REVIEW OF THE LAND BILLS 2013

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Executive Summary

Malawi adopted the National Land Policy (MNLP) in 2002. This followed a process of consultation and technical studies such as the Customary Land Utilization Study and the Public Land Utilization Study of 1998. A Presidential Commission on Land empanelled in 1996 published its report in 1999. The Presidential Commission report made a number of proposals some of which were adopted in the MNLP. The Land Bill 2013 and the Customary Land Bill 2013 seek to implement some of the recommendations adopted in the MNLP. This paper has highlighted some of the key concerns expressed by various stakeholders over the long period that the country has been debating the drafting of new land laws. It has made a number of recommendations as summarized below.

The MNLP proposed that a comprehensive basic land law be drafted as it was noted that Malawi relies on notions of English property law which are of limited utility to the social, economic and political questions that Malawi's land policy has to contend with. The Land Bill 2013 has however not incorporated any substantive property law provisions; in essence the Bill has adopted the Land Act 1965 approach which merely provides for procedural and administrative matters and therefore assumes the applicability of received English property law as it stood at that date. We have recommended therefore that the Land Bill 2013 needs to make provision for basic property law reflecting the country's constitutional and development frameworks; general principles of land management; and duties and responsibilities of various stakeholders, among other issues.

The Land Bill 2013 has changed the categorization of land from the current public, customary and private land to only public and private land and has made customary land a mere component of public land. We have observed that this approach merely reinforces the alienation of communal (customary) land; we have therefore recommended instead that land be categorized into public and customary categories as proposed by the Presidential Commission on Land, so that private land will be a component of customary land and public land. We have also proposed that freehold land be abolished and existing freehold interests converted into leases under the proposed land categories. This will cure the anomaly that freehold land has no institutional oversight. In addition, any leases created out of customary land should upon expiry revert to customary land, and not to public land as is the case at the moment.

The Land Bill 2013 needs to address the question of access to land especially for the vulnerable and marginalized such as women, children headed households and the poor in general. In particular, both the general principles and the institutional mandates need to reflect the need to prioritise access to land to these groups in a bid to promote food security, economic development and poverty reduction programmes. Further, although access to freehold land by non-citizens takes up much of the provisions in the Land Bill, the real issue is to prevent concentration of land in a few hands. Hence, the Land Bill needs to provide for ceilings for access to land for specific uses; it should also provide for mechanisms for monitoring use of private land and ensure that the land is ploughed back into the community when leases are not renewed.

The Constitution vests all land in the republic, the people of Malawi. While the Land Bill repeats this general language, we propose that public land be held by the Minister of lands or local government authorities, as the case may be; while customary land will be held by traditional authorities territorially on trust for the people under their jurisdiction. This land holding framework will entail that each of the institutions holding land be subject to such duties and responsibilities as are required to meet their trust obligations. The Land Bill 2013 is however silent on the responsibilities of these land institutions; we therefore propose these be specifically incorporated.

The Customary Land Bill 2013 provides for the management of customary land; however the fact that this land category has been subsumed under public land makes the legal framework unwieldy. This is clear from the very definition of customary land and how it realtes to customary law; and the difficulty of using customary law to administer customary estates which are essentially private land! Again the Customary Land Bill 2013 seeks to introduce democratic land governance within the traditional land institutions. This is intended to curb perceived corruption among traditional leaders. However, while the Bill succeeds in limiting powers of traditional authorities, there is the real difficulty of how 'democratic' these land committees are and whether, considering the experience from existing natural resources committees, these committees can be sustainably implemented. We recommend that for operational reasons it may be easier and less costly to continue using traditional land institutions; but providing requisite oversight provisions in the law including specific accountability and transparency mechanisms to address perceptions of abuse and corruption.

The paper has highlighted a number of drafting issues which need to be addressed to ensure there is internal consistency within and between the land bills as well as between the land bills and related legislation touching on land matters such as those dealing with forestry, water, environment and wildlife.

Background and Introduction

Following the adoption of the National Land Policy 2002, Government appointed a Special Law Commission to review land related legislation and prepare draft bills to implement the policy. The Law Commission published its report in 2006 including a number of draft bills for consideration. A Land (Amendment) Bill 2006 was gazetted for debate by the National Assembly; this was however opposed by civil society including LandNet as an insufficient response to the legislative requirements of the National Land Policy which identified the need for a basic land law (see especially paragraph 2.3 of the National Land Policy). The drafting and gazetting of the Land Bill 2013, the Customary Land Bill 2013 and several other draft legislation amending various legislation has to some extent answered that concern.

