Kausiro Village).

Customarily, land is a valuable asset to the local owners and forms the backbone of their livelihoods as clearly narrated in the preceding quote. Paradoxically, government considers it less valuable and accords it dismal recognition since it is unregistered, perceived to have no value and as a public property (Personal communication, 14 September 2016). However, taking customary land as the undoubted and lawful property of the people of Malawi (Malawi

Government, 1965; Malawi Government, 1994), then compensation is not negotiable upon expropriation, whether registered or not.

COMPENSATION REQUIREMENTS IN MALAWI

Powers of expropriation and compensation.

While the Constitution assures every Malawian of the right to acquire property individually or in partnership and guarantees their protection, subsection 44(3) of the same Constitution limits these property rights by empowering government to expropriate them for public utility, subject to compensation. Subsection 44(3) stipulates 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.'*

In Malawi, any property is to be taken against a public utility and not otherwise. The Malawi National Land Policy offers that land for national development purposes shall be acquired based on eminent domain principle (Subsection 4.2.5 (a)), by virtue of government's sovereign authority and in the public interest (Subsection 4.8.3) or for public use (Subsection 4.16.1). The Land Act (Section 27) and Lands Acquisition Act (Section 3) provide for expropriation of any (customary) land for a public purpose, or in the interests of Malawi, either by compulsory acquisition or agreement (Malawi Government, 1965; Malawi Government, 1971). However, public utility is not defined in any of the Malawi laws, thereby spawning confusion, misinterpretation, and abuse of power through arbitrary takings. The National Land Policy corroborates this observation and reiterates that public purposes or services that invoke expropriation, be conspicuously outlined in subsection 4.15.1(a) (Malawi Government, 2002). Astoundingly, even the newly passed 2016 land laws have failed to outline the public

uses that may trigger expropriation.

The Malawi Constitution stipulates appropriate compensation to defray any expropriatory losses, damages and disturbances suffered by affected persons (Subsection 44(3)), and thereby protect property by prohibiting arbitrary deprivation (Section 28), prevent any discrimination on grounds of property (Section 20), and avoid seizure of private property (Subsection 21(6)). The National Land Policy (Subsection 4.16.1) emphasises that government is duty bound to protect the free enjoyment of legally acquired property rights in land, and that any landholder whose property is expropriated for a public use, should be made whole again through fair and adequate compensation for the loss. The primary goal for compensation is thus to indemnify affected people of their losses and fully restore them to their previous status as if expropriation never happened. Fundamentally, compensation that indemnifies affected people of their losses includes market value of lost property; loss of value of land due to severing in partial expropriations and injurious effects of proposed works on acquired land; allowance for consequential losses, damages and disturbances; consolatory payment for disturbing one's livelihood (solatium); and compensation for any special attachments or values that a property owner attaches to property or other benefits ensuing from owning such property (Keon-Cohen, 2002; Keogh, 2003; Barnes, 2014). The legal basis for assessing compensation in Malawi is hence market value (Malawi Government, 1971; Malawi Government, 2002).

Market value as a compensation basis. The Malawi National Land Policy (2002) considers market value as the best price a property interest would reasonably sell in an unconditional exchange on the valuation date, assuming that: seller and buyer are willing; prior to valuation date, there was a reasonable period (having regard to the nature of the property and the state

of the market) for the proper marketing of the interest, for the agreement of price and terms and for the completion of the sale; state of the market level of values and other circumstances were, as on any earlier assumed date of exchange of contracts, the same as on the date of valuation; and a purchaser with special interest takes no account of any additional bid (Malawi Government, 2002). This definition assumes the property interest is exchangeable and has a market. Similarly, the International Valuation Standards Council (2017, paragraph 30) defines market value as the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion. Thus, the underlying principle for market value is willingness to transact.

Broadly, market value is considered a good basis as it plainly defines property value and the value determination process. It is seemingly an autonomous amount validated by market evidence, accomplishes fair and efficient expropriation, as expropriated persons get appropriate compensation to replace lost properties from the market, and become whole again (Baum *et al.*, 2008; Barnes, 2014). Further, the market is considered as a neutral measure for property values. Ironically, Kelly (2006) argues that it is hard to determine how much owners value their properties, as market value ignores some real property aspects, such as historical and family value (Kaufman, 2010). Thus, market value does not always equal owner's real loss and insufficiently covers property losses.

