COMPENSATION ASSESSMENT PRACTICES IN
EXPROPRIATION OF CUSTOMARY LAND RIGHTS IN
MALAWI

BY

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Thesis presented for the degree of

DOCTOR OF PHILOSOPHY

in the Department of Construction Economics and Management

Supervisor: Associate Professor Manya Mainza Mooya

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Declaration

I declare that this thesis is my own unaided work, both in conception and execution, apart from the normal guidance of my supervisor. Neither the substance or any part of the thesis has been submitted in the past, or is being, or is to be submitted for a degree in the University or any other University.

Signed by candidate

Lucky Kabanga
Abstract

Providing various public infrastructure requires a lot of land that is normally expropriated from private and/or customary owners as government may not have it, in return for compensation to cover the expropriatory losses occasioned. Commonly, such compensation is assessed based on market value. While private land is tradable, customary land is conceptually and statutorily not. Essentially, the study examines how expropriated customary land is valued for compensation purposes. It argues that existing compensation valuation practices for expropriation presupposes private property and functional property markets, thereby realising inadequate compensation for customary land. By doing so, the study analyses applicability of indemnity and taker’s gain compensation theories and methodologies that are founded on private land, to customary properties and in different social settings, to achieve desired compensation goals.

The study uses three case studies in Malawi to collect empirical data through face-to-face interviews and focus group discussions from sixty respondents that included key informants, expropriatees, government officials, government valuers, private valuers, local leaders, development partner and civil society organisations representatives. Qualitative data were analysed qualitatively through thematic analysis and simple descriptive analysis for quantitative data. The study finds that Malawian compensation law derives from indemnity compensation theory but that its applicability to customary land is challenged by various factors including inadequate and unsupportive laws, underdeveloped or non-existent land markets to support adopted market value-based methodologies, customary land prevalence, absence of assessment methodologies for non-tradable or rarely exchanged properties and non-compensation of various expropriatory losses.

The study concludes that indemnity compensation is fundamentally applicable to customary land as it desires to protect land rights from arbitrary takings and prevent expropriatees from impoverishment, but that current compensation practices obtain inadequate compensation that impoverishes expropriatees. This calls for other non-market dependent compensation assessment methodologies such as Contingent Valuation Methodology.

The study makes a contribution to knowledge regarding the compensation of customary land acquired compulsorily, in the areas of theory, empirical data and policy development.
Keywords: Compensation, Customary land, Indemnity theory, Market value, Taker’s gain theory.
Publications from this research

The following journal articles and conference papers have been published in the course of this research work:


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<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>ADB</td>
<td>Asian Development Bank</td>
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<tr>
<td>AfDB</td>
<td>African Development Bank</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>AUC</td>
<td>African Union Commission</td>
</tr>
<tr>
<td>AUECA</td>
<td>African Union and Economic Commission for Africa</td>
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<tr>
<td>CCF</td>
<td>Compensation Claim Form</td>
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<tr>
<td>CSO</td>
<td>Civil Society Organisation</td>
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<tr>
<td>CVM</td>
<td>Contingent Valuation Method</td>
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<tr>
<td>DC</td>
<td>District Commissioner</td>
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<tr>
<td>FAO</td>
<td>Food and Agricultural Organisation</td>
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<td>FGD</td>
<td>Focus group discussion</td>
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<td>FRIM</td>
<td>Forestry Research Institute of Malawi</td>
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<tr>
<td>GBI</td>
<td>Greenbelt Initiative</td>
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<tr>
<td>GFDRE</td>
<td>Government of the Federal Democratic Republic of Ethiopia</td>
</tr>
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<td>GFRN</td>
<td>Government of the Federal Republic of Nigeria</td>
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<tr>
<td>GNI</td>
<td>Gross National Income</td>
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<tr>
<td>GRG</td>
<td>Government of the Republic of Ghana</td>
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<td>GRM</td>
<td>Government of the Republic of Malawi</td>
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<tr>
<td>GURT</td>
<td>Government of the United Republic of Tanzania</td>
</tr>
<tr>
<td>HPM</td>
<td>Hedonic Pricing Method</td>
</tr>
<tr>
<td>IVSC</td>
<td>International Valuation Standards Committee</td>
</tr>
<tr>
<td>MLGRD</td>
<td>Ministry of Local Government and Rural Development</td>
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<td>MLHUD</td>
<td>Ministry of Lands, Housing and Urban Development</td>
</tr>
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<td>MNLP</td>
<td>Malawi National Land Policy</td>
</tr>
<tr>
<td>MPICO</td>
<td>Malawi Property Investment Company</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<td>NPC</td>
<td>National Planning Commission</td>
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<td>NSO</td>
<td>National Statistical Office</td>
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<tr>
<td>PAL</td>
<td>Press Agriculture Limited</td>
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<tr>
<td>T/A</td>
<td>Traditional Authority</td>
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<td>TCM</td>
<td>Travel Cost Method</td>
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<td>TLMA</td>
<td>Traditional Land Management Area</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>USA</td>
<td>United States of America</td>
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<tr>
<td>WTA</td>
<td>Willingness to accept</td>
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<tr>
<td>WTP</td>
<td>Willingness to pay</td>
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Chapter 1: Introduction

*The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter - all his forces dare not cross the threshold of the ruined tenement!*

*William Pitt (1763)*
1.1 Background

Public development projects require a lot of land which is mostly expropriated as government may not have the appropriate land, or in appropriate quantities, or in appropriate locations. Such public developments include roads, canals, railways, airports, schools, hospitals, water facilities, sports facilities, sewerage, electricity, gas and oil, irrigation and drainages, dams and reservoirs, public parks, forest reserves and defence facilities among many others (Barnes, 2014; FAO, 2009). As various projects are being implemented to provide additional infrastructures or to rehabilitate and expand existing ones, the inevitable expropriation is increasing (FAO, 2017; Mangioni, 2008). The powers to expropriate private land and properties are fundamentally entrenched in legal frameworks of most countries, international instruments and declarations (FAO, 2009). These powers are crucial in making forced takings of private land by government acceptable, actions which are *ultra vires* in normal circumstances (Denyer-Green, 2014). Expropriation is known as compulsory land acquisition or compulsory purchase (UK), eminent domain (USA), compulsory acquisition (Australia and Malaysia), resumption and takings (Barnes, 2014; Chan, 2003; Du Plessis, 2009). It is generally regarded as dichotomous: either as a reserved power of the government (Reserved Power Theory) or as an inherent power of the government (Inherent Power Theory) (Kratovil & Harrison, 1954; Stoebuck, 1972). The reserved power theory implies that expropriation powers are rights in land reserved for every government during land rights allocation to expropriate private property for public uses. Contrariwise, inherent power theory provides that expropriation rights are inherently part of any government, rights that are indispensable for the survival of governments, without which governments would be weakened as they would not be able to execute their duties smoothly (Kratovil & Harrison, 1954; Stoebuck, 1972).

Fundamentally, expropriation is usually restricted by the need for compensation to affected parties to cover various expropriatory inconveniences. Compensation is called by various connotations which include adequate compensation (Malaysia), appropriate compensation, fair compensation (UK), just compensation (USA), just terms compensation (Australia), just and equitable compensation (South Africa), reasonable compensation, commensurate compensation (Ethiopia) and equivalent compensation, among others. Since these terms are generally undefined in relevant laws, they may have similar or diverse meanings in different jurisdictions (Barnes, 2014; Baum, Sams, Ellis, Hampson, & Stevens, 2008; Du Plessis, 2009).
As with any other system, smooth operation of compensation depends upon the development, completeness and clarity of existing laws, standards, principles and guidelines. Compensation is adversely affected by laws that are contradictory, inadequate, unpredictable and ambiguous (Kakulu, 2008; Larbi, 2008; Otubu, 2012; Sifuna, 2006; Tagliarino, 2017). The bias of existing statutes towards private property systems make them inappropriate to handle customary tenure, resulting in the latter being misinterpreted, under-compensated or totally disregarded (Ajibola, 2013; Sheehan, 2000; Sulle & Nelson, 2009). Essential instruments such as technical valuation standards, guidelines or rules are absent; and if present, vague and conflicting in most developing countries (Haruna, Ilesanmi, & Yerima, 2013; Viitanen & Kakulu, 2009). This is one of the direct consequences of importing laws and applying them wholesale without acclimatising them meaningfully in the receiving environments (Pachai, 1978; Seidler, 2014; Sheehan, 2000).

Malawi, as a developing country, is striving to reduce poverty - a persistent and key challenge (NPC, 2020), and sustain economic growth through public infrastructure developments in various sectors including agriculture (for example, the Green Belt Initiative), energy, transport, education (like Mombera Public University project) and health (such as Phalombe District Hospital project), among others (GRM, 2012, 2017a). As these projects require big and usually contiguous land, it is normally land under customary tenure that is expropriated as it is prevalent. However, and to my knowledge, no empirical research has been done in expropriation and compensation in Malawi at such scholarly levels, more so regarding customary land. As more projects and hence expropriations are anticipated, it is desirable to have studies to fill existing knowledge gaps, facilitate informed policy development and project implementation.

1.2 Preliminary literature review

Generally, various scholarly works and research on expropriation and compensation have analysed laws, processes, practices and compensation, and found that most existing laws are ambiguous, contradictory, incomplete and punitive in some cases; market value structures are absent or underdeveloped; poor governance in implementing projects and informed contributions from professionals are lacking (Ambaye, 2013; Msangi, 2011; Sifuna, 2006; Viitanen & Kakulu, 2009). These findings are attributed to nature of current legal structures regarding compensation, valuation bases and methods (Kakulu, 2008), prevailing tenure
systems mostly dominated by customary or public land (Ambaye, 2013; Chan, 2003; FAO, 2012), low levels of land market development, poor technical expertise and skills (Chauveau et al., 2007; Sulle & Nelson, 2009), information challenges and unconducive assessment environments (Ambaye, 2013; Kakulu, 2008; Sulle & Nelson, 2009). Other studies established that existing legal frameworks lack standards or shared definitions for common interpretations and application while statutory compensation packages are unclear (Ajibola, 2013; Alias & Daud, 2015; Mangioni, 2008; Tagliarino, 2017). Essentially, these issues contribute to challenging compensation assessments and hence inadequate compensations (Mangioni, 2008).

Studies focusing on customary land tenure and the applicability, compatibility and implications of current laws on their expropriation and compensation show that customary land practices are partially or completely unrecognised and unsupported by current laws while private land rights are fully embraced (Alias & Daud, 2008; Brobby, 1991; Haruna et al., 2013; Sulle & Nelson, 2009). Other studies established that, unlike for private properties, there is no single and consistent compensation assessment approach for customary/native land tenure (FAO, 2017; Fortes, 2005; Litchefield, 1999), and that Western-based and local tenure systems value land rights differently because of non-material aspects attached to land such as spiritual and cultural values (Sheehan, 2000; Small & Sheehan, 2008; Tagliarino, 2017). Further, some studies established that it is challenging to quantify customary/native land rights using current bases and methods of assessing compensation (Alias & Daud, 2008; Mitchell, Myers, & Grant, 2015; Small & Sheehan, 2008).

Essentially, reviewed literature establish several broad challenges present in the expropriation and compensation purview. First, existing compensation concepts and institutions are more aligned with registered private land regimes as a result of their origins. Second, most existing laws are characterised by inconsistencies among themselves and inadequate coverage of customary and other unregistered lands. Third, almost all compensations are assessed using market-reliant bases and methods for both private and customary land rights, even though the latter are normally conceptually and legally considered as non-market assets. Non-market-based assessment bases and methods are thus absent in most compensation assessment environments, and this is the third challenge. Finally, and more significantly, most studies
reviewed are insufficiently informed by relevant theories, making them difficult to apply to similar contexts.

Expropriation and compensation settings in Malawi are characterised by similar challenges and seem very acute more especially compensation valuation. The above factors precipitate into such questions as how are customary land rights practically valued for compensation purposes? What actual compensation assessment methodologies are employed to achieve appropriate compensation acceptable to both expropriators and expropriatees? The elusiveness of standard methodologies for appraising customary land rights have made the situation even more challenging. However, these queries remain largely unaddressed, yet they need to be.

1.3 Research problem

Expropriation and compensation laws in Malawi are characteristically English imports essentially meant for private property rights. Such institutions are alien and deficient where non-private tenure, such as customary ones, dominate as in Malawi. Expropriation of property requires appropriate compensation, according to Section 44 Subsection (3) of the 1994 Malawi Constitution (GRM, 1994). Enabling laws such as Lands Acquisition Act (1971) advocates for fair compensation; Public Roads Act (1989) demands reasonable compensation while other legislation provide for various compensation principles. These different statutes and terminologies spur inconsistencies in interpreting and implementing the laws, more especially in acquisition and compensation of customary land. Furthermore, market-based valuation for compensation purposes is widely believed to be challenging where land markets are weak or non-existent, land is customarily held or unregistered, and where land rights are usufructs only (FAO, 2009). In Malawi, customary tenure accounts for over 70.0% while private land only covers about 3.0% (NSO, 2011). Furthermore, formal land markets are principally weak while parallel and unregulated land markets thrive as customary practices prevail (Chome & McCall, 2005; GRM, 2002).

These incongruences, from constitutional frameworks in compensation and valuation to land rights and markets spawn a complicated environment for compensation and valuation. This status has led to the main question of the research which looks at how valuation of expropriated customary land for compensation purposes is conducted to achieve appropriate compensation.
Specifically, what are the compensation valuation practices and how do they affect the final compensation for private and customary land rights?

1.4 Hypothesis, objectives and research questions

The study’s hypothesis is that existing valuation practices for compensation for expropriation presupposes private property rights and functional property markets, and thus lead to inadequate compensation for customary property rights. Thus, the study analyses current practices of determining compensation for expropriated customary land rights to establish whether or not they result in appropriate compensation. Explicitly, it intends to:

a) Investigate the theoretical foundations of Malawian compensation laws,

b) Analyse existing compensation laws to establish their adequacy in achieving appropriate compensation for customary property rights,

c) Analyse practical challenges affecting the achievement of appropriate compensation for customary property rights,

d) Examine expropriatees’ perceptions towards compensation adequacy, and

e) Propose a valuation model for customary property rights based on available literature, experiences from other countries and findings of the study.

Following from these objectives, the research asks how are expropriated customary land rights assessed for compensation purposes to achieve appropriate compensation. Fundamentally, the following questions steer the study:

a) What are the theoretical foundations of compensation laws in Malawi?

b) How adequate are current compensation laws to facilitate the achievement of appropriate compensation for customary land rights?

c) What are the key practical challenges affecting the achievement of appropriate compensation for expropriated customary land rights?

d) How do expropriatees perceive received compensation in terms of its adequacy for expropriated customary land? And,

e) What valuation model(s) are suitable for customary property rights when assessing compensation?
1.5 Conceptual framework

 Anything capable of ownership, either real or personal, tangible or intangible, is property (United Nations, 2005). Thus, property rights are ownership rights one has over those properties based on statutory and/or customary laws (Eggertsson, 1990). Broadly, these property rights classify into customary/communal, private and State/public (Demsetz, 1967). Communal property ownership rights represent a right exercisable by all members of a particular community, based on customary law (Chipeta, 1971) while private property ownership rights are exclusive to owners. State property ownership rights are under government. In most developing countries, property rights are dominated by customary tenure as customary laws and practices are dominant. Fundamentally, governments have supreme rights over any property rights either as a reserved right (Reserved Power Theory) or an inherent one (Inherent Power Theory). Thus, expropriation is an implied power necessary for execution of powers expressly conferred on such governments (Kratovil & Harrison, 1954). Where reserved right concept is practised, land is mainly considered as public property with people only having use or occupational rights over the land, but without ownership rights and hence uncompensable when resumed. This is common where land is nationalised as in Ethiopia and Mozambique and where outright private land ownership is not allowed (Cotula, 2012; Moyo, 2003). Contrariwise, where inherent rights concept prevails, exclusive land ownership rights are granted to individuals, as in Kenya and Mali (Vermeulen & Cotula, 2010) and compensable once expropriated (Kratovil & Harrison, 1954). In this research, these theories are used to examine and understand prevailing expropriation and compensation practices to establish what is actually taken, and whether compensable or not.

Broadly, the need to compensate losses occasioned by expropriation limits the scope of expropriation. Thus, compensation is meant to encourage efficient expropriation, deter arbitrary acquisitions, promote fair takings, restore dispossessed persons and counter expropriatory demoralisation, among others. Various concepts represent these compensation intents including full compensation (Epstein, 1985), appropriate compensation (Sax, 1964), fair compensation (Denyer-Green, 2014), equivalent compensation (Barnes, 2014), adequate compensation (Nosal, 2001), commensurate compensation (Barnes, 2014), full indemnification (Blackstone, 1872) and demoralisation cost theory (Michelman, 1967), among others. Except Michelman’s demoralisation cost theory, these compensation concepts demand coverage of lost property and other expropriatory inconveniences. These are classified as full compensation.
concepts based on indemnity theory. Demoralisation cost theory of compensation requires an amount that covers the consequential inconveniences or expropriatory demoralisation and not necessarily all losses suffered, thus representing partial coverage. Similarly, compensation concepts guided by taker’s gain theory expect compensation to cover only the thing taken or gains made by takers and nothing more. Consequently, compensation focuses primarily on property acquired while other expropriatory losses are wholly or partly excluded (Kratovil & Harrison, 1954). However, most scholarly works reviewed including those of Alemu (2013), Ambaye (2013), Du Plessis (2009) and Kakulu (2008) do not use these theories either to inform their researches or as part of their analytical/conceptual frameworks. In this research, indemnity and taker’s gain theories form the conceptual framework that is used to understand and analyse legal foundations of compensation practices in Malawi.

Whether compensation is based on indemnity or taker’s gain philosophy, the guiding principle is that of equivalence, which requires compensation for acquired property to be based on its current market value (Barnes, 2014; Denyer-Green, 2014). Market value is 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 (IVSC, 2019). Additionally, other allowable expropriatory losses are considered where compensation is guided by indemnity principles. For taker’s gain principles, equivalence is achieved by covering the lost properties only.

Thus, market value generally underpins most property assessments for compensation purposes (Barnes, 2014). The rationality being that any person deprived of property should receive as compensation, an amount that would have been realised in voluntary exchanges in the property market at the time of expropriation (Denyer-Green, 2014). This aspiration is seemingly achievable for private properties since they are freely exchangeable and can realise optimal values in competitive markets, unlike customary ones. The compensation assessment environment becomes more complicated with dependence on market-based compensation assessment basis and techniques for customary properties that are conceptually considered to have several strata of rights belonging to one individual. A critical analysis of the two compensation theories is undertaken in Chapter 2 to deepen our understanding of their core philosophies and develop the conceptual framework for analysing compensation valuation.
practices for customary land rights in Malawi since reviewed empirical studies have used various frameworks ranging from descriptive to analytical ones, that are not applicable to addressing objectives of this study. Alternatively put, reviewed literature lack clear theoretical frameworks, making their application to this study and generalisation of its findings to similar contexts challenging.

1.6 Research methodology

The research uses case study as its methodological approach to examine valuation practices of private and customary properties for compensation purposes. It aims at a holistic analysis and understanding of compensation and its valuation in real life situations by using three case studies. Thus, the study employs desk research, key informant interviews and FGDs to gather primary and secondary data. Main research data were collected from various expropriatees, local leaders and government officials directly affected/involved in the three case study projects in Malawi as detailed in Chapter 5. Other respondents included officials from MLHUD; private valuers; representatives from FAO, Oxfam and World Bank; a representative from civil society organisations and community leaders. Generally, this is a qualitative study and uses qualitative analysis. Chapter 5 presents the study’s detailed methodology.

1.7 Significance and contribution of study

Fundamentally, the study aspires to contribute to existing knowledge in several ways. At the policy level, it is expected to contribute towards policy formulation, development and improvement of legal frameworks and valuation guidelines, principles, rules and standards for compensation. Empirically, the study contributes towards deepening our understanding and filling in some gaps in existing knowledge regarding compensation and valuation of customary land; contribute to current debates on compensation and valuation of customary land, and to show how received law affects compensation and valuation practices in different environments. As reviewed empirical literature show that there has been no study analysing valuation of customary and private property rights in rural areas using the same set of laws, case studies and analytical framework, this study contributes towards that knowledge gap. By proposing a single valuation model for customary land, the study makes a further contribution to knowledge.

Theoretically, the study develops its own conceptual framework. In that regard, it contributes
to existing compensation theories by examining the study’s findings against such theories. Further, by testing the study findings against existing compensation theories, the study is actually examining applicability of existing compensation theories on customary land tenure. Thus, the study extends tenets of compensation theories developed in private tenure settings and meant for private properties to customary tenure settings. By developing its own analytical framework to analyse the phenomena under study and applying that analytical framework to both private and customary properties, the study manifests its originality and significance.

1.8 Terminology

For purposes of this study, the following terms have the meanings as defined here.

**Allodial interest** is the highest proprietary interest known to customary schemes of interest in land. It is sometimes referred to as paramount title, absolute title or radical title.

**Customary estate** are private land rights on customary land with usufructuary rights in perpetuity, and once registered, title of owner has full legal status and can be leased or used as security for a mortgage loan. It is similar to a freehold.

**Customary land** is all land used, occupied or held under prevailing customary laws.

**Customary law** comprises rules grounded in prevailing customs: that is unwritten laws established by long usage and applicable to particular communities.

**Customary tenure** is the right to own, use or dispose of land rights based on customary laws and on the fact that they are recognized as legitimate by the community, enforced in the customary courts or even merely by social pressure and normally unregistered.

**Non-market value** is the estimated amount that a person or community attaches to their various physical and non-material properties and services at a particular time based on their knowledge or intuition in non-market settings.

**Non-material aspects** of customary land rights, also known as non-monetary, incorporeal and intangible aspects refer to communal, cultural, economic and spiritual aspects among others,
attached to land under various customary practices.

**Private land** is all land exclusively owned, held or occupied under freehold tenure, and/or customary land allocated exclusively to a clearly defined community, corporation, institution, clan, family or individual.

**Usufruct** is a use right over land held by a member of the land holding community or a stranger who has obtained an express grant from the land holding community using customary mode of alienation. It is sometimes referred to as customary freehold, proprietary occupancy or determinable title.

### 1.9 Scope and limitations

The study analyses compensation valuation practices for expropriated customary and private land for public projects wholly funded and compensated by Malawi Government in Mzimba, Phalombe and Salima Districts in rural Malawi. The focus is thus on purely government funded projects and not those funded by other institutions. Furthermore, the study concentrates on private and customary property rights in rural areas or where land markets are non-existent. Essentially, all other public projects not funded by government and where property rights are neither private nor customary, or in urban areas, are beyond the scope of this research.

### 1.10 Thesis structure

This thesis has eight chapters spread across five thematic areas of introduction, theoretical and literature review, study setting (context), methodology and findings and analysis. Introduction is in Chapter 1. Chapters 2 and 3 provide reviews of relevant literature for the study. Thus, Chapter 2 discusses the main compensation theories and develops the study’s conceptual framework. In Chapter 3, the study continues with the review of literature through a comparative analysis of international experiences on compensation valuation practices of customary land. Background to legal frameworks regarding expropriation, compensation valuation and their historical development in Malawi is presented in Chapter 4, thereby providing the study’s setting and context. This is followed by Chapter 5 that discusses the study’s methodology while Chapter 6 presents its findings. The analyses of the study findings are presented in Chapter 7 as Chapter 8 concludes the study.
Chapter 2: Compensation theories

If a new road were to pass through the land of a private person, it might perhaps be extensively beneficial to the public. In this and similar cases the legislature can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislation does is to oblige the owner to alienate his possessions for a reasonable price.

William Blackstone (1872)
2.1 Introduction

Blackstone (1872) contended that government could take any private property for public benefit by giving equivalent compensation for injuries sustained, so as to restore those affected to their previous niches. Compensation is thus a corrective measure intended to restore those whose property has been expropriated (Kratovil & Harrison, 1954). This chapter’s sections 2.2 and 2.3 focus on purposes of compensation and amounts payable for taking private land. Relevant compensation theories are reviewed in section 2.3 while section 2.4 discusses nature of customary land rights. Compensation purposes and their applicability to customary land compensation and challenges faced are discussed under sections 2.5 through 2.7. This contextual analysis provides an understanding of compensation concepts that form the basis for examining valuation practices for customary land compensation in Malawi. Nature of customary land in Malawi is discussed in Chapter 4. Section 2.8 summarises the chapter.

2.2 Reasons necessitating compensation

Fundamentally, compensation aims at distributing inconveniences of public projects among the people, as no single person should bear the cost alone (Epstein, 1993). Thus, compensation is paid because government does not intend to take private property without compensation and harm people, unless clearly stated (Barnes, 2014). Explicitly, compensation is meant to restore expropriatees to their previous status as before expropriation (Denyer-Green, 2014). How far the burden is spread depends on compensation tenets adopted in each jurisdiction. The two main classes of compensation are full and partial. Full compensation requires expropriatees to be fully compensated for land taken and all relevant expropriatory damages while partial compensation considers only the property taken. Within these compensation categories, variations exist based on particular aspirations and laws of each country. Fundamentally, there are several main intents of compensation including the following.

a) Encourage efficient expropriation

Generally, the need for compensation limits and encourages efficient expropriation. Epstein’s (1985) full compensation ideology desires reimbursement for any injury to land rights at market value and all admissible losses, as making government pay for its interferences leads to costly takings. The need to pay for every interference forces government to select only beneficial programmes, thereby using public resources efficiently. Furthermore, compensation presents a budget constraint and limits number of expropriations (Fischel, 1995). Thus, compensation
forces decision makers to bear costs of their actions, thereby encouraging efficacious decisions and expropriations.

b) **Deter arbitrary takings**

Seemingly, compensation helps in preventing arbitrary deprivations as government is a presumed competitor in the market when obtaining resources for various public purposes (Sax, 1964). In that merchandising capacity, government has to pay prevailing prices for what it acquires to discourage arbitrary gains. The requirement for compensation promotes good governance and deters government from getting property by using its advantageous position (Barnes, 2014). This echoes Blackstone’s (1872) long standing reasoning that government can take any private property but, it must pay ruling prices as in private transactions, and not by using unorthodox means. Essentially, government is seen as an individual participating fairly in an exchange through equitable prices, thereby discouraging arbitrary takings.

c) **Promote fair expropriation**

Government expropriations afflict individuals unequally. According to Denyer-Green (2014), fair compensation ensures impartiality to all expropriatees as no-one bears expropriatory costs alone for the society. Compensation that induces government to make rational development decisions (Fee, 2006) while distributing expropriatory infirmities equitably among the public promotes fair takings (Du Plessis, 2009). The fairness principle, like the equivalence principle, requires compensation for the value of land taken and resultant losses. Landowners should be compensated appropriately for their losses, for paying them more impoverishes government while less compensation impoverishes them. The equivalence principle is followed in most commonwealth jurisdictions (Allen, 2004) with varying modifications.

d) **Protect private property**

Society demands adequate compensation to prevent subjective expropriations by government thereby shielding themselves (Nosal, 2001). FAO (2009) stresses that compensation provisions are purposely implanted in constitutions of many countries to protect private property from predatory authorities. The mere need for compensation makes government consider its actions judiciously, thereby providing some level of protection. Essentially, the need to pay commensurate compensation generally increases property protection.
For some properties, strong person-property attachments exist through freedom, identity, spirituality and contextuality, and these need compensation when lost (Radin, 1982). Property is the hallmark of individualism and the cradle of social liberty (Denman, 1978), and the constitutional warranty of compensation protects these values from arbitrary expropriations, as property must be taken only when acceptable public needs arise. The inviolability of the home is intricately woven with individuals, families and communities (Radin, 1982). Acquiring such properties causes significant personal tribulations and requires commensurate compensation to be appropriately protected (Sheehan, 2000). The need for efficient, non-arbitrary and fair expropriation fortifies protection for private property.

e) To wholly restore expropriatees
Theoretically, expropriatees replace lost properties from the market using their compensation money. Alternatively, compensation is believed to be a leverage for turning owners unwilling to sell their land to acquiesce since they will be able to replace it from the market (Denyer-Green, 2014). As such, compensation amounts satisfying and assuring landowners of replacement properties turn them into willing sellers. The owner’s economic loss of expropriated properties must be ascertained by determining the pecuniary value to the owner and cannot be less than ruling prices (Baum et al., 2008). Thus, restoring expropriatees requires full indemnification of expropriatory losses as anything less will not buy them replacements and cover other losses sufficiently. Compensation assessment should ensure that expropriatees’ welfare is generally good regardless of the taking (ADB, 1998; Denyer-Green, 2014). Ideally, owners should be indifferent between being expropriated and retaining the property. Where indemnity is the compensation measure, then all acceptable acquisition losses are recoverable, just as they are against a private defendant (Epstein, 1985).

Some compensation concepts disregard transaction costs, equating expropriation to a market sale where a willing seller covers sale expenses (Denyer-Green, 2014). Expropriation is a forced exchange with unwilling sellers who should not be forced to bear ensuing losses. Expropriatees are unsatisfied nor indifferent when consequential costs of takings are systematically loaded on them.

f) Cover demoralisation costs of acquisition
Expropriating private property disheartens owners and sensible governments only acquire if acquisition benefits exceed costs (Alias & Daud, 2015). Thus, Michelman’s demoralisation
cost theory demands compensation or settlement costs, which are economic values of time, effort and resources for adequate compensation, when expropriation results in loss of production, income, incentives or in social unrest if unpaid. Reimbursement is hence required to mitigate such inconveniences. However, Michelman’s proposition lacks a specific compensation measure nor does it require compensation commensurate to market value of the property or indemnify owners against all losses. It desires an amount that would satisfy demoralisation. It is thus an equitable redistribution of demoralisation costs on all (Epstein, 1985). The challenge with this argument is that it is difficult to quantify and monetise demoralisation and compensate adequately. The other challenge is that agreed compensation may be exiguous to cover losses sufficiently as it is determined subjectively. From a utilitarian perspective, compensation is due when losses are greater than settlement costs and not otherwise (Michelman, 1967).

2.3 Compensation amount

Compensation is difficult to address since expropriation involves various properties while landowners expect it to cover their personal values, expropriatory problems and intended project benefits (Denyer-Green, 2014). Equally, expropriators may have limited budgets that fail to meet actual compensation (Cernea, 2008). Compensation amount concerns adequacy and its measure, and it is affected by assessment bases and methods.

2.3.1 Compensation adequacy

Compensation principles adopted in each country dictate compensables as mirrored in the law (Barnes, 2014). Alias and Daud (2015) query what monetary quantum constitutes adequate compensation and what is the yardstick for adequacy? Adequacy is examined by the extent compensation fulfils desired compensation aspirations and varies according to jurisdiction (Serkin, 2005). Broadly, compensation classifies into two theories - indemnity and taker’s gain, based on compensables covered to satisfy intended goals. These two theories thus address issues of compensation adequacy and compensables.

a) Indemnity compensation theory

This theory requires compensation covering the various expropriatory losses to wholly restore expropriatees as before expropriation (Baum et al., 2008; Denyer-Green, 2014). As Denyer-Green (2014) contends, compensation means an indemnity which must adequately cover land
lost and all other consequential inconveniences, and not more or less, to restore expropriatees fully. Similarly, World Bank (2013) requires compensation for assets lost at full replacement value plus other payments to improve or restore expropriatees’ livelihoods. Consequently, indemnity compensation is measured by considering owner’s losses, and not purchaser’s gains. Thus, in assessing compensation, pecuniary values of properties lost to owners must be determined, and not otherwise. Essentially, fully indemnifying expropriatees of their losses requires compensation that covers land taken, severance, injurious affection, disturbance, solatium and/or special values (Akujuru & Ruddock, 2014; Barnes, 2014; Denyer-Green, 2014; Keogh, 2003). These items are now discussed briefly.

i) Expropriated land
Expropriated land forms the primary compensation item under indemnity compensation principles at its current market value, as it is the most basic resource for economic and social development lost by expropriatees. Thus, doubtlessly, compensation for expropriated land and assets is economically justifiable, legally obligatory and indispensable (Cernea, 2008; Denyer-Green, 2014), unless otherwise stated. Conceptually, where land is uncompensated, then compensation fails the indemnity standard.

ii) Severance and injurious affection
Fundamentally, this is compensation for loss of value of retained land in partial acquisitions where full compensation is demanded (Barnes, 2014). Severance and injurious affection are based on market value of land or rental value for temporary acquisition (Baum et al., 2008; Mangioni, 2008). Normally, severance is caused by the severing, increased operational costs on remaining land thereby depreciating its net value, or adverse effects on development potential of retained land due to loss of accessibility or other (Baum et al., 2008; Denyer-Green, 2014). Likewise, injurious affection is loss in value of remaining property emanating from proposed projects or uses on acquired land (Barnes, 2014) due to reduced land size, less demand for the property, visual intrusion or reduced privacy and adverse environmental issues such as increased traffic, dust, noise and dirt that alters the character of the land altogether (Baum et al., 2008; Denyer-Green, 2014). The premise for compensation for injurious affection is the proximity of the two lands which results in enhanced values, and the negative effects of partial expropriation on remaining land that are important (Denyer-Green, 2014). Technically, severance contributes to injurious affection. Generally, any loss not due to severance represents injurious affection (Baum et al., 2008).
iii) Disturbance compensation

Disturbance compensation covers various expenses above land value and arises where the loss is clearly a consequence of the taking (Barnes, 2014). Generally, Baum et al. (2008) entails that disturbance compensation covers many items but the most common ones include professional fees (for surveyors and lawyers among others); costs of finding alternative accommodation, property or land; removal/relocation costs (including temporary storage, insurance and damage to goods during transit); publicity costs (for advertisement, alterations of headed notepaper, business cards, signposts, change of address and so on); adaptation of fixtures, fittings, chattels and premises; increased and double overheads; goodwill and bridging finance; loss of income and profit; redundancy payments and loss on forced sale among many (Barnes, 2014; Denyer-Green, 2014). Disturbance compensation is based on financial calculations benchmarked on prevailing and reasonable costs (Baum et al., 2008; Denyer-Green, 2014). All compensation principles under indemnity concept necessitate disturbance compensation. As argued by Epstein (1985) and The Independent Institute (2010), ignoring these losses in compensation is unfair as expropriatees bear them alone.

iv) Solatium or consolation

Solatium is a statutory additional payment for disturbing one’s property rights, paid as a lump sum or percentage of the agreed compensation quantum (Baum et al., 2008; Du Plessis, 2009). In the UK, any person displaced from a home receives these additional sums. For freeholders and leaseholders, home loss is 10.0% of the property’s market value with a minimum of £4,700.00 and a maximum of £47,000.00. Any other solatium claimant, such as a home occupier, gets £4,700.00 (Denyer-Green, 2014).

v) Special values

The final compensation item concerns special values, which emanate from personal attachments to and benefits enjoyed by owners from the property besides market value (Denyer-Green, 2014; Keon-Cohen, 2002). Special value is a characteristic of the expropriated interest which is of sentimental/economic value to owners but which would not enhance market value of the interest (Keogh, 2003). Such properties may include special or sentimental assets or sites like graves. According to Akujuru and Ruddock (2014), some tribes in rural Nigeria consider compensation adequate when their social and cultural values attached to expropriated properties are compensated. This is applicable in many parts of the world, including Australia (Sheehan, 2000), Ethiopia (Alemu, 2013), Malaysia (Alias & Daud, 2008), New Zealand.
(Boyd, 2001; Fortes, 2005), Nigeria (Aluko, Omisore, & Amidu, 2008) and many other areas (Small & Sheehan, 2008). Compensation for social, cultural, spiritual and other special values is based on percentages or agreed amounts since it is challenging to quantify them using market methods (Boyd, 2001; Fortes, 2005).

Fundamentally, compensation concepts subscribing to indemnity philosophy include adequate compensation, appropriate compensation, commensurate compensation, fair compensation, full compensation, equivalent compensation and full indemnification, among others (Ambaye, 2013; Barnes, 2014; Denyer-Green, 2014).

b) Taker’s gain compensation theory
This theory focuses on expropriated property with expropriated land being the primary and only compensation item. It argues that compensating additional items exhausts public resources while enriching expropriatees (Kratovil & Harrison, 1954). Thus, since it is property that is taken, then government should compensate for that at its market value and nothing else. Taker’s gain compensation is measured by benefits to the taker and not expropriatee’s losses. Thus, compensation for land also measures compensation adequacy. Fundamentally, most expropriatory losses are ignored by expropriators and are absorbed by expropriatees. However, clear examples of principles following this ideology are difficult to find, though practically, compensables considered indicate which principle is followed.

2.3.2 Test for compensation adequacy
The common benchmark for compensation appropriateness for expropriated land is its market value on acquisition date. As a compensation measure, market value connotes the property price a willing seller realises in a perfectly competitive market. According to IVSC (2019), market value represents an estimated amount for which an asset/liability exchanges on the valuation date between willing exchange parties in an objective transaction, following reasonable marketing and where the parties behave knowledgeably, prudently and freely. This estimated amount is seemingly the most probable or best or most advantageous price for exchanging the asset/liability in a competitive market on a particular date. It is also taken that exchange parties transact rationally without undue influence and that they have full information about the market, comparables, exchange prices and fellow participants. Further, it is assumed that the assets were adequately exposed on the market to enable potential buyers to know and decide whether to bid or not (IVSC, 2019).
Compensation appropriateness for disturbance, solatium and special value is based on value to the owner (Denyer-Green, 2014). Essentially, considering market value of expropriated land and monetary amounts of other losses constituting the compensation award and paying them is a reasonable way of testing compensation equivalence and aptness (FAO, 2009). Also, compensation timing, expropriates’ right to appeal and payment mode affect compensation adequacy, among other aspects.

2.3.3 Bases for compensation valuation
Before discussing compensation assessment bases, let us look at the following economic concepts: cost, price, market and value to clearly ground their meanings.

a) Cost, price, market and value
Cost is the amount (of money) needed to produce a good or service (United Nations, 2005), while amounts needed to facilitate an exchange are transaction costs (IVSC, 2019). Cost relates to price when it is used as payment for goods or services. Ordinarily, price represents the actual amount paid for an exchange in the market (Blackledge, 2009; United Nations, 2005). Fundamentally, the set of arrangements that brings buyers and sellers together through the price mechanism represents the market, and it is defined geographically or by products or product features, number of participants or some other features. Essentially, a real estate market involves exchange of real property rights (Mooya, 2016; United Nations, 2005). Accordingly, and as Shapiro, Mackmin, and Sams (2012); Mooya (2016) and Sanders (2018) contend, nature of such transactions and rarity of exchange data contribute to imperfect markets, more especially for real properties.

Economically, property value is created by a property’s utility or capacity to satisfy desires of various parties. Contextually, value relates to price of a property in an exchange. Thus, value is an estimate of the likely price payable for a property at a given time, which depends on type of market transaction, motives and interests of parties involved (Blackledge, 2009; United Nations, 2005). This conceptualisation of value is common in the Western world where property is freely exchangeable, unlike in the developing world, where most land and property are held under different but mostly customary arrangements and perceived differently (Ubink & Amanor, 2008; Wily, 2011). Further, diverging views on meaning of property contributes to challenges of meaning of value by various individuals and groups in different societies, cultural settings and economic arrangements (Small & Sheehan, 2008). According to Mooya (2016),
conceptual challenges of market value are threefold: in what form (intrinsic or extrinsic) does value exist? What is the acceptable basis (individual or collective) of measuring value? And what is a fair measure of value in a given case or for a given object? These questions are prominent in compensation valuation, as discussed in this and later chapters.

Practically, formal value of any exchangeable property is premised on its highest and best material utility and expressed monetarily (Mooya, 2016; Small & Sheehan, 2008). Highest and best use is the use that is physically achievable, financially feasible and legally acceptable for a particular property and produces optimum benefits (IVSC, 2019). Such use may be the existing one or a different one. Technically, highest and best use concept relates to land use planning and demonstrates a situation where land is subdivided into different plots for different uses based on various laws. Antagonistically, customary properties are not zoned to such high detail if at all, and their uses are based on traditional norms and normally mixed in nature (Kasanga & Kotey, 2001). As it will be seen in later chapters, this concept is partially applicable to customary properties and yet, value concept related to the highest and best use is applied wholly when valuing customary properties.

b) Bases of value for assessing compensation

Bases or standards of value are fundamental premises on which reported values are grounded (IVSC, 2019). Bases are dictated by valuation terms and purposes, which influence methods, inputs, assumptions and resultant values in specific valuation assignments (IVSC, 2019). Market value is the most common basis for assessing compensation in most jurisdictions (Kitay, 1985) while other bases include replacement cost/value and investment value/worth (IVSC, 2019). As defined already, market value is a time-specific estimate and not an actual exchange price. Further, the market requires exchange parties that transact freely and fully-knowledgeable to make prudent decisions.

Theoretically, exchange properties are sufficiently marketed prior to valuation date to enable interested parties make their offers. Where properties enjoy limited advertisement, then ensuing values may not meet market value expectations. As stated in preceding paragraphs, accessible market information is necessary to fairly inform market participants on nature, character, actual and potential uses of subject properties, as well as market conditions on valuation date. Such information is believed to help market participants behave intelligently and rationally in their
dealings, as well as motivate them to willingly participate in the transaction. Where these conditions lack in any degree, market value fails to materialise.

For expropriation purposes, World Bank (2012) considers market value as the amount required to enable affected parties replace lost assets. Market value affords a useful explanation of property value and valuation processes. Conceptually, market value results from interactions of sellers and buyers in competitive markets while considering all price influencing factors, including highest and best use. Market value is a fair measure of compensation as it has external validity (Baum et al., 2008), produced through objective valuation based on market forces, carried out by an existing profession of valuers (Denyer-Green, 2014) and that the market is a neutral gauge of value (Allen, 2004). Market value satisfies criteria for fairness and efficiency as expropriatees get money that enables them to replace lost properties (Denyer-Green, 2014). However, market value does not always equal owner’s losses as it essentially ignores some real but invisible special values (Denyer-Green, 2014; Witter & Satterfield, 2014).

Replacement cost/value is another base of value where the cost approach is used (IVSC, 2019). This is the amount required to sufficiently replace assets lost by expropriatees plus transaction costs (World Bank, 2013). To achieve full restoration of expropriatees, World Bank dissuades depreciating affected structures when applying the cost base for compensation purposes. Practically, replacement cost/value base is widely used under World Bank supported projects.