On the other hand, a number of issues have recently been highlighted following the publication and debates on these bills. Thus, although the Land Bill 2013 was passed by the national Assembly and is awaiting assent of the President there are a number of concerns expressed by various groups with regard to:

- whether the Land Bill 2013 can really be considered a basic land law;
- whether the institutions responsible for land administration and management are sufficiently robust and have the requisite transparency and accountability mechanisms;
- whether the Land Bill and related legislation have addressed access to land by various groups in accordance with constitutional provisions and the overriding objectives of poverty reduction, food security and economic development;
- whether the status of customary land and title registration have been effectively addressed in line with ground reality and available resources and technical capacity; and
- Whether the issues of gender and rights of vulnerable groups have been addressed.

This paper therefore seeks to contribute to the on-going debates and specifically to provide civil society organizations the necessary materials to advocate various constituency positions. The analysis starts with a general assessment of the Land Bill as a basic law for land governance. We then evaluate the various provisions to consider their internal consistency as well as cross sector harmonization. The paper then provides a summary of the proposals for addressing the issues identified and highlighted in the analysis.

The paper has largely been drawn from a desk review of the land related legislation including the various positions of civil society organizations such as LandNet, Catholic Commission for Justice and Peace, ActionAid International Malawi and Centre for Environmental Policy and Advocacy. The paper also benefited from proceedings of a stakeholder workshop on the Land Bills convened by LandNet in July 2013 attended by civil society, traditional leaders and a representative of the Malawi Law Commission.

1. **Need for a comprehensive new land law**

As pointed out by Brooke-Taylor (*Land Law in Malawi*, p. 5) the Land Act 1965 is not a comprehensive statute; it was built firmly on the law as it stood at that date in England. The Land Act incorporates the common law and doctrines of equity and statutes of general application in force in England in 1902 many of which have been rewritten and consolidated in that country. Brooke-Taylor comments that:

> *It is not enough to know the Malawi Land Act. Half the significance of its provisions and of the threefold division of land would be lost if one does not appreciate the source of the division. Nor does the Act make any attempt to codify the law that is to apply to the individual categories.*

The National Land Policy echoed this position in paragraph 2.3.1 where it is observed that:

'*A careful review of land legislation in Malawi from colonial to post-colonial times concludes, as indeed many others have done, that:*

- *First, the imposition of English Law in general and English property concepts in particular has constrained the evolution and growth of customary land law. As a result, there is need to design and enact a basic land law that would provide a broad framework for the determination of property rights, for the conduct of proprietary transactions, for the control and management of land, and for the settlement of disputes over land.*
- *Second, care should also be taken in that framework to provide mechanisms and guidance for the orderly evolution of customary land law and to encourage a more transparent management of land held under customary tenure.*
- *Third, not enough antecedent property law was received to provide Malawi with a robust juridical basis for unambiguous interpretation of land rights. As a result, the ability to determine claims arising from the corpus of land laws in Malawi remains rudimentary and undeveloped.*
- *Finally, the Registered Land Act remains a statute of very limited application and needs to be revised and extended to apply to all land, irrespective of tenure'.*

The National Land Policy proposals are ambitious but necessary. Land is the most important resource for livelihoods for the entire population; hence any uncertainty in the law cannot inspire development initiatives. The Land Act 1965 did not provide all major principles and guidelines affecting land. In order to find out the applicable law one must read such obscure English feudal legislation as the *Statute of Uses* 1535, *Statute of Frauds* 1677. Brooke Taylor lists over 45 of these. In addition one must consider the common law and doctrines of equity as pronounced by English judges from the feudal system to date. These statutes were received into Malawi to facilitate the acquisition of land by the settler community and were never intended to assist Malawians.

The new law needs to be easily accessible to most Malawians so as to avoid reference to statutes in England prior to 1902 which are replete with unnecessary technical jargon such as uses, rule in Shelly's case or such other feudal notions of English landholding. A comprehensive piece of legislation must therefore blend relevant common law and equity

rules into what is critical for local livelihoods, economic development and promotion of investment at the moment, including right to property, right to development, and gender equality in land transactions as envisaged under the Constitution, among others.