Market value assessment methods. Practically, comparison, income, and cost methods, that are heavily market-reliant, are the common methods for calculating market

value in most countries including Malawi. Comparison methods compare subject property with comparable properties exchanged recently in the market to estimate value. Use of comparable market evidence reduces uncertainties as in other methods (Blackledge, 2009). Income methods capitalise income into value. Capitalisation converts income into a present value by using a suitable discount rate (Scarrett, 2008). Principally, value is found by dividing the property's net income by discount rate. For cost techniques, property value equals land value plus depreciated current cost of reproducing or replacing the improvement (Blackledge, 2009). Cost methods are used when the other approaches are unsuitable or to supplement them. For Malawi, the valuation officer at Regional Lands Office (North Malawi) explained that occasionally, spot valuation technique is used as an additional method. Still, this technique requires market data and that the valuer is knowledgeable about the state of the subject market and have ample experience to apply this method, which might not always be the case.

RESULTS AND DISCUSSIONS

Assessing compensation for expropriated properties. Government valuers assessed compensation for Mombera University project using existing laws and guidelines. There are no specific guidelines for assessing compensation for customary properties. As discussed elsewhere, customary land is non-compensable when expropriated in Malawi, as in many other African countries (Cotula and Vermeulen, 2011). Technically, this is debatable because there is no law that stops compensating customary land upon expropriation. Accordingly, compensation for the university project covered buildings (houses, kitchens, toilets, bathrooms, granaries, kraals, and others), planted trees (fruit and others) and crops and graves, while land and natural tree losses and other disturbances were discounted. The discussion on compensation assessment

thus focuses on how the compensated items were assessed and the challenges encountered, and how they were addressed. But first, let us briefly look at the property market.

General property market in Malawi and project area. The Malawi property market is generally developing, with formal property markets concentrated in urban areas where private land (freehold and leasehold) account for 20.0% and customary tenure accounts for 47.0%. Parallel and unregulated property markets dominate, guided by traditional practices even in urban areas due to the involvement of traditional leaders in planning areas (UN-HABITAT, 2012), and normally go undocumented. Traditional practices dominate rural property markets and are rarely recorded. The current state of the property market indicates that market information is difficult and costly to access. Field interviews in September - December 2016 with various valuers indicated that lack of data clearing houses, reluctance of fellow valuers to share information due to mistrust and fears of data misuse, and misinformation among other factors, worsen the situation. These issues are well articulated by De Soto (2000) in his book: 'The mystery of capital: Why capitalism triumphs in the West and fails everywhere else'. One of the valuation officers at the Regional Lands Office (North Malawi), during interviews on 8th August 2016, complained that it is very hard to access reliable market information in Malawian property markets, and the information is almost non-existent in rural areas. The officer added that available information is highly questionable. This property market status is also attributed to high prevalence of customary tenure in Malawi, which favours traditional mechanisms.

As highlighted elsewhere, some respondents in the project area explained that it is possible to buy or sell customary land, guided by traditional arrangements. Data relating to these exchanges is patchy and rarely recorded. Where some

data exists, details are lacking. Dependence on traditional practices in many cases highlights that formal statutes do not regulate these property transactions. Essentially, there is no formal property market that can provide needed information. How were expropriated properties then assessed in the project area?

Assessment of compensation in the project area. According to the valuation officer at the Regional Lands Office in the study area, compensation assessment for lost assets involved collecting data about noting the status of the building components such as roofs, walls, floors, and doors. Each building was measured externally to collect data necessary for computation of external gross area. The data were then organised based on each affected household, type, and nature of building. Most buildings were constructed with temporary to semi-permanent materials such as poles, unburnt bricks, grass, mud, and other local materials while some were made of burnt bricks, corrugated iron sheets, and cement floors.

The next step involved market search for transactional data of similar properties in the local area and elsewhere to aid computation of market values. Some data were collected for property markets in urban areas like Mzuzu City. The accessed data were then screened to get data that met necessary market conditions for use as comparables, such as that from arms' length transactions (International Valuation Standards Council, 2017). Values for compensation were then calculated using the chosen market data and data for the subject properties. The list of properties with values was subsequently taken to affected people for verification. Verification helps to capture any omitted properties or affected people, correct wrong property ownership, and disclose tentative compensation values. Once all the feedback and queries are considered, a final compensation report is prepared and submitted to the clients for their action, in this case, central government.

Market value as a compensation basis.

Market value assumes the property in question is exchangeable. As discussed in the previous paragraphs, customary tenure dominates in the project area and a formal property market is almost non-existent, and any pecuniary exchanges of property rights are undocumented because of the prevailing customary settings. Such an environment is not conducive for assessing compensation based on market value as market evidence is scarce. Likewise, market data from other sources for private property exchanges is unsuitable to support compensation assessment for customary properties because the properties are different with different value schemes (Small and Sheehan, 2008). Also, use of compensation data from other expropriations may not be ideal as the data may not comply with market requirements, as contended by Baum *et al.* (2008). Thus, resultant figures lack external validation and cannot measure compensation for lost customary properties. Lack of discernible property market in the project area challenges resultant amounts as appropriate for expected compensation.