Another value base is investment value (also called worth), which denotes value of a property to a particular owner or buyer for individual investment or operational objectives. Principally, this basis reflects benefits one enjoys from holding the property and thus, precludes a presumed exchange. Alternatively put, it is used to measure investment performance (IVSC, 2019).

c) Valuation methods

Valuation methods are either market- or non-market-based. Market-based approaches rely on market information for their successful application in assessing market value. Broadly, all market-based valuation methods rely on some kind of comparison to arrive at market value, guided by the substitution principle, which believes that value of a property is influenced by the price that would be paid for a substitute property of similar utility and desirability (Mooya, 2016). Commonly used market-based valuation methods are comparison, income and cost. On the other hand, non-market-based methods rely less on market data and solicit most of the
information from would-be affected parties themselves. For compensation purposes, that would mean gathering information from affected people themselves. Contingent valuation, hedonic pricing and travel cost are some of these methods. Choice of valuation method lies with the valuer, dictated by guiding laws, property nature and valuation purposes. Presumably, any of these methods is applicable subject to legal prescriptions, valuation bases, purposes and suitability in particular circumstances (IVSC, 2019). The following are briefs on these methods.

i) Comparison method
This method compares subject properties with similar properties in almost all aspects including location, utility and desirability and for which recent market information is available, to estimate value (Blackledge, 2009; Isaac, 2002). Use of comparable market-based transactions is trusted to reduce uncertainties, unlike in other methods. Under this method, the principle of substitution, which provides that value is set by the price a buyer pays to get a substitute property, and that the buyer will not pay more for property that is equally desirable, is the most vital theoretical pillar (Mooya, 2016; Wyatt, 2007). Because of its reliance on revealed preferences and thereby considered less uncertain, this method is highly used and relied upon (IVSC, 2019; Mooya, 2016). However, where market data are scarce like where customary land and other unregistered land prevail, this method is vulnerable.

ii) Income method
Income method is frequently used for income-producing properties as market value is a function of achievable income over a given period and required rate of return (IVSC, 2019). It is also called the indirect comparison method as it depends on market information in generating value (Mooya, 2016). Fundamentally, property value is found either through direct capitalisation, which is the traditional income method, or discounted cash flow (DCF) method. Direct capitalisation determines value by dividing the first year’s income or terminal value by required rate of return (capitalisation or ‘cap’ rate). Alternatively, DCF discounts forecasted cashflows to a present value of the property on a particular valuation date using an appropriate discount rate (Isaac, 2002; Mooya, 2016). Theoretically, one of the challenges with the income method, and as Mooya (2016) contends, is that it is a highly technical process that may not represent the direct, common sense and intuitive approaches that actual investors may use. Mooya further argues that it is one thing to mathematically relate market value to rent and discount rates, and totally another for resultant figures to represent actual exchange prices. Practically, the method suffers from insufficient market data and forecasting of cashflows.
generally, which may force valuers to make unrealistic assumptions (Blackledge, 2009; Mooya, 2016).

iii) Cost method
Cost methods apply to properties lacking markets, are specialised in nature such as public schools and where market data is scarce (Scarrett, 2008). Its premise is that rational buyers will not pay more for properties than costs of constructing equally desirable substitutes, unless undue time, inconvenience, risk or other factors are involved (IVSC, 2019; Mooya, 2016). For cost methods, property value equals current cost of replacing or reproducing the improvement after deducting for obsolescence, plus land value (Scarrett, 2008). Generally, value is equated to cost, which is not always a realistic assumption (Blackledge, 2009). Put differently, cost methods do not determine market value, but replacement or reproduction costs and thus taken as methods of last resort (Wyatt, 2007). Property value under cost approaches is calculated either of three methods. First is replacement cost which considers property value as cost of similar properties with equivalent utility, but not exact physical aspects. Thus, replacement cost is that of a modern comparable property providing similar function and utility, but of current design, construction materials and techniques (Scarrett, 2008).

Second is reproduction cost that considers value as cost of replicating original properties (Wyatt, 2007). It is appropriate when costs of modern replacements exceed those of replicating subject properties, and when utility offered by subject properties can only be provided by their replica (IVSC, 2019). Broadly, value under replacement and reproduction cost methods equals depreciated building costs plus land value. Lastly, summation method is typically used for investment companies or other property types or entities for which value is primarily an aggregate of costs of all properties under the holding. Thus, the process involves costing each property using appropriate valuation methods, and summing them together to get value of the whole investment (IVSC, 2019).

iv) Contingent Valuation Method (CVM)
Fundamentally, conventional market-based valuation methods are deficient to assess various passive/non-use or special values related to various properties (Carson, 2000; Denyer-Green, 2014). This is because there are no market data about these values to aid their valuation (Arrow et al., 1993). CVM is frequently used to value non-market goods and services, and estimates what a prudent individual is willing to pay (WTP) or accept (WTA) to retain or lose an asset
(Arrow et al., 1993; Freeman III, 2003). It is a stated preference and survey-based method of non-market valuation. It elicits information on the maximum a person would pay or accept for a good or service when market data are not available (Boyle, 2017). Boyle adds that CVM is one of the most commonly used non-market valuation method, despite its controversies.

In expropriation, WTP represents compensation amount a landowner is ready to pay to keep their properties while WTA implies compensation sum a landowner is prepared to receive to surrender their properties (He & Asami, 2013). Accordingly, Carson (2000) argues that the minimum WTA compensation is the appropriate measure in a situation where one is being asked to give up a good. In estimating WTP or WTA, CVM includes both direct-use values realised from utilising the resource like wild fruits from forests and indirect-use (non-use) values that do not require use of the resource such as fresh air from forests. Thus, contingent valuation sources information from affected people (survey-based) regarding their readiness to pay or receive.

However, Hausman (2012) contends that CVM’s main challenges include hypothetical response bias leading to overstated values, that is incentive incompatibility problem (Garikipati, 2005); large differences between WTP and WTA and embedding problem which encompasses scope problems. Carson (2012) underscores that well designed and conducted studies can cover these issues and produce reliable estimates for assessing damages (compensation) including lost passive/special values, as responses can be taken as revealed economic behaviour of participants. Good quality contingent valuation results also depend on how well-informed are respondents to make knowledgeable decisions and not be overwhelmed with it, when presented with sufficient and relevant information about the project or policy together with specific conditions for that particular contingent valuation (Arrow et al., 1993).

Further, Arrow and colleagues offer that one way of overcoming these drawbacks with CVM is to ensure good construct validity of the entire contingent valuation survey instrument. It is presented that these challenges depend on participants’ levels of familiarity or knowledge about target assets (Morwitz, Steckel, & Gupta, 2007), characteristics of participants involved in the survey, attributes of commodities under study and type of scripts used (Kling, Phaneuf, & Zhao, 2012). While CVM is not perfect like other economic measurement techniques, ADB (2007) considers it potentially useful to compensation assessment for customary land and other non-market assets as it captures use and non-use values (Ajibola, 2012).
v) Hedonic Pricing Method (HPM)

The most common application of hedonic concept to environmental valuation concerns housing markets by analysing consumer choices. HPM predicts property values by using regression analysis of particular asset characteristics like location, building size and materials, access to schools and public transport among others. It assumes a continuous functional relationship between property prices and these attributes (Ajibola, 2012; Taylor, 2017). The technique believes that prices paid for associated marketed goods and services reflect value of property or characteristics in question (Akujuru, 2014). Akujuru also highlights that HPM is biased towards WTP for perceived benefits and excludes WTA. Since HPM relies on transactional data for its operations, it is challenging to use where data are scarce (Ajibola, 2012). Furthermore, HPM is also challenged by environmental attributes that are specific to different housing and property markets (Taylor, 2017). Essentially, HPM may not be applicable in compensation assessment for expropriation purposes.

vi) Travel Cost Method (TCM)

TCM is an indirect method for estimating user benefits for recreational activities and sites such as beaches, parks and heritage sites. Thus, individuals reveal their WTP for recreational uses of the environment in the number of trips made and sites visited (Parsons, 2017). Travel and time costs including contingent costs constitute implicit price of participation. Most simple TCM models assume that a journey is for a single purpose of visiting a specific recreational site. Yet, a trip may have several aims and it is problematic to define and measure opportunity costs of traveling time used for other purposes other than visiting the site, thereby under- or overestimating the site’s value (Ajibola, 2012).

TCM is limited in its scope of application because it requires user participation. Most importantly, it cannot be used to measure non-use values (Boyle, 2003). Thus, sites that have unique qualities that are appreciated by non-users will be undervalued, just like on-site environmental features and functions uninteresting to visitors (Ajibola, 2012). One critical drawback with TCM is that it is not applicable where there are no recreational activities (Boyle, 2003). Another critical challenge in using TCM is that of congestion at target sites, which is difficult to incorporate in its valuations, thereby resulting in incorrect values (Parsons, 2017). Fundamentally, TCM is only applicable to recreational facilities (Parsons, 2017), making it challenging to use where no such sites exist as in the three case studies used in this study.
2.4 Nature of customary property rights

Conceptually, only customary/native tenure based on tribal customs prevailed in African countries and beyond before colonisation introduced Western property concepts and institutions (Abdulai & Ndeku, 2008; Bentsi-Enchill, 1965; Seidler, 2014). This resulted in hybrid tenure systems with private, public and customary land classes. However, customary tenure has prevailed in most developing countries and remains dominant to date (FAO, 2017; Ubink & Amanor, 2008). Thus, as public projects are increasing in most countries, customary land finds itself at the crossroads of expropriation.

Private tenure, which is guaranteed by government, ensures exclusive ownership and enjoyment of property (Alston, Libecap, & Mueller, 1999). Fundamentally, Besley and Ghatak (2009) contend that this exclusiveness and liberty catalyse owners to invest, exchange, lease and collateralise their assets for various financial facilities, thereby producing, securing or assuring their optimal values (De Soto, 2000). Such property systems support competitive property markets necessary to provide quality property information on ownership, land details, values (or prices) and rentals that aid real estate valuations and market transactions (Mooya, 2009) including expropriation and compensation (Barnes, 2014). However, private property rights are limited by inherent and reserved rights of governments to expropriation subject to compensation (Kratovil & Harrison, 1954), as explained in section 1.5 of Chapter 1.

Public land is held by government and its agents for various public services, infrastructure and buildings. All governments are ultimate landowners and decide who to grant title, type of title, at what time, how secure and how to arbitrate land matters (Alston et al., 1999), guided by reserved or inherent power principles as discussed in Chapter 1. Public land is presumably protected by virtue of its class. In jurisdictions where land is generally considered public property, individuals have usufructs only, thereby limiting market exchanges, mortgaging and collateralising among others, and hence stifling property markets (Alemu, 2013; Ding, 2007). In such jurisdictions, government has reserved powers over land matters, and can resume any land except that which is already used by itself without compensation, as discussed elsewhere.

Generally, customary land is all land owned, occupied or used under prevailing customary laws and held as individual, public, communal or open access. Private customary land is exclusively allocated to and utilised by individuals, families and clans for various uses while the
reversionary interest remains with communities ad infinitum (Chipeta, 1971). Public customary land regards all land used for the common benefit of people of a particular community as graveyards, market places, play grounds and places of worship, among others (Chipeta, 1971; Ubink & Amanor, 2008). Customary common and open access resources include grazing lands, fisheries, water systems and natural forests, among many, and they are commonly held by a particular community under customary law. While our focus is on customary common land and resources, it is worth mentioning that what is considered as common land in England is still not common to all and considered private enclosures because access is strictly limited to persons holding common rights and not everyone (Clark & Clark, 2001; McKean, 2000). In that sense, common land in England is fundamentally different. Cumulative property rights that a person may have over common property include accessibility, benefit, management, withdrawal and exclusion of other groups (Andersen, 2011; Ostrom, 2010).

Alternatively, open access land is freely accessible by anyone regardless of the community one comes from (Andersen, 2011). However, most customary properties are regarded as public property by various governments (Cotula & Vermeulen, 2011) despite lacking clear declarations or statutes to that effect. Where customary land is classified as public property, then it is not compensable during expropriation based on reserved powers of government, as discussed previously. Otherwise, it is people’s private property and hence compensable when expropriated.

Customary land is usually acquired by original occupation, allocation by local leaders, gift and inheritance and not by government grant (Adu-Gyamfi, 2012; Ubink & Amanor, 2008) as well as exchanges based on traditional arrangements (Haruna et al., 2013; Takane, 2008). The community can allow or restrict anyone from using communally owned rights. The Yoruba (in Nigeria) consider land as the basis of creation, stories, religion, spirituality, art and culture; relationships with living people, the dead and future generations (Aluko et al., 2008). Some authors actually contend that one attribute of customary properties is cultural and spiritual attachment (Small & Sheehan, 2008). Essentially, proprietary interests of any living member are implicit as holders and mere caretakers.

Absence of documentary certificates of ownership characterise customary land. This tenure exhibits a strong people-land bond, a link considered indissoluble, but this is changing now due to evolving customs and introduction of Western property concepts (Bannerman & Ogisi,
1994; Ubink & Amanor, 2008). Similarly, inheritance of such property involves matrilineal or patrilineal practices (Bentsi-Enchill, 1965; Tschirhart, Kabanga, & Nichols, 2018). Allocation of customary land to outsiders requires communal or familial consent (Abdulai & Ndekugri, 2008), but economic exchanges are now happening based on customary arrangements and unregulated by formal institutions (Haruna et al., 2013; Takane, 2008). The right of alienation is implicit in customary land concepts and generally restricted by custom. This protects and ensures continuity of the community (Bannerman & Ogisi, 1994).

Customary land has various intangible values such as inheritance, initiation and ritual sites, burial areas and religious sites, among others. These intangible values are substantially invaluable to concerned societies (Alias & Daud, 2008; Witter & Satterfield, 2014). Some communities take land as the cradle of life and root of ownership from a supernatural creator, proprietorship that is absolute (Small & Sheehan, 2008). Customary tenure is still strong, dynamic and prevalent in most developing countries (Kasanga & Kotey, 2001; Ubink & Amanor, 2008), though it has been affronted by various factors including colonisation (Wily, 2011). Theoretically, collective rights accord protection to particular groups of people through cultural membership (Xanthaki, 2003). In addition to restricted alienation as a protective measure, statutes in some countries and international instruments confer general protection for customary land rights.

Broadly, the set of economic and social relations defining individuals’ positions regarding resource use in customary settings are intricate and cobwebbed as a person may have several bundles of rights including an exclusive ownership bundle, a communal usufruct bundle over communal resources and a rights bundle over common and open access resources, even those beyond one’s community. Individuals are thus entitled to exclusive benefits for exclusive land but share communal, common and open access resources with fellow community members and even those beyond that community for open access.

2.5 Compensation theories and customary land rights

Transplanted private property institutions are prominent in most developing jurisdictions while customary property institutions are affronted to date (Seidler, 2014). These received property concepts and statutes guide expropriation and compensation for customary properties in many developing countries (Small & Sheehan, 2008), although private and customary property rights
are fundamentally different. Consequently, does the application of these institutions on expropriated customary land achieve identical compensation aims as for private properties?

a) **Efficient expropriation and customary properties**
Efficient expropriation for quantifiable private properties is achievable since market information is normally available to support estimation of reasonable values for their compensation. Contrastingly, customary properties are hardly quantifiable since property data on ownership, size, boundaries, rights and interests are scarce, as tangible records are non-existent. The complex nature of customary properties worsens the situation (Alias & Daud, 2008; Witter & Satterfield, 2014). It is generally difficult to monetise customary properties into reliable sums equal to value or quantity of land lost (Kakulu, 2008; Small & Sheehan, 2008). Seemingly, government takes more land than required since it is almost free (Larbi, 2008), thereby achieving inefficient takings of customary properties.

b) **Prevent arbitrary takings of customary properties**
As the preceding paragraph highlights, inadequate compensation promote arbitrary expropriations due to reliance on wrong measurement standards, absence of relevant market data and nature of customary properties (Alias & Daud, 2008; Keogh, 2003; Small & Sheehan, 2008; Sulle & Nelson, 2009). Additionally, expropriation represents a monopsonic market setting with only one buyer - government, that competes with itself and dictates compensation payable (Ambaye, 2013; Chan, 2003). Statutorily, customary properties are poorly recognised in existing laws (Magigi & Drescher, 2010) with no clarity on rights to value, basis and methods of assessment and guidelines (Alias & Daud, 2008). Essentially, existing compensation practices and processes equate customary properties to private properties without their incorporeal attributes (Sheehan, 2000; Sulle & Nelson, 2009), thereby resulting in inappropriate compensation that fail to fully deter unfair takings.

c) **Fair expropriation and customary properties**
The contention by Otubu (2012) and other researchers that no individual should be loaded by public development costs highlights the need to balance public needs and individual interests. For compensation for private properties guided by the fairness principle, it is possible to estimate commensurate compensation using available market data and achieve impartial takings. Contrariwise, fair customary property expropriation means that compensation should cover, in addition to land, consequential losses, other intangible aspects and benefits from
planned projects (Denyer-Green, 2014). The complicated nature of customary properties makes quantification and estimation of fair land values challenging, leading to undervaluation and inappropriate compensation. Also, as expropriated customary expropriatees relocate, they miss planned project benefits, despite contributing their land, making takings more unfair. While the Pointe Gourde principle requires that any increase or decrease in value of acquired land due to proposed projects should be disregarded in the compensation (Denyer-Green, 2014), this unfairness is about difficulties in quantifying and monetising compensation for affected customary properties, and not mainly project-induced value increases.

Fundamentally, use of Western concepts of property and value strip customary land of its intangible values and equate it to an exchangeable commodity as the two are incomparable (Small & Sheehan, 2008). Alias and Daud (2008) underscore that it is difficult to attach reasonable prices to customary/native properties because of their complex nature, deficient measurement concepts, tools and criteria (Sulle & Nelson, 2009). Principally, a compensation award that discriminates some inherent property attributes deprives them of their real character and worth, leading to unjust compensation and acquisitions.

d) Compensation and protection of customary properties

Theoretically, the need for compensation is a means of protecting properties against expropriation. Principally, protection for private properties and hence claims for compensation are guaranteed by government through land ownership titles (Alston et al., 1999). Protection may therefore mean not taking the property, compensating in monetary terms or replacements. Inversely, while proprietorship of customary properties is complicated by their nature, their titles are unwritten and insured only by concerned communities (Chipeta, 1971). This leads to their being abused by government and other interested parties (Chasukwa, 2013; Chinsinga, 2017). As for immaterial values of customary land, they are difficult to appreciate by strangers and alien land institutions as Witter and Satterfield (2014) and Xanthaki (2003) contend. A better protection option for customary properties is not to expropriate them as monetary compensation cannot cover all its aspects while replacement may not restore all rights and benefits adequately, like weakened social networks and communal protection enjoyed by belonging to certain groups. It is thus difficult to achieve satisfactory protection for customary properties through compensation in all its forms. This is worsened by government claims that customary land is public property and non-compensable (Cotula & Vermeulen, 2011). Restricted alienability is generally another inherent feature of customary land that guarantees
protection and continuity of communities. Compensation overlooks this aspect thereby reducing protection.

e) Restoring customary expropriatees

Restoring expropriatees to their earlier positions requires compensation commensurate to lost properties plus relevant disturbance expenses. This assumption is usually difficult, as compensation based on market value maybe lower than owner’s losses due to uncompensated invisible and personal losses (Barnes, 2014; Witter & Satterfield, 2014). Non-market improvements are normally ignored by market value assessments, thereby giving less reimbursements and failing expropriatees to pull through (Kakulu, 2008; Sheehan, 2000). Fundamentally, market value-based compensation for customary land is challenging for several reasons. Conceptually, expropriating customary land involves tangible and intangible values, some that go beyond one’s property or community, resulting in cobwebbed rights and livelihoods (Aluko et al., 2008; Chipeta, 1971). Quantification and monetisation of such rights and relationships are challenging, let alone achieving satisfactory compensation (Mitchell et al., 2015; Witter & Satterfield, 2014). Restoring customary property owners is thus difficult because compensation given cannot replace their lost lands and livelihoods.

f) Cover demoralisation cost of customary land acquisition

Generally, loss of customary properties lead to loss of proprietary and traditional use rights; loss of bases of life and history, spirituality, art and culture, identity and protection; loss of communal, tribal and familial relationships and inheritance rights; severance of ties with ancestors and social networks; and loss of cultural treasures and heritage, among others (Abdulai & Ndekugri, 2008; Magigi & Drescher, 2010; Small & Sheehan, 2008). Customary land acquisitions further lead to loss of access rights to public, communal and open access resources used variously for grazing, medicines and natural resources (Cernea, 1997; Schmidt–Soltau, 2003; Witter & Satterfield, 2014). These losses harm expropriatees variously and greatly.

The demoralisation cost concept of compensation desires to satisfy these disturbances. However, the proposition lacks a compensation measure for affected properties. Its application to private property is challenging since there is no benchmark for assessing property value. Furthermore, assessment of other losses is difficult since it only requires an amount that satisfies affected persons without any yardstick. It is also difficult to know the monetary sum
that will satisfy these injuries. For customary land, the proposition may be applicable since it only requires an amount that is reasonable and acceptable to landowners. This may call for negotiations between acquiring authorities and landowners and agreeing on reasonable amounts payable for the inconveniences. The concept may also address subjective aspects of customary land that are not covered by market value. Its application to some items may still suffer from problems of availability of information on intangible aspects such as the price of a shrine to the community and hence consensual amounts to settle on.

2.6 Analysing compensation and customary land acquisition

Increasing large-scale customary land expropriations globally, some of which are dubbed as land grabbing, are raising concerns regarding land rights, compensation and livelihoods as compensation is dismal or not paid at all (Borras, Franco, Gómez, Kay, & Spoor, 2012; Cotula, 2009; Fairhead, Leach, & Scoones, 2012; Hall et al., 2015; Margulis, McKeon, & Borras, 2013). Existing compensation principles and institutional frameworks in many countries consider property as a private entity convertible into an economic value like other commodities. Customary land is not readily convertible. Theoretically, land is the primary item of compensation for private properties, and this is expected for customary properties to be the case. Yet customary land is either entirely excluded from compensation packages or partially considered, arguing that it is public property and that communities will provide free replacements (Cotula & Vermeulen, 2011; Kakulu, 2008). Interestingly, most statutes are vague on this aspect while access to free customary land is difficult even in remotest areas in contemporary times (Sulle & Nelson, 2009), thereby thwarting any free replacements. Where customary land is compensated, it is based on market value or replacement value, which is problematic to realise owing to lack of market evidence (Mitchell et al., 2015; Small & Sheehan, 2008; Sulle & Nelson, 2009).

Related to material loss of land is severance and injurious affection, which are compensable as for private land. For clear-cut private land, any partial acquisition is ably reconcilable between land taken and land left. Abstractly, affected rights are known and quantifiable, thereby enabling computation of losses and compensation regarding severance for private properties (Baum et al., 2008). Injurious effects on retained land are also measurable since information concerning land use and market values may be available, making estimation of depreciation and compensation feasible (Denyer-Green, 2014). Contextually, customary properties are not
well defined, making their quantification challenging. Likewise, partial takings have to be reconciled against remaining land. However, absence of ready information challenges computation of losses and reimbursements (Alias & Daud, 2008; Mitchell et al., 2015). For common and open access resources such as grazing wetlands, how would severance and injurious affection be measured and who gets compensated since each community member has a usufruct over the land? Fundamentally, these questions lead to difficulties in monetising losses and hence compensation.

Furthermore, how is severance and injury to immaterial values such as people-land relationship handled? Since the compensation assessment basis does not recognise this aspect, then obviously it is left out. Where land is not considered, then injury to land does not arise. Essentially, it is difficult to apply severance and injurious affection on customary land because of their nature. All these issues highlight the challenges of applying existing compensation principles and institutional frameworks to estimating compensation for customary land (Sulle & Nelson, 2009; Witter & Satterfield, 2014).

For disturbances, some aspects outlined in subsection 2.3.1 (a) (iii) are applicable to customary land compensation. Other inconveniences related to loss of immaterial aspects are highlighted under subsection 2.5.5. Fundamentally, current concepts and tools for measuring compensation seem to be ignorant of these attributes and disregard them, yet they are invaluable to concerned people and may have deeper effects including demoralisation. Even though disturbance is only based on pecuniary calculations, some of them, for example loss of the right to inheritance is difficult to estimate due to their nature and lack of supporting data.

Occasionally, consolation/solatium is paid to cover expropriatory nature of expropriation. This is directly proportional to the compensation sum. Where land is overlooked in the compensation formula as observed by Ambaye (2013) and Cotula and Vermeulen (2011), and the taker’s gain rules, then solatium is negligible. However, this is still payable based on a percentage of the compensation sum. Additionally, special value may have to be considered for various personal and/or community assets like sacred places, shrines and temples, initiation and ritual sites, inheritance value, cultural rights, personal identity and special relations between people and land (Keogh, 2003; Witter & Satterfield, 2014). The challenge in estimating compensation for these valuables regards lack of standard formulae, supporting information, valuation bases and methods (Alias & Daud, 2008; Small & Sheehan, 2008; Sulle
& Nelson, 2009). Generally, it is challenging to estimate compensation using existing principles, statutes and guidelines as they are incompatible with customary land practices (Haruna et al., 2013; Larbi, 2008).

While market value determination relies on availability of comparable data of recent market transactions, prices and market conditions, it is costly to obtain such data even in well-established private property markets (Evans, 2004; Mooya, 2016). For customary properties, such market data are hardly existent. Obtainable private property evidence is inappropriate as substitutions, making their use debatable. In such situations, market value as a fair basis and compensation measure fails as it lacks external validity and results in inadequate compensations. Additionally, market value is based on real material condition of subject properties on assessment date (Baum et al., 2008) in addition to other aspects. However, its application on customary land inherently focuses on the material components, disregarding some valuable non-monetary attributes (Alias & Daud, 2008). Thus, for customary properties, market value does not equal owner’s loss and hence unsuitable (Small & Sheehan, 2008).

Normally, market-based assessment standards and methods are prescribed for determining market values in many countries as discussed in subsection 2.3.3. For private properties, these bases and methods are suitable where markets are operational, but become less and less applicable as markets thin out (Marzena & Weretka, 2008; Mooya, 2016; Sanders, 2018). Methodologically, all market-based valuation methods require some kind of market data regarding land values, property prices, cost estimates, depreciation rates, incomes, expenses and rates of return (Blackledge, 2009; IVSC, 2019; Mooya, 2016). For customary properties, there are no official markets to furnish such data, rendering market-based standards and methods unfit (Alias & Daud, 2008; Aluko et al., 2008). Additionally, it has to be noted that determining knowable market value is challenging because its assumptions of rational and fully informed market participants are non-existent in real property markets (Babawale, 2013; Mooya, 2016; Sanders, 2018). That is, property markets are characteristically imperfect (Babawale, 2013; Evans, 2004). Consequently, use of these methods is difficult for customary properties since their requirements are not there.

These shortcomings of market-based valuation methodologies provide opportunities for other non-market techniques which do not rely on market data such as contingent valuation discussed under section 2.3. As CVM solicits its own data from expropriatees, it provides an opportunity
for its application in compensation assessment for customary properties where market data is non-existent. After all, most statutes request expropriatees to submit compensation claims and this augurs well with the principle of contingent valuation. For HPM and TCM, they require existing market data, and thus not ideal as substitute methods where market data are scarce.

### 2.7 Challenges of compensation assessment for customary land acquisition

The review highlights three major issues concerning expropriatory compensation for customary lands. First, available compensation concepts are well-suited for exchangeable private properties while supporting laws are characteristically framed to operationalise these concepts. Thus, their application to private properties presents no major issues as required market evidence and necessary assessment guidelines exist. Contrariwise, customary land exchanges are scarcely recorded with market data being rare. Nature of customary land is vaguely presented in existing statutes and research works while compensation assessment guidelines are absent (Ajibola, 2013; FAO, 2017; Sulle & Nelson, 2009; Tagliarino, 2017). Further, presence of non-material aspects in customary land challenges application of existing guidelines, valuation bases and methods.

Second is existence of conceptual inconsistencies in property rights. Imposition of foreign property concepts and statutes in most developing countries led to hybrid tenure systems with private, public and customary property tenures. Customary tenures deviate fundamentally from private ones and application of institutions intended for exclusive properties on them is challenging. Third challenge concerns absence of non-market valuation methods for assessing customary properties. Commonly accepted methods for assessing market value for acquired private and customary properties are market-based yet the latter exhibits non-market attributes to a larger extent. Non-market-based techniques such as contingent valuation method, may be applicable to customary properties to circumvent current valuation challenges.

Also, the review shows that most research works are insufficiently informed by relevant compensation theories in their analysis, making their application to similar studies and contexts challenging.
2.8 Chapter summary

Compensation is generally meant to restore expropriatees to their previous pecuniary status, by compensating for properties taken and other admissible losses. For private property rights, market value-based compensation encourages efficient acquisitions, discourages arbitrary takings, promotes fair expropriation, protects private property, restores dispossessed owners and reduces expropriatory demoralisation. Where indemnity compensation principle prevails, these aims are achieved by compensating properties acquired, severance and injurious affection, disturbance and solatium (and special value) as applicable. Thus, indemnity principle represents full compensation. Contrariwise, taker’s gain compensation principles demand market value of property taken and nothing else, as adequate compensation. However, these principles disregard the other many losses occasioned to expropriatees, effectively representing partial compensation notions. However, compensation guided by indemnity and taker’s gain theories is considered conceptually and statutorily adequate.

Market value is the common basis for expropriated private properties, assessed through comparison, income and cost methods, which heavily depend on market information. Other methods which are less dependent on market data but rarely applied in compensation assessment include contingent valuation, hedonic pricing and travel cost.

Conversely, acquisition of customary land involves material and non-material aspects, which are generally complex. Customary properties are poorly recognised in current statutes with ambiguous rights to assess, vague assessment bases and methods and guidelines. Use of market-based methodologies treat customary properties as private, thereby misrepresenting them as the two are fundamentally different and cannot be measured by the same yardstick. This results in a conceptual conflict between measuring standards and customary properties, making their application and results (values) debatable. This leads us to the major study question as to whether current practices that presume private land in functional markets bear adequate compensation or not for customary properties.
Chapter 3: Compensation - A comparative overview

It is important for the world to know and understand the relationship between people and the jungle, land, rivers, mountains and environment. ... The whole world says that we will give you compensation. But I want to ask all of you: have any of you ever sold your mother? Can they give us the price for pure air and water, for our history?

Dayamani Barla (India) in Survival International (2014)
3.1 Introduction

Compensation valuation in any particular environment is influenced by legal, cultural, social, economic, political, tenurial and historical factors. To contextualise compensation issues with these structural variables, the chapter first discusses how Ethiopia, Ghana, Nigeria and Tanzania address compensation for expropriated customary land rights. Thus, sections 3.2 to 3.5 focus on property rights, expropriation requirements and compensation mechanics in these country case studies and undertake a comparative analysis in section 3.6. The chapter then shifts to a review of existing empirical literature on customary/native land valuation for compensation purposes in section 3.7 and discusses gaps identified in the reviewed empirical literature in section 3.8.

The four country case studies are spatially distributed on the African continent and are all predominated by customary land practices. Apart from Ethiopia, the other three countries share a common historical background and hence origins of their statutory laws regarding land, expropriation, valuation and compensation - colonisation. Conversely, Ethiopia was never colonised. Selection of these countries was based on three conditions. First criterion was availability of sufficient information on expropriation, valuation and compensation to enable the researcher to have deeper insights into how these issues are dealt with. The information is also intended to illuminate the research objectives and strengthen the research context. This is the second criterion. Third condition is related to the conceptual/analytical framework of the study. Compensation in these four countries is based on market dependent tools and presumably guided by either the indemnity or taker’s gain principles. It is hence necessary to have cases that talk to the conceptual framework as discussed under section 3.6. Additionally, Ethiopia is chosen with an anticipation of unique lessons due to its not being colonised.

3.2 Ethiopia

Ethiopia holds that all land and natural resources are exclusively vested in the State and the Ethiopian people (Ambaye, 2013). Alternatively stated, land in Ethiopia is a nationalised asset and private land rights are disallowed (Cotula, 2012; Vermeulen & Cotula, 2010). Broadly, customary land practices are dominant, practised by communities according to their customs (Alemu, 2013). Government issues leaseholds over public land without private freeholds. Fundamentally, every Ethiopian has full rights to their improvements on the land and to convey or claim compensation for the same. Land is not economically exchangeable to protect
vulnerable groups from dispossession (GFDRE, 1995). While Ethiopians are considered as joint land owners with government legally, they are taken as mere occupiers by the same government (Ambaye, 2013). Thus, all land is first resumed by government before leasing it to third parties. Prevalence of customary land practices, absence of private ownership of land and restrictions on economic land exchanges stifle property markets in Ethiopia (Alemu, 2012). However, Ambaye (2013) explains that economic exchanges of land held customarily are increasing based on traditional arrangements, though they are considered informal.

Essentially, land rights in Ethiopia are held reservedly by the government as Ethiopians only have occupancy rights and private ownership of the improvements they make on the land, and not the land itself (GFDRE, 1995). Thus, land is not compensable. Contextually, private property is any asset on the land whether tangible or intangible, which individuals can acquire and dispose of as they wish, subject to prevailing norms (Ambaye, 2013). However, Sub-article 40(8) limits private property rights by empowering government to interrupt any private property rights for public purposes, subject to commensurate compensation for the affected private properties only.

When expropriating private properties, government is expected to notify people when the properties will be taken and their compensation entitlements. Consequently, affected people are expected to submit compensation claims to government once served with expropriation notices and relocate once compensated (GFDRE, 1960). Affected property owners unhappy with compensation received can appeal to district administrative bodies or the court (Ambaye, 2013). However, Alemu (2013) and Ambaye (2013) allege that affected people are scantly informed about impending projects, land to be taken and their rights, thereby giving room to arbitrary takings vis-à-vis amount of land, targeted land and compensation amounts. Further, expropriation notices are rarely served. Moreover, it is claimed that customary land occupiers are removed without compensation, while resistance to vacate expropriated land is countered by police force (Alemu, 2013). Essentially, expropriation is characterised by various institutional and practical challenges due to inadequate content, contradictions and absence of guidelines, inconsistent application and poor governance (Ambaye, 2009), among others.

Ethiopia follows a broad public purpose system without specifically outlining public uses, but allows any land use that conforms with the law and promotes public benefit, including profit-oriented schemes that serve public interests through employment (Ambaye, 2013). Although
the broad definition of public purpose provides flexibility for considering other beneficial uses, it is also prone to abuse. Large expanses of customarily occupied land are seized through threats for urban expansion (Alemu, 2012), road construction (Ambaye, 2013) and commercial agriculture (Cotula & Vermeulen, 2011), mostly without compensation. Practically, ambiguities of public purpose weakens protection for customary property rights, resulting in arbitrary takings. The inadequacy of public use to protect property interests is strengthened by requiring compensation, which is also disrespected as stated above.

Constitutionally, any expropriation of private property requires commensurate compensation (GFDRE, 1995), that is full compensation to indemnify losses caused and restore affected people wholly, as discussed in section 2.3 of Chapter 2. For land, compensation is not claimable by individuals since it is a public property for use and benefit of all people. However, the compensation clause also aims to restore affected persons, as much as possible, by requiring equivalent compensation for personal property losses. Thus, compensation has to be equated to amount of actual damage suffered on date of decision by the assessment committee (GFDRE, 1960). Ironcally, Sub-article 1474(1) of the Civil Code talks of value of land as compensation to enable expropriated persons replace lost land, contradicting Constitutional Sub-article 40(7), which limits compensation to one’s improvements (personal property). Sub-article 1474(1) is thus confusing. Compensation in Ethiopia considers replacement cost of improvements on acquired land, disturbance, crops and trees and interest on delayed compensation (Ambaye, 2013) as severance and injurious affection do not arise since all land is considered public property.

Thus, compensation for expropriated private properties is based on their replacement cost (GFDRE, 2005), while the Constitution through Sub-article 40(8) demands property value as the basis (GFDRE, 1995). Where value equals cost, then this discrepancy disappears. Unfortunately, in the Ethiopian compensation environment, this may not hold as highlighted by Ambaye (2013) that compensation amount based on replacement cost is ten times lower than market price and cannot replace lost properties. The need for property value seems to support the equivalent compensation intent of the Constitution while property cost backs the actual damage stance. Rarity of market information concerning customary properties complicates compensation estimation through replacement cost (Alemu, 2013), while depreciating rudimentary structures is more challenging owing to their nature. Use of outdated government rates in estimating compensation compounds the challenge.
To achieve desired compensation in Ethiopia, various methods are used in assessing compensation. For building improvements on acquired land, their compensation is estimated through cost methods, which are discussed in section 2.3 of Chapter 2. For affected people in urban areas, minimum compensation is current unit cost for constructing a comparable low cost structure (Ambaye, 2013). Unfortunately, this is affected by fluctuating construction costs. Practically, depreciation is deductible, further reducing compensation (Ambaye, 2013), but its treatment is ambiguous and more challenging for assessors. For customary properties, depreciation is elusive due to elementary nature of most building materials and market information scarcity. Likewise, cost rates used are guesstimates at best and mostly unreliable for cases of purely traditional structures. Ambaye (2009) highlights that use of replacement cost is further hurt by inflationary conditions in Ethiopia.

Disturbance covers displacement allowance, income loss for temporary expropriations, assessment fees, cost of removal, transport and erection of new properties based on government rates (Alemu, 2013). Displacement allowance resembles consolation covering expropriation inconveniences but lacks proper justification. Permanent loss of rural farmland gets ten times the average annual income for the past five years preceding expropriation as disturbance allowance. Similarly, temporary takings get five times until repossession. Of critical contention is choice of multipliers of 10 and 5 since they are not explained in any of the laws (Ambaye, 2013). Ambaye (2013) also explains that affected rural people prefer replacement farmland against monetary compensation for their lost incomes. This is because farming is their main occupation and compensation money given is lower to enable them replace their lost farmlands. An urban dweller’s displacement allowance comprises a plot, annual rent or free accommodation for one year provided by government.

For biological assets, cost incurred to care for immature crops is paid while government rates on average annual yield apply to mature crops and current unit prices for trees (Ambaye, 2013). Similar to physical improvements, application of government rates that are normally outdated contributes to unfair compensation.

Compensation assessment is done by committees comprising community elders, representatives from local land and agricultural offices, trade and industry and local councils in rural areas. In urban areas, assessors include engineers and quantity surveyors among others (Ambaye, 2013). These assessors lack prior valuation training and knowledge, thereby
contributing to unsatisfactory compensations (Alemu, 2013). According to GFDRE (2005), assessment committees are stand-ins for certified valuers.

Generally, Ethiopian expropriation and compensation laws are inadequate and contradictory, leading to inefficient and arbitrary acquisitions. Takings are inefficient and unfair due to inadequate compensation, use of replacement cost as a basis, or non-payment of compensation while arbitrary because of ambiguous public purposes, more customary land taken than needed and land confiscations (Ambaye, 2013). Absence of necessary land market structures to support market-reliant bases and methods and lack of valuation standards result in scarcity of relevant market evidence for customary properties (Alemu, 2013). Dominance of public land and absence of exchangeable private land rights worsens the situation. With increasing acquisitions, forced relocation of people from communal land is growing while most dispossessed landowners are not compensated, nor resettled and neither allocated replacement farmland (Ambaye, 2013). The ideal to indemnify expropriatory losses is supplanted by practices that make affected people poorer than before as takers gain arbitrarily in Ethiopia in practice.

3.3 Ghana

Unlike Ethiopia, Ghana runs a hybrid tenure system, combining statutory (public and private freehold) and customary tenures concurrently, with the latter being prevalent. Public land is vested in the State while all customary lands (also called stool or skin lands) are privately owned by various chieftainships (GRG, 1992; Vermeulen & Cotula, 2010). Thus, unlike in Ethiopia where all land is public, Ghana entertains private land ownership (Cotula, 2012). Customary tenure exhibits absolute ownership interest and use rights to communities and individuals (Abdulai & Ndekugri, 2008). These rights are jealously guarded and any disposition to strangers requires consent from the holding community or family (Akrofi & Whittal, 2013). Access to and inheritance of customary land follows patrilineal and/or matrilineal etiquettes, in addition to direct purchases based on customary procedures and gifts (Larbi, 2008). As Larbi highlights, the strict adherence to customary land customs seems to be modernising as seen through direct purchases and unregulated land markets in urban and rural areas (Kasanga & Kotey, 2001). As individuals can own land privately in Ghana (GRG, 1992), it is freely exchangeable despite official land markets being concentrated in urban areas and lacking in rural areas (Anim-Odame, 2011).
Government and local chiefs in Ghana can grant exclusive property rights to individuals (Abdulai & Ndekugri, 2008). Constitutionally, any private land is expropriatable for a justifiable public interest or purpose, per Sub-article 20(1) of Ghana’s Constitution (GRG, 1992). The Constitution is supported by State Lands Act (GRG, 1962b) and Administration of Land Act (GRG, 1962a). Further, any acceptable acquisition is subject to fair and adequate compensation. Fundamentally, Ghana practices inherent property rights system with private property rights to individuals and hence compensable when expropriated, as discussed in Chapter 2.

Principally, any land which is the subject of expropriation is transferred to the President upon serving notices to affected owners in person and publishing the notices three consecutive times in local newspapers and in the Government Gazette (GRG, 1962b; Larbi, 2008). For customary land, notices are served on chiefs, who inform concerned subjects. Notices contain relevant details of projects, affected lands, possession dates and compensation procedures. Such notices officially mandate expropriatees to submit compensation claims to the Land Valuation Board (Larbi, 2008), detailing nature of interests in land, manner and extent of damage, compensation amount and assessment basis. However, notices are not always served, thereby making it difficult for expropriatees to submit their compensation claims to relevant authorities. Adu-Gyamfi (2012) claims that about 82.0% of all land acquisitions breached these procedures while Larbi (2008) observes that acquisition processes exclude landowners until at the end, while compensation cannot be claimed in the absence of notices. Further, the several expropriation laws and lack of clear provisions present practical challenges in some cases. An example is absence of clear criteria for expropriating land (Larbi, 2008).