It is important that the draftsman takes a bold step to rewrite the law rather than repeat rules built on a foundation that in the first place had little or no relevance to Malawi and some of which were abandoned by those who bequeathed these to the Malawi legal system in the first place. This may be a difficult task but not impossible. It is one Malawi must embrace if we are to attain sovereignty over our land resources. But as observed by ActionAid International commenting on the land bills now before the National Assembly:

> *The Land Bill has not provided any substantive matters affecting land, land categorization, land rights etc, the bill has concentrated on providing for the powers of the Government over land. In this sense the land bill has been reduced to mere procedural law as opposed to a substantive law.*

This observation is clearly born out from reading Parts III and IV of the Land Bill 2013 which have largely been copied from the Land Act 1965.

2. Role of Customary Land Law

On the other hand customary law, which is supposed to regulate customary land on which a majority of Malawians live and earn their livelihoods, is unwritten and therefore uncertain. While there have been sentiments that this facilitates flexibility, much of applicable customary land law has remained unchanged for centuries and in a number of cases has been overtaken by practices on the ground. This could be codified and where there is change then amendments can be effected in the same way as other legislation is changed. This will enhance certainty in the law and prevent abuse of the law by powerful interests who may manipulate customary law to suit their interests. District Councils for example can be given the mandate to incorporate customary laws in their by-laws. But as pointed out below the Customary Land Bill has numerous references to the role of customary land law; yet no consideration of the state and status of customary land law has been done.

3. Vesting of Land

The Republic of Malawi Constitution vests all land and territories of Malawi in the Republic (section 207). The Land Act 1965 vests land in the President; this was premised on the common law conception that land can only be vested in a legal entity and cannot be held in abeyance. In England such a person was the Queen while the Malawi substitute at Independence is the President as Head of State. In view of section 207 of the Constitution the 1965 Act seems at variance with the Constitution. The Land Act is however merely vesting land in the personification of the Republic, the President, the Head of State. As President of the Republic of Malawi, the President represents the State of Malawi that comprises the territory and people of Malawi as core elements: see the Montevideo Convention on the Rights and Duties of States. When a State transacts it does so through the President who provides the necessary mandates for State representation in international forum. The Government of the Republic of Malawi enters

into such international agreements as sanctioned by the President. The Land Bill has just repeated the constitutional formulation by vesting all land in the Republic. This however does not place any responsibility over land on anyone and explains why the Presidential Commission on Land proposed that the new land law should provide that land be held (not owned) by the institution responsible for its administration and stewardship subject to specific fiduciary and administration responsibility. This approach would not violate the Constitution since the institutions would hold the land for use and benefit of the people of Malawi. The institutions would be bare trustees, holding the title to the land to satisfy vesting requirements but no more, not for their benefit or for Government but for the owners as directed by the Constitution.

Admittedly, at common law no terms and conditions were imposed on the Crown since he/she was the owner of the land as conqueror. Our Constitution is however clear as to the obligations attaching to a person exercising State functions: see sections 6, 7 and 12 of the Malawi Constitution.

4. Land Categorization

Section 207 of the Constitution mandates, that all land must be vested in the Republic. The Republic is constituted by the people and territory of Malawi; hence, though not as elegantly drafted, section 207 seeks to vest land ownership in the people of Malawi. But as pointed out above, vesting land in the people of Malawi is not enough to ensure responsibility and stewardship over land resources. All it means is that radical title is vested in the people. None of the people individually have any title, claim or specific responsibility over any piece of land. Hence title to specific land categories must be held by specific institutions.

The land categorizations are based on the type of institutions that hold title and also assume responsibility for the use, management and general stewardship over the particular land category. Thus public land is the responsibility of the Minister and local government authorities, customary land is the responsibility of traditional authorities; private land is an anomaly in that, save for leasehold land, no specific institution has the clear responsibility. It is for this reason that we propose that private land should now be a mere component of the public land and customary land categories. This will provide a clear link between use, responsibility and custodian ship over private land.

Customary Land should be held (not owned) territorially by traditional authorities on trust for the people in the jurisdiction of each traditional authority. What this means is that title to all land within a traditional authority area will be held by the traditional authority on trust for the people of the area. This land should include both what is now customary land and private (both freehold and leasehold) land but not public land. It will be necessary however to stipulate the terms of the trust imposed by law over and above those stipulated by the Constitution since this trusteeship will have management and stewardship functions. In other words, the functions of traditional leaders should go beyond allocating land to their subjects but should also include managing land that has already been allocated.