Conceptually, the market value definition in the Malawi National Land Policy (2002) assumes that the seller and buyer are willing to exchange their properties. In expropriation, no one is willing to transact. Buyers are statutorily empowered to acquire any property right by any means for public purposes, as previously discussed. In this case, government was forced to acquire the customary land for Mombera University project while property owners were statutorily compelled to surrender their land. During a focus group discussion with PAPs on 7 October 2016, they stated that had they been asked, they would have rejected the taking of their land, and even the project. The compulsive nature of expropriation defeats the principle of the willingness to transact, and an objective market value cannot obtain in such environments, even if the valuer does his/her best to hypothesise a

normal market transaction (Baum *et al.*, 2008). Principally, non-existence of a property market or unavailability of comparable evidence for customary properties in the project area makes the imagination of a real exchange challenging for purposes of compensation assessment.

Market value also considers physical conditions of subject properties during assessment (Baum *et al.*, 2008), and disregards other real and intangible values like customary land ownership, long occupation, cultural identity, attachment to spirits and social organisation. Consequently, 17 households who had been on the project land for over 100 years, lost their customary land without any compensation; their long occupation of over a century was disregarded, while the social organisation of family ties was severed or disturbed as households relocated to two different neighbourhoods. Kaufman (2010) stresses that non-compensation of these real values inherent in properties hurts many expropriated property owners. Similarly, Akujuru and Ruddock (2014) argue that affected customary property owners consider compensation adequate when their social and cultural values related to property are covered. These ignored aspects culminate into inappropriate compensation. One respondent, during a focus group discussion on 7 October, 2016, complained that he received little compensation for many assets lost. Kakulu (2008) and Mitchell *et al.* (2015) contend that this is not surprising as valuers are generally ill-equipped to compute prices for intangible aspects in markets and so, overlook them during assessment.

Market value itself is assumed to be a product of an exchange of a property that was reasonably marketed before the valuation date, while considering the nature of properties and state of markets. Private properties are normally advertised through various means. But customary properties are rarely openly traded and seldom marketed. For Mombera University

acquisition, this assumption is hard to imagine because of the nature of acquired properties - customary. And there is no discernible property market to support market value assessments.

Furthermore, expropriation has one buyer - the acquiring authority, and owners have no choice but to sell to that buyer, irrespective of exchange conditions (Denyer-Green, 1989). Fundamentally, government has a special interest to get the customary property at any cost, and uses its advantageous position and assessors to fix its own compensation amounts, which owners consider inadequate for Mombera University project.

While an independent market value requires that the transaction be an objective one with both parties acting knowledgeably, prudently and without compulsion, Customary land owners in this case had insufficient information if any, about expropriation and compensation, nature and characteristics of similar assets for comparison purposes, actual and potential uses of their properties since they never thought of exchanging them, nor had they had the slightest idea of the state of any actual or imagined markets for similar properties, and therefore could not make a fair decision on the exchange. Contrariwise, government actors were more informed and experienced about other property markets, expropriation, and compensation processes. Expropriated people could not act judiciously in the compensation assessment process as they had no market information. One is only prudent when relevant and quality market information is available as needed (International Valuation Standards Council, 2017). Finally, expropriated customary owners were pressured to surrender their land without any negotiations or agreement on the compensation they would want to relocate. Government and local leaders intimidated people that the land is public property and they had no say. Expropriated people felt that if they asked for what was due to them,

they might be imprisoned and gave up (Personal communication, 7 October 2016). Broadly, PAPs were unwilling, uninformed, imprudent, and forced to accept the expropriation of their land. Most of the requirements to realise market value for the expropriated customary land for Mombera University project were non-existent. Additionally, Pachai (1978) and Mitchell *et al.* (2015) argue that compensation for customary land is difficult in many cases because of difficulties in establishing the actual bundle of property rights to value since such rights are not fixed by boundaries (as cited in Sheehan, 2000).

Compensation assessment methods used. The Lands Acquisition Act (1971) only provides market value as compensation basis while the choice of assessment methods is left to the valuer. Methods used in assessing compensation for Mombera University project are discussed under each of the broad items compensated - buildings, planted trees and crops and graves.