While Ethiopia adopts a broad public interest principle without outlining any acceptable public uses, justifiable purposes in Ghana include defence, public safety and order, morality, health, town and country planning or promotion of public benefit and other authorised purposes, per Sub-article 20(1) of the Constitution (GRG, 1992). Additionally, Sub-article 10(1) of the Administration of Lands Act mandates expropriation of customary land for public purposes (GRG, 1962a). These public purpose requirements shield private property interests to some extent, without which land would be indiscriminately taken. Kasanga and Kotey (2001) underscore that expropriation powers in Ghana are abused or misapplied due to a narrow public interest interpretation. Larbi and colleagues (2004) contend that most lands acquired for various public developments are still undeveloped years later due to lack of justifiable public purpose
and strategic approaches. Adu-Gyamfi (2012) quantifies such undeveloped expropriated lands to be about 44.0%. These issues portray inefficient and arbitrary takings and weak protection for mostly customary properties in Ghana.

Fundamentally, Ghana requires fair and adequate compensation for any expropriated property to restore expropriatees to their previous state but without advantaging or disadvantaging them. This compensation principle subscribes to indemnity compensation theory and demands full compensation to restore expropriatees to their previous positions, as highlighted in Chapter 2. Ghana’s compensation aspiration protects individual interests by ensuring that affected persons get adequate compensation for their loss. Practically, compensation is not as prompt and fair, and cases of non-compensation are rife (Larbi, 2008).

Principally, compensation covers market/replacement value of acquired property, severance, injurious affection, disturbance, special loss for disturbing customary property rights, per Article 10 of Administration of Lands Act (1962), crops and trees and interest on delayed compensation (Larbi, 2008). These compensables equate to those demanded by indemnity compensation theories, except for consolation which is not provided for. However, it is only registered customary land and that with absolute ownership rights that is compensated during expropriation (Larbi, 2008). Individual customary landholders whose land is unregistered are expected to be proportionately compensated by local leaders, who receive compensation as communal representatives. Consequently, individual land users are mere occupiers of customary land. This practice is highly criticised as villagers are commonly uncompensated albeit local leaders receiving compensation (Adu-Gyamfi, 2012). Apparently, compensation inadequacy and non-payment are serious challenges in Ghana, especially for customary properties as other compensable aspects are disregarded (Adu-Gyamfi, 2012). This is vindicated by government’s grabbing of about 43,370 hectares of customary land without compensation against 7,660 hectares of legally acquired and compensated land (Larbi, 2008).

In assessing compensation in Ghana, market value is the primary basis supplemented by replacement value where market value is inapplicable (Larbi, 2008). For Ghana, replacement value is the amount required for reasonable reinstatement equivalent to previous condition of land. However, paucity of reliable market data due to nature of property markets (Anim-Odame, 2011) and inadequate statutes in assessing compensation (Larbi, 2008) betray adequate compensation attainment, as customary land and other losses are generally uncompensated.
In assessing compensation, expropriated customary land is assessed using market methods, though market evidence for customary land is challenging. Actual assessment involves inventoring land, buildings, landowners and interests on the land, among other aspects and preparing a proprietary plan (Larbi et al., 2004). Claims are verified by the Land Valuation Board and compensation determined and paid. For customary land, an amount considering land value and benefits landowners get from the land, is paid annually to stool accounts. This payment is considered proper for use of the land (Adu-Gyamfi, 2012). Put differently, compensation for communal/stool land is paid as an annual rent to communities but individual landowners are not compensated and it is not clear how the proceeds are used.

For improvements, exchangeable ones with market evidence are assessed by comparison method while income methods apply to income generating properties (Larbi, 2008). For specialised properties and comparable data scarce settings, cost methods are used. Principally, the main challenge relates to rarity of exchange data, building costs, income, expenditures and discount rates to support these market-based methods in assessing customary properties.

Regarding severance and injurious affection, laws are implicit as article 4(1) of State Lands Act (1962) only mentions any other expropriatory damages suffered without outlining them. However, Akrofi and Whittal (2013) explain that before and after technique is generally applicable, based on market value of acquired land and that compensation equals value of remaining land before acquisition minus value after acquisition. Availability of relevant data is the main challenge.

In Ghana, disturbance compensation covers valuation fees, construction fees and other expenses deemed relevant (Larbi, 2008). Laws are mostly ambiguous on what reasonable expenses are eligible under disturbance, thereby confusing valuers. Likewise, assessment guidelines for special losses are absent, leaving valuers to decide what to consider and how. These ambiguities highlight the inadequacies in existing statutes, as hinted by Larbi (2008). For crops and trees, young crops are compensated using cumulative costs spent on growing them while government prices are paid for mature crops against average annual yield. Trees are assessed using current unit prices. Using old government price data is one of the key issues (Larbi, 2008).
Expropriation and compensation laws in Ghana exhibit deficiencies and ambiguities. A major challenge is unclear procedures for due process of expropriation and compensation, leading to unwarranted acquisitions of customary land amounting to over 80.0% of all acquisitions without paying compensation (Adu-Gyamfi, 2012). These acquisitions are based on ambiguous public uses and once acquisition is approved, the recipient of the land moves in without completing the process (Larbi, 2008), yielding arbitrary, inefficient and unfair takings.

3.4 Nigeria

Through the Land Use Act of 1978, Nigeria nationalised all land in 1978, thereby abolishing private freehold land ownership and vested all urban land in State Governors and rural land in respective local governments (Famoriyo, 1978; GFRN, 1978). Thus, Nigeria follows the reserved rights ideology and holds all land as public property, as in Ethiopia. However, customary land practices are widespread (Aluko et al., 2008). Government at various levels grant occupancy rights to individuals on either State or rural/customary land (Kakulu, 2008). Just like the cases of Ethiopia and Ghana, formal property markets in Nigeria are concentrated in urban areas while unregulated parallel property markets guided by traditional institutions over land in urban and rural areas also flourish (Haruna et al., 2013).

Despite granting only occupancy rights, Nigerian Constitution in Section 43 guarantees the right to immovable property to every Nigerian and protection for those rights (GFRN, 1999). Further, the same Constitution limits those property rights by empowering government to expropriate any private property on the land in return for compensation (GFRN, 1999). As regards expropriation of private property, any land occupancy title is terminated upon notification. Nuhu (2008) highlights that acquisition notices are published in Government Gazettes, with varying contents and usually after acquisition and compensation determination, for record purposes only. Short notices are frequent, sometimes just for a week (Nuhu, 2008), while compensation follows acquisition and often delayed. Any compensation disputes are handled by appropriate Land Use and Allocation Committees in each State or local government, if in place, and their decision is final (Aluko et al., 2008). This is because courts have limited jurisdiction over compensation matters, per Subsection 47(2) of Land Use Act (GFRN, 1978). Acquisition processes are mostly autocratic with various challenges (Kakulu, 2008).
In Nigeria, expropriation needs sanctioned public purposes, compensation payment and legal redress mechanism (Kakulu, 2008). Occupancy rights can be revoked for mining and oil pipelines, related purposes and extraction of building materials (GFRN, 1978). Broadly, public purpose is vague in current laws and this concerns many parties. Kakulu (2008) established that inexplicit definitions bear inconsistent interpretations of the Land Use Act, leading to government acquiring customary land on unjustifiable purposes (Otubu, 2012). Haruna et al. (2013) found that only 38.0% of 470 hectares of land publicly acquired was developed in Greater Yola Region between the years 2000 and 2010. The issue of non-development of acquired land is also common in Ethiopia and Ghana. Haruna and colleagues add that self-gratification is a major issue contributing to arbitrary takings of private property, as public use is a smokescreen in some of these acquisitions to get land cheaply. While several decrees regulate expropriation, they are abstruse and opposing in many aspects, lacking in descriptions and depth of fundamental principles and guidelines, such as the Constitutional compensation principle itself (Akujuru & Ruddock, 2014; Kakulu, 2008). These challenges become more profound where customary land is concerned.

Compensation is required for any expropriated private properties and has to be paid promptly in Nigeria. Purposes of compensation are difficult to comprehend from the start and even after reviewing the Land Use Act since the compensation principle is broad and without any description. However, through the Constitution, the Nigerian people aspire to promote good governance and welfare of all persons, through principles of freedom, equality and justice (GFRN, 1999). Accordingly, one assumes that compensation aspires to protect individuals’ property rights fully against unwarranted interferences. Equally, compensation ensures that public developments for the common good are not subjectively hampered by personal interests. Practically, such inadequate provisions for compensation presents major challenges and affects compensation (Kakulu, 2008; Nuhu, 2008). Generally, compensation comprises replacement cost of improvements, crops and trees, resettlement allowance where necessary and interest at bank rates for delayed compensation (GFRN, 1978). Unlike in Ethiopia and Ghana, these compensables are mostly those lost during expropriation, and hence Nigeria’s compensation principles may be said to be guided by taker’s gain ideology, as discussed in Chapter 2.

Where the dispossessed are communities, compensation is paid to either the communities themselves or to community leaders who are empowered to use the funds for communal good according to customary laws or into some fund specified by the Governor, to be used for that
community’s benefit. This arrangement has led to chiefs/governors benefiting substantially as their people are impoverished (Kakulu, 2008). The payment of compensation for communal land to community leaders is similar to Ghana and faces similar challenges. Compensation inadequacies result in hold-out problems in some acquisitions and fights between affected people and government in others, thereby derailing intended projects (Haruna et al., 2013; Kakulu, 2008). Thus, just as in Ethiopia and Ghana, compensation is highly contestable in Nigeria.

Generally, compensation assessment for expropriated private properties in Nigeria is based on replacement cost/value (GFRN, 1978; Nuhu, 2008). Kakulu (2008) argues that while compensation desires to put affected occupiers in a comparable position as before the taking, replacement cost as a basis fails to achieve that aspiration. Construction data for customary properties is rarely documented while such structures are mostly made of elementary building materials with unknown depreciation characteristics, and hence inapplicable (Nuhu, 2008). This leads to inadequate compensation that cannot replace lost assets. Per Kakulu (2008), replacement cost basis makes no sense and seriously conflicts with the equivalence principle.

As observed already, land is not compensated in Nigeria as a public asset (Kakulu, 2008). However, where occupiers paid land rent in the expropriation year, the rent paid is refunded. For customary land under agriculture, replacement land is recommended under Subsection 6(6) of Land Use Act (1978), though this is rarely done and impractical with increasing land scarcity. Those given replacement land are not given any other compensation even where replacement land price is lower than actual losses, but have to pay any excess for a higher priced replacement land. There is discontent regarding these practices and non-compensation of land in Nigeria (Kakulu, 2008).

Similarly, improvements are assessed using replacement cost basis and method. Costs for replacement purposes are difficult for customary properties since market data is rarely available and highly variable where accessible. Akujuru and Ruddock (2014) established that actual building costs averaged N95,000/m² against compensation of N17,000/m² (where N = Nigerian Naira currency) in 2014. This is about 5.6 times lower than prevailing costs, effectively ruling out any replacement of lost assets of permanent nature, and restoration of expropriatees. Government rates used are generally low (Otubu, 2012) and that is more critical in inflationary economies.
Disturbance compensation is left to the discretion of the valuer, though not legally provided for (Famuyiwa, 2011; Nuhu, 2008). The Petroleum Act (Section 37, 1990) provides for fair and adequate reimbursement for disturbing surface rights, but without compensable items nor its assessment procedure, referring users to the Land Use Act (1978). Ironically, the referral law itself provides no assessment guideline for petroleum related issues, redirecting valuers back to the Petroleum Act. Absurdly, both statutes are bereft of such procedures and refer valuers back and forth, in a circus of ambiguity. Kakulu (2008) emphasises that such uncertainties are a significant challenge with Nigerian compensation laws. Likewise, such uncertainties extend to crops and trees, which are assessed using values or rates prescribed and determined by appropriate Land Officers (Nuhu, 2008). In other words, crop and tree compensation is based on rates that are subjectively prescribed by government officers, and are generally lower and lacks any market relation due to their outdatedness, leading to inappropriate compensation for crops and trees (Kakulu, 2008; Nuhu, 2008).

Fundamentally, institutional frameworks guiding compensation in Nigeria lack in many respects including clear definitions, descriptions and depth, resulting in confusion, multiple interpretations and impaired implementation process that produce unsuitable compensation (Kakulu, 2008). The compensation quantum is limited to improvements without land value and other losses are selectively and discretionary considered by valuers, leading to acquisitions that benefit government and not individuals. Absence of market information and use of government outdated rates are key issues.

3.5 Tanzania

As Ethiopia and Nigeria, land is a nationalised property in Tanzania and vested in the President as trustee for all Tanzanian citizens (GURT, 1999a). Generally, customary land practices dominate Tanzania’s tenure system despite the abolition of chieftaincies in 1963 by government. Occupancy rights are issued on both public and customary land by government and village land committees (Kusiluka, Kongela, Kusiluka, Karimuribo, & Kusiluka, 2011), but not freehold ownership (Vermeulen & Cotula, 2010). Some communities regard land as private property with social, cultural and economic values based on culture, accessibility, capital investment and human energy (Magigi & Drescher, 2010). Informal property rights in urban areas are also recognised (GURT, 1999b). All private and informal property rights are subject to expropriation.
Customary land tenure recognition is debatable with others arguing that it is less recognised, presumed non-existent and lacks legal procedures to formally consider it during expropriation, leading to conflicts (Magigi & Drescher, 2010). This challenges Kombe’s (2010) observation that customary land enjoys wide legal recognition in general. However, recognised long-standing occupations or uses of land are legally recognised (GURT, 1999a), as Kombe (2010) contended. Fundamentally, customary and other non-private land rights are recognised to a greater extent in Tanzania (Purdon, 2013; Sulle & Nelson, 2009). While land is generally public property in Tanzania, it is recognised that it has value which must be considered in all transactions involving that interest in land including expropriation, per Sub-article 3(1) of the Land Act (GURT, 1999a).

Fundamentally, every person is free to own property which is protected by law, per Article 24 of the Constitution of Tanzania (GURT, 1977). The surety to property rights and protection is susceptible to interference when public benefit exceeds individual property benefits. Fearing untenable violations, Sub-article 24(2) emphasises that tolerable interferences with property demand an acceptable public purpose, authority of law and fair and adequate compensation (GURT, 1977). Acceptable public uses warranting expropriation include nationalisation, exclusive government uses and schemes, agriculture, social services, housing, health and sanitation, transportation, mining or oil, among others (GURT, 1967, 1977). The need for a public benefit ensures that individual property rights are not arbitrarily disturbed, thereby assuring protection. Likewise, a public need guarantees the public availability of land when required. These conditions provide a basis for which expropriation can be legally supported and diffuse ambiguity. However, Kombe (2010) argues that other public uses are questionable.

Tanzania’s notification process of expropriation is akin to that of Ghana and apart from informing people about expropriation and some details, it also invites affected people to participate in the process (GURT, 2001b). Further, notices provide guidance concerning where to forward compensation disputes, like to mandated courts and village land councils. However, expropriation is afflicted by non-involvement of landowners, compensation non-payment and delays in some cases, lack of transparency, weak structures for checking land grabbing and exclusion of the disadvantaged among others (Kombe, 2010; Msangi, 2011; Purdon, 2013; Sulle & Nelson, 2009). Some of these matters are forcefully resolved by government (Kombe, 2010; Kusiluka et al., 2011).
Expropriation in Tanzania demands full, fair and adequate compensation to fully indemnify expropriatees and restore them. Such compensation covers market value of expropriated property, severance, injurious affection, disturbance, solatium, crops and trees, interest on delayed compensation and resettlement provision (Msangi, 2011). This compensation package is similar to that of Ghana. Land or building replacement similar to acquired properties are alternatives to monetary compensation (GURT, 2001b). In addition to these, rural expropriatees are to be given regular supplies and food stuffs for a certain period to assist them resettle and tree seedlings (GURT, 2001b).

However, there are opposing arguments regarding land compensation. Msangi (2011) established that land was generally compensated in one urban expansion project in Dar es Salam while Cotula (2009) contends that customary land, presumed public property, is uncompensated in most cases. Seemingly, this inconsistent practice is attributable to inadequate recognition of customary land (Magigi & Drescher, 2010) and inadequate compensation laws regarding customary land (Sulle & Nelson, 2009). Omission of some compensables, compensation delays and non-compensation contribute to compensation inadequacies, while protracted litigations and refusal to relocate are other challenges (Msangi, 2011; Purdon, 2013).

Generally, compensation for acquired properties is based on market value (Msangi, 2011; Sulle & Nelson, 2009). However, and as discussed previously, comparable evidence for customary property transactions is normally difficult to find because of the nature of their transactions. As in other areas, market data for private properties are used in Tanzania. Msangi (2011) found that comparable market data are searched in general property markets and that available information is normally unreliable. Application and achievement of reliable market values for customary properties is thus challenging and less re-assuring to achieve fair compensation, as also observed by Sulle and Nelson (2009).

To get market values for land and frequently exchanged properties, comparison method is used supported by whatever market data is available. In an urban expansion project in Dar es Salam, land under customary tenure was valued based on market value, using market prices from other property markets with adjustments. Msangi (2011) explains that these market data were considered undependable. Information found in the market mostly concern private properties and lead to extensive adjustments to suit the exercise at hand. Attainment of reliable market values and fair compensation for customary land is thus difficult (Sulle & Nelson, 2009).
Generally, use of statutory compensation mechanisms on customary property rights produce conflicting results (Magigi & Drescher, 2010). For properties that rarely exchange due to their nature, use or location, cost methods are used. The common challenge faced is availability of suitable market data for assessing customary properties. These issues culminate into unfair compensation for expropriation (German, Schoneveld, & Mwangi, 2011; Purdon, 2013).

For severance and injurious affection, laws do not outline any assessment methods and it is unclear if these two are actually assessed and paid to affected people since land is public, unless they only concern private improvements affected by expropriation. For customary land, it is challenging to quantify and monetise injury to remaining land for compensation purposes as discussed in section 2.6 of Chapter 2. As regards disturbance compensation, such items as transport, accommodation, profit loss and capital cost losses, among others, are considered in compensation (GURT, 1999a; Msangi, 2011). Transport allowance is paid based on government rates while accommodation considers market rental of subject or similar properties over a 36-month period. Profit loss takes monthly business profit for three years and capital cost losses embrace actual expenditure incurred (GURT, 2001a; Msangi, 2011). However, challenges sprout where government rates are used, since they are normally lower as they are old. Further, solatium is computed as market value of acquired land multiplied by average commercial bank interest rate on fixed deposits (Msangi, 2011). Market value determination is the main challenge affecting fair and adequate compensation for customary properties in Tanzania.

Just like other compensables, compensation for crops and trees is based on government rates, which are usually dated as stated elsewhere. Quantity of lost crops or trees is multiplied by given rates in the crop compensation schedules to get compensation amounts (Msangi, 2011). While money is the main form of compensation, it can also be a replacement plot of similar quality and/or, comparable building. Additionally, affected people in rural areas are normally supplied with plants and seedlings to vegetate their new lands or neighbourhoods thereby preventing deforestation to some extent, regular supplies of grain and other basic food stuffs to assist them in getting re-established for a specified period (GURT, 2001b; Msangi, 2011).

Broadly, expropriation and compensation laws in Tanzania are typified by some ambiguities in definitions of relevant principles such as public purpose, weak structures for monitoring customary land grabbing; delayed, partial or no compensation paid more especially in rural
areas; insufficient participation by affected people and conflicts between affected people and government (Kombe, 2010; Purdon, 2013; Sulle & Nelson, 2009). Government rates are mostly used instead of market values in compensation assessment, partly attributed to scarcity and unreliability of available market data (Msangi, 2011), a situation that is expected where land is public property with stifled markets. Other challenges relate to loss of non-monetary values such as strong sociological and cultural values, places of worship, et cetera., which are not considered in compensation (Kusiluka et al., 2011; Sulle & Nelson, 2009).

3.6 A comparative analysis of the four country case studies

Broadly, compensation laws in Ethiopian, Ghana, Nigeria and Tanzania are of Western character with minimal localisation as in many other developing countries (Allen, 1993; Kitay, 1985). These laws dismally recognise local customary and dominant land tenure while favouring private ones (Adu-Gyamfi, 2012; Haruna et al., 2013). This is unsurprising for Ghana, Nigeria and Tanzania as their statutes originated from England (Kakulu, 2008; Seidler, 2014), courtesy of colonisation. For Ethiopia, one only assumes that her laws were formulated based on Western philosophies, despite being uncolonised (Ambaye, 2013). Land is generally public property in the countries reviewed with only occupancy rights or leaseholds on customary and public land and no private freehold, except Ghana that has a hybrid tenure system with private freehold. Thus, where public land regimes dominate, people lack land ownership rights (Cotula, 2012; Vermeulen & Cotula, 2010).

These countries ensure protection for legally recognised property rights while sanctioning their expropriation for public purposes. Public purpose description varies from being broad and inexplicit (Ethiopia and Nigeria) to moderately explicit (Ghana and Tanzania). Ethiopia refers all uses to urban structure or development plans which exist for selected urban centres (Ambaye, 2013) while public uses in Nigeria focus on petroleum development purposes. This ambiguity results in arbitrary takings in these countries (Cotula & Vermeulen, 2011). Based on reviewed literature, compensation in these countries, except for Nigeria, adopt principles that aim to indemnify and restore affected people’s prior welfare through fair compensation. Nigeria’s compensation goal is confusing due to nature of existing provisions, which are unclear (Kakulu, 2008). Compensation guided by indemnity principles normally covers market value of acquired property, severance, injurious affection, disturbance, solatium and/or special values/losses, as applicable. The tenure system practised in these countries together with the
compensation principles adopted and their theoretical orientations and compensables are summarised in Table 3.1.

Table 3.1: Summary of compensation principles and items in the four country cases.

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>ETHIOPIA</th>
<th>GHANA</th>
<th>NIGERIA</th>
<th>TANZANIA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ITEM</strong></td>
<td></td>
<td></td>
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<tr>
<td><strong>Theoretical tenure system adopted</strong></td>
<td>• Reserved without private land rights</td>
<td>• Inherent with private land rights</td>
<td>• Reserved without private land rights</td>
<td>• Reserved without private land rights</td>
</tr>
<tr>
<td><strong>Compensation principle</strong></td>
<td>• Commensurate compensation (Sub-article 40(8))</td>
<td>• Fair and adequate compensation (Sub-article 20(2))</td>
<td>• Compensation, (Subsection 44(1))</td>
<td>• Fair and adequate compensation, (Sub-article 24(2))</td>
</tr>
<tr>
<td><strong>Theoretical compensation orientation</strong></td>
<td>• Indemnity</td>
<td>• Indemnity</td>
<td>• Taker’s gain</td>
<td>• Indemnity</td>
</tr>
<tr>
<td><strong>Compensables</strong></td>
<td>• Land</td>
<td>• Land</td>
<td>• Land</td>
<td>• Land</td>
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<td></td>
<td>• Improvements</td>
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<td>• Severance</td>
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<td>• Displacement allowance</td>
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<td></td>
<td>• Special losses</td>
<td>• Special losses</td>
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<td><strong>Market-based assessment basis</strong></td>
<td>• Replacement cost</td>
<td>• Market value</td>
<td>• Replacement cost</td>
<td>• Market value</td>
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<tr>
<td><strong>Market-based assessment approaches</strong></td>
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<td>• Comparison</td>
<td>• Cost</td>
<td>• Comparison</td>
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<td></td>
<td>• Income</td>
<td>• Income</td>
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<td></td>
<td>• Cost</td>
<td>• Cost</td>
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<tr>
<td><strong>Non-market-based assessment basis</strong></td>
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<td>• None</td>
<td>• None</td>
<td>• None</td>
</tr>
<tr>
<td><strong>Non-market-based assessment methods</strong></td>
<td>• None</td>
<td>• None</td>
<td>• None</td>
<td>• None</td>
</tr>
</tbody>
</table>
Comparatively, Nigeria proffers least compensation as it only considers individual’s private properties invested on the land and nothing else as it is guided by taker’s gain compensation. It is followed by Ethiopia as it offers disturbance and displacement compensation. Ethiopia’s compensation practices seem to be guided by taker’s gain ideologies in dire contrast to adopted compensation principle that subscribes to indemnity concept and expects full compensation.

Customary land compensation is controversial in all four countries. In Ethiopia and Nigeria, land is not compensated as it is a nationalised property. In Ghana, only registered customary land rights are compensated while all other customary land rights are disregarded with private land getting full compensation. For Tanzania, reviewed literature is divided between customary land being compensated and not as discussed previously. Likewise, it is ambiguous whether compensation for severance and injurious affection is paid or not in Tanzania because land is a nationalised asset and no one can claim compensation for it apart from their occupancy rights. Furthermore, severance and injurious affection are even more arduous in the case of customary land rights.

For disturbance items, they depend on the dictates of each particular country. Despite adopting indemnity compensation principles, practices in these countries lead to dispossessed owners shouldering expropriation costs to varying degrees while the State gets valuable land at low cost. In Nigeria, Kakulu (2008, p. 165) highlights that current compensation practices are the height of injustice, obnoxious and suicidal ways of taking people’s rights without compensation. These compensation practices cause agitation in all these countries (Alemu, 2013; Kakulu, 2008; Larbi, 2008; Sulle & Nelson, 2009). Fundamentally, there are some discrepancies between adopted compensation principles and their guiding philosophies and compensables needed to achieve them. A clear case in point is Ethiopia, an observation also made by Alemu (2013) and Ambaye (2013).

Compensation assessment is generally based on market value or replacement cost of acquired property while replacement cost is the sole valuation method in Ethiopia and Nigeria. Ghana and Tanzania use comparable, income and cost methods. Before and after technique is presumably applied for assessing severance and injurious affection where applicable. Common challenges in all four environments are ambiguous statutes and guidelines and weak property market structures to support assessment of customary properties using market-based concepts and methods. Seemingly, compensation is based on value to taker as governments dictate
compensation amounts as they assess, pay and adjudicate on compensation matters (Alemu, 2013; Larbi, 2008; Msangi, 2011; Nuhu, 2008).

In summary, the review has noted several challenges affecting compensation as outlined below.

i) There are mismatches between theoretical compensation expectations and provided compensables. Alternatively put, reviewed literature and laws manifest misunderstandings between adopted compensation principles and supporting compensables.

ii) Existing compensation laws are deficient, contradicting and conflicting with confusing recognition of customary land rights and no specific guidelines for handling them during compensation, thereby failing to restore affected people.

iii) Current laws exhibit discrepancies regarding customary land tenure. In the four countries, customary land seems to belong to the people but in reality, the land is treated as a subset of public land, leading to partial compensation or none at all during expropriation.

iv) All four countries reviewed prescribe and depend on market-based compensation assessment bases and methods and none prescribes or uses any non-market-based assessment bases or methods. A major problem is that property market structures are poorly established and almost non-existent for customary properties. This situation renders market-reliant valuation methodologies inefficient.

v) In relation to faulty or less developed property market structures, in general terms the conditions necessary to attain reliable market values rarely exist. Ambaye (2013) in Ethiopia, Kasanga and Kotey (2001) in Ghana, Kakulu (2008) and Nuhu (2008) in Nigeria and Msangi (2011) and Sulle and Nelson (2009) in Tanzania attest to this as they observe that information obtained from the general property market is distorted and unreliable. This is a serious challenge where parallel markets are in operation.

vi) Use of unqualified people to undertake compensation assessment as in Ethiopia (Ambaye, 2013) and Nigeria (Kakulu, 2008) undermines the belief that compensation is assessed by professional valuers, leading to contested compensation.
3.7 Empirical studies on customary land compensation

Existing empirical literature regarding valuation and compensation for customary land have looked at various aspects including legal frameworks and processes, valuation bases and methods and policy reforms among others. To understand how expropriation of customary land works in Ghana, Adu-Gyamfi (2012) used in-depth interviews and literature review in a case study design, and established that the existing system is deficient with various bottlenecks in the process and procedures including non-compensation. Research work on similar issues in Ghana and elsewhere using case study frameworks and mixed research tools by, among several researchers, Larbi (2008) in Ghana; ADB (2007) in Cambodia, China and India; Sifuna (2006) in Kenya; Haruna et al. (2013) in Nigeria and Ty, Van Westen, and Zoomers (2013) in Vietnam, came up with similar findings. Brobby (1991), in his study in Ghana focusing on who has the right in a claim for compensation for expropriation of customary land rights, argues that existing laws and valuation methods deny dispossessed owners their rightful entitlements to compensation in breach of fundamental principles of compensation. Cotula and Vermeulen (2011) examined accountability of acquisition process in several African countries using literature review, qualitative and quantitative methods in case study design and found that in most African countries, existing statutes are very weak to ensure fair implementation processes and compensation (Cotula, Vermeulen, Mathieu, & Toulmin, 2011). More studies still find similar challenges in various developing countries.

Alemu (2013) in Ethiopia and Kakulu (2008) in Nigeria examined valuation of rural farmlands and customary land rights for compensation purposes applying case study and phenomenological approaches using interviews and existing literature. Both researchers established that the valuation environments are not supportive of assessment of customary properties due to lack of supporting structures including appropriate compensation assessment bases and methods. These studies underscore that compensation assessment methodologies are market-reliant in the two countries. Fortes (2005) in New Zealand and Litchefield (1999) in Australia found that there is no universal compensation model nor a single valuation methodology for determining appropriate compensation for native land rights apart from the traditional ones. These studies used existing literature and case laws.

Challenges of assessing compensation for customary/native land have also perplexed researchers and valuers in other parts of the world. Using the case of the Orang Asli people in...
Malaysia and questionnaires, interviews and existing case laws, Alias and Daud (2008) found that the law does not provide any guidance on valuation of native land rights for compensation aims. These researchers wonder what rights should then be valued, what valuation bases and methods to use and how to quantify native land rights. Likewise, ADB (2007) in its empirical study on compensation assessment practices in Cambodia, China and India, found that no appropriate valuation bases nor approaches for customary land rights exist.

In Papua New Guinea, Bannerman and Ogisi (1994) examined various methods used in determining value of expropriated customary land rights for compensation purposes through field studies and literature review. They found that conventional valuation bases and methods are used by government but dispossessed owners refuse such compensation due to misunderstanding the valuation processes and unwillingness to part with their land. Instead, dispossessed owners demand ransom amounts (called payment for peace method) that has no clear justification, or ask for amounts related to other transacted lands elsewhere, similar to market methods.

In China, compensation for arable land acquisition is based on 6-10 times its average production value in the past three years before resumption; settlement subsidy payment estimated at 4-6 times on the same terms while crop compensation ranges from 3-4 times. Improvements are assessed using government rates (Ding, 2007). Ding concludes that absence of concrete guidelines for just compensation often results in compensation that seems to be ad hoc and arbitrary to farmers. In Australia, Sheehan (2000) compared and contrasted value perceptions of land rights of indigenous people and Anglo-Australians and found that there are stark attitudinal contrasts between their value systems, manifested through non-monetary values attached to economic, cultural and spiritual aspects for the indigenous (Small & Sheehan, 2008).

Occasionally, contingent valuation method (CVM) discussed in Chapter 2, has been used, though hypothetically. In China, He and Asami (2013) examined how residents valued their dwellings during expropriation in Beijing and established that they required values (WTA) higher than market prices. In India, CVM was applied in an involuntary resettlement setting and results demonstrated its usefulness for non-market common properties and other lost assets without suffering the incentive incompatibility problem (Garikipati, 2005). In Malaysia, Alias and Daud (2008) found that CVM got favourable ratings as a method for assessing native lands.
against conventional valuation methods while ADB (2007) highlights that CVM has potential for use in assessing compensation for expropriation.

3.8 Gaps in reviewed empirical literature

Generally, the analysis of the various empirical literature has established that the different countries adopt different compensation principles, but none of the empirical works reviewed has tried to find out why do these countries adopt these compensation concepts. Fundamentally, it is important to reflect that most legal compensation frameworks are informed by either indemnity or taker’s gain theories as discussed in Chapter 2. In return, these statutes guide compensation assessment regarding compensable losses and how they should be assessed to realise desired compensation during expropriation. Thus, for one to clearly understand the purpose of compensation in a particular jurisdiction, there is need to know which theoretical underpinning (indemnity or taker’s gain) guide the compensation laws, compensation goals and expected compensation practices. In the absence of such knowledge regarding the theoretical bases of the compensation laws, it is very challenging to fully grasp the purpose of compensation in any particular setting as it lacks anchoring to any relevant compensation theory. Since this issue is lacking in the literature reviewed, it presents one of the most important gaps and this study intends to look at that.

Related to this issue is the fact that without knowing the theories guiding compensation in a certain environment, it becomes difficult to ably analyse applicable compensation laws and procedures as to whether they are responsive or not to achieve aspired compensation objectives in a particular country or setting. Fundamentally, by looking at the theoretical orientation of the laws, this study will also be analysing this gap by examining the existing compensation laws to see how responsive to the adopted theoretical compensation ideology are. Essentially, the reviewed literature also indicate that there are gaps regarding what compensables, compensation assessment bases and methods are required in responding to the theoretical orientation demands. In other words, the literature fails to show the relationship that is there from the adopted compensation theory through the guiding compensation laws to what items to compensate and how to assess them. All these are relevant issues that are not fully addressed in the literature, if at all.
Summarily, the foregoing literature review shows that most of the empirical works are inadequately informed by relevant compensation theories, thereby challenging their application to other similar works or environments. This study intends to address that and hence, these issues form part of the research agenda for this study, as reflected in its objectives.
Chapter 4: Malawi - A socio-economic profile

Customary land rights in Malawi are closely connected to ethnic identity and T/As. This creates a powerful system of land allocation regimes and a tenure system designed to preserve the asset base of the community for current and future generations. People traditionally see land and kinship in a genealogical map through which access to land is reached. Families and individuals are allocated exclusive fee simple usufruct in perpetuity, subject only to effective utilization.

Malawi National Land Policy (GRM, 2002)
4.1 Introduction

This chapter presents a geopolitical history and socio-economic background of Malawi to contextualise the study. It starts with spatial location, history and socio-economic brief in section 4.2, then discusses land rights in Malawi in section 4.3, followed by expropriation and compensation in section 4.4. Section 4.5 looks at the general property market in Malawi, while section 4.6 presents the three case studies from which study data were collected, namely: Mombera Public University Project in Mzimba District (Northern Malawi), Phalombe District Public Hospital Project in Phalombe District (Southern Malawi) and Salima Greenbelt Initiative (GBI) Sugar Production Project in Salima District (Central Malawi). A chapter summary is presented in section 4.7.

4.2 Spatial, historical and socio-economic background

Malawi is a slender country in south central Africa, surrounded by Mozambique to the east, south, and southwest; Tanzania to the north and northeast; and Zambia to the northwest. Topographically, the African Rift Valley traverses the country from north to south, giving it low lying plains, high and steep plateaus and mountain ranges (Kettlewell, 1964) spanning across 94,276 km² and 24,208 km² of water bodies (NSO, 2009). About 55 % of the total surface area (118,484 km²) is arable land, while conservation areas and game reserves cover 14.3% (GRM, 2002).

Broadly, Malawi’s history is characterised by tribal immigrations of Chewa, Ngoni, Yao and Lomwe among others between 15th and 18th centuries; tribal wars; trade between Arabs, Yao, Chewa and Europeans in salt, ivory, beads and cloth among other commodities; slave trade perpetuated by Arabs, Yao, Portuguese and Chewa; religion (Islam and Christianity) and colonialism (Kandawire, 1977; Peters & Kambewa, 2007; Pike, 1965; Rangeley, 1963). Social organisation of these tribes was mainly patrilineal and matrilineal, and mixed in some cases. Early Europeans arrived in Malawi from mid-18th century, while Malawi became officially a British colony in 1891 till 1964 (Pachai, 1978). Unsurprisingly, Malawi’s land laws are English-oriented despite the major cultural differences and perceptions of reality.

Demographically, Malawi’s population has grown about 35 times from 500,000 people in 1891 (Kettlewell, 1964) to about 17.6 million in 2018 (NSO, 2019) and projected to grow to about 33.6 million by 2050 (NSO, 2020c). Most of this population is in southern (44.1%) and central
regions, with the rest in northern Malawi at 13.0% (NSO, 2020d). Rural population is about 84.0% while national mean density is 186 people/km² (NSO, 2020d). Malawi’s population density has grown about 433.0% from 1966 to 2018 (NSO, 2019).

Malawi’s economy is agriculture-reliant with over 80.0% of export earnings and contributing about 36.0% of national GDP in 2011 (GRM, 2011). Thus, most Malawian households (83.0%) depend on farming for their livelihoods (NSO, 2017) based on an average household land size of 0.6 hectares (GRM, 2002). According to Ellis, Kutengule, and Nyasulu (2003), household land holdings are actually smaller, ranging from 0.2 hectares to 0.5 hectares. Malawi, with a GNI of US$5.9 billion and GNI per capita of US$340.00 in 2017 (World Bank, 2016b, 2017), is a least-developed country (World Bank, 2016b). About 71.0% of Malawians live below the international poverty line of US$1.90/day (World Bank, 2017) (US$1.00 = MK739.67 as of 7th February, 2019). This observation is supported by NSO (2020a) that most Malawians (about 77.0%) were poor in 2020.

Agriculture remains the economic backbone for most Malawians as about 85.0% of households were engaged in agricultural activities in 2020 (NSO, 2020a), while any adverse shocks like drought and poor rains, negatively affect yields and incomes, thereby promoting poverty (NSO, 2012; World Bank, 2016a, 2019). Thus, agriculture dependence epitomises that land is the most basic resource for social and economic development in Malawi (GRM, 2002), and its loss is variably detrimental to affected people’s livelihoods. This is worsened with about 81.0% of the rural population being considered poor.

4.3 Property rights in Malawi

Broadly, land is the material of the earth and includes the surface covered with water, all things growing on it, buildings, other things permanently affixed to it and free or occupied space for an indefinite distance upwards as well as downwards, subject to limitations upon airspace imposed, and rights in use of airspace granted by international law (GRM, 2016b). Constitutionally, property rights are guaranteed and protected under Sections 28 and 209, and can be held individually or jointly (Chirwa, 2005; GRM, 1994). Property rights are ownership rights a person has over material and abstract things, endorsed by statutory and customary laws (Chipeta, 1971; GRM, 1994, 2002). The duality of statutory and customary land laws demonstrates conceptual/perceptual differences in various societies towards land, which
essentially resulted in a dual or hybrid property system in Malawi. Thus, broadly, there are customary property rights based on customary laws and private and public property rights based on statutory law (GRM, 2002, 2016a, 2016b).

4.3.1 Customary land rights
Customary land thrives on customary practices by certain tribes but excludes public land (GRM, 1965, 2002). These property rights account for over 70.0% of all land in Malawi (NSO, 2011), are rarely registered and believed to be a gift from God or of God to ancestors and once considered unmarketable (Chipeta, 1971) as highlighted in the epigraph. Further, such land is taken as the basis for social security (Kishindo, 2004) despite Europeans considering it outdated as in other colonised countries (Ubink & Amanor, 2008). Factually, customary land rights are reducible to exclusive ownership by individuals, families and communities based on rules-in-use in particular societies (Chipeta, 1971; GRM, 2002). Unfortunately, many researchers and scholars misconceive customary tenure as being entirely owned by communities or local chiefs in Malawi (Chipeta, 1971). This delusion is reflected in previous land policies that disregarded individual customary land ownership (GRM, 2002). A good culprit is the 1965 Land Act and other land laws, which adopted these colonial misconstructions. As Chipeta (1971) elucidates, chiefs have their own individual or family land, but are trustees over communal/public and common access resources, but not all customary land. This confusion is perpetuated by Section 25 of the 1965 Land Act, which declares all customary land as lawful and undoubted property of Malawians under trusteeship of the President in perpetuity. Government and its agents misinterpret this provision as purporting customary land as public land, and hence obtainable without compensation. This hypothesis perpetuates colonial policies that suppressed the true character of customary land in Malawi, as also stated by MNLP (GRM, 2002).

Under exclusive customary land, holders have exclusive usufructs in perpetuity over one or several fragmented land pieces scattered within their communities (Duly, 1948) for various uses including housing and farming, among others. This land is freely shared and inherited, disposed of, surrendered and donated among other rights by holders (Chipeta, 1971; Duly, 1948; Pachai, 1978) subject to existing customs. However, owners cannot mortgage customary land since it is unregistered, considered insecure and economically valueless (GRM, 2002). Customary land titles are known only in subject communities and not beyond (Chipeta, 1971;
Pachai, 1978). Thus, customary properties are considered weaker legally and insecure tenurially (GRM, 2002; Peters, 2010), despite holders considering them complete.

Fundamentally, land reverts to chiefs, communities or owners only when completely abandoned, owning families relocate or chased away due to witchcraft and other unacceptable conducts (Chirwa, 2005). Hence, chiefs are paramount custodians and protectors of communities and their lands, and not absolute landowners (Chinsinga, 2017; GRM, 2002). Practically, and as Kandaŵire (1977) contends, individuals/families own customary land, but ideologically, communities do. Thus, GRM (2002) emphasises that individuals and families have exclusive fee simple usufructs in perpetuity under customary tenure, an observation legally re-emphasised in "Kamuzu (Administrator of Deceased Estate) v Attorney General (Civil Cause No. 1839 (A) of 1997" 2004).

Usually in Malawi, community members within any village or T/A area have some reciprocal rights over exclusive land, mainly farmland. Once owners harvest their crops, fellow villagers can graze their livestock in those gardens; collect left over grains, sweet potato or cassava tubers and groundnuts; trap birds (Chipeta, 1971); hunt grasshoppers and mice; gather stalks and tubers and pass through freely. At village or community level, all land within any village is exclusive to that village, together with all common and open access resources and benefits. And within any T/A area, there are common or open access resources benefitting people from various villages, such as forests, grazing grounds, fishing areas and others. These individual, communal, common and open access rights over land are internally and externally related in various ways, resulting in complex customary land rights. Figure 4.1 depicts a simplified representation of these relationships.