It should be noted that the general perception that customary land has no title is a creature of English land law; it was intended to make it easier for colonial authorities to facilitate land grabs from Malawians without compensation. Our land law has perpetuated this wrong notion; our own Government has alienated vast tracts of customary land by first converting it into public land, hence giving customary land title, then issuing leases. Yet we never wonder who gave title to public land. The law must therefore confer title on customary land and enable traditional leaders as trustees to issue leases.

Public land should be held (not owned) by the Minister responsible for lands or local government authorities on trust for the people of Malawi. This will also mean that title to such land as forest reserves, national parks and wildlife reserves, land on which there is public infrastructure such as schools, clinics, roads, offices and others will be held by Government.

The new legislation must impose specific duties and responsibilities on all holders of land to ensure that principles of transparency, accountability and land stewardship are provided for and enforceable. There must be consequences for inaction, violation and any illegal dealings by anyone of the landholders. Neither the Land Bill 2013 nor the Customary Land Bill 2013 has these provisions.

5. Abolition of freehold land

Freehold land should be abolished. It does not add anything to encouraging investment in land; on the contrary there is a wrong perception that such land is untouchable by the state. The Land Bill 2013 has in fact perpetuated this perception in that, unlike the Customary Land Bill, the Land Bill 2013 has failed to make any specific provisions for stewardship of freehold land or any general principles for its administration and management.

In addition, freehold land is steeped in English feudal history and stands rather uneasily with our own concept of landholding, namely, that land is held by the community and that individuals have limited user rights. The new land law should therefore convert all freehold land into renewable leaseholds of 99 years. Claims for compensation should not be entertained since this land has always belonged to the people of Malawi as owners of radical title; colonial expropriation and creation of freeholds did not change this. In any event, leasehold is as secure as any title so long the holder complies with its conditions. The law should clearly provide that leaseholds are renewable unless the holder of either customary or public land title gives valid reasons for refusing to renew and such reasons must be stipulated in the law so that investors are aware under what conditions their leases may not be renewed. Of course there must be compensation for any developments on the land in the event that the lease is not renewed.

If these provisions are stipulated in the law no one can claim that their property was arbitrarily taken from them and indeed the limitations on the rights to land (abolition of freehold) can be justified on the ground that several of our neighbouring countries abolished or do not have freeholds and therefore it is in accordance with international practice.

6. General Principles

It is necessary for the Land bill to stipulate at the very beginning the general principles that will guide the administration and management of land categories. These principles will address economic, social, agricultural, environmental and other issues that impact on land including the institutional framework. They will act as the inspiration behind the entire bill against which those charged with duties and responsibilities under the new law will be accountable. In fact this is the format most current legislation is taking and especially those relating to natural resources management.

The guiding principles could relate to promoting access to land, access to land resources information, promoting transparency and accountability in land administration, capacity building, among others. There are policy guidelines in the MNLP that could be formulated into guiding principles for this purpose.

7. Duties and responsibilities of key stakeholders

The Land Bill 2013 has not articulated any specific responsibilities for those charged with the duties to administer land. These include the Minister responsible for land and local government authorities. The best scheme would be to stipulate both the trust and administrative duties for the key institutions responsible for any land category such as traditional authorities, the Minister for lands and local government authorities.

It is also important to stipulate the duties and responsibilities of senior technical officers at the appropriate level such as the Commissioner for Lands since they are technical in nature; this is the case with some recent legislation such as the Forestry Act or the Fisheries Conservation and Management Act. The Minister should provide political advice and supervision. Further, the Bill needs to outline the relationship between the land institutions and other agencies such as those responsible for water, forestry, environment and agriculture and provide for cross sector management guidelines.

8. Rights and Duties of Malawi Citizens in matters of land

Section 28 of the Constitution provides every person the right to acquire property and prohibits arbitrary deprivation of property (section 28). The Constitution also gives every Malawian right to economic activity, to work and pursue a livelihood anywhere in Malawi (section 29). Finally, a right to development requires Government, *inter alia*, to introduce reforms aimed at eradicating social injustices and inequalities (section 30). These provisions provide the foundation for developing a basic land law and the specific issues that it must address. They have considerable bearing on what substantive provisions should be included in a basic land law as well as the interpretation and development of customary land law.