Buildings: Buildings included any structure constructed on the homestead of any PAP like houses, kitchens, kraals, pit latrines, external bathrooms, and granaries, among others. According to the Government valuation officer who conducted the valuation, a comparison approach was used for buildings that seemed exchangeable and presumed comparable market evidence was obtainable while for those that scarcely exchange or special buildings, the cost approach was employed. The Government valuer explained that data were searched in property markets as far as Mzuzu City. However, it is hard to envisage how data from urban markets or other locations were adjusted to fit properties mostly made of rudimentary materials in a typical rural setting. Essentially, the valuer complained that market data availability is a major challenge in value determination using comparison approaches. For cost techniques, calculation of building cost estimates requires costs of building materials or similar, newly

completed buildings. Information on fees for professional work and labour is also desirable. Ironically, most properties expropriated were of traditional materials that lack known costs, professional fees, labour charges, and depreciation information, among others. Such data gaps complicate valuation of customary properties using cost approaches. Broadly, Small and Sheehan (2008), Alemu (2013), and Anuar and Daud (2012) contend that, because of their nature, it is hard to quantify and monetise customary properties into reliable amounts.

Planted trees and crops: All crops, fruit and non-fruit trees owned by PAPs were assessed using government prices gazetted in 2010 (Malawi Government, 2010). Compensation amount for crops was found by multiplying price per yield (kilograms) per hectare for each crop against quantity of land (ha) lost. For fruit trees, the unit price per tree was multiplied by quantities lost. Use of unit price for fruit trees leaves out the productive capacity of each fruit tree during its life span and the lost income to the owner, thereby undercompensating PAPs. Compensation for planted trees used for poles, timber and fuelwood was estimated as the product of the price per cubic metre and quantity of trees lost in cubic metres. However, a major challenge in getting acceptable amounts pertains to the outdatedness of the price rates since they were gazetted in 2010 and no provision is made for appreciating or updating them annually to date. Further, reliability of such price rates is questionable in an environment characterised with high inflation and price fluctuations. Moreover, the estimates ignore the value for sustainable environment health and benefit.

Graves: Graves are among those sentimental assets that were compensated. The valuer from the Regional Lands Office (North Malawi) indicated that these assets, which are very subjective, were assessed using the cost approach. When asked where market data for

assessment of land values and costs for building materials was sourced from, he indicated that data were obtained from affected people and local leaders. The valuer explained that he usually consults local leaders and other elders on how they culturally handle issues of graves and how much they had spent to put a tombstone or pave the graves. He admitted that the challenge with this data is that the sources were not sure of the total amounts spent on the works since labour was contributed by themselves except where they needed the technical work of a brick layer. Based on the data obtained, the valuer adjusted the data and calculated that K120,000.00 (about USD 160.00) for unpaved graves (earth) and K350,000.00 (about USD 467.00) for paved ones were adequate amounts. The valuer also explained that he used his understanding as to how much it would cost an unpaved or a paved grave. However, this data is not tested in the market and is highly unreliable.

Contrariwise, the valuer did not indicate how much was the value of each lot of a grave and what aspects were considered in the computations. Assessing compensation for graves pose challenges to assessors because of the sentimental attachments people have over graves and it is not surprising that the valuer guess-estimated a lot. It is hard to believe that the amount attached to the graves were representative.

KEY CHALLENGES IN COMPENSATION ASSESSMENT

Assessment of compensation for expropriated customary properties based on market value basis and market-based assessment methods faces several challenges. Some of the major ones include:

- 1) Nature of customary properties. Customary properties are not bound with fixed lines and some of its rights go beyond what is seen by most people. Conceptually, customary property

rights belong to multiple owners (ancestors, the dead, living, and unborn generations) and are not meant to be exchanged. These aspects are hard for valuers to understand, appreciate their relevance and ably quantify and monetise. Less tangible values are normally disregarded during compensation assessment. According to the government valuers from the Regional Lands Office (North Malawi), customary properties are broadly valued just like private properties, although the two are ontologically different. This treatment ignores the less tangible values of customary property rights thereby yielding inappropriate compensation.

2) Absence of a discernible property market in the project area. Ostensibly, some customary properties are exchanging hands on an economic basis based on existing traditional arrangements, which are subjective in nature and not ruled by market forces of supply and demand. These transactions are rarely documented and thus market data is hardly available. The lack of market evidence and nature of exchanges are not supportive to market value basis and market reliant compensation assessment methods. Practicing valuers address this challenge by seeking comparable information from other markets and practitioners; and by keeping and using own data including other compensation assessment data, which might not be suitable for the work at hand.