Ordinarily, customary land acquisitions involved occupation of unoccupied land, war conquests, invasions, take-overs of abandoned land and grants by families and local chiefs (Chipeta, 1971; Pike, 1965). In contemporary Malawi, acquisition is mainly through customary practices (84.1%) that include family allocations (56.0%), inheritance (13.6%), land grants by local leaders (9.2%), given by non-family members (5.3%) and economic exchanges (3.7%) based on both statutory and customary arrangements (NSO, 2020a; Takane, 2008). Inheritance follows either patrilineal, matrilineal or mixed social systems. Per Berge, Kambewa, Munthali, and Wiig (2014); Takane (2008); and Tschirhart et al. (2018); the Lambya, Tonga, Ngonde, Tumbuka, Nyanja, Ngoni in northern Malawi and Sena in southern Malawi are patrilineal.
Figure 4.1: Graphical representation of the complex nature of customary property rights.
These tribes pass land rights through male lineages as they believe that male children are family land keepers, as they bring their wives to their family land and expand their tribes, while their sisters marry away. However, for unmarried females, they are apportioned land for housing and farming, but final authority over such land rests with their brothers or uncles.

Contrariwise, the Chewa, Yao, Ngoni, Nyanja and Lomwe in central and southern Malawi entrust land and family matters with females, since they stay on family land, bear children and expand tribal populations, as their brothers wander and settle at their wives’ family lands, in a typical matrilineal system. In mixed inheritance, land goes to any child or beneficiary regardless of their gender (Takane, 2008). Government also leases out customary land for various purposes (GRM, 1965, 2016a, 2016b).

Customary land benefiting communities is generally communal/public and include graveyards, markets, worship places, public buildings or assets, grazing areas, game and forest reserves, fishing areas, initiation grounds, dancing grounds and many more (Chipeta, 1971). Alternatively, all customary resources used freely as sources of firewood, water, grass, poles, ropes, reeds, wild fruits, wild vegetables and other natural products, fish, grazing areas among many, are customary common or open access properties. Only where settlement or farming is to be involved does one need permission from local leaders to use the resource (Chipeta, 1971). For these communal and common resources, it is only owning community members that benefit, such as in a T/A area. Any non-member has no right of access to those assets. For example, members of neighbouring villages cannot bury their dead in a graveyard situated in an adjacent village, unless it is an inter-village graveyard. These land rights relationships are shown in figure 4.1, which highlights underlying social rules, positions, kinship and internal relationships in any community (Lawson, 2003) under customary social organisation. For open access, such resources are accessible by anyone regardless of their grouping. For example, free flowing water in a stream.

Fundamentally, customary tenure is central to T/As, cultural identity and social organization, and authority over land flows from paramount leaders through village heads to clan or family heads, down to household heads or individuals, based on specific prevailing tribal customs, as the epigraph underscores. As these land rights are unregistered, any consequential transactions are rarely registered (GRM, 2002). Broadly, customary land is not as unexchangeable as it used
to be since it is changing hands economically (Chasukwa, 2013; Chinsinga, 2017), as discussed elsewhere.

The 2016 Land Act defines customary land as all land used for the benefit of the community as a whole and includes unallocated customary land within the boundaries of a TLMA (GRM, 2016b). Similarly, Customary Land Act (2016) considers customary land as land within the boundaries of a TLMA excluding government or reserved land; land designated as customary land under Land Act (2016); land demarcated as customary land under any written law or administrative procedure in force at any time before operationalising this Act, whether that demarcation was formally approved or gazetted; and land whose boundaries have been agreed upon by a land committee with jurisdiction over that land. Contextually, defining customary land as for the benefit of the whole community provides a wrong perception since some customary land is under exclusive use by specific individuals, families and communities. Further, customary land will now be based on written law and legally demarcated and not customary etiquettes only. Statutorily, customary exclusive land is now registerable as ‘customary estate’ (GRM, 2016a, 2016b). Essentially, structural elements that define customary land in any society are being mutated from current amorphous and social nature to more individualistic and definite entities with identifiable features. Alternatively put, social rules defining customary land, social positions that individuals hold in particular societies and people’s internal relations in those communities are being restructured to more private and fixed arrangements, as typified by Western ideologies. Thus, these new definitions symbolise a paradigm shift on customary land concepts in Malawi (GRM, 2002).

Any other land not exclusively registered is unallocated customary land, including any such land used communally, commonly or openly. Land benefiting whole communities is one referred to as customary land in the 2016 Land Act, which differs from the 2016 Customary Land Act. Considering customary land as for community benefit supports the claim that customary land is public property, a basis used by government to take such land without compensation, which MNLP refutes (GRM, 2002). This paradigm shift towards more formalistic customary land is epitomised by increasing exchanges based on market principles, albeit being unregistered (GRM, 2002).

4.3.2 Private land rights
Any land registered under Registered Land Act is private (GRM, 1967b, 2017b). Though not
defined in the Land Act (1965), a Certificate of Claim is documentary evidence of private ownership of land, issued by the Protectorate Government in Malawi during colonisation to European settlers who acquired land from local chiefs under customary arrangements, and later claimed it as their own private property. Thus, registered private property rights as we know them now in Malawi were introduced by the colonial government in 1891 (Chipeta, 1971; Pachai, 1978). Freehold is the highest tenure attainable in Malawi over land, though it is being discouraged now in favour of leaseholds (GRM, 2002). A freeholder has exclusive possession of land in perpetuity with all normal rights such as leasing, selling, subdividing, sharing to family members, donating, mortgaging, assigning and many others associated with full statutory property ownership. Fundamentally, the most common form of freehold interest in Malawi is fee simple, which is an absolute interest in land in perpetuity and holders can dispose it freely. Such interests are inheritable by general heirs when owners die (GRM, 2002). By virtue of being granted and registered by government against specifically defined property entities with identifiable features, freeholds enjoy statutory guarantees and security (GRM, 2017b).

The 2017 Registered Land Act has also introduced customary estate, which is a new, legally created private property rights bundle representing individual or family customary land registered privately under this law (GRM, 2017b). A customary estate mimics freeholds with an indefinite term, inheritable by general heirs or by will, subservient to expropriation and collateralisable as other private properties (GRM, 2016a, 2016b). From freeholds and customary estates, leaseholds of up to 99 years are creatable (GRM, 2017b). Statutory leaseholds enjoy full legal protection, while similar customary arrangements are only known under those traditional arrangement but not legally, unless registered (GRM, 1967a, 2002). Essentially, leaseholds in Malawi as any private property enjoy all normal property rights and are disposable, leasable, bequeathable, mortgageable for financial facilities, and expropriatable among others (GRM, 2016a, 2016b). Contrary to customary property exchanges, private property transactions are recorded in government registries, thereby ensuring availability of property market data for other uses when needed (GRM, 2002).

**4.3.3 Public land rights**
This is all land under government including any other land that is not customary or private (GRM, 1965). All such land before 2016 was vested in the President in perpetuity, but now it is vested in government (GRM, 2016b). This land is exclusively acquired and used publicly for
government buildings, schools, hospitals, public infrastructure or availed for private use by individuals and organizations by government. Strictly, public land implies land managed by government agencies, local governments or T/As, such as national parks and conservation areas for Malawians (GRM, 2002, 2016b).

Under customary settings and as explained in subsection 4.3.1, all land exclusively reserved as dambos (marshy areas), community woodlots, forests and many other uses in a TLMA for exclusive use of members of a particular T/A or unallocated, is public (communal) land (GRM, 2016a). Broadly, public assets are openly or commonly accessible. Generally, public land is leasable by government for various private uses, but reverts back to it upon expiry of the lease (GRM, 2002).

Since colonial times, both colonial and independent governments treat customary land as a subset of public property, albeit without legal evidence. Consequently, all customary landholders are regarded as tenants/squatters on their own land up to date (GRM, 2002). This position leads to arbitrary resumptions of customary land by government. For example, declaration and gazetting of any land under customary tenure as a planning area resulted in that land becoming public property without any formal procedures nor compensation to owners (GRM, 1988, 2002). Public land also suffers heavy encroachment in Malawi and to strengthen their protection, it is now required to be registered (GRM, 2016a). Apart from public land, all other lands are expropriatable in Malawi.

To conclude, it is very important to note that Malawi’s tenure system follows inherent rights system with private land rights being granted to individuals on both public and customary land. This entails that, when any land that is not clearly and legally public is taken for public uses, compensation is inevitable as Chapter 2 discusses.

### 4.4 Expropriation and compensation in Malawi

Expropriation in Malawi pre-dates colonisation for communal uses such as foot paths, animal paths, initiation grounds and others, and were generally replaced by other lands for extensive takings (Duly, 1948). Modern expropriation originates from English land laws due to colonisation (Ng’ong’ola, 1992; Pachai, 1978). Thus, Malawi Constitution authorises expropriation in Subsection 44(3), supported mainly by Lands Acquisition Act (1971) and
Land Act (1965) and other purpose-specific statutes. These laws are undergoing amendments/repeals and that presents an opportunity for the study to review both old and new laws while focusing on the old. This is done in Chapter 6 as part of the study analysis.

4.5 General property market in Malawi

Malawi’s property market is generally developing with formal exchanges concentrated in urban areas where private land accounts for 20.0% and customary tenure practices 47.0%, with the rest being public land. Official land markets are almost non-existent in rural areas (UN-HABITAT, 2012) while urban markets are characterised by mostly registered private properties (Chome & McCall, 2005). Since their titles are officially recorded, consequential transactions and changes are also recorded, including exchange prices and other relevant aspects. This documentation ensures availability of relevant market information for various property transactions and economic activities in market economies (Mooya & Cloete, 2012).

Practically, status of property markets in Malawi is dominated by exchanges guided by traditional arrangements (Chome & McCall, 2005; UN-HABITAT, 2012). And as Chome and McCall (2005) summarise, most people prefer customary-based transactions against statutory-based ones because they are more convenient to their needs. Some of these exchanges are authenticated through written agreements and sanctioned by local headmen, but lack details regarding land size, boundaries and shape among others, as they involve mostly unregistered properties. Where estate agents are involved, some exchange information may be available (Chome & McCall, 2005) but may not meet property market requirements. Also, poor storage of written exchange agreements may lead to their missing and destruction thereby making data availability difficult and costly (NSO, 2017). For rural properties, statutory-based property markets are non-existent, as kinship dominates in land transactions, making required market evidence rare.

4.6 Case study district profiles

The study has three case studies namely: Mombera Public University Project, Phalombe District Public Hospital Project and Salima GBI Sugar Production Project as figure 4.2 shows.
Figure 4.2: Map of Malawi showing study districts.
Source: NSO (2017, p. xxxii)
The following sections profile the study districts, starting with Mzimba for Mombera Project.

4.6.1 Mombera project, Mzimba District

Mombera Project is about 12.0 kilometres south of Mzimba (M’mbelwa) District headquarters and about 110.0 kilometres south west of Mzuzu City, in Kazomba area, Kausiro Village, T/A Mzikubola, northern Malawi (M’mbelwa District Council, 2017). The project site totals 432.0 hectares and was expropriated by Malawi Government in 2015 from 17 customary landowners. The project aims to increase access to higher education and availability of highly skilled workforce in Malawi and meet rural development goals through employment in the project areas (GRM, 2012).

Mzimba, at 10,473 km$^2$, is the largest district in Malawi. It borders Zambia on the west, Kasungu District on the south, Nkhata Bay District on the east, Nkhotakota District on the southeast and Rumphi District on the north as figure 4.2 depicts. Mzimba’s population is 940,184 people with 48.5% males and 51.5% females (NSO, 2019). Only 2.8% of the district population is urbanised (NSO, 2020d). Mzimba’s population density is 90.0 persons/km$^2$ (NSO, 2019) and about 2.1 times lower than the national one. According to M’mbelwa District Council (2017), average household land size is 4.0 hectares, much higher than the 0.6 hectares at the national level. Ngoni and Tumbuka tribes dominate in Mzimba, while others include Tonga, Chewa and Senga. Culturally, patrilineal system prevails in the district (M’mbelwa District Council, 2017; Takane, 2008).

Economically, most households (86.5%) rely on agriculture and fishing activities for their livelihoods while 23.1% of that population depend on non-agricultural enterprises, of which wholesale and retailing, accommodation and food services is prominent at 79.5%; seconded by manufacturing at 14.5% (NSO, 2017). Those engaged in casual or part-time work account for 33.4%, while salaried and wage-reliant households are only 9.9%. Regarding poverty, a household self-assessment indicates about 73.0% of households are generally poor, and the rest well-to-do (NSO, 2017).

Land in Mzimba classifies into customary, public and private (M’mbelwa District Council, 2017). Private property rights are comparatively high at 15.0% against the national 3.0% (NSO, 2011). Mombera University Project expropriatees had free customary ownership in perpetuity, as discussed under subsection 4.3.1.
4.6.2 Phalombe project, Phalombe District
This project is at Migowi Trading Centre, about 8.0 kilometres northeast of Phalombe District headquarters and about 75.0 kilometres southeast of Blantyre City in Matope Village, T/A Kaduya, southern Malawi (Phalombe District Council, 2013). Malawi Government acquired 40.05 hectares of customary land from 167 households in three phases, starting in 1994. The project aims at improving district health services as there is no referral hospital in Phalombe District up to now (2019). Yet, Malawi considers health the linchpin for socio-economic development (GRM, 2017a).

Phalombe District covers 1,323 km² (NSO, 2019) and bounds Zomba District on the north, Mulanje District on the west and southern parts and Mozambique on the eastern side (Phalombe District Council, 2013) as figure 4.2 indicates. About 48.0% of Phalombe’s 429,250 people are males and the rest females (NSO, 2019). Of this population, 97.6% is rural-based (NSO, 2019). Phalombe’s population density is 1.7 times higher than Malawi’s at 325 persons/km² (NSO, 2019), with 0.6 hectares household land on average (NSO, 2017; Phalombe District Council, 2013). Most people (about 82.0%) acquire land through customary arrangements while recorded purchases are insignificant (NSO, 2017). Ethnically, Lomwe tribe prevails in Phalombe, followed by Nyanja, with Yao being the least. Generally, Phalombe is mainly matrilineal (Phalombe District Council, 2013).

About 96.0% of total households engage in agriculture and fishing while about 23.0% either solely depend on or supplement with other enterprises, dominated by wholesale and retailing, accommodation and food services (67.3%). Practically, most accessible income generating tasks are casual or part-time labour at 71.6% while salaried or work-based wages are only 2.0% (NSO, 2017). A household self-assessment regarding poverty levels ranks 78.9% of Phalombe people as poor, almost equal to the national rate of 77.0% (NSO, 2020a).

Like Mzimba, customary land characterises Phalombe at 76.3% (Phalombe District Council, 2013), while statistics for public and private land were unavailable during the study. While traditional land practices in Mzimba follow male lineages, Phalombe favours females (Takane, 2008; Tschirhart et al., 2018).

4.6.3 Salima project, Salima District
This is a public-private venture by Malawi Government under GBI with a foreign private
company. The project sits on about 6,800 hectares of leasehold land known as Chikwawa Estate, initially owned by PAL for 99 years from 13th April 1971. The land situates about 40 kilometres north of Salima town and about 140 kilometres northeast of Lilongwe City in T/A Khombedza’s area, Salima District. GBI aims to improve irrigation agriculture and transform Malawi from a predominantly consumer and importer to a producer and exporter, by increasing irrigated farmland from 90,000 hectares to 1,000,000 hectares. The target is to increase agricultural exports and foreign exchange earnings and improve household incomes and reduce rural-urban migration (GRM, 2011).

Salima covers 2,151 km² and supports 478,346 people, with 48.5% males and 51.5% females. It currently has 222 persons/km², 1.2 times higher than the national density (NSO, 2019). Salima borders Nkhotakota on the north, Dowa and Ntchisi on the north-west, Lilongwe on the west, Dedza and Mangochi on the south and Lake Malawi on the entire eastern side (Salima District Council, 2018) as figure 4.2 illustrates. About 3.0% of Salima’s population is urbanised (NSO, 2020d). Chewa and Yao tribes dominate, while others include Tonga, Tumbuka, Nyanja and Ngoni (Salima District Council, 2018), with mixed matrilineal and patrilineal practices. Household land sizes average 0.4 hectares (Salima District Council, 2018). As customary land holdings are common (78.0%), most land transactions are customary-based, with economic exchanges accounting for only 3.0%. Private land accounts for 18.0%, which is comparatively high against the national proportion of about 3.0%, while public land is only 4.0% (Salima District Council, 2018).

Most households (82.7%) in Salima depend on agriculture and fishing, which contributes 79.0% of household income. About 19.0% rely on non-farm activities; of which wholesale and retailing, accommodation and food services prevail (60.6%); seconded by transportation, storage, information and communication services (16.0%) (NSO, 2017). Apart from agriculture and fishing, most people (53.1%) also depend on casual or part-time work while only 4.9% depend on wages and salaries or some other kind of paid work. Self-assessment poverty results by households indicate that about 76.9% are poor, with only about a fifth being better-off (NSO, 2020a).

Further, the following tables characterise the populations in the three districts. Table 4.1 shows that about 62.0% of household heads are aged between 25 and 49 years while those above 49 years are 29.0%. Those aged below 25 years account for an average 9.8% (NSO, 2014). Despite
the figures being prepared in 2014, it is believed that they are still reliable for purposes of this study.

Table 4.1: Percentage distribution of household heads by age group in study districts.

<table>
<thead>
<tr>
<th>District</th>
<th>Age of head of household</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>19 - 20</td>
<td>20 - 24</td>
</tr>
<tr>
<td>Mzimba</td>
<td>0.8</td>
<td>9.1</td>
</tr>
<tr>
<td>Phalombe</td>
<td>0.8</td>
<td>10.6</td>
</tr>
<tr>
<td>Salima</td>
<td>0.5</td>
<td>7.5</td>
</tr>
<tr>
<td>Average</td>
<td>0.7</td>
<td>9.1</td>
</tr>
</tbody>
</table>

Source: NSO (2014).

In terms of education attainment, the majority (an average of 65.7%) have primary education, while 17.2% have secondary education. Those with post-secondary education average 2.8% in the study districts (NSO, 2014) as table 4.2 summarises.

Table 4.2: Proportion of households based on highest education level in study districts.

<table>
<thead>
<tr>
<th>Highest level of education completed</th>
<th>District</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>Mzimba</td>
</tr>
<tr>
<td></td>
<td>8.3</td>
</tr>
<tr>
<td></td>
<td>43.2</td>
</tr>
<tr>
<td></td>
<td>10.5</td>
</tr>
<tr>
<td></td>
<td>2.5</td>
</tr>
<tr>
<td></td>
<td>0.1</td>
</tr>
</tbody>
</table>

Source: NSO (2014).

Broadly, semi-permanent and traditional construction materials characterise about 55.0% of dwellings in the study districts while about 45.0% of the structures in Mzimba, Phalombe and Salima are said to be permanent (NSO, 2020a), as table 4.3 depicts.

According to NSO (2020b), a housing unit built of non-durable materials is a traditional structure. For example, one of grass thatch with walls made of unburned bricks is regarded as a traditional structure. A semi-permanent structure is one that lacks one of the materials of the permanent structure such as having a roof made of iron sheets with the wall made up of unburnt
Table 4.3: Classification of dwelling units in study districts.

<table>
<thead>
<tr>
<th>Type of dwelling structure</th>
<th>Mzimba</th>
<th>Phalombe</th>
<th>Salima</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent (%)</td>
<td>53.3</td>
<td>42.7</td>
<td>37.9</td>
<td>44.6</td>
</tr>
<tr>
<td>Semi-permanent (%)</td>
<td>22.3</td>
<td>22.2</td>
<td>24.9</td>
<td>23.1</td>
</tr>
<tr>
<td>Traditional (%)</td>
<td>24.4</td>
<td>35.1</td>
<td>37.2</td>
<td>32.3</td>
</tr>
</tbody>
</table>


bricks. A permanent house is generally made of durable roofing materials such as iron sheets and strong walling materials such as burned bricks. Furthermore, most households in Mzimba, Phalombe and Salima live in their own houses at 73.6%, 87.6% and 71.0% respectively, while those who bought their houses range from 0.5% in Salima to 1.3% in Mzimba (NSO, 2017).

Whether it is due to prevalence of customary tenure, most land exchanges in the study districts are based on traditional arrangements, with intra-family allocations topping the transactions at an average of 53.0%, as table 4.4 illustrates. Intra-family allocations entail subdividing available family land and allocating the new lots to other family members, whether because of adulthood or marriage or other reasons. This does not involve local leaders as it is considered a family matter. As explained previously, land sales and purchases stand at 3.0% in Salima while statistics for the other districts were unavailable during the study as shown in table 4.4.

Table 4.4: Nature of land transactions in Mzimba, Phalombe and Salima districts.

<table>
<thead>
<tr>
<th>Land transaction type</th>
<th>Mzimba</th>
<th>Phalombe</th>
<th>Salima</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intra-family allocations (%)</td>
<td>39.6</td>
<td>81.6</td>
<td>37.7</td>
<td>53.0</td>
</tr>
<tr>
<td>Inheritance (%)</td>
<td>21.6</td>
<td>5.6</td>
<td>15.0</td>
<td>14.1</td>
</tr>
<tr>
<td>Grant by local leaders (%)</td>
<td>8.2</td>
<td>3.4</td>
<td>18.4</td>
<td>10.0</td>
</tr>
<tr>
<td>Gift from non-family members (%)</td>
<td>12.8</td>
<td>1.8</td>
<td>6.9</td>
<td>7.2</td>
</tr>
<tr>
<td>Purchase (%)</td>
<td>-</td>
<td>-</td>
<td>3.0</td>
<td>1.0</td>
</tr>
</tbody>
</table>


Grants of land by local leaders such as village heads concern customary land that is generally unallocated and free, surrendered or abandoned, to either fellow villagers or new comers. It is important to note that these customary land allocations are permanent and in perpetuity, subject to local norms. This entails that once customary land is allocated, it cannot be taken back
anyhow by local leaders, unless the holders abandon, surrender, or are chased away from that community because of unacceptable behaviour such as witchcraft (GRM, 2002; "Kamuzu (Administrator of Deceased Estate) v Attorney General (Civil Cause No. 1839 (A) of 1997," 2004), as also discussed elsewhere.

Broadly, the preceding discussions provide ample context to the study districts such that we now have an idea about social and physical aspects of areas in which case studies situate. Generally, the communities are basically all customary founded, with prevalent customary tenure transacted based on traditional arrangements except for Salima project land.

4.7 Chapter summary

Malawi runs a hybrid tenure system based on statutory and customary laws, resulting in customary, private and public land rights. Customary land dominates owing to its embeddedness in people’s cultures, against the alien statutory private property rights that are very minimal. Unlike customary land, private properties are duly registered and fully protected by law and enjoy all normal property rights as anywhere else. However, there is antagonism on ownership of customary land as government claims absolute rights over it while customary holders culturally consider such land as theirs, given to them by their parents and ancestors.

Malawi’s primary basis for compensation is market value of property taken, which is supported by many compensation statutes, convoluting the environment and affecting consequential processes and outcomes in the process. In such a setting, how then do valuers satisfy necessary market conditions to achieve appropriate compensation based on market value for expropriated customary land rights?
Chapter 5: Research methodology

Case studies are generalisable to theoretical propositions and not to populations or universes. In this sense, the case nor the case study represents samples.

Yin (2018, pp. 20-21)
5.1 Introduction

This chapter presents the study methodology used to achieve intended research goals. However, the chapter does not detail various research methods like case study, experiments and surveys, as voluminous literature already exist on that. This chapter has eight sections. Section 5.2 discusses methodological issues in compensation research to contextualise challenges faced in this topical area and locate this research appropriately. Section 5.3 details the study’s conceptual framework which was developed in Chapter 2 while a detailed research methodology is discussed in section 5.4. Case study as a research method is presented in section 5.5. A detailed research design covering selection of case studies, respondents, data collection and analysis is explained in section 5.6 while section 5.7 covers ethical issues. Section 5.8 summarises the chapter.

5.2 Methodological issues and conceptual frameworks in compensation research

Reviewed empirical literature on compensation for expropriation reveal some conceptual and practical issues. The nature of customary land, knowledge about them and how that knowledge is generated and presented is not well tackled in existing studies. This is partly because customary tenure is generally misunderstood by many, either because they are strangers to customary tenure environments or because they get their customary tenure narratives from secondary sources (Chipeta, 1971). The other key reason is that most professionals in real estate like valuers, are trained to deal with private land and not customary ones. Thus, when dealing with customary properties, they equate them with private properties and/or apply methodological concepts meant for private properties. Alias and Daud (2008); Kakulu (2008); Mitchell et al. (2015) and Sulle and Nelson (2009) highlight these challenges. And since current land institutional frameworks and structures in most developing countries including Malawi are based on private property concepts and meanly cover customary land, they fail to properly handle them. Put differently, existential nature of customary land and how it is understood is seemingly based on wrong assumptions and methodological approaches, as private land philosophical assumptions prevail in most researches even where customary land dominate (Alias & Daud, 2008; Small & Sheehan, 2008).

Practically, there are definitional and contextual challenges. On definitional issues regarding
customary lands: what aspects characterise them, how are they defined and how do various stakeholders and researchers perceive them? These issues are rarely discussed in most compensation research. Second, while economic exchanges of customary land are legally prohibited, in reality, they are happening. Ironically, the same laws that forbid economic exchanges of customary land require market value-based compensation for their expropriation. This presents a challenging research and practical environment.

Contextually, there are several challenges relating to research in compensation for customary land. The fact that customary tenure norms derive from and are sustained by communities themselves, and that this tenure is as much a social system as a legal code as discussed elsewhere, means that customary rules and hence research settings in one communal setting differ from others. This may require innovative methodologies to achieve intended aims. Second, there may be circumstantial conflicts between expropriatees and acquiring authorities due to various reasons including approach used and inadequate compensation among others. Such conditions present unconducive research settings as researchers may be presumed as government agents and thus unwelcome and mistreated. Kakulu (2008) provides an example regarding some expropriated rural communities in Nigeria that are aggressive towards acquiring authorities including government officials like valuers. The third constraint relates to the organic nature of rural settlements that challenge use of standard random sampling techniques that require orderly arrangements. Mooya (2009) emphasises this challenge regarding research in informal settlement land markets in Namibia. Finally, availability of expropriatees as respondents also depends on how and where they relocate to. Where expropriatees relocate to a single area, random sampling becomes applicable based on available compensation lists of expropriatees or dwellings if in an orderly manner. But where expropriatees relocate themselves in disorderly, scattered and to distant areas, then random sampling techniques are challenged. These challenges entail poor quality analysis issues in various compensation assessment studies regarding customary land issues, as Sheehan (2000, p. 50, citing Lane & Yarrow, 1998, p.148) also underlines.

Regarding conceptual frameworks in existing scholarly works on compensation at doctoral or any other level, including those of Ajibola (2012), Akujuru (2014), Alemu (2013), Ambaye (2013), Du Plessis (2009) and Kakulu (2008), among others; they have not grounded their analytical frameworks on the compensation theories discussed in Chapter 2, nor any other. Actually, of those reviewed, only two doctoral works discuss such compensation theories.
Ambaye (2013) discusses compensation theories (indemnity and taker’s gain) in his thesis to inform his argument but does not use them as part of his analytical framework. Similarly, Du Plessis (2009) analyses these compensation principles in trying to understand and clarify the meaning of compensation from various perceptions.

Furthermore, extant empirical literature do not examine relationships between nature of subject property rights and assessment methodologies applied and consequential compensation outcomes. Alternatively framed, most of these empirical works are either based on economic concepts such as market value or recommend them as suitable measures of compensation, without questioning their suitability in social settings with thin/underdeveloped property markets or where customary property rights and other unregistered property rights dominate. Thus, considering the preceding methodological issues together with available conceptual frameworks in compensation research shows that none of the conceptual frameworks are suitable for this study and requires its own. Thus, section 5.3 discusses the conceptual framework for this study.

5.3 Conceptual framework for this study

This conceptual framework has been developed specifically for this study. It is informed by indemnity and taker’s gain compensation theories which are detailed in Chapter 2. Indemnity compensation principle aims at restoring expropriatees in similar pecuniary positions as before expropriation by compensating for lost property rights and other expropriatory losses and inconveniences including consolation/solatium, severance, injurious affection, disturbance, and/or special values. Alternatively, taker’s gain principle requires acquiring authorities to compensate for what they have gained - land, and that which expropriatees have lost (land), and nothing else (Kratovil & Harrison, 1954). Under both theories, compensation for expropriated property rights is based on market value. For severance and injurious affection demanded under indemnity theory, they are also based on market value since they relate to affected land (Barnes, 2014). For all other losses, they are based on owner’s loss (Denyer-Green, 2014).

This conceptual framework has four tiers as diagramatised in figure 5.1. The highest tier - the theoretical level, is where relevant compensation laws are examinable to establish their theoretical orientation and hence compensables that form the evaluative criteria and their
assessment methodologies. The second tier is the practical level in which compensation is assessed guided by the higher level compensation prescriptions. The third tier represents actual compensation outcomes emanating from the assessments in the second tier. This is the outcome level. The lowest level - the reconciliation level, is where compensation prescriptions (theoretical and legal levels) are reconciled with actual compensation (outcome level) to examine whether compensation meets desired goals or not based on adopted compensation theories.

Fundamentally, this conceptual framework is ideal in analysing various compensation issues. In analysing compensation laws, the conceptual framework would assist in establishing the theoretical orientation of compensation in concerned jurisdictions, that is whether the legal aspiration is to fully indemnify expropriatees for the lost properties and consequential losses, or to only cover what is taken. Such examination would also establish prescribed compensables, compensation assessment bases and methods. This type of analysis relates to the theoretical level. Second, this conceptual framework is also suitable for scrutinising compensation valuation processes on how allowed compensables are to be or are assessed. This is possible as the primary compensation item in both theories - land and related aspects, is to be assessed according to market value requirements. This examination would happen in the practical tier. Fundamentally, this conceptual framework is also applicable in investigating compensation

Figure 5.1: Conceptual framework for the study.
outcomes (outcome level) as to whether they meet theoretical, legal and market value expectations. Finally, in the reconciliation level, the three top levels come into play as prescribed and actual compensation are reconciled. This is meant to examine if actual compensation satisfies compensation prescriptions and methodologies, and hence adequate or inadequate.

Principally, compensation concepts/principles related to either indemnity or taker’s gain theories inform most constitutions, statutes and Acts in various forms. Reciprocately, these statutes guide compensation assessments regarding compensable losses and how they should be assessed to realise desired compensation during expropriation. Essentially, it is necessary to analyse the nature, content and adequacy of these compensation laws regarding their theoretical orientation, aims and sufficiency to support attainment of aspired compensation for private and customary land rights. Further, it is critical to examine how expropriated land rights, whether customary or private, are valued in pursuit of desired compensation in rural areas where markets are generally non-existent. Alternatively put, what are the legally prescribed bases and methods for assessing compensation? Practically, key factors and challenges affecting compensation valuation within those case studies will be examined together with their effect on compensation for both customary and private land. Further, analysing compensation outcomes is intended to establish what items were compensated and hence adequacy of final compensation. Fundamentally, key factors in the evaluation criteria include market value of expropriated properties, severance, injurious affection, disturbance, consolation and special values, as fully discussed in Chapter 2. The whole analytical process starting from analysis of compensation laws through compensation adequacy/inadequacy is shown by dark grey arrows in figure 5.1. Finally, research findings form part of the study’s recommendations as shown by the arrows on the left of figure 5.1. The three case studies are our compensation environments in which relevant laws apply in guiding compensation assessment. Further, this conceptual framework is modifiable and applicable in many compensation settings where legal compensation aspirations are explicitly stated. Where they are ambiguous, some challenges may be faced in its application.

5.4 Research methodology

This section discusses the study’s general methodology in relation to issues discussed in preceding sections. Thus, there are two subsections, one addressing conceptual and practical
challenges discussed in section 5.2 and the other presenting this study’s methodology.

5.4.1 Addressing conceptual and practical challenges

Section 5.2 discussed several conceptual and practical challenges characterising research in expropriation and compensation. The key conceptual issue expounded the absence of adequate discussion regarding nature of customary land rights. Thus, customary lands are grounded in tribal customs and practices, are intergenerational and consist of both material and immaterial aspects. The material aspect represents the physical features like the land itself, while immaterial ones relate to sentimental attachments that people have with their lands, such as inheritance rights, decision making rights on land allocation and use, and other special benefits and access rights (Witter & Satterfield, 2014). Unlike private land, customary land lacks fixed boundaries. And, as customary tenure derive from communities themselves, it is considered as a social system as well as a legal code (Chipeta, 1971; Wily, 2011) and thus manifests itself through social rules. Lawson (2003, p. 37) defines social rules as directives, codes, conventions or understandings about how an act could or should be performed. For example, in matrilineal societies, it is known and accepted that land inheritance is through female lineages. Second, these tenure practices are highly and systematically differentiated into various social positions with their own antecedent rules and benefits, and hence responsibilities and duties. Thus, considering any customary tenurial system, one common position is that of village head person, whose responsibility is the welfare of his or her villagers including protection of their land. Likewise, others are family heads who oversee family land and norms. Finally, the various practices, rules and positions are related in various ways. For example, once a family is allocated land by a village head, it expects protection in cases of uncertainty from the village head. Similarly, the village head acts in the best interests of his subjects. Thus, there are internal relationships characterising particular social systems (Lawson, 2003). Essentially, customary tenure practices are guided by social rules, acted upon and enforced by people in various positions that are variously internally and externally related.

The study also highlights some practical challenges regarding expropriation and compensation research in section 5.2. As customary land is treated as private land in some previous studies and led to challenging research and practical environments, this study appreciates customary land as it is in its own right as just discussed above, and understands that this position results in research settings that differ from one case study to another. This is expected because case study communities are transformational social realities as discussed elsewhere, and cannot be
adequately treated by concepts and instruments considered universal and immutable and meant for private land realities, as the two differ naturally. Thus, where markets are thin or non-established, economic concepts are challenged. This calls for alternative and more fitting concepts and instruments in such environments.

The other practical research challenge concerns conflict between acquiring authorities and affected communities. This mostly concerns compensation issues or unmet promises by acquiring authorities. In these cases, affected communities may become aggressive towards strangers including researchers presumed as government agents and thus become physically unsafe. To address such issues, it is imperative that researchers follow relevant communication protocols when conducting research. One way is to go through DCs to inform local leaders of intended research areas, who in turn inform their subjects of intended research. This must be augmented by at least one sensitisation meeting with local leaders and potential respondents to provide adequate identification and affiliation particulars and clarify any misunderstandings. This can be done by holding FGDs first when starting data collection, since they will serve also as sensitisation fora. Once people understand that one is a researcher and not government agent or politician as presumed, they seemingly become co-operative and supportive.

Finally, the other research implementation problem observed regards respondent sampling or selection. While random sampling techniques are applicable in many cases, their use in organic or disorderly settlements or where expropriates relocate themselves to various sites, become challenging. To circumvent these challenges, convenience and purposive selection of respondents is suitable, supported by snowballing where necessary.

5.4.2 Study research methodology

The study uses case study approach in analysing current compensation practices in rural Malawi, more specifically how expopriated land rights, whether customary or private, are valued for compensation goals. It is argued that evidence from several case studies or sources provide enriching and compelling findings, and hence understanding of particular phenomena than single case studies or sources (Yin, 2014). Yin (2018) further contends that case study analysis shows how far theories hold or not in various contexts, while enabling researchers to examine operative factors or mechanisms in various social contexts (Bryman, 2012), and provide similar or contrasting findings but for anticipatable reasons. This is called theoretical replication (Yin, 2018). Empirically, researchers in case studies are better positioned to
investigate factors and challenges influencing, in this case, compensation valuation processes, outcomes and challenges. The three expropriation projects in Malawi, namely Mombera, Phalombe and Salima, represent the study’s case studies located in rural areas whose culture is almost entirely customary, with more or less similar physical conditions. Legally, these case studies were subjected to the same set of compensation laws, as alluded to elsewhere.

5.5 Case study research

The study desires to understand contemporary and complex social phenomena regarding compensation practices for expropriation in a holistic and real-world perspective in Malawi, through an in-depth analysis. Thus, a case study of three projects is used as the main method for collecting empirical data. It is an appropriate methodological tool based on nature of questions and proposition - requiring an analytic case to examine holistically on how compensation processes unfold in rural areas and why they unfold that way. Thus, the distinctive need to apply a case study was further strengthened by its capability to use multiple evidence sources including documents, interview data and observations among others, and corroborate findings thereby achieving data triangulation. Additionally, since data comes from different respondents who share their own perspectives on the research topic or problem at hand based on the same set of questions and theoretical proposition(s), case study aids theory triangulation (Yin, 2018, p. 128).

Further, the case study method is selected because of time and available resources to conduct the research as compared to other techniques such as survey and experiment (Saunders, Lewis, & Thornhill, 2007). Survey is concerned with identifying patterns across large and diverse populations (Antonesa et al., 2006) and would require covering all expropriation and compensation projects in Malawi, which is unfeasible. Equally, experiments need specifically designed environments in which variables are directly, precisely and systematically manipulated as in laboratory or field settings (Yin, 2014). Experiments also require more resources than normal case studies (Creswell, 2014). Thus, guided by nature of study questions and proposition and other aspects, survey and experiment are inappropriate for this study.

However, case study is criticised for its presumed limited scientific generalisation. On that, Bryman (2012) emphasises that case study findings are not generalisable to other cases or populations, resonating with Yin (2018) as highlighted in the epigraph, with its restricted
external validity. Moreover, others contend that particularity rather than generalisability characterises good qualitative research (Creswell, 2014, p. 204). Yet, Berg, Lune and Lune (2004) argue that proper selection of case studies ensures that results generally provide an understanding about similar individuals, groups and events beyond original case studies, through analytic generalisation (Yin, 2018). Yin underscores that case studies are tools for illuminating empirical light on relevant theoretical concepts/principles and that cases are not sampling units as highlighted in the epigraph.

Impliedly, analytic generalisation leads to greater insights on how and why particular phenomena manifest in particular actualities. Fundamentally, case study findings are generalisable to theoretical propositions and hence on conceptual levels higher than study populations and universes (Yin, 2018). Basically, case study findings are generalisable to similar entities through what this study calls horizontal generalisation (analytic generalisation) at lower levels (Level I inference, Yin (2018)), and vertically to some broader theory in level II inference (Yin, 2018), which this research calls theoretical generalisation. The study visualises this through figure 5.2. Thus, Yin (2018) argues that if a case study’s findings offer explanations about similar individuals, groups and events beyond original case studies through analytic generalisation, then it also strengthens its external validity.

5.6 Research design

Generally, a research design must consider what focal research questions to study, what
relevant data to collect and how to analyse the results (as cited in Yin, 2018, p. 26). As a case
study research, this design considers five key components, which include (Yin, 2018, p. 27):
a) Research questions,
b) Propositions,
c) Case(s),
d) Logic linking data and propositions, and
e) Criteria for interpreting findings.

Thus, study’s questions are:
a) What are the theoretical foundations of compensation laws in Malawi?
b) How adequate are current compensation laws to facilitate the achievement of
   appropriate compensation for customary land rights?
c) What are the key practical challenges affecting the achievement of appropriate
   compensation for expropriated customary land rights?
d) How do expropriatees perceive received compensation in terms of its adequacy for
   expropriated customary land? And,
e) What valuation model(s) are suitable for customary property rights when assessing
   compensation?

The research’s proposition is that current practices of compensation valuation in Malawi
presupposes private land and functional land markets and therefore lead to inadequate
compensation for customary land. To undertake the analysis, three public projects (case
studies) spatially distributed in Malawi were selected as study units. The study analyses how
expropriated land rights in rural areas are valued for compensation purposes, and that calls for
case studies that are located in rural Malawi. Thus, a case study design addresses this need, and
improves study robustness (Yin, 2014). Data collected is then meant to respond to the
proposition made by way of the conceptual framework presented in section 5.3. Essentially,
qualitative analysis and interpretation of study findings are achieved through this conceptual
framework aided by existing theoretical and empirical literature.

**5.6.1 Identification of case studies**

Per Yin (2014), one fundamental challenge in case study research regards identifying
appropriate cases to examine. Essentially, this study’s cases were selected based on that data
collected from them satisfy its research aims and afford insights into legalities and practicalities
of compensation valuation in rural Malawi most conveniently, in relation to its theoretical proposition. Hence, several factors guided selection of case studies. First, only projects subjected to the same set of laws, processes and procedures concerning compensation were eligible. Thus, all chosen case studies were subjected to compensation laws of Malawi and expropriated by and for use by Malawi Government. Second, expropriatees in these case studies must have received compensation for their expropriatory losses guided by prevailing compensation laws and paid by Malawi Government itself. This was to ensure that case studies are those subjected to Malawi’s compensation laws and not international requirements like those of World Bank, which deviate markedly from local ones. Third condition needed case studies that situate in rural areas where customary land practices dominate. This presented no challenge as over 70.0% of land in Malawi is customary. Existence of customary land and private land, or either one of these, as the focal variable in potential case studies was the fourth criterion. Generally, statutory private properties are also found in rural areas, mostly commercial agricultural estates registered under Registered Land Act (1967). Fifth, and possibly most important aspect is data availability and accessibility for selected case studies vis-a-vis compensation. Thus, three case studies located in Mzimba (northern Malawi), Phalombe (southern Malawi) and Salima (central Malawi) as shown in figure 4.2 qualified, with accessible data at MLHUD offices. Data from these case studies were further assumed that they will illuminate the research proposition and respond to study questions raised. The three case study areas are also physically accessible in all weather conditions and would not detract the research plan.

5.6.2 Respondent selection, data types and collection
The study planned to triangulate, interview and discuss issues pertaining to compensation valuation and its challenges with various participants as means of collecting primary data. It identified four main groups of respondents namely, government officials, government valuers, expropriatees and key informants. These were believed to have necessary knowledge, experience and information regarding compensation issues. These respondents were subjected to face-to-face interviews and FGDs using semi-structured and mostly open-ended questions relevant in collecting targeted data. Each interview and FGD were planned not to exceed two hours and proceedings were to be audio-recorded, subject to respondent permission. All potential respondents were to be contacted prior to actual interviews either through formal letters, emails, telephones, fax, in person or orally as the situation demanded. Expropriatees were to be communicated through DC’s offices to inform concerned local leaders to notify
them. Thus, the study was designed to collect data from various respondents while maintaining linkages among the various data sources, study objectives and proposition. Hence, and as Yin (2018) guides, this was meant to strengthen construct validity and reliability of research findings through data triangulation.