It is important for the new law to provide for rights and duties of ordinary Malawi citizens towards land. In the first place, in accordance with the right to development and to pursue an economic activity provided for under the Constitution every Malawian must be accorded access to land for livelihoods and shelter. This will legislate the general policy statement under the National Land Policy where Government seeks to promote

access to land. In this regard the Land Bill needs to articulate rights of different interest group including vulnerable groups, women and the poor. This will implement policy provisions under the MGDS, Gender Policy and related policy instruments that promote empowerment of various groups.

The formulation of such a right of access to land will be subject to its practicability and enforceability. Access to information on land should also be legislated to compliment right to information under the Constitution but with more concrete provisions regarding mechanisms for facilitating such access. In addition, mechanisms for facilitating transparency and accountability in land dealings should be introduced both in the general principles as well as to empower citizens to demand these entitlements. On the other hand, citizens should take responsibility for the use to which they put the land given to them and the law should provide for duties to encourage better land stewardship.

9. Granting Land to Non Citizens

There is a Law Commission Report recommending amendment of section 20 of the Constitution so as to replace 'nationality' with 'national origin' as the prohibited basis for discrimination[1]. This should cover the dilemma as to whether non-citizens can be lawfully prevented from acquiring freehold land. This amendment however requires a referendum which is very unlikely to be held. It follows that discrimination on grounds of nationality may be challenged in the Constitutional Court.

The Land Bill 2013 prohibits grants of private land to persons who are not citizens of Malawi for an estate greater than 50 years unless a greater estate is required to realize the investment. The Bill further prohibits sale of private land to non-citizens before offering such land to Malawians. The question is whether these limitations are reasonable and acceptable in accordance with international human rights standards.

These provisions seek to ensure that Malawians have the right of first refusal to acquire national assets for their empowerment that is a noble policy goal that every country pursues vigorously. Foreign nationals pay heavier school fees than citizens in almost every country; and even in the face of the World Trade Organization trade liberalization, developed countries such as European Union and the United States subsidize production of their citizens. This we believe is geared towards local empowerment, a policy incorporated in the MGDS.

The Land Bill 2013 also empowers the Minister to acquire freehold held by a non citizen who has not been resident in the country for more than 2 years and who cannot show an intention to develop the land or dispose of it to a Malawian. It also prohibits transfer of title to private land between non-citizens by way of gift or *inter vivos.* These provisions were enacted to implement the policy statements in the MNLP intended to forestall speculative transactions. Their effect is to deny non-Malawians freedom to transact in the same manner that Malawians can.

[1] See Malawi Law Commission (2006) Constitutional Review Programme: Issues Paper (Lilongwe)

We are generally of the view that prohibiting non-citizens from acquiring freehold land neither adversely affects investment nor increases access to land for Malawians. Leaseholds are as secure for investment as freeholds and the MNLP clearly provides that the term for any lease will depend on the type of investment. It is clear however that prohibiting non citizens from acquiring freehold land, which comprises no more than 2% of available land, will not free land for citizens. In order to prevent accumulation of land in a few hands the law should provide a ceiling on land sizes held by any person regardless of their national origin. Such a provision may be included in regulations so as to give discretion for differentiating types of investment and required land grants.

10. Power of a Corporation to hold Land: Section 4 Land Act

Section 4 of the Land Act provides that a body corporate cannot hold land unless it has a license to do so issued by the President. It is not clear what utility this provision has when it does not apply to almost all corporate persons in Malawi at the moment. Corporate persons are created under the Companies Act, the Trustee Incorporation Act and special statutes. These provide power to hold land and the Land Bill 2013 specifically exempts them from obtaining licenses from the President.

Hence limited companies, normally used for profit business, NGOs, religious and other charitable bodies are not covered, they can hold land without any need for a license. This would leave chartered companies but these are rare and it is unlikely that we still have these in Malawi so as to require this provision.

Even if we have need for this provision, there is no need for the President to grant licenses; the Minister responsible for land matters could easily do this. Under the section the decision of the President whether or not grant a license is final and not subject to review in any court; clearly this provision cannot be sustained under the current Malawi Constitution where all executive decisions are generally reviewable.

11. Registration of customary land

The National Land Policy proposed that customary land be registered. This is primarily intended to promote security of tenure and certainty in customary land transactions. The Policy also proposes measures to ensure that registration does not lead to landlessness as new titleholders may readily dispose of their registered title. The Customary Land Bill has provided for this safeguard and empower local committees responsible for land to control such transactions.