3) Use of data from other property markets. Available data from urban markets usually relate to private properties. Such data may not be suitable because comparable properties are different in nature and situated in different markets. These differences may lead to illogical adjustments that realise values that are not representative of the subject properties and hence inappropriate compensation amounts. Valuers indicated that such data help them to compute compensation values regardless of the ontological differences and they had no

alternative to addressing this challenge. The study contends that a data search in the relevant locality should obtain some evidence on how land and improvements are exchanged and use that as the basis for compensation assessment,

4) Testability of available market evidence. Most of the data used as comparables were obtained from other valuers or from the valuer's on records of previous valuations. The data may have been accepted and used by clients because it met their expectations and helped them to achieve their goals. However, such data is specifically related to that unique property and/or transaction and may not have been tested in the broad property market as per market value expectations. Such data may therefore not be necessary market evidence to rely on when assessing compensation based on market value as the resultant figures may not be representative themselves, thereby giving wrong amounts. Quality data are generated through market forces and hence tested and accepted as such. Unfortunately, respondent valuers indicated that they trust such data because it came from other valuers and because they did the valuation themselves. This is a systemic problem in the valuation arena and requires a functioning market to generate real market data to overcome it.

5) Use of market value as a compensation assessment basis for customary properties. Market value is the legal basis for assessing compensation in Malawi. Various market-based assessment methods are used to realise market value. In the absence of a discernible property market in the project area and the vicinity to furnish necessary market evidence, such methods are deficient and challenging to realise a reasonable value using transplanted data from other property markets as discussed above. The dependence on market value as a compensation assessment basis is hence a problem. This is a major challenge for practicing valuers since the

law does not provide alternative bases and they still use it regardless of the shortfalls.

6) Uninformed expropriatees. Market value requires that any participant to a transaction should be fully informed about the property market, similar properties and prices of such properties so as to make an educated negotiation and decision about expected compensation. The PAPs for Mombera University Project, during a focus group discussion on 7 October 2016 claimed that they were not informed about the taking of their land nor were they fully sensitised on what to expect in term of compensation, among other issues. They further alleged that they were intimidated by their own local leaders and government officers to surrender their land. This is against the conditions of a knowable market value that require an agreed amount between the parties based on mutual negotiation without compulsion. Government therefore takes advantage of project affected parties. In such cases, an independent market value does not obtain, and the figures calculated by government valuers cannot be taken as reasonable market values. Government valuers undertake a validation exercise where PAPs confirm quantities of their assets and the resultant compensation amount to overcome this problem.

7) Capacity of valuers undertaking compensation assessment. It has been noted that some government valuers entrusted with compensation assessment have the necessary academic qualifications but lack much-needed skill and experience regarding valuation of customary properties for compensation purposes. For example, the two valuers in the Regional Lands Office (North Malawi) could not ably define customary properties apart from that they are based on customs. They know better the exchangeability of private properties, market value basis and market-based valuation methods. As discussed above, these tools are

ill-equipped for customary properties and require extra skills and knowledge. Yet current valuers lack these aspects and treat customary properties as any other private property. This disregards many less tangible aspects and benefits of customary assets and results in lower compensation amounts. The study suggests that valuers should be trained and oriented on both private and customary properties and how these different properties can be valued.

The challenges outlined above contribute to inappropriate figures being considered as market values. Yet they are not market values in their true sense since they have been generated based on data which does not qualify under market value conditions. These amounts are market values without a market (Evans, 2004; Mooya, 2009; Kaufman, 2010).

CONCLUSION AND RECOMMENDATIONS

Compensation assessment for customary property expropriation in Malawi is assessed using market reliant methods, based on market value. The application of market value as a basis for compensation is difficult where operational property markets to avail needed market evidence are absent or thin. Property exchanges in prevalently customary settings are rarely documented, and where they are, details lack. This challenges availability of market information needed for assessing market values through market-based assessment methods such as comparison, income and cost. These factors, coupled with inadequate knowledge, skills and experience of valuers entrusted with compensation assessment regarding customary properties, lead to figures other than market values. Fundamentally, prevailing compensation assessment practices guided by market value and market-based methods bear amounts that are inadequate as compensation for customary property holders and cannot enable expropriatees to replace lost properties and restore their previous livelihoods.

This paper recommends that a comparative study to analyse the challenges of valuing customary property rights with those of private property rights for compensation purposes be carried out. Further, research is needed to look at alternative bases to market value for assessing compensation for customary properties, and other methods of valuation that are more suitable for compensation assessment in environments where customary properties dominate or where property markets are thin be developed.

STATEMENT OF NO-CONFLICT OF INTEREST

The authors declare that there is no conflict of interest in this paper.

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