Respondents in cohort one were to involve government officials from MLHUD directly involved with expropriation and compensation including for each case study, one Regional Lands Commissioner and two Regional Lands Officers. From MLGRD, the DC and one District Lands Officer, each from Mzimba, Phalombe and Salima districts where case studies located. Hence, for each case study, this group was expected to have five respondents. These respondents were ideal as they had first-hand experience on compensation processes and were to provide data to address study objective one, focussing on nature, content, aim and hence adequacy of relevant existing laws vis-à-vis compensation, and their responsiveness to those aspects in practical terms. It was also expected that such data would provide insights into how officials understood and interpreted existing compensation laws. Relevant and probing questions were to follow where necessary, for clarification and/or additional information. The purpose here was to get rich data on technicalities of compensation by looking at both theoretical and practical aspects of the law, valuation of customary and private land for compensation purposes and key challenges encountered. Alternatively, it was expected that these government officials would share perspectives that fed into practical compensation processes in general, thereby achieving theoretical triangulation. DCs as immediate administrators of land matters and coordinators and assessors of crops and trees for compensation purposes other than land and improvements, were to provide additional data on practical implementation aspects, more especially on implementation procedures.

The second group was to comprise six government valuers, two for each case study who were involved in assessing compensation because of their direct involvement and practical experience with compensation process. These valuers, from the three Regional Offices for MLHUD, were key in providing information on practical compensation assessment processes and challenges encountered. In-depth interviews planned with these respondents were to focus on technical aspects of the law, perspectives and practice covering valuation bases, methods, standards, compensation items and challenges.

Third group of respondents was to constitute expropriatees (expropriated households) for each
case study area, including PAL as private land expropriatee of Salima project site. According to NSO (2020a), a household consists of one or more persons, related or unrelated, who live together and make common provisions for food and other common housekeeping arrangements and recognise one member as head, which this study adopted. Expropriatees were to be selected conveniently for Mombera and Phalombe and purposefully for Salima based on their experiences with compensation issues. Snowballing was to be applied where available respondents directed the researcher to other potential respondents (Bryman, 2012) as necessary. As an in-depth analysis, maximum number of respondents in this category was to be guided by the saturation principle. Creswell (2014) explains that saturation in data collection occurs when similar information or insights appear repeatedly in new data sets collected. Additionally, two FGDs comprising expropriatees in each case study were planned, as a way of introducing the research, getting potential respondents prepared and triangulating data from individual expropriatees and other sources. Where expropriation committees were established, one meeting was to be held with those committees. Such data were intended to enrich our understanding of how compensation matters were understood and perceived by expropriatees in real-life settings.

Final group was expected to comprise various key informants (KI) from non-government organisations (NGOs) and civil society organisations (CSOs) working in the land sector, such as Landnet Malawi, a consortium of several CSOs; government officials (3) such as Principal Secretary for MLHUD, Lands Commissioner and Chief Valuation Officer; two local leaders for each case study totalling six; private practice valuers (10) and development partners (4), totalling 24. These key informants were to be purposively selected and were intended to provide in-depth data and validate data provided by other respondents. To supplement qualitative interviews and FGDs, observations of physical features such as land and buildings together with photographs were planned as necessary.

Secondary data were expected to be acquired through existing legal documents including the Constitution, Parliamentary Acts, regulations, guidelines and standards, among others; academic and research documents including journal articles, books, theses, research papers, unpublished works and many more; and other relevant general documents like project documents and reports, compensation reports and schedules, list of expropriatees, maps, photographs, to name but some, as well as census data and socio-economic profiles. These resources were to be collected from government offices, various websites, institutions like
NSO, local governments, private individuals, valuers, resource persons like supervisors, libraries and any accessible sources to supplement primary data.

### 5.6.3 Data analysis

The study planned to transcribe, then organise and classify all collected qualitative data into meaningful thematic categories based on study objectives. According to Saunders and colleagues (2007), thematic categories are codes/labels for classifying data to aid their analysis. A qualitative computer-based data analysis program, Nvivo, was to be used in doing this for each case studies.

A search for key themes and patterns/relationships in coded data would then follow to find necessary meanings. Findings from this process were to be tested against the evaluative criteria of the study’s conceptual framework to draw conclusions. Yin (2018) calls this process pattern matching in which empirical findings from the research are tested against the conceptual framework developed before data collection. Put differently, this process, which Bryman (2012) calls content analysis, involves searching for underlying themes/patterns in materials being analysed.

Existing compensation laws were expected to be qualitatively analysed and critiqued by looking at their own nature, content and objectives, and how they facilitate realisation of desired compensation for expropriatory losses of customary land. Any quantitative data collected were to be analysed using simple descriptive statistical techniques such as averages, ratios, percentages and others. Interpretation of findings, drawing of conclusions and recommendations for the final research report were then to follow.

### 5.7 Ethical considerations

Research on compensation in a real-world setting involves various people and that obligates observance of necessary ethical standards as guided by EBE Faculty Ethics in Research Policy (2012) and how the study addressed them. As a matter of principle and practice, the study was to be conducted with due care and sensitivity by among other things disclosing researcher’s particulars and institutional affiliations. Further, it was expected that potential participants would be alerted about nature of the study prior to soliciting their willingness to participate in the study, and hence gain an informed consent, either verbally or written and signed where
possible. The study intended to ensure that participants are protected from any harm such as foreseeable physical, legal, psychological/social, degradation and stigmatisation, as well as any deception. This was to be achieved through use of appropriate language, respecting community or organisational etiquettes, culture and assuming appropriate code of conduct as necessary. Participants were not to be compelled to share data that they were not prepared to disclose and were to be free to opt out of interviews as they desired. Thus, data collection instruments were designed to capture only relevant data for the study while use of cameras and audio recorders was to be done with participant’s permission. It was further designed that reporting of research findings would adhere to identified structures and direct quotes would be used as necessary, while respecting respondent’s privacy and confidentiality through use of pseudonyms. This also required that data be represented fairly as obtained from the sources.

5.8 Chapter summary

This chapter looks at previous empirical works on expropriation and compensation to contextualise main empirical and practical issues facing research in this field. It further analyses previous research works to establish analytical/conceptual frameworks used and see if they are applicable to this research, and find that they are not due to nature of study questions and proposition. The chapter then discusses the study’s conceptual framework. It thereafter presents the study methodology before discussing case study as a research method, research design and ethical issues. Thus, this chapter provides a detailed explanation on how the research will be executed.
Chapter 6: Research findings

“That’s why we have been talking about harmonisation of those legal instruments to say: we have to have one understanding because when you say adequate compensation, it’s adequate to who? Is it adequate to the giver of the compensation or the receiver? Because what I may think is adequate to you, may not necessarily be adequate! What is appropriate to me, may not be appropriate to you. So, may be at least fair, we may begin to say we are looking at balancing both sides.”

FAO Representative (KI-FAO01), 9th August 2016, Mzuzu.


6.1 Introduction

Chapter 6 presents findings of the research. It begins with a general account of the research implementation including briefs on respondents and their coding. This is followed by sections 6.2 and 6.3 which present findings or evidence from key informants and the three case studies based on the research’s objectives.

The study collected primary data from key informants, governments officials, government and private valuers and expropriatees from three case studies of Mombera Public University project in Mzimba District, Phalombe District Hospital project in Phalombe District and Salima GBI Sugar Production project in Salima District. Respondent codes are provided in brackets as necessary. Key informants included Commissioner for Lands (KI-CGO01), eight valuers in private practice (KI-PV01 to KI-PV08), one civil society organisations (CSO) consortium representative (KI-CSO01), three development partners’ representatives from FAO (KI-FAO01), Oxfam (KI-OXF01) and World Bank (KI-WBO01), one T/A in Phalombe (KI-PTA01), one group village headperson (KI-GVH01) and two community elders (KI-CME01 and KI-CME02) in Mombera. Table 6.1 summarises the total numbers of interviewees per respondent group at the national level and across the three case studies.

Table 6.1: Number of interviewees per category at national and case study level.

<table>
<thead>
<tr>
<th>No.</th>
<th>Interviewee group</th>
<th>National level</th>
<th>Mombera</th>
<th>Phalombe</th>
<th>Salima</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Key informants</td>
<td>13</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>17</td>
</tr>
<tr>
<td>2</td>
<td>Government officials</td>
<td>0</td>
<td>3</td>
<td>2</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>3</td>
<td>Government valuers</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>4</td>
<td>Expropriatees</td>
<td>0</td>
<td>17</td>
<td>11</td>
<td>1</td>
<td>29</td>
</tr>
<tr>
<td>5</td>
<td>Private valuer for Salima expropriatee</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>13</td>
<td>25</td>
<td>15</td>
<td>7</td>
<td>60</td>
</tr>
</tbody>
</table>

Of the local leaders and elders, one elder had a diploma with the others having no education, while all other key informants had university/college degrees and minimum working experience of two years. Generally, these informants provided data on the theoretical basis of compensation laws in Malawi; nature and adequacy of existing compensation laws in supporting intended compensation aspirations; practical challenges affecting compensation,
assessments bases and methods and perceptions regarding adequacy of actual compensation and their challenges.

For Mombera project case study, respondents included Regional Commissioner for Lands (MCGO01), Regional Lands Officer (MCGO02) and two Regional Valuation Officers (MGV01 and MGV02) from Regional Lands Office (North) in Mzuzu City, a District Lands Officer (MLGO01) from Mzimba District Council and seventeen expropriatees (MEXP01 - MEXP17), totalling twenty-five, as summarised in table 6.1. Government officers included three males and two females, all university/college graduates with less than ten years working experience. For expropriatees, saturation, gained with eight expropriatees, was to guide total respondent numbers. However, all seventeen expropriatees wanted to share their experiences regarding expropriation and compensation for Mombera project and were allowed, hoping to get new insights on topical issues. Ten of the seventeen expropriatees were males while seven were females. Of the seventeen expropriatees, fourteen were mbadwa (locally born) with three being immigrants. Educationwise, eight expropriatees had primary education, two had university/college education, with the rest having none. Generally, thirteen expropriatees were unemployed and relied on subsistence farming, two self-employed, one employed in a professional job while the last one was a retiree. Furthermore, one FGD (FGD01) was held with eleven expropriatees (MDIS01 - MDIS11) where the research and its goals were introduced together with the researcher’s particulars and institutional affiliation. In return, discussants welcomed the researcher and offered their full cooperation and support.

Respondents for Phalombe project case study comprised Regional Commissioner for Lands (PCGO01) and Regional Valuation Officer (PGV01) from Regional Lands Office (South) in Blantyre City, a District Lands Officer (PLGO01) from Phalombe District Council and eleven expropriatees (PEXP01 - PEXP11), per table 6.1. Government officers consisted of two males and one female, with education ranging from diploma to university degrees and minimum working experience of two years. While maximum number of expropriatees was guided by saturation at seven, a total of eleven expropriatees participated in the study. The four additional expropriatees were interviewed with the hope that they could provide new information on the topical issues of interest. Of the eleven expropriatees interviewed, five were males while six were females. Nine of them were mbadwas while two were immigrants. Out of the eleven respondents, five had no formal education, three had primary education, two attained secondary education while one had university/college education. For employment, six were unemployed
and depended on some subsistence farming and other activities, three were self-employed, one was a retiree with the last one doing other things. Additionally, a FGD (FGD02) was held with twenty participants (PDIS01-PDIS20) that included local leaders, an assistant to the T/A (chief) who had knowledge of the project and some expropriatees. More village heads attended the group meeting due to miscommunication from the DC’s office that government officials were coming to address affected people’s compensation issues which were lodged a few years back.

Regarding Salima project case study, seven respondents were involved as table 6.1 shows, and included Chief Valuation Officer (SGV01) based at MLHUD headquarters in Lilongwe City, two Regional Valuation Officers from Regional Lands Office (Centre) in Lilongwe City, Greenbelt Initiative Official (GBI01) in Lilongwe City, District Lands Officer (SLGO01) for Salima District Council, a private valuer from Knight Frank (SPV01) for the expropriated party and the expropriatee’s representative (PAL01). All respondents had university/college education with one female and six males and working experience of more than two years. In all three case study districts, DCs did not participate in the study for unstated reasons, despite accepting the invitations. Thus, overall, seventeen key informants, eight government officials, five government valuers, twenty-nine expropriatees and one private valuer for the expropriatee in Salima project participated in the study, as detailed in table 6.1. Further, table 6.1 indicates that thirteen respondents were involved at the national level, twenty-five respondents for Mombera case study, fifteen for Phalombe case study and seven for Salima case study, totaling sixty.

As regards respondent selection, key informants, all other government officers and local leaders were chosen purposively while community elders were snowballed by expropriatees. In Mombera and Phalombe projects, expropriatees were selected conveniently while also snowballed in Phalombe as expropriatees relocated themselves randomly thereby making random selection difficult. While expropriatees relocated themselves in Mombera project, they settled in two settlement areas, making it easier to find them at those locations. In Salima, and being a lone expropriatee, purposive selection was applied. Similarly, the private valuer for Salima expropriatee was purposively chosen. Essentially, random selection techniques were inapplicable in these areas since expropriatees relocated themselves haphazardly to where they found resettlement land.

Thus, primary data from these respondents were collected through face to face interviews and
FGDs. Interviews lasted between 30 and 90 minutes, using semi-closed and open-ended questions as per guiding questionnaires in appendix I, supported by additional probing ones as necessary. Observations were used as necessary. Secondary data were sourced from various sources including government officials, statutes, journal articles, relevant textbooks, project and compensation reports, theses and various websites. The qualitative data gathered for the study were thematically analysed guided by the study’s objectives while any quantitative data collected were analysed using simple descriptive statistics. Findings were tested by the study’s conceptual framework aided by relevant theoretical and empirical literature.

Potentially, a physical safety challenge seemed imminent as expropriatees disliked strangers in their midst as they presumed them to be government agents, more especially in Phalombe and Salima case studies. In Phalombe, several respondents asked me to confirm that I was not a government official and hiding my identity, because if I were, I would be turned away right there and then. This is because government kept on promising affected people that it will go to pay their compensation or address outstanding issues but without doing that. This challenge was deflated by the FGD done at the start and additional explanations where needed to individual respondents. In Salima case study, it was established that the new landowners were wary to any visitors because of misunderstandings with the locals. In the end, the research had expropriatees’ support and gathered required data in all three case studies, which are presented in sections 6.2 and 6.3. Fundamentally, data presentation is structured in line with the first four objectives of the study. As the last objective requires a proposition, it is handled under recommendations where necessary and in Chapters 7 and 8.

6.2 Evidence from key informants (KI)

This section presents evidence from key informants regarding theoretical compensation law foundations in Malawi, nature and adequacy of current compensation laws and key challenges affecting compensation for customary land. The issue of expropriatees’ perceptions on adequacy of compensation paid for expropriated customary land rights has been left out because there were no expropriatees included in this category of respondents to provide the needed data.

a) Theoretical foundations of compensation laws in Malawi

Generally, to establish the theoretical basis of compensation laws in Malawi, respondents were
asked to share their understanding and interpretation of the purpose of the constitutional compensation principle in Malawi - appropriate compensation. It was anticipated that their responses would point towards the theoretical foundations of Malawi’s compensation laws since it would be difficult for them to explicitly name the exact theories. In response, most key informants explicated that appropriate compensation represents compensation that is meant to fully restore expropriatees to their previous status in such a way as if expropriation did not happen. Respondents reiterated that under such a compensation principle, expropriatees are expected to get full compensation for their expropriatory losses and that they should not become impoverished as a result of the expropriation. Respondents explained that this is compensation meant to enable beneficiaries to live in the same way as they were living before being expropriated. KI-FAO01 explains:

“And when you look at the guidelines that we have been talking about, they actually say that when you are moving people from one area to the other because you are interested in the land that they are using, you have to make sure that their life, their quality of life, wherever they are going to go, is either at par or better than where they are coming from.... Yes, adequate compensation has to be at par or better than their losses.”

Fundamentally, KI-PV01 added that under appropriate compensation principle, compensation must include everything that an expropriatee lost. It must include whatever it will take to put that affected person in his/her former position. It has to look at what that person had. It must look at his ways of earning a living and then at the end say, if he leaves this place, will that person need something that will restore him/her to his/her previous status? That would be called appropriate compensation.

Other informants explained that appropriate compensation is synonymous with adequate compensation and fair compensation. This assertion was further underscored by several informants who indicated that the various compensation laws in Malawi adopt different compensation concepts/principles, which according to KI-FAO01 and other respondents, are ambiguous as to whether they mean the same thing or not. The informants explained that while the Malawi Constitution through Subsection 44(3) demands appropriate compensation for expropriated property generally, Lands Acquisition Act (1971) prescribes fair compensation for expropriated private property while Land Act (1965) requires reasonable compensation for
expropriated customary land. Table 6.2 summarises the various compensation concepts adopted in the different compensation laws together with their specific sections, including those amended in the recent past.

Table 6.2: Summary of compensation concepts adopted in Malawi expropriation and compensation laws.

<table>
<thead>
<tr>
<th>No</th>
<th>Compensation concept adopted</th>
<th>Statute</th>
<th>Section/Subsection</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>• Appropriate compensation</td>
<td>Malawi Constitution (1994)</td>
<td>• Subsection 44(3)</td>
</tr>
<tr>
<td>2</td>
<td>• Fair compensation</td>
<td>Lands Acquisition Act (1971)</td>
<td>• Section 9</td>
</tr>
<tr>
<td>3</td>
<td>• Appropriate compensation</td>
<td>Lands Acquisition (Amendment) Act (2017)</td>
<td>• Subsection 9(1)</td>
</tr>
<tr>
<td>4</td>
<td>• Reasonable compensation</td>
<td>Land Act (1965)</td>
<td>• Section 28(c)</td>
</tr>
<tr>
<td>5</td>
<td>• Reasonable compensation</td>
<td>Land Act (2016)</td>
<td>• Section 18</td>
</tr>
<tr>
<td>6</td>
<td>• Appropriate compensation</td>
<td>Customary Land Act (2016)</td>
<td>• Subsection 17(8)</td>
</tr>
<tr>
<td>7</td>
<td>• Adequate compensation</td>
<td>National Land Policy (2002)</td>
<td>• Subsections 4.2.5, 4.6.2, and 4.16.1</td>
</tr>
<tr>
<td>8</td>
<td>• Reasonable compensation for customary land</td>
<td>Public Roads Act (1989)</td>
<td>• Subsection 45(1)(a)</td>
</tr>
<tr>
<td></td>
<td>• Compensation for private land</td>
<td></td>
<td>• Section 46</td>
</tr>
<tr>
<td>9</td>
<td>• Adequate compensation</td>
<td>Aviation Act (1971)</td>
<td>• Subsection 5(6) and 6(3)</td>
</tr>
<tr>
<td>10</td>
<td>• Refers to Lands Acquisition Act (1971)</td>
<td>Town and Country Planning Act (1988)</td>
<td>• Section 64</td>
</tr>
<tr>
<td>11</td>
<td>• Reasonable satisfaction</td>
<td>Electricity Act (2004)</td>
<td>• Subsection 44(1)</td>
</tr>
<tr>
<td></td>
<td>• Fair and reasonable compensation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>• Refers to Land Act (1965) and Land Acquisition Act (1971)</td>
<td>Forestry Act (1997)</td>
<td>• Section 23</td>
</tr>
<tr>
<td>13</td>
<td>• Refers to Section 5 of Land Act (1965) for customary land</td>
<td>Malawi Housing Corporation (1964)</td>
<td>• Section 12</td>
</tr>
<tr>
<td>14</td>
<td>• Fair and reasonable compensation</td>
<td>Mines and Minerals Act (1981)</td>
<td>• Subsection 105(1)(b)</td>
</tr>
<tr>
<td>15</td>
<td>• Refers to Land Act (1965) or Land Acquisition Act (1971)</td>
<td>Monuments and Relics Act (1991)</td>
<td>• Subsection 18(1)</td>
</tr>
<tr>
<td>16</td>
<td>• Compensation</td>
<td>Railways Act (1902)</td>
<td>• Section 9</td>
</tr>
<tr>
<td>17</td>
<td>• Just terms compensation</td>
<td>Water Resources Act (2013)</td>
<td>• Subsection 107(2)</td>
</tr>
<tr>
<td>18</td>
<td>• Refers to Lands Acquisition Act (1971)</td>
<td>Education Act (2013)</td>
<td>• Subsection 45(4)</td>
</tr>
</tbody>
</table>
Essentially, KI-PV02 and KI-PV03 underlined that Malawian land laws were just imposed from the English compensation laws during colonisation and have largely remained as such without much localisation.

b) Adequacy of compensation laws

When asked about applicable compensation laws in Malawi, key informants explained that generally, there are many compensation laws depending on the purpose concerned, but that the Constitution (1994) is the supreme one supported mainly by Lands Acquisition Act (1971, 2017), Land Act (1965, 2016) and Customary Land Act (2016). Some of these laws are outlined in table 6.1. Most informants underscored that compensation matters for customary land are scantily provided in the current laws. On legal character, several respondents reiterated that these laws are tailor-made for private land with none being specifically meant for compensation for customary land. KI-PV06 explained that among available laws, Public Roads Act (1989) is more comprehensive than Lands Acquisition Act (1971) and Land Act (1965), and that it is applicable in various cases. Regarding the adopted concept of appropriate compensation and others, some respondents stated that while it is meant to restore expropriatees, it is unclear and subjective and does not arise in reality. KI-PV04 explains:

“When you speak to my mother who is in the village, to them, appropriate compensation does not arise. As long as someone can mention Kwachas in some thousands or millions, irrespective of the size of the land and the right that they are selling there, to them, they have been given something. That is number one. Number two, I think that there was no provision that these people could challenge what has been given because, public utility expropriations, it is government valuers who do the valuations. Right? Now, when they go there and do the valuation, it is like what they have done is what? Is final. So, I think that is where you are saying that it is less appropriate, and it should be refined and unpacked better. And then third, under the current limitations of information availability, maybe appropriateness can only be linked to local respective markets where the land is located.”

KI-PV04 attributed these issues to nature of current laws and language used - English, which contributes to these laws being poorly known to most locals, as KI-CSO01 agrees.
On legalised compensable items, informants stated that for private land, Lands Acquisition Act (1971) provides for:

i) Initial cost of purchasing the land,
ii) Value of improvements on the land, and
iii) Appreciation in land value since acquisition.

Similarly, KI-PV08 stated that apart from Lands Acquisition Act (1971), Public Roads Act (1989) is more generous and requires compensation for private land to cover:

i) Land,
ii) Severance,
iii) Injurious affection, and
iv) Relocation costs (disturbance).

Furthermore, KI-CGO01 explained that with the recent land law reviews, the list of compensation items for private land has been expanded, but did not name the added compensables.

For customary land, informants indicated that no compensable items are provided in Land Acquisition Act (1971) nor Land Act (1965), apart from requiring fair and/or reasonable compensation for losses suffered. However, KI-PV08, as in the case of private land, explained that it is only Public Roads Act (1989) that provides compensables for customary land, and that this law is more comprehensive than both Lands Acquisition Act (1971) and Land Act (1965). Under the Public Roads Act (1989), compensables for customary land include:

i) Land taken either monetarily or through replacement,
ii) Severance,
iii) Relocation costs, and
iv) Re-establishment costs.

Essentially, KI-PV01 emphasised that the many compensation laws are a challenge as they provide variously on what constitutes full compensation during expropriation, more specifically for customary land rights.

Regarding compensation valuation bases, informants stated that compensation is to be based
on market value only and no other bases. Respondents further explained that while the law provides a compensation assessment basis, no single law prescribes any valuation methods to be used. When asked to summarise the current legal compensation system, informants narrated that it fails to meet minimum compensation requirements to restore expropriatees, as emphasised by KI-WBO01 and KI-FAO01. Informants added that the environment is guided by ambiguous and inadequate laws, leading to unsystematic compensation practices (KI-OXF01). KI-PV08 summarises:

“They (laws) are not adequate. That is why I am saying that the Public Roads Act can be used in a number of cases, because to us as valuers, that is the one which was comprehensive. But the others, I think they leave out possibly the parameters that go into the formula. For Lands Acquisition Act itself, it is dry. That is why I think if we had a comprehensive compulsory acquisition and compensation, a standalone Act: that one is a standalone, but it lacks details.”

Regarding customary land, KI-CSO01 concludes:

“Our laws have not been very fair to the ordinary Malawian. Because the laws have not been very clear on how they will support the customary kind of institution to safeguard what people have in that context. So, it has not been good and it’s something that I would recommend that it changes so that it can protect the interests of the people. Most of the times once we talk of policy and legal framework changes, then we have a very good starting point. But then the other challenge that we have is that even where you have the policy in place or the legal framework in place, people don’t know it.”

Essentially, respondents characterised the legal compensation environment as unfair as it deprives people of their land rights in most cases. KI-FAO01 narrates why this is the case:

“So, in most cases you find that compensation is inadequate. Why? Because those that are responsible for the compensation will not look into the issues of what else were these people accessing that we need to take to that place so that they don’t actually feel deprived because we have moved them out. So, you find that in a village that had a clinic, that had a water source, that had a school, people have been taken to a bush where there is nothing. Where
do their children go to school? When they are sickly, where do they go to? Where do they go to draw water? And those things you won’t need in a year’s time! Those are things that you start requiring immediately you move to that new area. And if they are not there, what happens? And what alternative means have been provided to the people? To say, in case they need this service, what do they do? Or how do they do or how do we come in to assist?

And as I said on customary land, when you talk about compensation, whatever word you may want to use fairness, appropriate or whatever; what has been happening is that they will only look at the changes that you have made on that land. Not in terms of ridges, no. But have you planted any trees? They will compensate you for the trees that you have planted. Did you build any house, or is there any structure that you built on that land? They will pay you for the structures that you have built. But on the actual land, there is nothing. But then if you give somebody the value of the house that they have and you look at the nature of the houses that we have on customary land most of the times, how much money are you talking about? So, it’s as good as telling someone saying, ‘uproot your house and take it elsewhere’. So where do they take it? Take that house to if they don’t have land where they are going to?”

Broadly, informants underscored that, in addition to these issues, the absence of a national resettlement policy worsens the situation (KI-CGO01, KI-FAO01).

c) **Practical challenges affecting appropriate compensation**

When asked how expropriated properties are valued, informant valuers explained that valuation of private land for compensation aims is based on market value and done using various valuation methods. Regarding customary land, informants narrated that they base their valuations on market value and apply market-based methods, just like the way it is done with private land. KI-PV08 narrates:

“Basically, the approach is the comparison approach…. Then assuming that somebody is going to lose customary land permanently, we could assume as if that land, as if it was freehold. So, it means he had to be given an
alternative land. If he cannot be given an alternative land, then he had to be compensated for whatever he had. I know, people would say customary land does not have value, but I mean look at the benefits that somebody was getting out of that land. You cannot just leave it out. No! So, land is based on normal compensation."

From KI-PV08’s quotation also raises one of the most important questions when it comes to compensation for customary land rights - that is what does a full loss connotate and what must be covered in the compensation package for expropriated customary land rights? These issues are elaborated in subsection 6.4.3 suffice to say that they present some practical challenges when assessing compensation for expropriated customary land.

For building structures, informants narrated that market value remains the benchmark and that some properties with market evidence are comparatively assessed while income generating ones are valued using income methods. Key informants also offered that where data is scarce and comparison and income methods are inapplicable, cost methods are applied. However, KI-PV07 underscored that where cost method is used, structures are depreciated accordingly to ensure that they are valued on ‘as is basis’ and this reduces the compensation amount.

For various trees, respondent valuers explained that they are valued based on market prices per unit volume or per item, or by using government gazetted prices. For selected fruit trees, an extract of the 2010 gazetted income losses are shown in table 6.3.

For crops, market prices are applied against quantities lost. Respondent valuers underlined that outdatedness of gazetted prices is a major challenge contributing to lower compensation values for trees and crops.

Where disturbance allowance is paid, respondents expounded that it is normally based on a proportion of total compensation and can go up to 50.0%. KI-PV03 clarifies that under disturbance allowance, such aspects like costs of relocation, engaging professionals like lawyers and others are considered. However, some respondents said that it is difficult to compute disturbance because there are no legal guidelines and everyone does it subjectively.
Table 6.3: Selected fruit tree estimated total income losses as of December 2010.

<table>
<thead>
<tr>
<th>Fruit tree type</th>
<th>Expected productive lifespan (years)</th>
<th>Estimated income loss (MK)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Avocado pear</td>
<td>30</td>
<td>45,000.00</td>
</tr>
<tr>
<td>Guava</td>
<td>30</td>
<td>15,000.00</td>
</tr>
<tr>
<td>Lemon</td>
<td>30</td>
<td>45,000.00</td>
</tr>
<tr>
<td>Mango</td>
<td>30</td>
<td>45,000.00</td>
</tr>
<tr>
<td>Masuku (Mexican apple)</td>
<td>30</td>
<td>45,000.00</td>
</tr>
<tr>
<td>Banana</td>
<td>10</td>
<td>8,000.00</td>
</tr>
<tr>
<td>Oranges</td>
<td>30</td>
<td>45,000.00</td>
</tr>
<tr>
<td>Pawpaw</td>
<td>10</td>
<td>5,000.00</td>
</tr>
<tr>
<td>Cashew nut</td>
<td>30</td>
<td>810,000.00</td>
</tr>
</tbody>
</table>

Source: GRM (2010).

Also, informants indicated that market data to support valuation using the various methods is a key constraint for private land, while it is almost non-existent for customary properties. KI-PV04 underscores that private property markets are synonymous to data availability and accessibility and that currently, they are underdeveloped with information availability challenges. She narrates:

“In an ideal situation, the market is synonymous with data availability and accessibility. So, in Malawi at the moment, the availability of data or information is kind of linked to who you know. We do not have a central point where you can say, for example, I will say in this era of information technology and social media, at the touch of a button, but you will not find it readily available. Even the National Statistical Office, the information that they provide is not holistic for use by valuers. So, what I am saying is that the property market, I would say it probably varies or it depends on district by district. And the most common one where you can find it, is in urban centres…. So, I think that is the hurdle we have. A market is there yes, but it is lacking relevant information. I think we can say that it is underdeveloped.”

Several respondents explained that while some information is available in government repositories, some data is doctored to evade paying high property taxes and/or outdated since
the system is poorly maintained. KI-PV06 added that sometimes, officers manning land registries are not keen to provide requested data timely. This forces valuers to rely on fellow valuers, their own databases and other sources including unregistered estate agents (KI-PV06).

For customary land, respondents stated that there are no official markets and land registries, hence no data. Thus, valuers garner data from various other sources including local leaders, exchange parties and even local agents where available. KI-PV01 underlined data availability, accessibility and reliability as key issues in valuation generally, and that the final valuation is as good as its inputs. In such market settings, KI-PV06 says that accessing data is time-consuming and costly. Informants also added that use of uncertified valuation officers and officers from local authorities is another big challenge in assessing biological assets.

When asked about alternative valuation bases and methods to circumvent the various challenges faced with current market-based ones, key informant valuers explained that the alternatives they have are normally to use a different method like the cost one instead of the comparison one. As regards non-market methods, all key respondent valuers expounded that they were not aware of such methods and they could not contribute anything towards them. And that closed any further discussion on such methods.

6.3 Evidence from case studies

As mentioned several times elsewhere in the thesis, the study used Mombera, Phalombe and Salima projects as its case studies and this section presents findings from them on a case study by case study basis. Presentations under each case study are structured along each objective and thus cover theoretical compensation bases, compensation laws, their nature and adequacy; practical challenges affecting compensation and expropriates’ perceptions towards adequacy of actual compensation given.

6.3.1 Mombera project

Mombera case study project situates in Mzimba District and involved land that was ordinarily under customary tenure with no infrastructure and services apart from building structures and biological assets, both natural and man-made belonging to the affected customary landowners. The site has undulating relief with some dambos that provided good farming areas to the inhabitants during the dry season.
a) **Theoretical foundations of compensation laws in Malawi**

To learn about the theoretical orientation of compensation laws in Malawi, three government officials and two government valuers involved with Mombera project were asked to explain how they understand and interpret the purpose of appropriate compensation as provided in the 1994 Malawi Constitution. They generally explained that appropriate compensation entails compensation that should put expropriatees in the same position as they were before being expropriated, and that they should not become worse off or better off by evenly covering their expropriatory losses (MGV01). MCGO01 summarises:

“So, it is clearly stated that the people who will be compensated, they should not be made worse off or better off! But people should maintain their status quo as they were before.”

Furthermore, some of these respondents indicated that such conceptual terms as appropriate compensation, adequate compensation and fair compensation are adopted in the various Malawian compensation laws currently in use.

b) **Adequacy of current compensation laws**

To understand nature, content and their adequacy, government officials and valuers were asked to share their views on compensation laws currently applicable in Malawi. In response, they explained that there are various compensation laws including the Constitution, Lands Acquisition Act (1971) and Land Act (1965) among many. Regarding specific compensation laws for customary land, respondents narrated that none exists and that the existing laws meant for private land rights are applied. On what appropriate compensation means, MCGO01 and MLGO01 explained that appropriate compensation or adequate compensation mean compensation meant to appropriately restore affected people. However, the respondents added that in our laws, these compensation terms lack exact meanings as they are uninterpreted and do not outline any factors to be considered to achieve them. MLGO01 narrates:

“For me, I feel like this Section 44(3) is not enough because they say that there is supposed to be appropriate compensation. But now if you look at it in terms of appropriate compensation, we don’t know the factors in it. How
can the compensation be qualified to be an appropriate one? Which factors are supposed to be considered? We don’t know those factors."

In agreement, MGV01 and MGV02 explained that when it comes to compensables for customary land, key compensation laws provide nothing to be considered during compensation assessment while practically covering only land and improvements for private land. They added that this results in subjective compensation packages. MGV01 added that only Public Roads Act (1989) has some items to be compensated for expropriated customary land without naming them. Respondents explained that in most cases, customary land is considered as public land since it is vested in the President (MGV01) and that government cannot compensate itself (MCGO01). When asked about the legal compensation assessment basis in Malawi, respondents mentioned market value and added that no valuation methods are outlined. Regarding the legal compensation environment, respondents described it as not rosy and characterised by archaic laws that do not reflect current realities (MCGO02) and poorly cover customary land (MCGO01). These laws also lack a benchmark to compare if compensation is fair or not for customary land (MCGO02). Generally, respondents considered most compensation provisions as vague (MCGO01, MGV01), a situation compounded by lack of any resettlement policy (MLGO01).

c) Practical challenges affecting compensation

For Mombera project case study, only one government valuer (MGV01) was involved in assessing compensation for affected assets. When asked to expound how affected assets in Mombera project were assessed, MGV01 narrated that compensation was based on market value. He explained that building structures that seemed exchangeable were assessed using comparison method while all others were valued using cost method. The assessor explicated that supporting market data were sourced from various markets including those in Mzuzu City. For trees, it was indicated that government price information gazetted in 2010 was used by multiplying quantities lost against relevant prices. Regarding graves, cost method was used supported by data gathered from local leaders and elders and assessor’s own understanding of the culture in the project area. MGV01 explicated that using available data and his own knowledge, unpaved graves (earth mound graves) were valued at K120,000.00 while those paved or with tombstones were pegged at K350,000.00. However, the assessor indicated that one main challenge in assessing compensation was scarcity of relevant market data in the project area. MGV01 added that available data were also unreliable since even the sources
themselves, as in the case of graves, were unsure of its exactness. He added that another key challenge in assessing compensation was lack of relevant guidelines for customary properties including what losses to consider as compensables and using which assessment bases and methods.

d) Perceptions regarding compensation adequacy

To analyse perceptions of expropriatees regarding actual compensation, respondents were asked how they compared assets lost and compensation received, and how they perceived the compensation. In return, respondents narrated that assets lost included land, various building structures (houses, kitchens, toilets, bathrooms, kraals, granaries, sheds, drying stands and others), various biological assets (native and exotic trees including acacias, blue gum, gmelina, et cetera and fruit trees such as mangoes, papaya, oranges and avocado pears), graves, natural and man-made resources including dambos and communal forests, livestock and other community assets like a borehole. Expropriatees narrated that compensation covered building structures, exotic planted trees like blue gum, fruit trees and some graves, while the valuer involved indicated that a borehole was also compensated. Expropriatees stated that among other fruit trees, they received K10,000.00 for each mango tree lost and K5,000.00 for an orange tree. Expropriatees underscored that many other losses were not covered and that transport money or actual transport to relocate, consolation allowance for forcefully taking their land, as well as annual crops, native trees, land, some graves and other inconveniences were uncompensated. Expropriatees underlined that government promised them that they will be replaced with resettlement land by the group village head, but that they were not yet given any land by the time the study was collecting data from them in August - September 2016 since land was scarce. On his part, the group village head (KI-GVH01) confirmed that expropriatees were not given any resettlement land because free customary land was unavailable in the area.

Expropriatees emphasised that while there were many challenges, but non-compensation of land was the most unfair thing done to them by government, since it was their lifeline for their livelihoods. MEXP01 explains:

“"There were so many challenges. When you consider land that you had settled for a long time and some of us, like me, was born on that land. So, we had so many things like livestock and others. We got established on that land. I remember that we have been on that land since 1948. So, today, they are
Apart from fearing incarceration, expropriatees indicated that they were poorly sensitised on their rights such that they did not know where to go and complain as the group village head person was already not on their side.

Regarding native trees, respondents claimed that they were told that those were public assets and government could not pay for them (MEXP01). As regards graves, respondents narrated that assessors only considered those that they could see and were near, thereby excluding others that were far (MEXP15). During a FGD with twelve of the expropriatees, MDIS01 emphasised that government abandoned them without telling them where to go and how to go there. The discussant narrated amid nodding from the other discussants that:

“Land, transport, sorry money for inconveniencing our livelihoods and other things did not come. They left us to fend for ourselves on many things like where to go and settle. The issue brought fear and we just wanted government to provide transport and dump us somewhere else so that the issue is finished completely since there was nothing good with the way things were done.”

Expropriatees also stated that other concerns regarding compensation included reduction of verified compensation by government unilaterally without consulting them (MEXP02, MEXP08), and loss of grazing land for those with livestock (MEXP17). Expropriatees also underlined that the project led to their loss of income through farming and other resources (MEXP02), and that hunger is a perpetual friend since leaving their former place. When asked on how they compared compensation given against their losses, sixteen expropriatees described it as lower than their lost assets, while only one characterised it as adequate since his affected structures were of temporal nature. MEXP17 underscored that, because compensation was very little, it became very difficult for most expropriatees to ably relocate and re-establish themselves elsewhere. Consequently, expropriatees perceived compensation as inadequate, and that is why they still had incomplete housing structures and lacked farmland, as MDIS01 narrates:
“Compensation was inadequate by far. All of us who received the compensation are complaining that we received inadequate compensation. This is why you see that our new houses are incomplete, and we doubt if we will complete them since all the money is finished now. Money to buy farmland we don’t have since we used all the money on the houses.”

Asked what should have been covered to satisfy their compensation expectations, respondents stated that compensation should have covered all their losses as well as transport, consolation and other things. Additionally, MEXP02 underscored that the compensation process and actual compensation were unsatisfactory and vague, and that compensation given left people shaking their heads in disbelief.

6.3.2 Phalombe project

Phalombe hospital project is in Phalombe District and occupies about 40.05 Ha of flat and formerly customary land that lacked any infrastructure and services prior to acquisition. The only improvements on the land were thus building structures, farmlands and plantations belonging to the expropriatees. Similar to the preceding part of the thesis, this one covers the same aspects starting with theoretical foundations of compensation laws in Malawi.

a) Theoretical foundations of compensation laws in Malawi

Generally, two government officials and one government valuer provided data on this aspect. They were asked to share their interpretation of the purpose of appropriate compensation and responded that appropriate or fair compensation is compensation that is meant to put expropriatees in the same status as before expropriation (PCGO01), and not to profit or make them suffer (PGV01). PGV01 shares:

“Appropriate compensation is, according to my understanding, assessing the properties, giving it a value that it will not affect the person who is relocating because the essence of valuation for compensation is not like that person to make a profit or to suffer. We want to make him to still be where he was before. Or, if anything, he should do well because you have empowered him, not because of the process itself. So, fair compensation should fully compensate the individual. It should not make him worse-off or better-off.”
As with key informants and other respondents in Mombera case study, these respondents used appropriate compensation and fair compensation concepts interchangeably.

b) Adequacy of applicable compensation laws

Government officers and the government valuer were asked about compensation laws used and how these are in supporting achievement of desired compensation for expropriated customary land rights. Respondents indicated that there are many laws used for compensation depending on purpose of acquisition, but that the Malawi Constitution (1994) is supreme. They added that key compensation supporting laws include Land Act (1965) and Lands Acquisition Act (1971). When asked about laws particularly meant for customary land compensation, all respondents said that none exists and that existing ones are generally used. On what appropriate compensation means, PCGO01 stated that this term confuses him and that he does not know what it is, despite understanding that compensation generally aims to restore affected persons.

Regarding compensables for customary land, respondents underlined that current laws do not outline any compensables for customary land but that the Public Roads Act (1989) provides differently with several compensable items. In the case of private land, respondents underscored that initial purchase price of land, improvements value and enhancement of land value since acquisition are compensable. Regarding compensation assessment basis and methods, PGV01 said that existing laws require market value of expropriated land but without any preferred valuation methods being stated. On key issues with current laws, PCGO01 underscored that current laws lack relevant guidelines and key provisions for customary land including compensables and favour private land. PGV01 added that these laws lack clarity in various aspects while others are contradictory. Essentially, respondents characterised extant laws as crude and challenging, as PCGO01 summarises:

“We have been having problems.... People have been deprived of their land for the sake of other developments. Because for us, we have been even struggling with the laws as such. Ok, even the guidelines we have been using, it has been difficult for us because our laws have not been very clear in matters of acquiring property. So, the laws have some gaps still and have to be addressed.”
On current legal environment for assessing compensation for customary land, PGV01 explained that it is generally difficult for valuers to achieve what the laws require in the current settings.

c) **Key challenges affecting appropriate compensation**

When prompted on how compensated assets were assessed, PGV01 stated that all valuations were based on market value basis as required legally. He explained that land was valued comparatively supported by market data from elsewhere. Regarding building structures, PGV01 explained that cost method was used because most structures were of temporal nature and their market evidence was scarce. For the various trees affected, PLGO01 said that these were assessed using government prices gazetted in 2010. When asked how market data were accessed, PGV01 responded that comparable data were generally challenging in rural areas, and they used data from elsewhere. He added that a key challenge is that comparables for customary land are not recorded and difficult to get. When asked about data reliability, the valuer said most available data are unreliable, as it depends on their sources. He clarified that data from registered valuers and reputable corporations like Knight Frank and Malawi Property Investment Company (MPICO) are reliable, while those from most estate agents are highly suspect. On disturbance allowance, PGV01 explained that it is calculated as a proportion of total compensation and can go up to 40.0% depending on severity of the situation. For Phalombe, it ranged between 15.0% and 30.0% and it was meant to assist expropriatees to buy replacement land.