Traditional leaders are however wary of the registration of customary land as they fear that it will:

- reduce their powers;
- abolish customary land after all customary land has been registered;
- facilitate corruption when carrying out registration since some opportunistic individuals will want to take advantage of the survey and titling process to extend their boundaries;

- severely hamper equitable access to land for vulnerable groups since those registered will not provide for these groups;
- intensify conflicts among children and dependents; and
- compromise the resettlement programme

It is worth noting that registration of customary land will take land out of the customary land stock and permanently alienate it to the private domain. This in itself is not a problem if the perceived benefits of registration can be realized. There are a number of challenges which the MNLP does not seem to have addressed. Land registration requires survey and adjudication which are resource intensive; the experience from the Ndunda pilot project in Lilongwe west does not inspire confidence. Despite commencing in the early 1970s the Ndunda registration system did not extend to any other area. Even adjudication of title in urban areas only has not been completed to date.

Registration of title over customary land will not confer any value on the land for which financial institutions can advance financial resources. Considering the dwindling sizes of family land holdings, from 1.53 hactares in 1968 to 0.8 hactares in 2000, the likelihood of completing the registration of such small parcels across the country in 5 years is very limited. To embark on such an exercise as a policy option is to ignore real problems such as enhancing food security, increasing household incomes and empowering vulnerable groups to be more productive that require same resources.

12. Power to dispose of Public and Customary Land

The Land Bill has given power over utilization of public land to the Minister and local government authorities. The Minister or local government authority can also acquire customary land for a public use by serving notice on the traditional authority concerned. However the Bill does not provide room for public consultation or that the power to acquire should be subject to local consent granted at a public hearing duly convened for the purpose.

In addition the Bill gives sweeping powers to the Minister or local government authorities at the expense of other stakeholders. This has caused numerous planning and development problems. Firstly, in a number of cases there has been conflicting jurisdiction where a land grant was construed as development permission or project commenced in areas designated by other agencies as ‘protected’ areas such as catchment areas. Secondly, only in few areas does the Bill expressly state the Minister’s powers shall be exercised in consultation with other agencies. Section 27 gives power to the Minster to acquire customary land for public purposes whereupon the land becomes public land. Now that customary land is a mere component of public land, the process of alienation of customary land will accelerate; and despite numerous calls for a provision to ensure that all leases issued out of customary land should upon expiry revert to customary land, the provision has not been enacted in the Bills.

Further, the powers of the Minister were exercised without clear fiduciary obligations even though under the current Act. Hence it is necessary to lay down the conditions or limitations of powers subject to which the Minister can exercise his disposing powers.

This will give Malawians recourse to specific remedies should the exercise of a power be in breach of these.

13. Some Drafting Issues

There are a number of clauses in the land related bills which are inconsistent with each other and existing law; these require revision as they affect the extent to which the intention of the legislature has been expressed. We review these here and suggest necessary amendments.

Customary Estate: Section 2 of the Land Bill 2013 defines a customary estate as 'any customary land owned, held or occupied as private land within a Traditional Land Management Area and which is registered as such under the Registered Land Act'. From this definition, it is clear that customary estates are part of the stock of customary land. And according to section 19.3.b of the Customary land Bill 2013, a customary estate is governed by customary law. The problem with this scheme is that the Registered Land Act registers private land and all land under that Act is governed by its provisions and applicable common law and doctrines of equity. While it is possible to except customary estates from the provisions of the Registered Land Act, the better approach would be to register customary estates under the Customary Land Bill.

There is also a clear contradiction between the provisions of section 19.1 and section 19.3.b in that while section 19.1 states that a customary estate is in every respect of equal status to a lease created under the Land Bill 2013, section 19.3.b provides that a customary estate shall be for an indefinite period. This is clearly wrong and must be revised. A lease has a defined period, the two sections therefore contradict each other.

Customary law: as mentioned above a customary estate is governed by customary law which is defined as 'the customary law applicable in the area concerned'. This definition has been repeated from that in the Land Act 1965; hence customary law is territorial in nature. And the Customary Land Bill is replete with reference to the role of customary law in customary land use such as in section 10.4; recognition of an association of persons formed in accordance with customary law for purposes of occupying, using and managing customary land (section 14.4); that a customary estate shall be governed by customary law (section19.3), among others. Although the land Bill defines customary law, the Customary Land Bill has no definition of customary law. This needs to be rectified. Further, the Customary Land Bill assumes there is a body of customary law out there which does or can recognize an association of persons occupying or using customary land. This assumption can not be justified considering the state of customary law over the years.

Traditional Land Management Area: is a new concept in the land bills and has been defined under section 2 of the Land Bill 2013 and the Customary Land Bill as 'an area demarcated and registered as falling within the jurisdiction of a Traditional Authority'. There is no definition of a Traditional Authority in any of the bills and neither does the Chiefs Act 1967 define or recognize that term. Hence the bills need to provide the definition. The definition of a Traditional Land Management Area also suggests that the

land will be demarcated and registered. The connotation is that the current areas of jurisdiction of chiefs under the Chiefs Act will be surveyed, demarcated and given title. Just like the process of adjudication required for registration of customary estates this may provide opportunity for both certainty and conflicts over boundaries. It is also an expensive exercise. It needs to be clearly thought through and planned.

Land Use and Management: the Land Bill has retained the power of the Minister under Part V to direct user of all land other than private or public land in urban areas. This part needs to be expanded to provide specific principles for land management. Surprisingly the Customary Land Bill has provided specific principles for management of customary land under section 5. On the other hand, there is no justification for limiting the regulation of land use and management to land other than private and public land in urban areas when there should be generic land use principles that should apply across all the land categories.

Freehold land: the Land Bill 2013 defines freehold land as 'an estate in land, inherited or held for life'. This definition does not reflect the meaning of freehold as recognized in property law; if however it seeks to change the definition of freehold in Malawi law then it has to say so and provide specific provisions to change the current profiles of freehold. As the definition stands now, it excludes almost all freeholds which are largely in fee simple, of indefinite duration. Considering that the new land law has made detailed provisions to restrict access to freehold land to foreigners, the definition as it stands makes that effort fruitless.

Land Categories: although the memorandum states that the Land Bill 'maintains the two categories of land, namely public land and private land' the Bill has changed land categories. Under the Land Act 1965 there are three categories of land, namely, public, private and customary land. The Land Bill has only retained private and public land and incorporated customary land into the two. Unfortunately customary land sits uneasily in either of these since the (customary) law applicable to customary land is different from that dealing with private or public land which is generally statutory and received common law.

The definition of **customary land** in the Land Bill as 'all land used for the benefit of the community as a whole and includes unallocated land within the boundaries of a Traditional Land Management Area', suggests that 'unallocated land' is not for the benefit of the community as a whole. In fact all customary land is held for the benefit of the community a whole; the new formulation seeks to change this framework but leaves a lot of room for interpretation. On the other hand, the Customary Land Bill defines customary land as 'all land declared as customary land in accordance with section 31'; as it happens section 31 does not declare any land as 'customary land' and one wonders why customary land should be declared in order to be identified when we have had this land category for decades. Section 3 of the Customary Land Bill is even more confusing. It states that customary land consists of land within a Traditional Land Management Area other than Government land or reserved land; land designated as customary land under the Land Bill 2013; and land the boundaries of which have been demarcated as customary

land under any written law or administrative procedure. In the first place, the Customary Land Bill does not define reserved land in a Traditional Land Management Area, so we are unable to identify this land. Further this definition could very easily include private land in a Traditional Land Management Area as customary land. Secondly, nowhere does the Land Bill 2013 designate customary land. Thirdly, there is no law or administrative procedure that sets customary land boundaries.

The Land Bill 2013 defines **Government land** as 'land acquired and privately owned by the Government…' It is not clear what is sought to be achieved by this definition; Government cannot acquire any property for private use or purposes. When one reads the definition of public land as 'land held in trust for the people of Malawi' one realises the danger of the definition of Government land under the Land Bill. It clearly suggests that Government land is not held or owned on trust for the people of Malawi. Clearly all land directly held by Government is so held for the benefit of the people of Malawi. On the other hand, the Land Bill vests public land and customary land in the Republic in perpetuity. Considering that customary land is a mere component of public land, it is not clear why it should specifically vest customary land in the Republic.

P**rivate land** other than leasehold land however is not vested in any institution, hence there is no direct institutional. The Land Bill defines private land as land which is 'owned, held or occupied under a freehold title, or a leasehold title or as a customary estate or which is registered as private land under the Registered Land Act. We have proposed that freehold land be abolished, so that private land be component of customary land or public land.