On current valuation environment, PGV01 underscored that it is poor and unconducive because there are no local valuation standards and guidelines such as what losses must be considered for customary land, and that many uncertified government valuation officers undertake valuations. He added that another challenge characterising the valuation environment is that government refuses to accept normal valuations for customary land sometimes, considering them high and demanding that they be reduced to meet budgetary needs. Similarly, customary land expropriatees also consider compensation values low and want them adjusted upwards to meet their expectations and/or expropriatory problems.

d) **Opinions about compensation adequacy**

Expropriatees were asked about their views regarding compensation that they received by
looking at their losses, compensation received and how compensation and losses compared. During an FGD, PDIS12 indicated that expropriatees had land, houses, kitchens, toilets, bathrooms, kraals, church building and others; various trees including acacias, blue gum, mangoes, papaya and herbs like neem; and other resources. These assets were reconfirmed by individual respondents. On which losses were compensated, eight of the eleven respondents indicated that they were given a lump sum without any breakdowns nor explanations and could not tell what was considered or excluded. The remaining three expropriatee respondents said that they were not yet compensated. On land compensation, discussants in the focus group meeting indicated that land taken in phase one was not measured and owners were given a fixed amount regardless of land size. PDIS01 explains:

“When government brought the idea of a hospital here at the start, it just said that you must surrender the land so that we can construct a hospital. People who had land there accepted that and did not expect that they will be given a little something for the land, and in the end, that is what my colleague here calls compensation. The amount of money given was K4,200.00 for a very big piece of farmland. Just imagine, whether the land was small or big, every affected landowner received the same amount. But the affected people did not complain since they wanted development in this area and things went on. But in the second phase of expropriation, affected farmlands were being measured. Now, this instigated the first group of expropriatees to start asking as to how it is possible to do that for these people when for us, we gave the land for free and government just thanked us. So, how come the same government is now assessing farmlands for the people expropriated in the second phase and receiving millions of Kwachas when for some of us with our big farmlands, we only got K4,200.00.”

These different approaches catalysed the first group of expropriatees to complain of low compensation. PEXP03 explained that compensation was generally insufficient. He narrates:

“When I saw the money and realised that it was very little, I returned it to government. They said that I should receive the money. And I said no, because the land that I bought is very big and for a lot of money. And the houses that I built there, I lost a lot of money, not this K286,000.00. So, for these days, for me to relocate from where I am, it’s a problem.... The money
is very little. Then I left, and they called me to go back. And I told them that I am not going back. They insisted that I should go back to tell me something. So, I went back and sat down while police around there were laughing, when I was refusing. Then they told me to sit somewhere, then I did. ‘We want to explain to you the procedures on how you can go about this issue. We are officials from Lands, so we want to tell you to receive the money and go and complain while you had received the money. For now, we want to tell you as such and show you the procedure. You need to go to the village head when you get this money.’ Then I said I no, that this money has been split deliberately. You have said that for land, it is about K100,000.00, the other K100,000.00 for the houses. So, do you want to tell me that those houses could be only about K100,000.00? Is that fair? That is unfair. Even the land, when you say it is about K100,000.00 something, is that fair? That is unfair and it will not be done. So, the officials said that they wanted to tell me to go to my local leader, and he should give me a letter and take to the DC of Phalombe…. So, they insisted that I should receive the money…. So, I got the money.”

PEXP08 added that compensation was indeed inadequate and that several expropriatees complained while some refused to take it at first until they were forced to receive it.

When asked what else compensation covered, all respondents stated that they got no additional compensation. Respondents underscored that one main challenge faced was delay in paying compensation for over four years (PEXP02). They also complained that their personal developments stalled during this period as they expected to relocate anytime (PEXP04). Respondents explained that it was painful for them to lose their land without being given any alternatives (PEXP05) and to be forced to get compensation they considered insufficient (PEXP08). They also narrated that lack of proper consultations with them was an issue on several aspects including relocation (PEXP05). On how they viewed compensation received, expropriatees explained that actual compensation was lower than their expropriatory losses and that is why they are suffering (PEXP07). They added that with the compensation given, they could not get replacement land in the neighbourhood because land prices were higher than what they got as compensation. Respondents reiterated that had they been given alternative land and
compensation for all the other losses including transport allowance, that would have been adequate.

6.3.3 Salima GBI project
Salima GBI Sugar project occupies about 6,800 hectares of private leasehold land in a rural, customary setting in Salima District. Being an old agricultural estate, the land had some farm specific infrastructure and services including warehouses, storage facilities, earth roads, boreholes and other support structures and various commercial crops such as cashew nuts and seed maize. The land slopes gently westwards and enjoys good climate for agricultural purposes. Thus, the evidence presented in this section concerns private leasehold land and covers theoretical foundations of compensation laws in Malawi, adequacy of current compensation laws, challenges affecting appropriate compensation and expropriatee’s perceptions regarding compensation for loss of the private land. Essentially, the evidence for the various aspects came from the Greenbelt Initiative official, government officials, government and private valuers and the expropriatee.

a) Compensation pillars of Malawian compensation laws
To establish the theoretical pillars of Malawian compensation laws, relevant respondents were asked to share their interpretations regarding purpose of appropriate compensation in Malawi. They explained that appropriate compensation stands for compensation based on prevailing market value of expropriated land (SGV01) and meant to put expropriatees in no better or worse position than before (SPV01, SGV02). SGV03 underscores that this is the spirit of the compensation laws in Malawi. He expounds:

“When we go through all these laws, we have all these issues. In the sections that we read, most of these are covered like the chapter or section that we quote, is about fair compensation for most of these. The language is generally that an affected person should be given fair or appropriate compensation so that they should not suffer where they go.”

As with key informants and respondents in the other case studies, the respondents in the case of Salima GBI case study used appropriate compensation and fair compensation concepts interchangeably. When asked if they mean the same thing, SGV03 had this to share:
“Appropriate compensation is the same as fair compensation. Because we are now in the market, and we have seen how the market is, right? And we have found the rate per hectare at the market, right? In addition to that, we are supposed to add a little something as disturbance allowance, that we have disturbed the person, which is added to the total. If the affected people are relocating some assets, then a transport allowance must be added. This is mainly when they are salvaging some of their properties. And even sometimes, it is good because we may not know if where the people are going, they will find land that does not require a lot of work like clearing it. So, we add a little something for that.”

Summarily, SPV01 underlined that appropriate compensation is meant to fully restore affected persons and that this principle applies to all types of properties. He adds that there are some cases where you have to consider things like goodwill and all those intangible things that have to be included in assessing the compensation so that at the end of the day, the owner is satisfied that due consideration has been given to all aspects of the process of compensation assessment. In addition to this, SGV01 explained that Lands Acquisition Act is being amended and more compensable items will be added. She added that with these new additions, compensation for private land will be much better.

b) Adequacy of current compensation laws in Malawi

To start with, respondents were asked to share applicable compensation laws in Malawi. They responded that there are many laws, but the Malawi Constitution (1994) is the primary one assisted chiefly by Lands Acquisition Act (1971) and Land Act (1965). When interrogated about specific laws for compensation purposes, they narrated that there are no specific compensation or valuation laws for private or customary land. They added that while existing laws are general, they substantially focus on private land and ignore customary land matters. On what compensables are there to support this compensation aspiration, the respondent valuers narrated that Lands Acquisition Act (1971) provides for initial price of purchasing the land, value of improvements and appreciation in land value since acquisition.

SGV01 added that while current laws underprovide when it comes to compensables for private land, the amended Lands Acquisition Act (2017) provides for more compensable items including the following:
i) Market value of the land or interest therein of the claimant at valuation date,
ii) Severance,
iii) Reasonable expenses for relocation, and
iv) Relief or consolation.

Respondents also highlighted that compensables for customary land are not provided in the repealed Land Act (2016), Lands Acquisition Act (2017) and Customary Land Act (2016), just like in the old laws. Regarding compensation assessment basis and methods, respondents reiterated that it is market value. They also stated that when it comes to valuations methods, the laws are silent. However, SGV01 also emphasised that in Malawi, replacement value compensation is prevalent to enable expropriatees re-establish.

On nature of current laws, respondent valuers underscored that existing laws lack standards and other aspects, thereby forcing development partners to use their own standards. Furthermore, respondents added that the Constitution is more recent than most of the laws, thereby giving rise to various contradictions among them (GBI01). Respondents also characterised current compensation environment as being guided by laws that are lacking and outdated (SGV01), hence weaker (SLGO01). GBI01 also emphasised that the land sector is guided by laws inherited from the colonial masters with minimal changes, and still favour private land against customary land.

c) Challenges affecting appropriate compensation
Respondent valuers explained that compensation was based on market value and that land was valued comparatively while cost valuation method was used in assessing building structures. For SGV01, she narrated that compensation for structures was done on replacement value basis while biological assets were valued by FRIM presumably based on market prices. On market information availability, the respondent valuers stressed that it was very difficult to access any needed market data in the project area because official land markets were absent, being in a typical rural setting (SGV01, SGV02). SPV01 added that the challenge of comparables also relates to lack of property data clearing houses even for urban markets, and that physical verification is totally difficult. He explains:

"... It is very difficult, unless you are actively involved in the property market, that is selling or lettings. This is where I find that people who are
practising, but not involved in selling or letting, it becomes doubly difficult for them to get information, unless they have special connections with individuals that are active in the market. Otherwise, it is very difficult. You have to keep your ears to the ground to see what is going on, and then develop your own database based on what you get whenever you hear about sales or lettings. And you have access to inspecting that property because that is the other problem. You may hear of a sell, but you have no access to get to that property so you can see the property, since you have no measurements, you cannot inspect it. So, even if you put it in your database, it is incomplete as you have to verify the data.”

However, available evidence is incomplete and generally unreliable, even that in government repositories as SGV01 narrates:

“When I was just joining the MLHUD, Valuation Section, I was warned by my supervisor, saying don’t rely on the figures at Tikwere [Central Government Land Registry] only. Apart from what is registered at Tikwere, get in touch with property firms. Some figures are reduced so that they should not pay a lot of stamp duty. So, although we have data at Tikwere for consideration, you cannot rely on that.”

Respondents also indicated that valuation of private properties in Malawi is daunted by lack of direct comparables (SPV01), data recency as most data is aged (SPV01) and discrepancies in reported exchange values (SGV01, SPV01), among others. They underscored that valuation for compensation purposes is also affected by reliance on data from other valuers without verifying it (SGV01), involvement of incompetent valuation officers in compensation assessment (SGV01, SGV03, SPV01) and subjectivity in compensation assessment as clear guidelines lack (SGV01, SGV02). These respondents stated that a lot of comparable data is needed, and this is time-consuming and costly (SGV01). Finally, respondents emphasised that government also presents challenges in compensation assessment as it considers values high and demands that they be decreased to meet its budget (SGV01, SGV02). SGV01 added that, on the other hand, expropriatees also demand higher amounts as compensation is considered low for their losses (SGV01). Respondent valuers underlined that these challenges are due to lack of explicit national compensation and valuation standards and clear cut compensables in the case of customary land.
d) Views of expropriatees on compensation adequacy

Regarding compensation adequacy, PAL’s representative, PAL01, was asked what assets were lost and how actual compensation was viewed comparatively. In response, PAL01 stated that his company had about 6,800 hectares of private leasehold land; various building structures including offices, warehouses, sheds, carports, staff houses and quarters; infrastructure including boreholes and earth roads; various commercial perennial and annual crops like cashew nuts, seed maize, and others; various movables including farm machinery such as tractors, ploughs and cars; among others. The respondent went on to explain that only land, building structures and cashew nut trees were compensated, while all other assets and losses were uncompensated. These assertions were verified by both public and private valuers involved in assessing compensation for the expropriatee. SGV01 also confirmed that cashew nuts were compensated based on valuations done by FRIM. On how they compared compensation with the losses, PAL01 emphasised that compensation was far below their losses and unfair. He explains:

“As far as the transaction involve government, the compensation is not an arms' length one. I am just quoting the approach that has been taken, it is not fully arms' length despite that a parallel valuation is done, but in most instances, they [government] took what was lower.”

Additionally, PAL01 explained that compensation was insufficient as it was delayed for about five years and paid without any interest or revaluation. He added that his company was also concerned to see government, as buyer of the land, valuing the assets that it was buying, while forcing the leaseholder to meet costs of these valuations and land resurveying of the whole estate. He narrates:

“Knight Frank only valued landed properties, and that was the biggest challenge that we had. And we had biological assets on these estates, and these are cashew nut plantations. To value cashew nut plantations, government told us to approach their own department. So, now you see the conflict? So, we contacted the Forestry Research Institute of Malawi in Zomba to come in and do the biological valuation of the cashew nut plantations. But there was conflict of interest because the buyer was valuing the property that they were buying. And we were not too sure whether we were given an arms' length price or not. So, we had to use that valuation that
came from government itself; just like the same thing that happened with the 
land. We had to adopt the landed property valuation that the government 
valuers did. Actually, instead of government doing it, we paid all allowances 
to the team from Zomba to come and do the valuation.”

PAL01 said that government did not pay them any additional compensation to transport their 
movables elsewhere nor did it reimburse valuation and resurveying costs despite that it was the 
same government that demanded these services. The respondents emphasised that the whole 
land taking transaction was bulldozed by government, despite the land being private and closed 
off by underscoring that fair compensation meant that compensation paid to them was based 
on market values of their lost assets and should have included all the losses suffered. PAL01 
added that while compensation was insufficient, they could not appeal against government as 
they feared that government may want to revenge in future transactions since PAL owns 
various estates and properties in the country.

6.4 Chapter summary

The study involved key informants, government officials, government and private valuers, 
expropriatees and various secondary sources in collecting primary and secondary data from 
various institutions including government, private firms, civil society organisations 
consortium, development partner organisation and project case study areas. The data from these 
ources indicate that theoretically, compensation laws in Malawi aspire to fully compensate 
expropriatees of their losses and hence put them in the same positions as they were before being 
expropriated, without bettering or worsening their livelihoods. The data has also shown that 
currently, there are many laws guiding compensation, with the Constitution being the main 
one, supported by Lands Acquisition Act and Land Act. Despite the many laws, there are no 
specific compensation guidelines or standards, and that current laws are ambiguous in many 
issues. It has also been shown that these laws are ambiguous, contradictory and inadequate in 
many aspects and fail to support the achievement of the desired compensation. Practically, 
compensation for both customary and private land is assessed using market-based 
methodologies, face data scarcity and reliability challenges, among others, according to the 
data. Fundamentally, these issues result in compensation that expropriatees consider 
inadequate to restore them legally and practically, and thus lead to their failure to fully replace 
their lost assets and full re-establishment. The findings are discussed in the next chapter.
Chapter 7: Discussion of findings

“We need development for real but one needs to be appropriately compensated when expropriated and relocated, so that you are able to re-establish wherever you are going without a lot of hardships related to the expropriation and relocation. That is that my friend.”

Expropriatee (PEXP03), Phalombe Case Study, 1\textsuperscript{st} December, 2016.


7.1 Introduction

Chapter 7 discusses the findings of the study presented in Chapter 6. The analysis starts by looking at theoretical foundations of compensation laws in Malawi, adequacy of applicable compensation laws in achieving appropriate compensation for customary land, practical challenges affecting realisation of appropriate compensation for customary land rights and perceptions of expropriatees towards actual compensation received in section 7.2. An analysis of the hypothesis then follows in section 7.3 while section 7.4 discusses implications of the findings in relation to customary land rights and indemnity compensation. Section 7.5 deliberates broad policy implications of the findings and closes the chapter.

7.2 Discussion of findings

This section analyses the study’s findings as presented in sections 6.2 and 6.3 of Chapter 6. The analysis is guided by the study’s hypothesis and objectives and based on the study’s conceptual framework developed in Chapter 2 and findings from other relevant theoretical and empirical literature analysed in Chapters 2 and 3. Section 7.2 starts by recapitulating on the objectives, hypothesis and the study’s conceptual framework.

Thus, reflectively, the main question examined by the study was how are expropriated customary land rights valued for compensation purposes to achieve appropriate compensation. Through this question, the study specifically aimed at:

i) Investigating the theoretical foundations of Malawian compensation laws,

ii) Analysing existing compensation laws to establish their adequacy in achieving appropriate compensation for customary property rights,

iii) Analysing practical challenges affecting the achievement of appropriate compensation for customary property rights,

iv) Examining expropriatees’ perceptions towards compensation adequacy, and

v) Proposing a valuation model for customary property rights based on available literature, experiences from other countries and findings of the study.

Fundamentally, the working hypothesis of the study was that existing valuation practices for expropriatory compensation presuppose private property rights and functional property markets, and thus lead to inadequate compensation for customary property rights. As discussed
elsewhere, indemnity and taker’s gain compensation theories inform the study’s conceptual framework. Indemnity theory aims at fully indemnifying expropriatees of their expropriatory losses, and thus wholly restore their livelihoods as if they were not expropriated (Kratovil & Harrison, 1954). To achieve this aspiration, expected compensation has to cover lost properties, severance, injurious affection, disturbance, solatium/consolation and/or special values (Barnes, 2014; Denyer-Green, 2014). Contrariwise, taker’s gain theory considers compensation as adequate when only the thing taken - land, and nothing else, is fully compensated (Kratovil & Harrison, 1954). Under both principles, the primary compensable item is expropriated property while measure of adequate compensation is market value (Kratovil & Harrison, 1954). For severance and injurious affection demanded under indemnity compensation, they are also measured by market value (Baum et al., 2008). All other compensables are to be based on owner’s loss (Baum et al., 2008; Denyer-Green, 2014). And as discussed in Chapter 2, the most common compensation concepts that fall under indemnity compensation theory include adequate compensation, appropriate compensation, commensurate compensation, fair compensation, just terms compensation and reasonable compensation, among others. For taker’s gain compensation theory, all compensation principles focusing only on land/property taken and no other additional compensation items qualify.

7.2.1 Theoretical orientation of compensation laws
Broadly, objective one is a high-level analysis in the theoretical level of the conceptual framework shown in figure 5.1 intended to establish the theoretical orientation of compensation laws in Malawi, and hence attendant compensables and assessment methodologies. Fundamentally, this objective responds to such questions as what is the purpose of appropriate compensation in Malawi? What are the desired compensation items? And what are the preferred compensation assessment bases and methods? Responses to these questions characterise the orientation of the laws between the two compensation theories. The findings would then provide a basis for analysing adequacy of applicable compensation laws, practical challenges affecting compensation for customary land, compensation adequacy in practical terms and proposition of a valuation model for valuing customary lands for compensation aims.

Then to find out the compensation orientation of Malawian laws, respondents were asked to explain their understanding and interpretation of the purpose of appropriate compensation in Malawi as adopted in the Constitution and other relevant laws. The evidence presented in
sections 6.2 and 6.3 indicate that compensation in Malawi aspires to fully compensate expropriatees of their expropriatory losses and wholly restore them such that they do not see any difference in their livelihoods before and after being expropriated. The data further show that such compensation is equated to prevailing market value of the expropriated property if this desire is to be realised. Additionally, the evidence underscore that to fully restore expropriatees, compensation must cover all losses occasioned by the taking and must consider what else is needed for one to be fully re-established. This interpretation of the purpose of compensation is similar to that aspired by the indemnity compensation theory. Similarly, the study’s interpretation is consistent with that found in some of the literature reviewed, including that of Ambaye (2013), Denyer-Green (2014) and Kratovil and Harrison (1954).

The research data also show that the adoption of the various conceptual principles including appropriate compensation, adequate compensation fair compensation and reasonable compensation among others that subscribe to indemnity compensation theory by these compensation laws as summarised in table 6.2 confirms this aspiration. To achieve indemnity compensation, then compensation in Malawi must cover land taken, severance, injurious affection, disturbance, consolation and/or special values, as stated several times elsewhere in this report. Furthermore, the research data found that compensation for expropriated land, which is the primary compensable item, is to be assessed based on their market value. This requirement is also in line with that of the indemnity compensation theory.

Essentially, the research findings confirm that compensation laws in Malawi derive from the indemnity theory and aims at fully compensating and wholly restoring expropriatees to their previous niches. Factually, the main reason for this stance in the case of Malawian land laws is that they were imported and implanted on Malawian practices during colonisation (GRM, 2002). It is thus unsurprising that our laws are based on English land laws and compensation ideologies that favour full indemnification compensation. This is similar to many other countries that were colonised by the English (Benson, 2008; Seidler, 2014). One thing that is clear from the presented data is that the indemnity compensation ideology is here to stay and we must be prepared for that by providing a conducive legal environment.

### 7.2.2 Adequacy of applicable compensation laws

The second objective follows from the first objective and it is also a high-level one taking place
in the theoretical level of the conceptual framework. This objective examines nature and responsiveness of existing compensation laws in line with the adopted theoretical orientation. Specifically, questions relating to this objective focused on key laws for compensation and their nature, specific provisions/guidelines for compensation for expropriated customary land rights, sanctioned compensable items, prescribed assessment bases and methods, main shortfalls characterising existing compensation laws and respondents’ description of the current legal compensation environment.

On key statutes guiding compensation, the study data indicate that there are well over ten laws available but that the Malawi Constitution (1994), Lands Acquisition Act (1971, 2017) and Land Act (1965, 2016) are the chief ones. The Constitution is an overarching law that provide fundamental and broad requirements of what is expected of compensation in Malawi. Consequently, Lands Acquisition Act is the main supporting law when it comes to compensation issues. However, the study data demonstrate that this law provides more favourably for private land rights and not customary land rights. As such, most customary land matters are attended to using Land Act (1965). Thus, these have been the key laws till a few years ago when Customary Land Act (2016) came onto the scene providing comprehensively for administration of customary land rights. In terms of their nature and content, presented data highlight that generally, current key compensation laws provide more competently for private land while very scantly when it comes to customary land. Put alternatively, existing compensation laws are tailor-made for private land and not customary land. This is expected based on the origins of these laws - England, where land is presumed as a definite entity under exclusive holdings and duly registered, including common land itself under the Commons Registration Act (1965) and Commons Act (2006) (Short, 2008), and with access restricted to only those with common property rights (Clark & Clark, 2001). In Malawi, even the Land Act itself provides less for customary land as regards compensation issues. This nature of the laws entails that the imported statutes suffer from less localisation and have not embraced local land tenures meaningfully. Similarly, Customary Land Act (2016) fails to detail and clearly guide how compensation for customary land should proceed. Because of the deficiencies in the laws that are meant to address customary land compensation, the data extrapolate that valuers apply the same methodologies meant for private land rights to customary ones, albeit their fundamental inadequacies themselves. Thus, there is no clear provision on how to support and safeguard customary land rights when it comes to compensation.
Moreover, the data show that customary land is considered as public property and uncompensable during expropriation. Broadly, there is no law that categorically classes customary land as such and application of this principle has no legal foundation. Additionally, we have seen in Chapter 4 that customary land is not public property and should thus be treated with the respect it deserves, by among other things, being rightly compensated during expropriation. This is also supported by the MNLP (GRM, 2002).

Regarding the various compensation concepts legally adopted as shown in table 6.2, the data signal that there is a problem with interpretation. There is no single law that clearly provides an explicit interpretation or meaning of what, say appropriate compensation or fair compensation, means. Or whether the different terms are one and the same in terms of their definition. This gap has led to some valuers to consider that appropriate compensation is more subjective and non-existent in reality, as every user of the law applies their own interpretation and hence compensation package. There is a need to have these various concepts streamlined and interpreted in a standard way to minimise these challenges.

On compensables supporting adopted compensation aspiration, available data indicate that for expropriated private land rights, compensation requires initial cost of acquiring the land, value of improvements and land value appreciation since purchasing. Two observations arise from this. First is that all these compensables relate to land and landed improvements and no others. This means that compensation meant for private land covers only the land and those affected improvements thereon and nothing else. This results in compensation that is unfair as many other losses are omitted. Second, the permitted compensable items are related to their values, which means that any property that does not have a market value or cost is not covered by this law. This would be the case in rural areas where land markets even for private land are almost non-existent. The requirement for market value is testimony to these laws’ favour towards exclusive property rights and not others. Generally, there is need to improve on the number of compensables to meet those demanded by adopted compensation principles and assessment methodologies if expropriatees are to be fully indemnified.

Regarding compensables for customary land, the data show that key compensation laws do not outline any specific compensables. The laws only require compensation that is reasonable without providing any compensation items to achieve that. Likewise, Customary Land Act (2016) only demands appropriate compensation for any expropriated customary land for public
purposes without entailing what factors must be met and how it should be assessed to achieve that. Essentially, absence of any compensable items for expropriated customary land rights in key laws relates to an important issue - that of what a full loss is for expropriated customary land. A clear meaning of what losses customary landholders suffer when their land is taken and how these should be treated to realise expected compensation present very murky areas in our compensation laws. This is also attributed to the poor coverage or engagement with customary land rights. Thus, in the absence of what a full loss represents, valuers are unable to provide a satisfactory compensation package, an issue that has been confirmed by the data in this research. It is thus essential that a list of items that represents a full loss or core losses for expropriated customary land rights be defined in the relevant laws, such as Customary Land Act.

Apart from these fundamental issues with existing laws, there are also no specific compensation laws. In the case of private land rights, existing laws are considered too general and lacking in many aspects like number of compensables in line with adopted compensation theory. As for customary land rights, in addition to being largely ignored by current laws, there are no specific laws meant to address their expropriation and compensation. Such specific laws would provide relevant guidelines on a detailed level to standardise the environment. In their absence, the general laws are applied to customary land issues and result in various challenges including inappropriate compensation. This remains a challenge since even with the ongoing land law reforms, there is, so far, no specific law on compensation formulated. It is thus an issue that needs to be looked into seriously and urgently.

Additionally, there is no prescribed compensation basis on which losses should be assessed, nor are there any preferred valuation methods to be used for expropriated customary land rights. These gaps have misled many valuers to think that the general basis is then market value. The other challenge is that since compensation has to be assessed, valuers have no choice but to apply any available guidelines, though they do not provide anything on customary land, to expropriated customary land. This produces non-representative results.

The study evidence has also indicated that current laws are generally unpopular in Malawi, mostly to the local Malawian. This is attributed to the legal language used - English. The study found that current laws are not user friendly because most people have difficulties in reading them, let alone understanding them. The other factor mentioned was that current laws have
been poorly publicised such that they are not well known to most Malawians largely. This was confirmed by most expropriatees who expressed ignorance on existence of any statutory land laws in Malawi. Most expropriatees indicated that what they know are their own customary laws. The connotation of this is that people are not aware of their property and compensation rights as legally instituted, and hence exploited. The lack of proper knowledge about relevant land laws was also an issue with most other respondents of the study. Most government officers seemed not to fully comprehend what the law requires when it comes to compensation, apart from basing it on market value. This was vindicated by some government respondents failing to even mention key compensation laws and/or relevant provisions in these laws.

Further, the data show that the other challenge with current compensation laws is that they fail to meet minimum compensation requirements. This is supported by the fact that the laws provide fewer compensables for expropriated private land rights and none for expropriated customary land rights. The situation is exacerbated by the absence of a national resettlement policy.

Other challenges concerning current compensation laws are that they are generally ambiguous in many aspects, archaic and superficial in that they do not reflect the true reality on the ground, and inadequate since they do not provide for all relevant issues. With these various legal challenges, the statutory environment is outdated and unfair, inconsistent and unconducive, and contributes to people being deprived of their customary land rights. This finding is similar to others on adequacy and applicability of extant compensation laws regarding expropriated customary land rights elsewhere, per Alias and Daud (2008), Ambaye (2013), Haruna et al. (2013) and Sulle and Nelson (2009).

7.2.3 Practical challenges affecting compensation adequacy
The third study objective is a middle-level analysis in the practical level of the conceptual framework intended to understand how compensation is actually assessed and what challenges are encountered. This level manifests the translation of theoretical and statutory compensation desires into tangible compensation. Thus, compensation valuation processes in this level are guided by the high-level theoretical and legal compensation prescriptions.

In terms of valuation challenges for private land, the study established that they include absence
of official land markets in rural areas while property markets in urban areas are underdeveloped. This means that compensation assessed based on market value is challenging even for private property rights because needed market evidence is inaccessible. This challenge is compounded by lack of market data clearing houses in Malawi. One may argue that there are public land registries that collect and record data for all registered (private) properties. While this argument is plausible, the problem is that government registries are not functioning as they should, resulting in data that is outdated, incomplete, doctored and missing files in some instances. This challenges availability and reliability of needed market data. The study also found that even when the data is there, the current crop of staffing is not keen on assisting data seekers, who are then frustrated by either being ignored or have to wait beyond their available time. The absence of easily accessible and verified data has led various valuers to depend on their own data from previous valuations or from fellow valuers, estate agents and other sources. The challenge with these data is that one’s data or that from other sources may not have been generated based on market value requirements, thereby being non-market and unreliable. This is a credible worry since markets are non-existent or underdeveloped in Malawi.

To get some good data, it has been seen that it is time-consuming and costly, issues that are expected with the state of affairs of our property markets. The other issue is that it is very difficult to verify any comparables accessed. This is because the data given is incomplete or the way the valuation was done leaves a lot to be desired. On data availability, one respondent from Knight Frank emphasised that with these hiccups, those that are not involved in the property market of selling and buying directly have many data challenges. Thus, it is challenging to do proper valuations in these settings and realise fair compensations for expropriated properties in Malawi.

Additionally, it has been observed that government also uses uncertified valuation officers to undertake compensation assessments. Looking at the existing environment, it is obviously difficult to achieve intended goals if one is uncertified nor is under the supervision of a certified valuer. While influence of government on compensation is common, this may be habitual with uncertified valuers who can easily be bulldozed by their masters. Use of unregistered valuers is also an issue in other countries, including Ethiopia where they use compensation committees (Aleme, 2013) and in Nigeria where expropriatees rely on services of compensation agents more than government valuation surveyors for various reasons (Kakulu, 2008). One clear issue
is that, frequently, lack of needed skills, knowledge and experience contribute to inadequate compensation which essentially fails to reinstate expropriatees.

The issue of influence by government as the taker was a common one in this study as expropriatees wonder how can government as the taker of their land be the assessor, payer and juror when issues arose? They concluded that this was a deliberate arrangement by government to favour itself by fixing compensation amounts that it wanted. This was of course vindicated in Salima case study where government relied on its own values albeit there being valuations by reputable private valuers - Knight Frank. Government valuers confirmed this by stating that they are under undue pressure in most government projects to undervalue expropriated properties and other losses to meet budgetary amounts.

The other critical issue established in the study was that there are fewer compensable items sanctioned for expropriated private land which covered initial cost of buying the land, improvements made on the land and enhancement in value since purchasing. Surely, this package falls short from the expectations of adopted indemnity compensation. These issues variously affect final compensation and cumulatively, contribute to inadequate compensation that could not re-establish economic or social livelihoods of expropriatees, thus slipping them into poverty. It has to be noted that there are many challenges but these came out as the main ones. Elsewhere, these issues are also variously existent as observed by Ambaye (2013), Tagliarino (2017), Sulle and Nelson (2009) and Viitanen and Kakulu (2009).

In the case of expropriated customary land rights, there are as many and similar challenges as those analysed in the preceding paragraphs for private land rights. However, there are two fundamental issues that run through all the other challenges regarding compensation for these land rights. The first one relates to the extent that existing compensation laws in Malawi cover and characterise customary land rights in terms of their nature and constituent rights. It has been shown in this study that there is no real engagement with customary land rights and their coverage is substantially dismal. The lack of serious engagement implies that customary land rights are not really known as to what they are and what they constitute in their rights bundles. This makes it difficult for anyone involved with these land rights to know exactly what they are dealing with and what land rights are involved.

As for expropriation, it is challenging to know the rights taken in their entirety and how to
handle them generally as regards their compensation assessment. This is all because the laws fail to provide a clear embodiment of these land rights and their composition, as seen from the poor legal coverage. This gap has led to another challenge when it comes to expropriation of customary land rights. What actually is expropriated in addition to the material land? And what is the total expropriatory loss for customary land rights holders? The study has shown that unlike private land rights, expropriation of customary land involves both the physical land and many other non-material aspects. As to the total losses suffered, we need to look at what expropriatees lost in reality and relate that to the tangible and intangible features of customary land rights. This is addressed in subsection 7.2.4. But for now, it is important to note that lack of clearly outlined losses about customary land rights has made it difficult to handle them ably during compensation assessment. This finding is consistent with that of Pachai (1978), that customary land rights are perplexing even to the Western settlers who failed to know what rights to compensate when taken and which ones to leave out. They ended up leaving these issues out of the laws. Practically, this has contributed to compensation packages that differ from one project to another despite all involving customary land. This is expected where a compensation standard to be used as a measure of minimum compensation adequacy is missing.

Apart from these two fundamental challenges, it has also been established that there are no specific compensation laws, guidelines and standards meant for customary land rights. This entails that there is no clear guidance on how these rights must be handled when assessing their compensation, nor is there a benchmark for measuring their compensation adequacy. Existing compensation laws which are applied to customary land rights are generally meant for private land rights, as already discussed, and the focus on market value of affected properties. They are generally inapplicable to these rights and obtain non-representative results. The general conclusion is that existing legal frameworks are inapplicable to customary land rights and hence results in inadequate compensations, as also observed elsewhere by Alias and Daud (2008), Broby (1991), Haruna et al. (2013) and Sulle and Nelson (2009).

The study has also shown that there is no prescribed compensation assessment basis for expropriated customary land rights and that market value is applied. The lack of any compensation basis is in line with the absence of compensation items discussed already. There is no point in having a measurement scale when you have no items to measure. However, when assessing compensation for expropriated customary land rights, it has been shown that market
value is taken as the de facto basis. The challenge with this basis is two-fold. First is that customary properties are considered non-market assets by the various laws in Malawi with no official markets. Practically, this is very challenging because the law itself is contradictory by considering customary land rights as off-market assets on the one hand, and expecting valuers to create market values for the same off-market properties on the other hand and achieve fair compensation. Off course valuers have tended to come up with figures purported to be market values. But these are not representative of the true customary properties and losses suffered.

The other practical challenge of having customary land rights as non-market properties is that there is no transaction data to aid their market-value assessments. As already discussed, official property markets are non-existent in rural areas for private land rights, and the situation is worsened by the prohibition of official markets for customary land rights. To circumvent this challenge, valuers use any available data from elsewhere, including untested exchange data regarding other customary properties. The problem with this is that the original sources of data are unknown and whether they are reliable or not. The other thing is that the process of generating that data is unclear and whether it followed market value requirements or not. The final issue on this is that with non-existent market scenarios, it is difficult to acquire market data that fully meets market value requirements. Thus, use of data from elsewhere may not meet expected conditions of market value standard. This entails that the resultant figures are just such, some figures and not market values. To use the words of Mooya (2009), these are just market values without any markets. These results are also consistent with those of several studies beyond Malawi including those of Adams and Tolson (2019), Alia and Daud (2008) and Babawale (2013). Simply put, it is very doubtful if any market values are achievable in the current environments for expropriated customary land rights in Malawi.

The study also reveals that in determining the sought-after market values for expropriated customary land, valuers use market-dependent methods including comparison, income and cost. Comparison method requires recent data on exchanges of comparable properties to be able to compute values for subject properties. For customary properties, such data is unavailable because there are no official markets. Any transactions are thus done outside of official market structures and normally unregulated. Similarly, there is no data to support income valuation methods because most rural properties are mainly owner-used. Even if they are let out, it is very demanding for one to get such data as no records exist. Essentially, one finds that there is no data regarding incomes, expenses and discount rates to support this
method. Because of this status quo, the income method is deficient when it comes to rural and customary properties. One may argue that but there are some income-generating properties in rural areas. Of course, there are. The point is that those incomes are unique to those properties and not representative of all properties in the neighbourhood and cannot be generalised to all properties. Mooya (2016) provides a very good illustration of this scenario in his book titled ‘Real estate valuation theory: a critical review’. This means that income methods are also inapplicable.

As for the cost method, its utilisation demands that there be comparable evidence for land, buildings, building cost estimates, professional fees, labour costs and depreciation among others. Market data relating to these aspects are normally non-existent in rural areas as were unavailable in the case studies because markets are not there. Because of comparable data challenges, it is difficult to obtain representative property values even under the cost method. For building cost estimates, it was observed that in both Mombera and Phalombe projects, affected structures were mostly traditional/temporary and semi-permanent, with a smaller proportion being permanent as discussed in Chapter 4.

Generally, traditional structures and materials lack official markets to avail data regarding their nature, quality, durability and pricing among others, entailing difficulties in establishing their true values based on market value and market-based methods. Other issues regard information on professional and labour expenses. It was not available as practices are done traditionally with no proper records in most instances. Additionally, as the cost method applies depreciation to affected properties, it is very difficult to decide depreciation rates for such traditional materials or properties in rural settings since no information exists. Fundamentally, assessors emphasised challenges of market data in assessing rural structures, thereby confirming the researcher’s suspicions that resultant values were guesstimates without any market linkages. It is thus difficult to obtain knowable market values for customary structures since required conditions lack. For this reason, other compensation assessment standards discourage applying depreciation (ADB, 1998; World Bank, 2012). Use of cost method is thus difficult where markets are absent, as in the case study areas.

Issue of data scarcity were also clearly observable for biological assets. The study has shown that compensation rates applied to affected trees that were compensated were lower, not market related and not the gazetted ones. In terms of being lower, it has been observed that a productive
mango tree was compensated K10,000.00 each while gazetted lost income over the entire productive lifespan of each mango tree was K45,000.00 as shown in table 6.3, resulting in loss of K35,000.00 per mango tree, which translates to 78.0% in lost compensation. Similarly, for each lost orange tree, an expropriatee got K5,000.00 instead of K45,000.00, representing a percentage loss of 89.0%. However, it is unclear where the valuer got these rates nor how he came to decide on them. What is clear is that, apart from being lower, they are also subjective since the concerned valuer failed to justify them. Essentially, their application contributed to significantly inadequate compensation for fruit trees. This trend was also observed in the case of non-fruit trees. It thus seems to be an inherent problem.

As in the case of expropriated private land rights, the other issue regards involvement of uncertified valuation officers to undertake compensation assessment. Looking at customary land rights with their complex nature and lack of any market data sources, it is clearly difficult to achieve intended goals by an assessor who lacks adequate knowledge and experience on how to handle these issues. This practice contributes to unfair compensation.

The issue of influence by government as the taker was also noticed in the study. It has been shown that expropriatees wondered how could government do the assessments on its own without asking property owners about the worth of their properties. This led to the expropriatees thinking that government does things secretly to dupe them. This allegation was strengthened when government reduced compensation amounts unilaterally that were already verified and agreed with expropriatees in the case of Mombera. Neither was any explanation given to expropriatees as to why the deductions were made. As for Salima case study, government chose valuations done by its own valuers, which were lower than those done by Knight Frank. Based on these findings, it is clear that government influences compensation amounts as it claims to have no money to meet higher and/or fair amounts.

The other practical issue affecting compensation was the consideration of customary land as a public property and hence uncompensable. The study has established that this stand by government is actually variable, leading to compensation for the land being paid in one project and not in other. It is important to emphasise that customary land rights are not public properties in anyway and that they are duly compensable when expropriated, as shown by the literature and in Chapter 4 and findings of this study. This practice is also criticised as wrong by the MNLP, as it considers customary land as people’s land (GRM, 2002). Non-compensation of
customary land is dubbed as official land grabbing by some and leads to landlessness and loss of various land-based economic and social activities as also shown by Cernea (2008), Chikaipa (2012) and Chinsinga (2017). Generally, non-compensation impoverishes affected people.

Additionally, the other challenge affecting compensation for customary land is the equating of customary land rights to private land rights so as to be able to apply available compensation assessment methodologies that are market-based. This is not the best way of course because the two property rights bundles are naturally different and cannot be equated as identical. Such practices have led to various losses such as exclusion of non-material aspects of customary land, thereby achieving less compensation.

Broadly, there are various practical challenges faced in assessing compensation for both expropriated private and customary land rights because of the nature of current compensation laws and state of property markets in Malawi. Specific to customary land rights is that the laws disregard them by providing insufficient coverage, and without any compensables and assessment bases. In practical terms, these contribute to inadequate compensation and impoverishment of affected people generally.

### 7.2.4 Expropriates’ perceptions towards compensation adequacy

The fourth objective covers the lower-level analysis regarding compensation outcomes and reconciliation levels of the conceptual framework. It aims at examining the compensation outcomes (outcome level) to establish whether they meet desired expectations or not. In other words, the compensation given is reconciled with the losses suffered based on expropriates’ perceptions. To be able to reconcile actual compensation and losses suffered, there is need to know what was the full loss suffered by expropriates. In the case of private land rights, we know what a full loss entails both theoretically and practically. To refresh our minds, theoretically, a full loss for expropriated private land is represented by expropriated land, severance, injurious affection, disturbance, consolation and/or special values. Thus, where private land is taken in full, then severance and injurious affection do not arise while for partial takings, all these are then applicable. Compensation that covers all these items is thus considered to be full and adequate, otherwise it is not. As for Salima case study, losses and inconveniences suffered included:

i) All land,

ii) Various building structures,
iii) Various biological assets including commercial crops like cashew nut trees,
iv) Infrastructure including earth roads and boreholes,
v) Income,
vi) Business,
vii) Various movables, and
viii) Other disturbances.