Customary Land Committees: the Customary Land Bill establishes these committees to perform land management functions. The Customary Land Bill 2013 defines customary land committees as committees appointed under section 4; yet these committees are elected. On the other hand, no specific procedure has been established as to the conduct of elections. Even though the Bill says the committee will be elected by the community, no definition of community has been provided.

Commissioner for Lands: Neither the Land Bill nor the Customary Land Bill establish or define this office. The Customary Land Bill states that 'Commissioner' bears the meaning ascribed to it in the Land Bill; yet the Land Bill does not define the word 'Commissioner'; and further still, no office of the Commissioner has been established. If anything the Bills assume the office exists and does not establish its functions. More confusing is the fact that there are two offices of Commissioner under the Bills: these being that of the Commissioner for Lands and the Commissioner for Physical Planning. The Bills should therefore establish the office of Commissioner for Lands and provide its specific functions, mandates, duties and responsibilities.

14. Summary of Key proposals

Comprehensive Land Law: The bill needs to provide more substantive land law rather than merely procedural or administrative provisions as is the case at the moment. In the

absence of such detailed substantive land law, the bill perpetuates depending on the common law and doctrines of equity many of which are obscure and of limited utility in Malawi.

Land Categories: We propose that the bill follows the recommendation of the Presidential Commission on land reform 1999. The commission proposed that there should be two categories of land namely public and customary land. Private land should be a component of either customary or public land. This categorisation will put land firmly into the hands of the people of Malawi as envisaged under section 207 of the Constitution.

Institutional mandates: Following from the proposed land categories, the bill needs to stipulate institutional mandates and responsibilities across the land categories. Thus, the Ministry of Lands and local government authorities shall take responsibility over the governance of all public land under their respective jurisdictions, whilst traditional leaders take responsibility over customary land under their jurisdiction. While the minister of lands retains the political supervision over all land categories, the administrative functions will be done by institutions which have the jurisdiction. Details of power and mandates need to be spelt out in the bill. It is also important for the bill to stipulate cross sector management of land issues including the relationship between these land institutions and other land users such as agriculture, water, forestry and environment.

Access to land: Land is the most important asset for poor communities in Malawi. Access to land including duties and responsibilities of various land users, therefore need to be articulated in the land bill. In particular, both the general principles, the institutional mandates need to reflect the need to prioritise access to land to the vulnerable groups such as the poor, women and children headed households in a bid to promote food security, economic development and poverty reduction programmes. The issues paper produced by ActionAid Malawi has articulated a number of possible approaches that can be considered for drafting purposes. Further, although access to freehold land by non-citizens takes up much of the provisions in the bill, the real issue is to prevent concentration of land in a few hands. Hence, the bill needs to provide for ceilings for access to land for specific uses; it should also provide for mechanisms for monitoring use of private land and ensure that the land is ploughed back into the community when leases are not renewed.

Traditional Authorities and Customary Land: Customary land is synonymous with traditional institutions. Hence, the customary land bill needs to specifically deal with this relationship. More importantly, the bill needs to empower traditional authorities to administer customary land as trustees of the people in their areas of jurisdiction. The current bill effectively takes the opposite direction and seeks to replace traditional authorities with democratic institutions without paying attention to customary norms and expected cost of implementation. In addition, the registration of customary land has several implications including permanently alienating customary land into private

property. The bill needs to specifically balance the dictates of private property and traditional land management.

Drafting Issues: The paper has highlighted several drafting issues that need to be addressed to ensure internal consistency and reflect the current legal framework. Several recommendations have been made in section 4 of the paper.

15. Conclusions

This analysis summarises findings of review of land related legislation in Malawi and consultation with civil society and traditional leaders. The main recommendations are the need for a comprehensive new land law that encompasses the general principles, rights and duties of various stakeholders as well as key elements for ensuring that duty bearing institutions are transparent and accountable institutions and effective cross sector management between the institution responsible for land administration and other agencies who utilize land and whose activities have a bearing on land resources management.

We have also considered the importance of vesting customary land in local institutions and stipulating the relevant obligations on those who holding trust obligations. We believe this will ensure that community based natural resources management is properly anchored in appropriate tenurial framework. Under the MNLP, customary land has been given ample attention, the new law should ensure that the institutional arrangements have the necessary powers and flexibility to deal with local land stewardship and in that respect they be given the space to grow local governance systems best suited to their local needs.

We have noted some drafting issues that need to be addressed as they affect the intention of the Legislature in the Bills.