From this list, the first four items relate to land and its various improvements; items v) and vi) fall under disturbance together with the others disturbances (item viii) while movables are not normally considered. Because the taking involved all land, severance and injurious affection fell out. Of the remaining losses, data show that only land and improvements thereon were compensated while lost incomes and business were excluded. The study also found that no other payments such as other disturbances concerning relocation costs and re-establishment expenses, consolation and other special values were compensated. Essentially, compensation for the lost private land rights was theoretically inadequate as not all recommended compensables were covered. Thus, compensation did not meet theoretical demands, thereby falling short of expectations. Practically, compensation excluded many other losses suffered by the expropriatee, thereby being unfair. To put it in the words of respondent PAL01, compensation was far below what was expected and thus inadequate. Fundamentally, compensation failed to indemnify and restore the expropriatee.

Further, the study established that the situation was worsened by delays of about five years in paying compensation without any interest being added nor any revaluation to recapture losses in money value being undertaken. It was also learnt that the expropriatee could not do anything like exercising their right of appeal because of fear that government may revenge through other transactions in future. In a nutshell, while expropriation suffocated the private agricultural business of the expropriatee, compensation failed to resuscitate it because the amount given was inadequate.

As regards customary land, before reconciling compensation and losses suffered, we need to revert to our question concerning what a full loss is when it is lost. This is a difficult question because the laws are deficient on this one on the one hand, and the existential nature of customary land rights themselves is complex on the other. However, loss of customary land
rights entails loss of the physical (land itself) and the non-material components. These are represented by various losses established in this study including:

i) Land,
ii) Various building structures,
iii) Various biological assets,
iv) Natural and man-made resources (such as forests, grazing land, dambos, et cetera),
v) Communal assets like a borehole,
vi) Land-based economic activities such as subsistence commercial farming,
vii) Income from the various economic activities and resources,
viii) Businesses,
ix) Various special assets and values like graveyards,
x) Non-material losses such as social networks and support, and
xi) General disturbance to livelihoods.

As customary land rights vary from setting to setting, this list may vary on a case-by-case basis. Using indemnity compensation items, then the first five would classify under expropriated land, items vi) - viii) and xi) fall under disturbance, while item ix) and x) do not classify into any of the known indemnity compensation variables. These two also overlap mostly, and would thus make their own category of special value/non-material losses. Thus, any compensation that considers all these losses would be taken as fair enough.

However, the study established that only land, building structures, selected biological assets and disturbance (only for Phalombe project) were compensated. Where customary land was compensated, it was argued that free customary land for free re-allocation to expropriatees was scarce. Ironically, where expropriated customary land was not compensated, the same government argued that local leaders will find unallocated customary land and give it to the expropriatees for resettlement. Paradoxically, it is known since 2002 that customary land, as a valuable and scarce resource, is rare even in the remotest areas of rural Malawi (GRM, 2002).

In fundamental terms, this implies that it is challenging to assume that local leaders will create land for replacing local expropriatees. Also, it is dumbfounding that government could take hundreds of hectares of land and fail to allocate its own people even an acre, leaving them landless. All in all, loss of land in all case studies led to disturbances in people’s livelihoods and various business activities that were land-based, thereby contributing to their impoverishment. Elsewhere, these issues are also common, as established by Bharali (2007)
and Cernea (2004). This entails the need for clear standards as regards compensation for customary land to avoid subjective decisions by government that impoverish expropriatees permanently.

Compensation for buildings was taken as unfair because most expropriatees complained that they could not replace their buildings with the money given. One of the areas of contention was how the compensation for the structures was assessed as expropriatees (property owners) who knew their worth, were not consulted by the valuers during assessment. They (expropriatees) wondered how valuers determined those compensation figures on their own when they had no idea how building issues are done in the project areas. The second factor that expropriatees raised was that the amounts given were not tallying with the cumulative investments in their structures if they had to rebuild them. On this one, it was learnt that expropriatees compared the amount of compensation given and how much they had spent on constructing their structures to see if they will be able to replace their lost ones. They found that the worth of their investments was higher than what they got as compensation, entailing that they will not be able to replace their lost buildings adequately. This finding entails two main things. One is that the use of market-based methodologies in rural areas where there are no markets is very difficult as required conditions are non-existent. Two is that it is always important to consult and involve expropriatees in the compensation assessment processes because they have local knowledge that strangers in the area including valuers lack but needed. This may contribute towards achievement of acceptable compensation amounts and lessening of compensation rejections.

Similarly, for biological assets, it was learnt that compensation was on the lower side. On this one, one respondent explained that for fruit trees, income realised from selling the fruits was higher than compensation given, entailing that what they were given was lower. In other case studies, it was found that native trees were uncompensated as government argued that these are public assets and no one owns them. The challenge with this argument is that someone was tending to the trees to be there, otherwise they would have been cut by other people. Secondly, this argument is weak because one can plant native trees and not all grow wildly. Third is that there is no law that provides that native trees are government property and therefore not eligible for compensation during expropriation in Malawi. All these seem as government tactics in trying to evade paying reasonable compensation. Thus, any non-compensation of trees that belong to an expropricatee is unconstitutional. Similarly, annual crops were not compensated as
government argued that expropriatees will harvest them when they mature. This is not always true because intended projects can start at any time without warning, thereby subjecting expropriatees to wasted efforts. Generally, the issue of omitted expropriatory losses is a big challenge when it comes to compensation in Malawi as elsewhere, as also established by others including Ambaye (2013) and Kakulu (2008).

The study also established that the other factor that contributed to inadequate compensation was non-compensation of various access rights to a diversity of natural and man-made resources, together with their invisible benefits to affected people. Benefits from these resources included wild foods like mushrooms, honey, wild fruits and bush meat among others; herbs used as food or medicine and as sources of various building materials through timber, grass-thatch and threads, among many. Invisible benefits included fresh or clean air from the trees and scenic views provided by topography and vegetation. These resources buoyed livelihoods of expropriatees significantly in various ways including income generation when sold. Some expropriatees attested to these by emphasising that during the rainy season, they usually gather wild mushrooms and sell by the roadside or to traders who come to buy in bulk, thereby generating some money that supported their lives in various ways. Similarly, dambolands supported livelihoods through income generation as they afforded people to farm and sell various produce during the dry season, including maize, French beans, cabbage and other vegetables. They complained that expropriation of their land took all these away and left them with nothing to rely on since no alternatives were provided nor any compensation given. Compensating these losses would make compensation better and contribute towards indemnifying some of the losses occasioned to expropriatees. This is a big challenge where no clear compensation guidelines exist. These findings are similar to those observed by others elsewhere including FAO (2009) and Yengoh and Armah (2016).

Similarly, expropriatees lost various social networks and cultural values among others that were not compensated. Generally, these disturbances are challenging to quantify and monetise and hence compensate in monetary terms. Fundamentally, non-compensation of these inconveniences demoralise expropriatees in various ways and their consideration make them take compensation as satisfactory to some extent. All in all, many other invisible losses such as control over their own land uses and local leadership powers, among many others, were ignored. Similarly, Akujuru and Ruddock (2014), FAO (2009) and Witter and Satterfield
(2014) emphasise that expropriatees in rural areas consider compensation adequate when their lost social and cultural values are compensated.

Like many other inconveniences, consolation for disturbing rights of expropriatees on the land were not compensated. This was a clear issue with some affected people who underscored that this was expected for the disturbances they suffered but that nothing came forth.

It was also established that expropriatees viewed compensation as inappropriate because they were intimidated by government and local leaders and could not express their discontent freely nor appeal against the compensation. In Mombera, it is alleged that expropriatees were vehemently told to let government do its work by the local group village headperson. And no one dared cross him nor government, and just resigned to the whole process. It was also stated that compensation in Phalombe was delayed for over four years. When expropriatees finally got their compensation money, it had lost value and they could not re-establish themselves adequately. It was also learnt that despite the delays, no interest was added nor were revaluations done to Carter for the lost money value similar to Salima case study. Additionally, compensation paid also omitted re-establishment and relocation costs and expropriatees had to use part of the compensation money to relocate.

The study revealed that as land forms the basis of people’s livelihoods, they were pained to lose their land but without any replacement land or alternatives to their livelihoods. Summarily, it is clear that many losses were omitted from the compensation packages and that expropriatees were not given the needed support. Thus theoretically, compensation was inadequate as compensation did not cover all expected losses, despite there being no list of losses to consider. Legally, compensation was considered unfair because of the lack of any compensation items for customary land, and hence decided subjectively and differentially. Practically and based on the list of lost items, compensation was inappropriate as it excluded many of the losses suffered by expropriatees. Fundamentally, compensation failed to indemnify and restore expropriatees, thereby impoverishing them.

The preceding analyses underscore that compensation that expropriatees got was substantially inadequate as many losses were omitted. Fundamentally, such compensation contributed to loss of land and land-based economic activities, increased food insecurity as expropriatees have less land to cultivate or nowhere at all, demoralisation, loss of access rights to common property
resources, loss of social networks and community support and protection among many others as expropriatees relocated individually to where they could find land. All these culminate into loss or disturbance of established livelihoods for good. These issues, as products of insufficient compensation for expropriation, are also well articulated by Cernea (1997). Broadly, this is a direct result of the lack of clear compensation laws including a national resettlement policy. It is thus imperative that relevant laws must be in place and sufficient to address these issues wholly. Let us now revisit our hypothesis.

7.3 Evaluating the study hypothesis

Fundamentally, testing of the hypothesis in this study is achieved by examining the research data to determine to what extent the hypothesis has been confirmed or rejected. This is because this is a qualitative research whose hypothesis is framed in such a way, hence making it difficult to apply quantitative or statistical tests that depend on calculations or quantifications. This can also be observed from the nature of the research data as well, which are mostly qualitative and not subservient to quantitative analysis tests.

The operational hypothesis for this study was that existing valuation practices for expropriatory compensation presupposes private property rights and functional property markets, and thus lead to inadequate compensation for expropriated customary property rights. To address this hypothesis, the study examined the theoretical orientation of existing compensation laws, nature and adequacy of extant compensation laws, practical challenges affecting compensation valuation processes and compensation outcomes.

Theoretically, the study shows that existing compensation laws in Malawi originate from indemnity compensation theory that require full indemnification of expropriatory losses so as to wholly restore expropriatees generally. To achieve that, the study indicates that compensation must cover lost land as its primary item among other compensation variables. The study also demonstrates that in assessing compensation for such lost land, its benchmark must be market value if resultant compensation is to be treated as fair. We also know from the study that it is only private land rights that are freely exchangeable with officially sanctioned markets in Malawi as elsewhere, and hence with market values or prices. Thus, by requiring compensation to be equated to the exchange price of expropriated land, the core assumption is that lost land is private, tradable and has a functioning market where market forces determine
its exchange price objectively. Additionally, it is also assumed that when compensation is related to market value of expropriated land, then expropriatees would be able to buy replacement properties from the market using the compensation money given. As seen in this study, that assumption is supported by the various existing compensation laws in the case of private properties and applied in practice during compensation assessment.

On the other hand, the study shows that compensation for expropriated customary land is usually inadequate and fails to indemnify nor restore expropriatees due to several factors. The first factor is failure to adapt the adopted indemnity compensation theory originally framed in private land tenure settings to fit and work efficiently in totally different customary tenure environments. This makes the applicable theoretical assumptions deficient in many ways when it comes to customary land in their current form, thereby resulting in unfair compensation. The study illustrates that the second issue is that applicable compensation laws themselves are not framed to support customary land matters efficiently. This is shown by lack of compensation items, assessment bases and methods for expropriated customary land, thereby resulting in subjective compensation practices that lead to inadequate compensation.

Practically, the study shows that in the absence of any compensables, compensation bases and methods for customary land, valuers are forced to use existing market-dependent procedures meant for private properties on customary properties. Because customary land differs fundamentally from private land and that it lacks official markets in Malawi, applied methodologies fail to attain reasonable compensation for the former as it is treated as private one, thereby misrepresenting its true nature and value. This is the third issue.

Finally, the study shows that these factors culminated into compensation that expropriatees considered generally inadequate culturally, economically, morally and socially. Expropriatees underscored that compensation was unfair because it excluded many of their losses variously including land, transport and sorry money for inconveniencing their livelihoods among others. They explained that government abandoned them without providing resettlement land nor any other support, and were left to fend for themselves on many things using their own resources. Expropriatees added that they failed to get replacement land, and hence re-establish themselves fairly with the compensation given because it was insufficient.
Fundamentally, the study demonstrates that current compensation valuation practices for expropriatory compensation indeed assumes affected land to be private and exchangeable even for unexchangeable properties, thereby contributing towards unfair compensation for expropriated customary property rights. Such compensation fails to satisfy expectations of indemnity compensation, of fully compensating and wholly restoring expropriatees. Instead, current compensation practices in Malawi impoverish expropriatees generally. Essentially, these findings support the hypothesis in full.

7.4 Customary land rights and indemnity compensation: A discussion

While this part of the thesis brings all the preceding analyses together, it also examines the primary study question, which looks at how expropriated customary land rights are valued for compensation purposes to achieve appropriate compensation? This question is very important to Malawi where customary land rights are dominant and comprehensive land law reform programmes are happening to address some of the challenges relating to customary land rights, expropriation, compensation and its assessment, among others. Furthermore, such a question is also pertinent to other contextualities where customary land rights are prevalent, invaluable and/or face similar problems.

The study has established that theoretically and legally, compensation desires to fully indemnify and restore expropriatees by compensating for expropriated land, severance, injurious affection, disturbance, consolation and/or special values. While indemnity compensation is also adopted in various other jurisdictions around the world (Alemu, 2013; Kitay, 1985), what does it imply in the case of Malawian settings where customary land rights are dominant? The fundamental implication is that compensation is expected to wholly restore expropriatees by compensating for all relevant losses suffered as stated just above. Thus, at the theoretical level, these factors form the evaluative criteria of whether compensation is adequate or not, as shown in the conceptual framework in figure 5.1. The second consequence is that expropriated land and improvements thereon are to be assessed based on market value standard and no other bases. The third and last consequence is that in assessing compensation, then market-reliant methods are the only ones to be used.

Generally, the core principle behind indemnity theory of fully compensating expropriatees in trying to wholly restore them is applicable to customary land rights. To achieve that, it means
that all the demanded compensation variables should be satisfied. The first and primary compensable item under indemnity compensation is expropriated land itself. Looking at land as it is in its basic form, it is passable as the principal compensation item without which compensation under indemnity settings fails. However, compensation for such expropriated land is to be measured using market value and no other scale. In this regard, we have seen that there are no official land markets for customary land rights in Malawi to furnish needed comparable data to aid in determining their market values. This means that it is not possible to attain knowable market values that are truly representative of expropriated customary land. Thus, market value as the required benchmark fails to obtain as required fundamental conditions do not exist. Essentially, expropriatees cannot be fully indemnified of their lost land because there is no market value. This is the first and core challenge. Fundamentally, while keeping land as the primary compensation item under indemnity theory for expropriated customary land rights, there is need for a totally different basis that is suitable for such land rights and not market value.

Further, the suggestion that market value is not the best benchmark for expropriated customary land is supported by the fact that market value requires sellers and buyers to be willing to partake in the transaction. Under expropriation, we know that both expropriator and expropriatee are unwilling. The expropriator is legally compelled to acquire the land through the various public projects, which in this case involved the university, hospital and sugar production projects. Alternatively, landowners were not willing to let go of their land. It had to take government to bulldoze expropriatees to acquiesce to the transaction. These findings, coupled with suppression of land markets by government, means no willing sellers and buyers existed hypothetically and practically. In such circumstances, determinate market values could not materialise and what comes out are just some non-market figures.

Likewise, the requirement that any land on sale should be reasonably marketed to ensure that all interested parties are given a chance to tender their offers could not be met because there are no markets in the rural areas in which the projects situate and expropriatees were not knowledgeable of the takings. This study has indicated that the various expropriated properties were not advertised by the expropriatees since they were not selling or planning to sell them. Essentially, expropriatees could not act justly in these expropriatory exchanges because they
were poorly informed if at all. These scenarios show how difficult it is to satisfy market value conditions in the case study areas.

Also, the study has shown that there was only one buyer involved in the expropriations - government, against many unwilling landowners. While this is expected due to the nature of the exchange, it entails that landowners are compelled to sell to that buyer only, irrespective of exchange conditions. This is one of the critical challenges that expropriation presents towards market value requirements, as also discussed by Denyer-Green (2014). Furthermore, the study indicates that the buyer had special interests to get the land at all costs for the three public projects and used its advantageous positions to achieve its goals. Essentially, the results of the research underscore that government irrationally influenced the taking of the land and the assessment of compensation by using its own government valuers and deciding how much to pay and how to pay it. This is clearly an issue of conflict of interest. These problems breached market value requirements fundamentally, and it could not obtain.

Broadly, while the intent of market value is to enable expropriatees to buy replacement land from the market and be restored using the compensation money given, the study established that this aim failed because resultant compensation amounts were lower and unrelated to the targeted markets. Of course, this is because there are no land markets to authenticate whether determined figures qualify as market values or not and to supply replacement properties. Thus, knowable market values are challenging to obtain in such settings, resulting in some figures other than market values. Generally, true market values are difficult to realise even for private properties as also established elsewhere by Adams and Tolson (2019), Babawale (2013) and Mooya (2016), among others.

Based on the preceding analysis, the study strongly considers that market value failed as the most suitable basis for assessing compensation for expropriated customary land rights. Essentially, indemnity compensation for the land could not be achieved. It is thus necessary that alternative and suitable bases be identified and adopted for assessing expropriated customary land rights. This is also in line with suggestions made by ADB (1998), Alias and Daud (2008) and Sheehan (2000) regarding compensation assessment basis for customary/native land rights.
The second factor required under indemnity compensation is severance. Since these are related to land losses, their compensation is also based on market value. While the challenges analysed in the preceding paragraphs related to market value apply to them, there are a few other issues that are of interest in the case of customary land. We have seen that customary land rights are generally complex and consist of both material and immaterial features. Thus, in partial takings of customary land, it becomes difficult to reconcile and quantify severance losses because actual quantities of land lost and left are unknown in definite terms. Similarly, where shared and access rights to other resources are concerned, their quantification is almost impossible when severed. These challenges become more daunting where communal, common and open access resources are involved since each community member has a right to use and withdraw some benefits from them. Thus, how to handle these issues is problematic and impossible to compute any severance compensation. Because of these challenges, it is suggested that severance in its current form is inapplicable to customary land rights and it should be dropped altogether as a standalone compensable item.

The third variable under indemnity compensation is injurious affection. In the case of expropriated customary land rights, this represents losses suffered by expropriatees due to works on expropriated land or proposed uses on expropriated land if they stay on remaining land adjacent to the expropriated project land or if they resettle within the project neighbourhood. This is applicable to customary land because any obnoxious use or activity such as water or noise pollution, would affect residents in the neighbourhood and thus requires redress. However, the challenge is to compute the injuries and values for compensation. Thus, the study suggests that injurious affection remains as a compensable item for expropriated customary land rights and to be measured as a proportion of compensation for the land.

The fourth variable, which is also applicable to expropriated customary land, is disturbance. It arises where the loss is directly a result of the expropriation and covers various items including removal/relocation costs, re-establishment costs, loss of income and profit, and loss of business, among others as discussed elsewhere. Disturbance is based on actual costs and prices and not market values and thus ably quantifiable. Similarly, consolation is another compensable variable under indemnity compensation. It is paid as a solace to comfort expropriatees for disturbing their rights in the expropriated land. This factor is also applicable to customary land and is calculated as a proportion of land compensation value or as an agreed lumpsum.
The final compensation item under indemnity compensation concerns special values, which emanate from subjective and sentimental attachments to and benefits enjoyed by owners from the property besides market value. In many parts of the world, compensation that considers various social and cultural values, spiritual and other special values is considered appropriate by affected people, per Akujuru and Ruddock (2014) and Keogh (2003). Special value losses are normally calculated as a percentage of the total compensation amount or based on an agreed lump sum because they are difficult to quantify (Boyd, 2001; Fortes, 2005). Special values are applicable to customary land rights as they are also related to the non-material components of customary land.

The foregoing analysis on the theoretical orientation of compensation vis-à-vis indemnity compensation theory shows that this orientation is not easily applicable to customary land rights in its current form. To be applicable to expropriated customary land rights, then some changes in its fundamental variables are inevitable as shown in the preceding paragraphs. Thus, applying indemnity compensation to customary land rights will require the expropriated land, injurious affection, disturbance, consolation and special values as its core compensation variables. This discussion is continued later in section 7.5.

Regarding legal frameworks, the study indicates that currently, while there is a multitude of laws addressing compensation matters in Malawi, none provides comprehensively for customary land rights including the key compensation laws. The Constitution only demands appropriate compensation without any more details, thereby being very broad and lacking in clear guidance when it comes to compensation. This constitutional gap was expected to be covered by key supporting laws. However, Lands Acquisition Act (1971, 2017) does not provide any helpful guidelines regarding customary land rights compensation nor does it address the constitutional shortfalls. Actually, this law is considered dry and unfit to be the key compensation supporting statute because of its nature and content. Lands Acquisition Act does not mention customary land even once in its entirety as it focuses on private land matters.

The other key law is Land Act (1965, 2016) itself, which covers all the major categories of land rights. However, when it comes to compensation for expropriated customary land rights, there is not much apart from requiring reasonable compensation. This law is also devoid when it comes to other land rights, such as those in unplanned and informal areas or squatter settlements. In specific terms, Customary Land Act (2016) which is meant to cover
expropriation and compensation matters concerning customary land comprehensively, is also disappointing as it only requires appropriate compensation without any other details on compensables, valuation basis and methods. Thus, current laws are essentially broad and unsupportive in terms of achieving full compensation for expropriated customary land rights.

To add to that, these laws are found to be ambiguous, contradictory, inadequate and outdated. They are ambiguous because they do not provide relevant interpretations for some key concepts such as appropriate compensation, fair compensation and reasonable compensation among others, and what they mean when it comes to customary land rights. They are contradictory as they provide differently on the same aspect. Legal inadequacy regards unclear provisions such as the acquisition process for customary land which is lacking in these laws. These laws are thus obsolete. Because of these and many other challenges and coupled with their numbers, they result in confusing users as to which law is applicable where, when and how when it comes to expropriated customary land rights. Essentially, this implies that currently, there are no laws meant to provide clear guidelines for assessing compensation for expropriated customary land.

Additionally, the study shows that current key compensation laws do not outline what losses are to be compensated when customary land is acquired compulsorily. As discussed in section 7.2, there are many expropriatory losses suffered in reality by expropriatees. But the lack of any outline means that what is compensated is at the mercy of compensation assessors or expropriators. Thus, it has been found that compensation packages guided by current laws are subjective and variable as there is no clear-cut list of what to include or exclude, as observed in Mombera and Phalombe case study projects despite both involving customary land. Beyond the key laws, it is only Public Roads Act (1989) that provides some compensables for customary land. Otherwise, this situation implies that compensation for expropriated land depends on which law is applied, instead of being standard.

On how expropriatory losses are to be assessed, all key laws provide no measurement standard on which to benchmark compensation assessment. As indicated elsewhere, it is illogical to have a measuring scale without the items to be measured. This has forced valuers to assume that compensation for acquired customary land is to be assessed based on market value despite being officially untradable. Similarly, while there are no stated valuation methods as there is no basis, we have seen that practically, comparison, income and cost methods are used. Because of non-existence of formal markets, comparable market evidence to support these
methods are scarce. This makes use of comparative methods challenging. As for income methods, most rural properties are owner-occupied, leading to absence of relevant data relating to incomes, expenses and rates of return, thereby making them inapplicable as well.

The study also established that, while the other two methods are used, cost method is the most commonly applied because of data challenges. For this method, cost estimates for building structures in addition to comparable land values are needed, but these are unavailable. In reality, most properties in rural areas use traditional materials that are locally found, thereby lacking market-related costs, labour charges and professional fees. In the case of information concerning depreciation for such building materials as bamboos, grass, trees and organic threads, among others, it is unavailable. Practically, valuers depreciate expropriated properties when assessing compensation to achieve an ‘as is basis’ so that expropriatees are not arbitrarily enriched nor is government unfairly deprived of public resources. It is vital to remember that computing depreciation is a demanding exercise in normal circumstances, and surely an impossible exercise for temporal rural properties. Accordingly, this results in improper adjustments that harm expropriatees through lower compensation figures.

On the other hand, rural properties are considered as low value and depreciating them decreases the already lesser compensation further, thereby failing to restore expropriatees and hence worsening their post-expropriation livelihoods. It would then seem that disregarding depreciation would be a good idea, as also advocated by Alemu (2013a) and World Bank (2013) elsewhere. Essentially, these data challenges make use of cost methods almost impossible in valuing such customary properties, and results in compensation outcomes that are not representative to the subject properties or losses. Fundamentally, these practical difficulties highlight the reasons that make market-based valuation methods unsuitable for non-market properties and compensation that is mostly unfair.

This also brings us to one interesting issue observed by the study regarding use of market value basis and purely non-market and special assets with sentimental values such as graves. The study established that graves are claimed by various families and/or clans of the departed and are highly regarded as epitomising their special links to their ancestors, one’s status, identity, belonging and authority over resources such as land in customary settings. For affected graves, the study indicated that claimants were compensated monetarily. The obvious question is how were the graves assessed in coming up with their economic values? The study revealed that
they were assessed based on market value. Surely, this is unprecedented as graves have no markets and hence no supporting evidence. Additionally, the study found that the cost method was used in assessing earth graves (mounds) and those with permanent tombstones based on data from the locals and valuer’s knowledge. The key challenge here is that there are no known costs for preparing graves in rural areas as this is done communally through community arrangements with no clear costs. Further, for fitting a tombstone, costs vary on a case-by-case basis and only cover the materials and labour and possibly the attendant ceremonies. This still ignores the unknown cost of making the graves and the land for the grave itself. Also, how was depreciation handled in the valuation since there are no such data. Methodologically, what is clear is that graves cannot be valued based on market value or market-related bases and methods, because they are non-market assets. These findings are consistent with those established elsewhere by Aluko et al. (2008), Sheehan (2000) and Witter and Satterfield (2014). Thus, as non-market assets, they can only be valued better using non-market bases and methods.

The study also shows that where no property markets exist but valuers are forced to apply market value basis, the main procedural challenge is getting supporting data. The study highlights that in such circumstances, valuers use any data accessible to them from various sources including urban land markets. Data from urban markets relate to private properties typically and generally inapplicable to properties in rural areas because of differing socio-economics, nature of properties, valuation conditions, recency and nature of comparable transactions themselves, among other factors. These variations lead to unacceptable adjustments that realise non-representative values for subject properties and hence inappropriate compensation. Further, the study established that valuers use such data in assessing compensation because they have no alternative data sources. With such imported and incomparable data, determinate market values fail to obtain as needed conditions do not arise.

Further to the preceding argument, most data believed to be and taken as genuine market comparables are accessed from fellow valuers or from valuers’ own previous valuations and other sources that are in various socio-economic environments. However, in rural areas with absent land market scenarios, such data relate to particular properties or transactions. On the other hand, such information may not have been generated in any market settings or by market forces as believed, thereby being untested against market value expectations. This is the case in rural areas as the study has shown that official land markets for both customary and private
land are non-existent. They may thus be irrelevant market evidence when assessing compensation based on market value, as they themselves are unrelated to any market value, thereby giving inappropriate amounts purported as market values. Regrettably, valuers trust such information at face value because they created it, came from other valuers whom they respect and because nobody monitors their work to point out such shortfalls. This is an inherent challenge in private property valuations and transplanted into customary land assessments. Fundamentally, what happens is like assessing compensation in the dark because none of the required conditions for market value to obtain exist in these settings. In other words, in these settings, valuers are forced to create values ex nihilo for expropriated properties where theoretically, none existed. This is also well articulated by Adams and Tolson (2019), Mooya (2009) and Sanders (2018).

It is also critical to point out that, while gazetted price or income data (GRM, 2010) purported to have been used in assessing compensation for biological assets seem better, they were outdated themselves and needed to be improved if they were to be applied. The best way would have been to ask the affected parties what their returns are from their trees and also consult the relevant government ministries responsible on what are the current price rates for biological assets. Otherwise, it is clear that practices involved in assessing compensation for lost trees contribute to unfairly low compensations. It is thus imperative that compensation must be given the seriousness it deserves if expropriatees are to be prevented from impoverishment by using up to date information.

We now close this section with a review of our main research question regarding how valuation of expropriated customary land rights for compensation purposes is conducted to achieve appropriate compensation. The results of the study indicate that expropriated customary land rights are assessed based on market value and determined through various market-based valuation methods. The study also shows that the resultant compensation is mostly inadequate in general terms and fails to achieve intended compensation goals of fully indemnifying and wholly restoring expropriatees. Further, it has been established that the use of market value as the only basis for assessing compensation relates to the adoption of indemnity compensation theory in the relevant compensation laws. This theory requires that all compensations for expropriated land rights and related losses such as severance and injurious affection be related to their market value if ensuing compensation is to qualify as fitting and not otherwise. The results also illustrate that the challenge with this compensation basis is that it requires
functioning property markets to provide required comparable evidence to support its manifestation. Where property markets are thin, non-existent or where unregulated property markets dominate, then it fails to materialise. Principally, the study has established that this is the case with customary land rights - they have no official markets and we know through this and other studies that their exchanges are through traditional and officially unregulated ways. This chokes any availability of relevant supporting market evidence for such properties.

Fundamentally, what the study results are telling us is that while the core desire of indemnity compensation theory of fully restoring expropriatees through fair compensation is applicable to customary property rights, the theory fails to fully embrace these land rights because of its need to benchmark compensation on market value and no other standard. On this aspect, the study illustrates that all compensation factors based on their market value (expropriated land, severance and injurious affection) are almost inapplicable in their current forms or interpretations to customary land rights. This is partially because of the lack of market value’s fundamental requirements and partly due to the nature of customary land rights. To circumvent these challenges and be able to satisfy the core objectives of indemnity compensation ideology for customary land expropriatees, the study demonstrates that relevant changes to the core compensable variables of the indemnity compensation theory are inevitable.

Additionally, the study shows that the chances to achieve appropriate compensation for expropriated customary land rights also depend on compensation assessment bases and methods that are fittingly applicable to these land rights. Impliedly, this entails that there should be institutional or legal frameworks that ensure an environment that is supportive to the realisation of desired compensation and state of restoration of expropriatees, by among other things, having suitable compensable factors, valuation bases and methods that support the valuation of customary land rights in their own true sense and not in borrowed robes that mimic private land rights.

7.5 Policy implications of the findings

Fundamentally, the preceding analysis demonstrates that the current legal and practical environment for administering compensation for expropriated customary land rights is generally unconducive to achieve intended compensation outcomes. The policy implication of this is then that consistent and conducive settings to catalyse realisation of appropriate
compensation must be sought. To achieve that, there is need for relevant policies and/or policy interventions whose main aim is to ensure that expropriatees are treated fairly and their livelihoods restored reasonably and not impoverished. It is only under such settings that indemnity compensation for customary land rights becomes plausible and not otherwise. Thus, the overall goal of policy intervention should be to provide adequate laws and specific guidelines and standards that encourage adequate compensation directed at restoring expropriatees. Furthermore, such laws must be unambiguous, uncontradictory and complete by providing for all relevant aspects. Essentially, the starting point for such policy interventions are the laws themselves by looking at such variables as theoretical compensation orientation, nature and adequacy of applicable compensation laws, compensable items and compensation assessment methodologies.

Regarding the theoretical compensation orientation in Malawi, we have seen that Malawian compensation laws derive from indemnity compensation theory. The implication of this finding is that existing laws must endeavour to provide a conducive environment in which expropriatees are fully compensated and wholly restored such that their post-expropriation social and economic wellbeing is not worse-off than before. This is believed to be achievable where compensation variables include expropriated land, severance, injurious affection, disturbance, consolation and special values. The study results also indicate that in the case of expropriated private land rights, this is theoretically achievable but that current laws provide fewer compensable items. These include market value of expropriated land/interest, severance, disturbances and relief or consolation. To meet the desired compensation goals then injurious affection and special value losses should be taken on board as part of compensation variables. Since current compensables are provided in the Lands Acquisition Act (2017), then it is only proper that it is revised to include the missing items to meet indemnity compensation requirements. Thus, the law should indicate market value of land/interest, severance, disturbance, consolation, injurious affection and/or special values as required compensables for expropriated private land rights. However, it is important to remember that special values are normally disregarded under private land compensation, as stated elsewhere.

In terms of compensation assessment basis, market value remains the standard for the valuation of expropriated private land. As for valuation methods, current laws do not outline any methods and it is thus required that the commonly applicable methods, that is comparison, income and cost should be prescribed in the law. Additionally, the law should also provide that where
market value basis and prescribed methods are not applicable, other suitable bases and methods that the valuer considers appropriate should be adopted. Thus, Lands Acquisition Act should state these requirements clearly to avoid any confusion and make it the most explicit reference point for compensation matters in Malawi for private land rights.

Similarly, the study shows that adoption of indemnity guided compensation for expropriated customary land rights entails full indemnification and re-establishment of expropriatees. This means that the six compensable variables under indemnity compensation are to be satisfied. However, because customary property rights are different in their existential nature to private properties, it has been established that some of the variables are inapplicable in their original forms while others are totally incompatible. The expropriated land and injurious affection are thus admissible only when their assessment basis is not market value, while severance falls out completely as elaborated elsewhere. Thus, for expropriated customary land, then compensation must cover expropriated land, disturbance, consolation, injurious affection and special value losses. However, considering that customary land rights also comprise non-material aspects, then compensation would be satisfying if those were also considered. Since special values and non-material features of customary land overlap variously, then these two form one compensable variable, special value/non-material losses. Adopting these variables as required compensable items for expropriated customary land would thus represent a full loss.

To ensure that no significant losses are excluded from compensation, then it is pertinent to look at the actual losses suffered by customary land expropriatees as outlined in subsection 7.2.4, and add any items that are not covered by the other selected compensables. And since no key laws prescribe any compensable items for expropriated customary land rights, it is imperative that this gap be addressed and do away with subjective compensation packages. Thus, to achieve indemnity compensation for expropriated customary land rights, it is proposed that the following list of compensables be adopted in the relevant law:

i) Land;
ii) Building structures;
iii) Biological assets;
iv) Man-made and natural resources;
v) Communal/common assets;
vi) Land-based economic activities;
vii) Income from various economic activities and resources;
viii) Businesses;
ix) Special value/non-material losses;
x) Disturbance;
xi) Consolation; and
xii) Additional items such as regular supplies, subsidies, food stuffs and tree seedlings.

While we might be familiar with some of these items from the literature, some need a little elaboration. Additional items include regular supplies, subsidies, food stuffs and tree seedlings which are rarely considered in most compensations. Results of the study indicate that customary expropriatees have difficulties in re-establishing their livelihoods in most cases because their livelihoods have generally been disrupted differently. Where expropriatees become food insecure as seen in Mombera and Phalombe case studies, it is proposed that expropriatees in rural areas be given regular supplies and food stuffs for a certain period of time, say 12 months or such period depending on severity of their situation to support them re-established. It would also be ideal to consider providing farm subsidies for expropriatees to kick-start their new livelihoods where necessary. Likewise, the study has observed that generally, expropriation contributes to environmental degradation through deforestation among many other factors. To address this issue, it is suggested that expropriatees be given seedlings of various trees, including fruit and non-fruit ones, to establish household level woodlots as well as communal forests to mitigate environmental issues. Elsewhere, such compensation practices are observed in Tanzania (GURT, 2001b). It is important to note that this list of compensable variables is flexible and can change depending on the situation on the ground because some issues may not arise or may have to be added. It is thus expected that since Customary Land Act (2016) is the presumed key law for customary land matters in Malawi, it should be reviewed to adopt the suggest list of compensables. The study believes that compensating these items would ensure that expropriatees are fully restored and not impoverished as currently the situation is. Additionally, such a list would erase all subjectivity on what to compensate and what not to when it comes to expropriated customary land.

In addition to lack of a full loss list or compensables, the study shows that another key issue blamed for inadequate compensation for expropriated customary land rights is the basis on which their compensation is assessed - market value. Policy wise, this implies that any compensation for expropriated land has to be founded on market value only. It has been demonstrated by the results of the study that in the case of expropriated customary land, there
is no clear basis adopted, but that in practice, market value is taken as the de facto basis. It has also been indicated that valuation practices based on market value for expropriated customary land rights have proved inefficient and results in non-representative compensation amounts because of lack of official markets to furnish needed market evidence to support their valuation. Because customary land rights are considered non-market properties, this study considers that \textit{non-market value basis} would be ideal in the current settings for several reasons. First, as the study has undoubtedly demonstrated, customary land rights are partially made of non-material features whose values are only known to the landholders. Second, these non-material aspects of customary land rights have no markets where they can be exchanged. They are fundamentally non-market resources. Third is that customary land rights in their entirety have no official markets in which they can be traded, hence no supporting information. Finally, any transactions involving customary land rights are guided by traditional arrangements that defy standard market value requirements as they use non-market mechanisms and values. All these findings support adoption of non-market value bases for expropriated customary properties. Essentially, it is necessary that Customary Land Act (2016) be amended to include this proposition.

Because market value is the only recognised assessment basis, the study illustrates that only market-reliant valuation methods such as comparison, income and cost, are applied in determining compensation for expropriated customary land rights. Because of the factors discussed in the preceding paragraph on market value, these methods are also deficient and fail to provide intended results, thereby contributing to inadequate compensation. It is thus clear that policies must seek to achieve appropriate compensation by having suitable compensation assessment methodologies. Because of the prevailing non-market conditions, it is imperative that non-market valuation methods be adopted. In Chapter 2, several non-market valuation methods including contingent valuation, hedonic pricing and travel cost are discussed. Of these, CVM is seen to be much better placed to achieve intended compensation goals because it does not depend on market data. Essentially, the study suggests the adoption of the contingent valuation method as a possible method for assessing expropriated customary land rights for compensation purposes.

While many CVM studies have been done, only a smaller number of them have focused on compensation for expropriation as discussed in Chapter 2, albeit all being hypothetical. Thus, while this study proposes that CVM should be adopted in assessing compensation by eliciting
value information from expropriation affected people, this is done without any prior guiding
tactical applications, as far as we know, and thus requires further research. In operationalising
contingent valuation in assessing actual compensation, affected people or expropriatees will be
required to provide their losses and compensation claims using a specially formulated Compensation Claim Form (CCF), which will act as the survey instrument. The core part of
this form concerns expropriatory losses, inconveniences and additional items as necessary that
affected people will have to provide. The list of losses proposed above for expropriated customary land will form the core compensables that expropriatees will have to choose from.
There will also be space where additional losses can be itemised by expropriatees. Thus, both
choice and open questions on losses will be used. Affected people will also be required to
provide contingent values for listed losses/inconveniences as and where necessary. Other
sections on the form will include a brief background to the project, if necessary, purpose of the
survey, role of expropriatees in the exercise, and how to complete the form; biodata; mode of
compensation preferred; and required welfare services or assistance to ably relocate to their
new sites; among others. The CCF will have to be concise but informative to respondents. To
improve communication with respondents, languages that affected people accept and
understand better should be used, as Whittington (1996) emphasises.

Affected people will also be sensitised on project aims, goal of survey exercise, their duties
and how to fill the CCFs and other aspects on the form. A demonstration will be required for
each project and survey on completing the form. After sensitisation/demonstration, affected
people will be given the CCFs to complete, followed by face-to-face discussions between
assessors and affected people over contents of the CCF and to clarify any ambiguities. For
some losses, like public and common assets and resources, CCFs will be filled by either local
leaders and elders, a committee or through an FGD, followed by discussions to validate the
issues as necessary.

As the study has shown that expropriatory losses related to customary land rights are diverse
and beyond the land itself, not all such losses can be known and be enlisted in the law. Thus,
to ensure that all relevant kinds of losses are considered, the CCF should be styled as an
entitlement matrix meant to inventory all relevant losses at individual, household and/or
community level, all affected parties and how best to handle them so that expropriatees are
fairly treated. This is expected to help in setting compensation standards by providing a range
of measures to mitigate expropriation losses and disturbances (ADB, 1998; AfDB, 2003).
For special value/non-material losses, their compensation amount will be a proportion of the amount attached to expropriated land. It is proposed that a minimum proportion of 25% be considered because special value/non-material losses are an important part of customary land rights and contribute significantly to people’s livelihoods. Additionally, this will also carter for injurious affection as discussed elsewhere. Depending on severity of losses suffered by expropriatees, this rate can go up to 75%.

Disturbance compensation depends on losses suffered and activities curtailed, and thus will depend on prevailing costs or prices of items or services concerned. Consolation will be assessed as a proportion of the compensation amount attached to expropriated land. To avoid any subjectivity on this, a proposition of interest rate for fixed bank deposit account seems fair since this is just sorry money. In other words, this is paid to console the affected people. And in any case, in the various Malawian cultures, it is understood that consolation is never too little nor too large. It is up to the one consoling to decide how much they can give to the consoled.

Once these compensables are valued, they can be satisfied in several ways. For expropriated land, results of the study have shown that the common mode of compensation is cash money as expropriatees resettle themselves. However, the same study has found that expropriatees in rural areas prefer replacement land than cash because of inadequate compensation issues that fail to restore them. It is thus an option that the law can take to replace expropriatees. Similarly, for building structures, apart from cash, compensation can be through alternative structures provided by the taker. A case in point is the Millennium Challenge Account project in the electricity sector in Malawi whereby expropriatees were given money or replacement houses based on their choice of compensation. Where biological assets are lost, they are normally compensated in cash. This can be supplemented by some household and communal afforestation projects as discussed already. It is thus expected that all these propositions will be adopted into the Customary Land Act (2016) since these issues concern customary land.

For public, common and open access resources, it is challenging to quantify losses of each beneficiary. One way to circumvent this is to provide alternative assets or services for communal use as compensation. This suggestion is also proposed by FAO (2009). Thus, Customary Land Act (2016) needs to be amended to take into account these suggestions to improve the situation because currently, all these are not provided for or are vague.
Furthermore, it is believed that such amendments will improve the situation and meet minimum compensation requirements for customary land, which the study showed that they are not satisfied.

At the general statutory level, the study observes that there are many laws providing for compensation in Malawi, thereby resulting in ambiguities, inadequacies and contradictions in various ways, that bear an unconducive compensation environment. It has also been demonstrated that while the laws adopt various compensation concepts, they do not have any common definition or shared meaning/interpretation to standardise their application, thereby resulting in subjective decisions. To circumvent these issues, then some policy changes must be undertaken to lessen the number of compensation laws to only two to cater for private and customary land. This means that all laws providing for compensation for private land expropriation should be reviewed and all compensation matters condensed into the Lands Acquisition Act only. This then requires that this law be thoroughly reviewed and comprehensively improved to stand to the new status and responsibility. This law must also cover all issues including relevant conceptual definitions.

As for customary land expropriation and compensation, Customary Land Act should be the reference law and no other. Essentially, this law should also be revised to embrace all relevant matters with clarity and straightforward procedures. These suggestions then cover issues of many laws, lack of specific laws for expropriation and compensation generally.

The study also revealed that customary land rights are poorly represented in current compensation laws generally, as evidenced by the lack of adequate engagement with them. This entails that customary land and its attendant rights are not well articulated in these laws, making it difficult to know what they are and how to handle them during compensation assessment. This issue has been answered by the formulation and adoption of Customary Land Act (2016) to some extent. Unfortunately, this law still lacks in some critical aspects. A clear example is the absence of customary land held by individuals, families or clans privately which is their treasured asset. Thus, it is necessary that relevant changes be made to address the existing gaps by reviewing Customary Land Act (2016) and other relevant laws.

It has also been discovered by the study that in Malawi, despite expropriation being there for decades, a national resettlement policy is not in place to guide how expropriatees are to be
resettled, how to compensate and what other welfare services to provide to help them resettle comfortably in their new areas. This implies that it is necessary and urgent to formulate and adopt a national resettlement policy as soon as possible.

The other simmering matter unearthed by the study regards legal language used in Malawian laws - English. It has been observed that no single law is written in any vernacular language, thereby limiting their popularity among local Malawians. The study proposes that all laws including compensation ones should be in local languages to improve their popularity and also ensure that Malawians are aware of their own laws and their property and human rights, and not feel ambushed when things are happening. Thus, it is imperative that Parliament and the Law Commission should consider this seriously and instigate some changes.

As for practical issues, the results of the study show that undertaking valuation through market-based methodologies for private properties is challenging in Malawi because relevant property markets are either underdeveloped or non-existent. This is further complicated by dysfunctional official land registries. It is thus necessary that current registries be revamped while considering a decentralised system of property data management as recommended by the MNLP (GRM, 2002). It is further suggested that all land records should be digitised and made available online at a fee. Furthermore, all transactions should be duly recorded to have complete market data that is easily accessible. To achieve this, then property data clearing houses should be established using relevant technologies on top of official land registries. Also, relevant staff members need to be trained in all new developments so that they are able to perform to expectations. These suggestions are expected to ease data access, provide most recent and complete data and also reduce difficulties in trying to verify comparables. However, for them to be acted upon, there is need for policy review to embrace clearly in relevant laws, such as Registered Land Act.

The study has also shown that market data for assessing compensation of biological assets are normally compiled and gazetted by government at national level. However, it has been observed that available data is normally outdated due to lack of updating. For example, current available data are of 2010 and not updated. This results in inadequate compensation and government must endeavour to update such data regularly and timely, such as annually, so that current data are always available when needed.
The other issue established was that of involvement of uncertified government valuation officers in assessing compensation generally. It has been shown that this contributes to unfair compensation. The laws already provide that only certified valuers must assess compensation and the observed behaviour by government is a breach of such law and hence unconscionable. Government is thus urged to respect and implement legal provisions justly and take compensation matters seriously and let only certified valuers do the job. Where uncertified valuation officers are to do the assessment, then they should only do that under the supervision of registered valuers but not all alone.

The study has also indicated that valuers assessing compensation for various properties using the cost method generally apply depreciation which essentially reduces compensation amounts. However, and as stated elsewhere, there must be a deliberate policy to dissuade valuers from depreciating value of expropriated properties as it contributes to unfair compensation. A strong case against depreciating rural properties is that these are considered as low value and depreciating them just takes what little value was there away. This should be provided for in Lands Acquisition Act and Customary Land Act as presumed key compensation laws.

For customary land rights, practical issues established by the results of the study that contributed to unfair compensation were many and include lack of description of a full loss and their compensables, absence of valuation basis and methods, non-existent of official markets and exchange data, use of data from elsewhere, temporal nature of rural properties, subjective compensation packages, absence of specific guidelines and treating customary land as private and/or public property. All these issues have been addressed in this chapter variously. On treating customary land as public property, the study has shown that this notion is wrong because the land belongs to the holders and hence exclusive and compensable. This has also been strongly reprimanded by MNLP and that any taking of customary land must be duly compensated (GRM, 2002).

As regards perceptions of expropriatees on compensation adequacy, the findings of the study show that compensation was generally inadequate because most losses and inconveniences including disturbance, consolation, relocation and re-establishment expenses, lost income and businesses among others were not compensated. These exclusions are blamed on the inadequacy of the laws and subjectivity of assessors and government in choosing which losses to cover and which ones not. For customary land, such omissions are expected because existing
laws do not provide any guidance on what to compensate and what not to. Generally, the study puts the blame squarely on the laws that are inadequate to achieve intended compensation goals and government for not showing much interest to improve the situation. Even after being repealed, Lands Acquisition Act (2017) need to be amended again to improve the list of losses to include injurious affection for private land. As for losses regarding expropriated customary land, it has already been suggested that Customary Land Act be revised to include the list of compensables discussed earlier in this section to avoid any omissions in future.

The other issue blamed for lower compensation are delays in paying compensation from the effective date of the valuation. This implies that compensation received does not represent losses suffered because of time lapse. To cover for this, two options are normally employed in practice. First one is that interest at prevailing commercial bank rate is applied to the amount delayed for the delay period to cover time value of money lost. The previous Lands Acquisition Act (1971) provided for this in section 9 but without any prescribed rate. Unfortunately, it was never operationalised for reasons known to government only. To make matters worse, the repealed Lands Acquisition Act (2017) has completely removed this requirement. This study proposes that interest should be paid to expropriatees for any compensation delay at prevailing commercial bank rate applied to savings account at compound interest. The other option is revaluing the properties when the validity period of the value expires. However, considering the magnitude of work for big projects, paying interest seems logical. Thus, the study strongly recommends the interest option to make good what has been lost. Thus, Lands Acquisition Act and Customary Land Act should be revised to include these issues of interest accordingly.

Furthermore, the study revealed that expropriatees were intimidated in various ways by government and local leaders to let government take the land without voicing out their concerns. It was also indicated that they were never consulted on anything but only told. This implies that expropriatees had no choice or power to appeal for fair compensation where they felt that things were not right. In Phalombe, some expropriatees were bold enough to challenge government on inadequacy of compensation and ask for re-assessment. These issues are products of poor governance as expropriatees did not know what the law says, their property and human rights and how to use the court system when seeking justice. Actually, one government respondent confirmed that they do not give all relevant information to expropriatees fearing delays with the project when people start objecting and appealing. Similarly, some expropriatees reiterated that they did not know that they can stand up to
government and even take it to court because they were not sensitised adequately. It is thus very critical that people are duly notified and sensitised as required by law through various means. People should be sensitised and/or trained on their property rights, human rights, expropriation and compensation processes and the complaint redress system. These issues are lacking in the case of customary land and Customary Land Act should ensure that these issues are part of its contents through reviews.

The trainings can also include issues of financial management after expropriation and compensation, income generating activities, dispute and stress management among others. For these issues, the need for a national resettlement policy becomes inevitable so that government has a clear plan of action on how to relocate and resettle expropriatees while ensuring minimal demoralisation. Similarly, such policies should address issues of compensation assessment and post-expropriation welfare of affected people and communities.

In conclusion, evidence from the study shows that compensation requirements lean towards indemnifying affected people and that this aspiration is choked by inadequate laws that provide an unconducive compensation environment. Practically, it has been shown that compensation is assessed through market-reliant procedures albeit there being no formal markets or underdeveloped ones. This practice results in inadequate compensation. To circumvent these challenges, several suggestions for policy intervention have been made. The thesis believes that these suggestions would help in addressing the various challenges faced and make the compensation environment more vibrant to achieve intended compensation aims. It is also expected that these suggestions will ensure that all parties know what is happening and state of each activity; trust among them; improved transparency in compensation assessment process; reduced fraud, corruption and exploitation of expropriatees; improved information sharing; reduced unilateral compensation reductions by government; improved participation of affected households in determining compensation and relations between affected parties and government; among others. These changes are meant to achieve indemnity compensation and ensure that expropriatees are restored as best as the legal and practical environments can do.
Chapter 8: Summary, contribution and further study

What I would say is that the legality of it [compensation] is deficient. The people who are doing it are not well trained or supervised. Then I would say there are a lot of deficiencies in compensation.... It is very challenging to meet what the law demands because the Constitution says it is appropriate. With those deficiencies, it is very difficult to achieve appropriate compensation, therefore all the compensations are unconstitutional.

Oscar Matope, 26th October 2016, Lilongwe City.
8.1 Thesis summary

As countries are increasingly providing various public and private investments in pursuit of diverse national and international development agendas, the prevalent customary land rights are increasingly the subject of expropriation. Such takings lead to various effects on affected people’s livelihoods as compensations have mostly been inadequate to fully indemnify and wholly re-establish them as before or better. For expropriated customary land rights, such compensation has been based on market value as the best benchmark that seemingly ensures fair compensation and reasonable re-establishment of affected livelihoods even where land markets are officially or practically non-existent. While numerous studies relating to compensation for expropriation have been conducted elsewhere, none has been done in Malawi. This study fills that gap nationally and internationally, as compensation issues are becoming more prominent because of their destructive effects on expropiators’ livelihoods.

This research primarily aimed at analysing current compensation practices for expropriated customary land rights to establish whether they or not result in adequate compensation. This goal was to be realised by analysing the theoretical positioning of compensation laws in Malawi, adequacy of applicable compensation laws in achieving appropriate compensation for expropriated customary land rights, practical challenges affecting realisation of appropriate compensation for expropriated customary land rights and perceptions of expropriators towards actual compensation adequacy. Within the wider objective, the study expected to establish that existing practices of valuation for compensation presupposes private land rights and functional land markets, and thus lead to inadequate compensation for expropriated customary land rights, thereby contributing to knowledge and policy development in these increasingly topical areas. While set in Malawi, the study has broader implications in many jurisdictions where customary land rights are prevalent and face similar challenges regarding compensation for expropriation.

This thesis spans over eight chapters, with Chapter 1 introducing the study problem, preliminary literature review, goal and objectives and study significance. Chapter 2 examines indemnity and taker’s gain compensation theories and their applicability to customary land rights to provide a basis for examining compensation valuation practices for customary land rights in Malawi. Essentially, the chapter develops the conceptual framework for the study. Chapter 3 contextualises compensation issues by examining four country case studies, namely Ethiopia, Ghana, Nigeria and Tanzania to see how they address the compensation question for expropriated customary land rights. The chapter analyses legal provisions, property rights and
compensation requirements in these countries comparatively. The analysis establishes that there is not much analysis on theoretical orientation of compensation laws and adequacy of extant compensation laws, as they focus on application issues mostly. The analysis also reveals that it is difficult to realise required compensation based on market value because of challenges in comparable data availability and dominance of customary/native land rights and/or public land rights. Additionally, the examination shows that there is no universally applicable compensation model or valuation methodology for expropriated customary land rights.

In Chapter 4, the political and socio-economic character of Malawi and the study districts of Mzimba, Phalombe and Salima is presented. Despite running a dual/hybrid tenure system, customary land tenure prevails (at over 70.0%) over statutory private land (at about 3.0%). This implies that most expropriations in Malawi involve customary land rights. Legally and practically, Malawi bases compensation on market value of expropriated land rights, supported by a multitude of compensation statutes with the Malawi Constitution, Lands Acquisition Act, Land Act and Customary Land Act being the key ones. The many compensation laws are blamed for confusing the compensation environment and affecting consequential processes and outcomes. These contextual aspects avail an environment relevant for posing general questions and getting answers regarding compensation for expropriation, more especially for customary land rights. Also, while Malawi is physically small in size, it has a higher and growing population, thereby compounding land issues and compensation challenges. Its size also made it possible to have three case studies spread across the country and cover them within the study time available.

Chapter 5, while examining previous empirical works on compensation, also contextualises the main empirical and practical issues facing research in compensation. The chapter then analyses previous research works to scrutinise conceptual frameworks used and see if they are applicable to this research. Consequently, none of the conceptual frameworks seemed applicable due to the nature of the study questions and the proposition. The chapter then details the study’s conceptual framework, before presenting the adopted methodology, detailed research design and its implementation. Chapter 6 presents the study’s key findings as Chapter 7 analyses these findings and presents key policy implications of the findings.
8.2 Key findings, conclusions and recommendations

The study examines whether current compensation practices for expropriated customary land rights result in adequate or inadequate compensation. The working hypothesis is that existing practices of compensation presupposes private land and functional property markets, and hence lead to inadequate compensation for expropriated customary land rights. The study finds that all existing compensation statutes orient towards indemnity compensation theory through their adopted compensation concepts. The study shows that the implication of this is that property rights are presumed to be private and freely exchangeable in existing and functional land markets. That any expropriated land should be fully compensated by covering the land taken, severance, injurious affection, disturbance, consolation and/or special value losses. And that all compensation assessments are to be based on market value only. The study also demonstrates that these requirements are mostly achievable for private land rights generally except where the required compensation variables are inadequate or property markets are underdeveloped or non-existent as seen in the case of Malawi.

Contrariwise, the study illustrates that customary land rights are not private assets in the statutory sense, neither are they legally exchangeable as they have no officially sanctioned markets. Furthermore, it is seen that formally, there are no clearly outlined compensable items, compensation assessment basis and methods for expropriated customary land rights thereby subjecting them to existing methodologies meant for private land. Essentially, the study indicates that because of these core issues, compensation for expropriated customary land rights is inadequate and cannot indemnify nor restore expropriatees, thereby impoverishing them.

In order to achieve the intended indemnity compensation for expropriated customary land rights, the study recommends the adoption of various compensation items including the expropriated land, building structures, biological assets natural and man-made resources, communal/common assets, land-based economic activities, lost businesses and incomes, special value/non-material losses, disturbance, consolation and additional items. Such a compensation package is believed to be reasonable enough to fully indemnify and restore customary expropriatees. This recommendation also addresses the issue of omission of various expropriatory losses from compensation due to absence of a clear-cut compensation package for customary land. Similarly, the study proposes that in the case of compensation assessment
basis, a *non-market standard* be adopted to be equally supported by a non-market valuation methodology - *the contingent valuation method*. This is because the study has shown that property markets are generally non-existent in rural areas, making use of market-based methodologies difficult. Furthermore, customary land is officially an off-market property thereby requiring non-market bases and methods. It is thus recommended that these propositions be taken on board in the Customary Land Act to improve the situation.

Legally, the study finds that existing compensation laws in Malawi are inadequate to achieve appropriate compensation for expropriated customary land rights. Among other factors, it has been found that the laws lack any meaningful engagement with customary land rights thereby failing to provide adequate guidelines on how to handle them during expropriation and compensation. While some issues like those pertaining to their existential nature are partially addressed by Customary Land Act (2016), some key challenges remain on how people hold land under customary tenure in terms of their categories, what compensables to consider during compensation assessment, on what basis should compensation be assessed and which methodologies to use. Essentially, on the first issue, this study responds by proposing that the law be revised to include customary land exclusively held by individuals, families and clans as a standalone category. Other categories to include under customary land are communal/public, common and/or open access resources, as discussed in Chapter 4. As for the other issues, they are addressed in the discussions that follow.

The study also confirms that there are various challenges constraining achievement of adequate compensation for customary land rights. The key problem is that customary land rights are officially non-marketable properties and assessing them using market-reliant methodologies is technically challenging and produces unfitting results. As customary land rights are non-market assets, they should be treated as such. Essentially, the study has made propositions that their basis and assessment methods be non-market as well.

Furthermore, the study illustrates that expropriatees perceive received compensation as inadequate because most of their expropriatory losses are omitted in compensation packages. The study vindicates that one of the reasons for such omissions is because there are no clear compensation variables and that compensation is mainly decided subjectively. Essentially, this entails that compensation results in inefficient, arbitrary and unfair takings and higher demoralisations costs for expropriatees. To circumvent these challenges, the study suggests
that compensation should cover land, severance, injurious affection, disturbance, consolation and/or special value for expropriated private land. As for expropriated customary land, the challenge of omission of losses and lack of any compensables is already addressed in paragraph two of this section. It is thus recommended that Land Acquisition Act (2017) and Customary Land Act (2016) be revised to adopt these suggestions so as to improve compensation for expropriated land rights in Malawi.

8.3 Thesis contribution to knowledge

The study contributes to existing compensation knowledge in various ways, including theory development, empirical literature and policy development.

8.3.1 Contribution to theory development

Broadly, the study makes several contributions towards theory development. The study shows that none of the previous empirical works on compensation used a conceptual framework that is grounded in indemnity and taker’s gain compensation theories. This led the study to develop its own conceptual framework informed by these two compensation theories for the analysis of its findings. This represents the first significant contribution. The second contribution to theory relates to the newly developed conceptual framework. This conceptual framework provides an analytical tool and hence a platform on which future research works related to compensation for expropriation of various property rights and other testable research propositions with potential for broader application and long-term research agenda can be grounded upon.

Further, the study illustrates that there has been no prior research works that have tried to extend the canons of these compensation theories to customary property rights and other non-private property rights as well as private properties located in rural areas where there are no functioning property markets. By using Malawi as a case study together with the study’s conceptual framework, this study does that. The study also shows that compensation laws in Malawi adopt indemnity compensation principles. Thus, by examining the theoretical orientation of current compensation laws in Malawi, the study demonstrates how the indemnity theory is institutionalised in the compensation system in Malawi and the case study countries. This is another contribution towards theory.
Further, the study demonstrates that in the case of customary land rights, there are several challenges in applying the indemnity compensation theory in its entirety. The first theoretical deficiency concerns the nature of the core compensation variables demanded by indemnity theory. It has been demonstrated that not all six variables are applicable to customary land rights because of their nature and requirements and thus require modification. This has led the study to come up with an entirely new list of compensables by combining some of those demanded by indemnity theory and other losses based on nature of customary land rights. Such recommended compensable items, as also enlisted under section 8.2, include expropriated land, building structures, biological assets, natural and man-made resources, communal/common assets, land-based economic activities, lost businesses and incomes, special value/non-material losses, disturbance, consolation and additional items. This represents a fourth contribution to theory development.

Another challenge with the theory in its original form is that it requires market value as its only basis for land, severance and injurious affection. This study demonstrates that market value basis is difficult to apply and achieve in environments where land markets are non-existent or underdeveloped, as in Malawi. In this regard, the study recommends the adoption of non-market value as the ideal basis for assessing compensation for customary land and other non-tradable properties. Essentially, this is the fifth contribution towards the development of the indemnity compensation theory and its application to customary land rights and other non-market properties.

Additionally, the study reveals that market-based methodologies used in determining market value are challenged where market evidence is rare. Also, the study illustrates that for expropriated customary land rights, there are no sanctioned compensation assessment methods and that market-based ones meant for private land are used. This has led the study to suggest that in such settings, the most applicable valuation methods are non-market ones. Essentially, it recommends the adoption of contingent valuation method as a possible solution to address this theoretical drawback, thereby making a sixth contribution to theoretical development and applicability. These are among the most significant contributions towards theory development that this study makes.
8.3.2 Contribution to empirical literature

Fundamentally, the study contributes towards deepening our understanding and knowledge regarding expropriation, compensation and valuation of customary land rights and private land rights in rural areas based on existing legal frameworks and practices. Specifically, it has already been highlighted elsewhere that this is the first study of its kind and at this higher level regarding expropriation and compensation in Malawi. It thus contributes towards that knowledge gap locally and globally. It has also been demonstrated that existing empirical literature on compensation lack sufficient theoretical analyses of relevant laws to establish the purposes of their adopted theoretical compensation orientation. This study does that, thereby contributing towards that knowledge gap fundamentally.

Regarding responsiveness or adequacy of existing compensation laws towards adopted theoretical stances, the study illustrates that none of the previous research works address this issue. This study does and thus makes another contribution towards current empirical knowledge. In relation to nature of applicable laws, the study demonstrates that reviewed empirical studies lack on analysing what compensables, valuation basis and methods are relevant in relation to adopted compensation principles and are actually provided. This has been covered in this study, and hence fills the existing gap to some extent.

Furthermore, the study shows that reviewed empirical works on compensation are not adequately informed by relevant compensation theories, making it challenging for such works to be applied to others or to be generalised to similar works and contexts. This study uses indemnity and taker’s gain compensation theories as its stepping stones and conceptual framework, thereby addressing this gap in existing empirical literature.

Fundamentally, it has also been illustrated that there is poor engagement with the nature of customary land rights in studies and laws reviewed, making it more challenging to work with such land rights. Essentially, the study has covered that aspect, thereby making a contribution to empirical knowledge. Finally, by addressing the various issues and gaps in existing empirical literature, this study generates some literature which respond to current topical issues under debate on compensation and valuation of customary land rights generally.
8.3.3 Contribution to policy development

Findings of any worthwhile research must address practical challenges by influencing relevant policy development and interventions. In that regard, the study makes several contributions towards policy development. The first such contribution is broadly directed towards improving the general legal compensation environment. As the study indicates, there are many laws providing for compensation in Malawi and that this results in an unconducive compensation environment. The study suggests that all these expropriation and compensation laws should be repealed and that the current Lands Acquisition Act should be the principal expropriation and compensation law for private land rights. For customary land, the Customary Land Act should be the main law. Thus, there should only be two laws addressing expropriation and compensation in Malawi. The study thus strongly urges that these suggested laws be developed further to strengthen them and address their current deficiencies. For example, one of the areas to focus would be clarity of procedures, guidelines, compensation assessment bases and methods for expropriation and compensation generally, as current ones are vague or non-existent. Additionally, these recommendations also respond to challenges of lack of specific expropriation and compensation laws generally, as underlined by the study. It is further expected that these suggestions will help in improving governance, accountability and transparency regarding expropriation and compensation.

The study also indicates that compensation payment is often delayed. It is suggested that the law must be clear in making compensation payment to be within the validity period of the values, which is mostly six months. Where payment if delayed, the study proposes that compound interest at commercial bank rate for savings account be paid for the amounts owed for the delay period. Since this is not provided for at the moment, then it must be clearly stated in the Lands Acquisition Act and Customary Land Act so that assessors and expropriators are aware and be prepared for that.

The other general issue concerns application of depreciation when using the cost method in assessing compensation for expropriated structures. The study recommends that affected structures should not be depreciated as that lowers compensation further, making restoration difficult.

As regards underdevelopment or non-existence of functioning property markets in general, it is vital that government must put relevant structures in place. It must make registration of any
transaction mandatory and that records should be updated regularly. As for current data management system, it requires revamping, decentralisation and digitisation including being web-based to ease accessibility. This will also reduce issues of missing files, corruption, fraud, and personalisation of property data at government repositories as established in this study. Further, it is apparent that property data clearing houses are needed.

The other challenge revealed by the study is the absence of a national resettlement policy. The study recommends that such a law should be formulated and adopted as soon as possible to address the various challenges faced currently in compensating and resettling expropriatees. Such a policy will provide a reference framework. It is also hoped that this law will lessen the impoverishment of expropriatees if well formulated.

The study also establishes that English is the only legal language used in a country where it is not the mother-tongue. It is thus strongly recommended that all laws must be written in local languages to improve their accessibility and popularity to the locals. This will also ensure that locals are aware of existing compensation laws, their rights and obligations.

The second contribution towards policy development focuses on private land issues. The study shows that there are fewer compensables sanctioned than expected under indemnity compensation. In that regard, the study recommends that expropriated land, severance, injurious affection, disturbance, consolation and/or special values be adopted to make compensation as responsive as possible towards expropriated private land. On compensation assessment basis, the study maintains market value for expropriated private land despite land markets being weak and non-existent in rural areas. As for compensation valuation methods, the study suggests the adoption of comparison, income and cost methods as they are the most commonly used practically despite not being prescribed. The study continues to suggest that where market value basis and methods are inapplicable because of market data challenges, then the law must warrant use of other methodologies that valuers deem applicable in that particular case. This must be clear in relevant laws.

The last fundamental contribution towards policy development addresses various issues of customary land rights that the study reveals. Specifically, in the absence of any compensables and inapplicability of indemnity demanded compensables, the study recommends that the
following items that have also been severally discussed elsewhere, be adopted as representing a full loss and hence compensables for any expropriated customary land:

i) Land,

ii) Building structures,

iii) Biological assets,

iv) Natural and man-made resources,

v) Communal/common assets,

vi) Land-based economic activities,

vii) Special value/non-material losses,

viii) Income losses,

ix) Businesses,

x) Disturbance,

xi) Consolation,

xii) Additional items like regular supplies, subsidies, food stuffs and tree seedlings.

In terms of compensation for special value/non-material losses, the study suggests that it should be a proportion of the value attached to expropriated land and that it should range from 25.0% to 75.0% depending on nature and severity of losses suffered. For injurious affection, it is proposed that compensation ranges from 15.0% to 50.0% of land value based on magnitude of losses occasioned. Consolation will have to be based on a commercial bank rate for savings account to avoid subjectivity while disturbance losses and expenses will be based on owner’s loss and/or prevailing costs. In the case of additional items, prevailing costs will be the basis.

While cash payment is the most common mode for paying compensation, this study recommends other options such as replacement of land and buildings, provision of tree seedlings and implementation of afforestation programmes at household and community levels. The last proposition also goes a long way in contributing to other issues like climate change, deforestation and environmental degradation in some ways, thereby linking them to broader development goals in Malawi, like Malawi 2063 and beyond (NPC, 2020; United Nations, 2015).

Through these key propositions, the study contributes towards policy development regarding expropriation of and compensation generally. In the case of the proposed compensables, compensation assessment basis and method, the study hopes that this will provide a universal
methodology for handling compensation for customary land rights as there is none currently. The study thus strongly urges the adoption of these recommendations into the Lands Acquisition Act and Customary Land Act in order to have a better compensation environment in Malawi.

8.4 Generalisation and study limitations

While the case study approach enabled the study to substantiate its findings through data triangulation from the various sources and through theoretical triangulation using respondent perspectives, its inherent challenge is generalisation of findings to other similar expropriation and compensation phenomena. However, in each of the three case studies, compensation was found to be inadequate and impoverished expropriatees for various reasons as demonstrated by the study. Analytically, these findings are attributed to inadequate legal compensation frameworks that fail to ensure the achievement of desired compensation because they either sanction fewer losses while leaving others in the case of expropriated private land rights, or they completely fail to provide any compensation packages in the case of expropriated customary land rights. Further, final compensation is inadequate because permitted bases and applied assessment methods lack sufficient support as land markets are underdeveloped or non-existent, making their application challenging. Thus, analytically or horizontally across the three case studies, these findings are similar and hence generalisable. Theoretically, these findings also show that compensation was inadequate in all three case studies, as it failed to meet expected theoretical goals of indemnity compensation. Essentially, these findings are theoretically generalisable to all similar expropriation and compensation phenomena in Malawi and elsewhere. Thus, summarily, these case study findings are analytically and theoretically generalisable to similar compensation phenomena. However, this must be done cautiously based on prevailing environments and nature of applicable conceptual frameworks.

8.5 Areas for further study

To have policies that respond to practical challenges regarding compensation, they need to be research-based so that they can capture prevailing and anticipated challenges. To achieve that, there is need to have a deliberate and on-going research programme on compensation theories adopted and their institutionalisation in applicable laws, applicability of compensation laws, assessment of compensation for customary land rights, adequacy of current academic curricula on property rights, other non-market valuation bases and methods, development of contingent
valuation methodology and its application to customary property rights, benefits of a codified law on expropriation and compensation and assessment of intangible losses in compensation for expropriation.
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Appendix

Interview questions for the principal secretary, lands commissioner and regional lands commissioners

Dear research participant,

This academic research aims to analyse current practices of determining compensation for the expropriation of customary land rights in Malawi with a view of establishing whether or not they result in appropriate compensation. The study objectives therefore are:

a) Investigate the theoretical foundations of Malawian compensation laws,

b) Analyse existing compensation laws to establish their adequacy in achieving appropriate compensation for customary property rights,

c) Analyse practical challenges affecting the achievement of appropriate compensation for customary property rights,

d) Examine expropriates’ perceptions towards compensation adequacy, and

e) Propose a valuation model for customary property rights based on available literature, experiences from other countries and findings of the study.

The research is being conducted by Lucky Kabanga, of Mzuzu University, Land Management Department, Private Bag 201, Mzuzu 2, Malawi, who is doing postgraduate studies at the University of Cape Town, South Africa. His email addresses are kabangalucky@gmail.com and knbluc001@myuct.ac.za and phone numbers are +265 999 205531 (Malawi) and +27 793156614 (South Africa).

Your participation in the research will contribute towards improving expropriation and compensation and also enable the researcher to finish his studies. The researcher extends his appreciation to every participant.
A. General background

1. Sex
   a) Male
   b) Female

2. Age (years)\(^1\)
   a) Under 25
   b) 25-29
   c) 30-34
   d) 35-39
   e) 40-44
   f) Above 44

3. Formal education attainment
   a) None
   b) Primary school certificate
   c) Secondary school certificate
   d) Vocational training
   e) University or college
   f) Other

4. Employment
   a) Government
   b) Private practitioner
   c) Private corporate
   d) Academia
   e) Civil society
   f) Other

5. Professional experience
   a) 0-5 years
   b) 5-10 years
   c) 10-15 years
   d) Over 15 years

\(^1\) Adopted and modified from the age categories used by NSO.
B. **Property rights**
1. How would you describe the property rights/tenure system in Malawi? (Property tenure, property rights classes, etc.)
2. How would you interpret the property section (section 28) in the Constitution of Malawi which reads:
   (1) *Every person shall be able to acquire property alone or in association with others and*
   (2) *No person shall be arbitrarily deprived of property.*
3. What are the major differences between private property rights and customary property rights in Malawi? (Ownership rights, tenure security, etc.).
4. What recognition is accorded to customary land rights in the current statutory laws in Malawi?
5. How are customary land rights acquired and transferred in general? (Normal acquisition and transfer process)
6. What rights do customary land owners have over their land? (Sell, lease, donate, transfer through inheritance, etc.)
7. What are the key challenges with the current land tenure system and how are they addressed?

C. **Expropriation**
1. What are the sources of expropriation powers in Malawi? (Constitution, acts, policies, etc.)
2. How would you describe these sources in relation to expropriation? (Nature/origin, content, adequacy, clarity, etc.)
3. What necessitates expropriation and why? (Public purpose, definition and interpretation, adequacy and clarity, etc.)
4. How are the various land rights expropriated and transferred? (Identification of land, notification, yielding up, roles of other stakeholders, etc.)
5. Are there any specific guidelines for the expropriation of customary land rights? If yes, please share a copy. How are customary land rights treated during expropriation using these guidelines?
6. What are the major weaknesses of the current expropriation laws and how are they dealt with?
7. What are the key challenges with the existing expropriation laws and how are they dealt with?

D. **Compensation**
1. The compensation section (section 44) of the Constitution under subsection (4) reads 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 a court of law."
   How do you interpret this provision?
2. What is the purpose of compensation in Malawi?
3. How would you describe the current compensation regime in Malawi? (Compensation heads, adequacy, shortfalls, etc.)
4. How is compensation paid and why? (Monetary, land, buildings, other)
5. What are the major challenges encountered with the current compensation laws and system? (Ambiguity on valuation basis, methods, guidelines, inadequacy, etc.)
6. How do you deal with these challenges?
E. General
1. Generally, how would describe the current expropriation and compensation environment in Malawi?
2. What specific suggestions and policy recommendations would you advance in view of the current situation?
3. Do you have any other comments regarding the subject matter?
Interview questions for regional and district lands officers

Dear research participant,

This academic research aims to analyse current practices of determining compensation for the expropriation of customary land rights in Malawi with a view of establishing whether or not they result in appropriate compensation. The study objectives therefore are:

a) Investigate the theoretical foundations of Malawian compensation laws,
b) Analyse existing compensation laws to establish their adequacy in achieving appropriate compensation for customary property rights,
c) Analyse practical challenges affecting the achievement of appropriate compensation for customary property rights,
d) Examine expropriatees’ perceptions towards compensation adequacy, and
e) Propose a valuation model for customary property rights based on available literature, experiences from other countries and findings of the study.

The research is being conducted by Lucky Kabanga, of Mzuzu University, Land Management Department, Private Bag 201, Mzuzu 2, Malawi, who is doing postgraduate studies at the University of Cape Town, South Africa. His email addresses are kabangalucky@gmail.com and knbluc001@myuct.ac.za and phone numbers are +265 999 205531 (Malawi) and +27 793156614 (South Africa).

Your participation in the research will contribute towards improving expropriation and compensation and also enable the researcher to finish his studies. The researcher extends his appreciation to every participant.
A. General background

1. Sex
   a) Male
   b) Female

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   b) 25-29
   c) 30-34
   d) 35-39
   e) 40-44
   f) Above 44

3. Formal education qualifications
   a) None
   b) Primary school certificate
   c) Secondary school certificate
   d) Vocational training
   e) University or college
   f) Other

4. Employment
   a) Government
   b) Private practitioner
   c) Private corporate
   d) Academia
   e) Civil society
   f) Other

5. Professional experience
   a) 0-5 years
   b) 5-10 years
   c) 10-15 years
   d) Over 15 years

B. Expropriation
1. What legal frameworks are used for expropriation of property rights in Malawi? (Constitution, acts, policies, etc.)
2. How would you describe these legal frameworks in relation to expropriation? (Nature/origin, content, adequacy, clarity, etc.)

3. What property rights were expropriated in this particular project? (Mombera University, Salima Greenbelt Project or Phalombe Hospital)

4. How were these property rights expropriated? Please describe the acquisition process in detail (Identification of land, notification, yielding up, roles of other stakeholders, etc.)

5. Are there any specific guidelines that were used for the expropriation of customary land rights? If yes, please share a copy. How were customary property rights treated during the expropriation? (As customary rights or as private rights)

6. At what stage of expropriation was the issue of compensation taken into account?

7. What are the major weaknesses of the current expropriation laws and how are they dealt with?

8. What are the key challenges with the existing expropriation laws and how are they dealt with?

C. General

1. Generally, how would you then describe the current expropriation environment in Malawi?

2. What specific suggestions and policy recommendations would you advance in view of the current situation?

3. Do you have any other comments regarding the subject matter?
Interview questions for valuers (public and private)

Dear research participant,

This academic research aims to analyse current practices of determining compensation for the expropriation of customary land rights in Malawi with a view of establishing whether or not they result in appropriate compensation. The study objectives therefore are:

a) Investigate the theoretical foundations of Malawian compensation laws,

b) Analyse existing compensation laws to establish their adequacy in achieving appropriate compensation for customary property rights,

c) Analyse practical challenges affecting the achievement of appropriate compensation for customary property rights,

d) Examine expropriatees’ perceptions towards compensation adequacy, and

e) Propose a valuation model for customary property rights based on available literature, experiences from other countries and findings of the study.

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Your participation in the research will contribute towards improving expropriation and compensation and also enable the researcher to finish his studies. The researcher extends his appreciation to every participant.
A. General background

1. Sex
   a) Male
   b) Female

2. Age (years)
   a) Under 25
   b) 25-29
   c) 30-34
   d) 35-39
   e) 40-44
   f) Above 44

3. Formal education qualifications
   a) None
   b) Primary school certificate
   c) Secondary school certificate
   d) Vocational training
   e) University or college
   f) Other

4. Employment
   a) Government
   b) Private practitioner
   c) Private corporate
   d) Academia
   e) Civil society
   f) Other

5. Professional experience
   a) 0-5 years
   b) 5-10 years
   c) 10-15 years
   d) Over 15 years

B. Property rights
1. What land/property rights do you encounter in the course of compensation valuation?
2. How do current property rights classes affect compensation valuation?
C. Market information
1. How is the market for property rights (private and customary) in Malawi (and why is it in that state)?
2. What is the ease of accessing market information for the various property rights?
3. How reliable is the available property market information?
4. What major issues constrain the property market and market information availability and reliability in Malawi?
5. How are these issues addressed?
6. How is compensation valuation affected by these issues?

D. Compensation
1. What key legal frameworks guide compensation for expropriation of land rights?
2. Are there specific provisions or guidelines that guide compensation for customary land rights?
3. How do you understand and interpret the Constitutional compensation section 44 subsection (4) that states 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 a court of law.”
4. What is the statutory composition of compensation for expropriation in Malawi?
5. How is compensation paid to affected people once assessed?
6. Are affected people provided with compensation schedules? Why?
7. What is your role in the compensation process as a valuer (and that of any other stakeholders involved in this process)?
8. What are the main constraints regarding compensation and how are they dealt with?
9. How would you describe the current compensation environment and practices in Malawi? (In terms of laws, compensation heads, adequacy, assessment, etc.)

E. Valuation (for compensation purposes)
1. Who is legally mandated to carry out valuation of property losses for compensation purposes during expropriation in Malawi and why?
2. How are the various compensation heads valued? Please explain in detail the sequential process involved (identification of expropriatory losses and compensation heads, market searches, valuation standards, basis, methods, etc.).
3. How do you get comparable market information for compensation valuation?
4. What are the main bottlenecks affecting compensation valuation in Malawi? (Lack of standards, ambiguous laws, unqualified valuers, clients influence, existing land tenure, market information, etc.)
5. How are these bottlenecks mitigated?
6. How would you therefore describe the current valuation environment for compensation aims in Malawi?

F. General
1. What suggestions and policy recommendations would you make in order to improve the valuation situation?
2. What other final comments would you want to make regarding property markets, compensation and valuation?
Dear research participant,

This academic research aims to analyse current practices of determining compensation for the expropriation of customary land rights in Malawi with a view of establishing whether or not they result in appropriate compensation. The study objectives therefore are:

a) Investigate the theoretical foundations of Malawian compensation laws,

b) Analyse existing compensation laws to establish their adequacy in achieving appropriate compensation for customary property rights,

c) Analyse practical challenges affecting the achievement of appropriate compensation for customary property rights,

d) Examine expropriatees’ perceptions towards compensation adequacy, and

e) Propose a valuation model for customary property rights based on available literature, experiences from other countries and findings of the study.

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B. Property rights

1. What is your understanding of land/property rights in Malawi?
2. Do you think customary land is adequately recognised in the statutory laws of Malawi in comparison to private land?
3. What rights do customary land holders have over their land? (Can they sell, donate, inherit, etc.)
4. What core challenges characterise the existing property tenure system in Malawi?

C. Expropriation
1. What laws guide expropriation in Malawi? (Constitution, acts, policies, etc.)
2. How would you describe these laws? (Nature/origin, content, adequacy, clarity, etc.)
3. Do you think that expropriation is necessary in Malawi? (Public purpose, definition and interpretation, adequacy and clarity, etc.)
4. How would you describe the expropriation process in Malawi more especially for customary land rights? (Identification of land, expropriation decision, notification, yielding up, roles of other stakeholders, etc.)
5. What are the major weaknesses and challenges with the current expropriation laws and how are they mitigated?

D. Compensation
1. What is the purpose of compensation during expropriation in Malawi?
2. Would you describe the existing compensation system in relation to customary land?
3. What are the key issues concerning compensation for customary land losses?
4. How are these issues addressed?

E. General
1. What is your general comment regarding expropriation and compensation in Malawi?
2. What would you suggest or recommend in order to improve expropriation and compensation in Malawi more especially for customary land?
Interview questions for local leaders and affected households

Dear research participant,

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3. Formal education qualifications
   a) None
   b) Primary school certificate
   c) Secondary school certificate
   d) Vocational training
   e) University or college
   f) Other

4. Employment
   a) Not employed
   b) Self employed
   c) Blue collar job (mechanic, watch man, etc.)
   d) White collar job (teacher, bank employee, etc.)
   e) Part time or piece work
   f) Other

5. Length of stay in case study area
   a) Mbadwa (Born in the area)
   b) Less than 1 year
   c) 1-5 years
   d) 6-10 years
   e) Over 10 years

B. Property rights
   1. What does land mean to you?
2. How do you acquire customary land in this area? (Buy, lease, inherit, allocation by village head, etc.)
3. Who is eligible to acquire land in this area?

C. Expropriation
1. Which expropriation laws are you aware of, if any?
2. How did you become aware of these expropriation laws?
3. Can anyone or the government come and take your land without your permission? Please explain how.
4. How did government acquire your land in this particular case? Please describe the process that was followed if you are aware of it.
5. What major challenges did you face with the expropriation process and how were they solved?

D. Compensation
1. What assets did you own before expropriation?
2. Were you compensated for any lost or damaged assets due to expropriation?
3. If yes to 2, how was the compensation assessed?
4. How were you compensated? (Money, land, building, seeds, lump sum, instalments, other, etc.)
5. How long did it take to be compensated after valuation?
6. How much compensation did you receive?
7. How would you compare the compensation that you received and the assets that you owned and lost during expropriation?
8. What was your role in the compensation assessment process? Please explain.
9. What other compensation were you given in addition to that for the lost assets?
10. What is your perception of the whole compensation process?
11. What key issues did you observe in the compensation process and how were they addressed?

E. General
1. What advice would you give to government in order to improve expropriation and compensation in Malawi?
2. Do you have any other final comments, suggestions and recommendations to make regarding expropriation and compensation?
Questions for a focus group meeting with affected households

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A. Property rights
   1. What does land mean to you?
   2. Please explain how does one acquire customary land in this area?

B. Expropriation
   1. Which expropriation laws are you aware of and how did you learn about them?
   2. How did government acquire your land? Please describe the process that was followed if you are aware of it.
   3. How did you participate in the acquisition process? Please explain.
   4. What are the major challenges that you faced with this process and how were they solved?

C. Compensation
   1. What assets did people own before expropriation?
   2. What expropriatory losses were compensated and how?
   3. How was compensation assessed? Please describe the process.
   4. How long did it compensation to be paid after valuation?
   5. What was your role in the compensation valuation process?
   6. How would you compare the compensation that you received and the losses due to expropriation?
   7. What other compensation were you given in addition to that for lost assets?
   8. What is your perception of the compensation that you received? (In terms of adequacy, etc.)
   9. What key issues did you observe in the compensation process and how were they addressed?

D. General
   1. How would you advise government to improve expropriation and compensation in Malawi?
   2. Do you have any other final comments to make regarding expropriation and compensation?