

## 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.

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 a number of concerns have been expressed by various groups and reports suggest that the Presidential assent has not been given pending further consultation. This paper has highlighted some of the key concerns expressed by various civil society organizations such as LandNet, Catholic Commission for Justice and Peace, Action Aid International Malawi and Centre for Environmental Policy and Advocacy.

## KEY PROPOSALS FOR THE BILLS

- 1. Comprehensive Land Law:** The bill needs to provide more substantive land law rather than merely procedural or administrative provisions as is the case with the Land Act 1965. The assumes the continued applicability of English property law as it was applied in Malawi in 1965 and does not take into account constitutional and development aspirations of the people of Malawi.
- 2. Land Categories:** We propose that the bill follows the recommendation of the Presidential Commission on land reform 1999 which proposes that there should be two categories of land, namely, public and customary; and that private land should be a component of either one of the two.

- 3. Institutional mandates:** 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.
  
- 4. Access to land:** Access to land including duties and responsibilities of various land users need to be articulated in the land bills. In particular, both the general principles and 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. 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. We have also proposed that freehold land be abolished and existing freeholds be converted to leaseholds instead of the approach in the Land Bill to deny non Malawi citizens the right to own freehold land. Further in order to avoid concentration of land in a few hands we have proposed that legislation introduces ceiling of how much land one can hold for specific uses.
  
- 5. Traditional Authorities and Customary Land:** Customary land is synonymous with traditional institutions. Hence, the customary land bill needs to specifically deal with this relationship. 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 TO BE ADDRESSED TO ENSURE CONSISTENCY

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 suggest the following necessary amendments.

- 1. 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.

2. **Customary law:** as mentioned above a customary estate is governed by customary law which is defined in the Land Bill as 'the customary law applicable in the area concerned'. This definition has been repeated from 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 (section 19.3), 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 has no factual or legal basis.
3. **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.
4. **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.

5. **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.
6. **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.
7. 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.
8. 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.

9. **Private land** other than leasehold land however is not vested in any institution, hence there is no direct institutional oversight of this land. 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 (leasehold) land should be component of customary land or public land.
10. **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 for the conduct of elections of these committees. Even though the Bill says the committee will be elected by the community, no definition of community has been provided.
11. **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.

The foregoing as are some of the shortcomings of the land Bill 2013 and the Customary Land Bill 2013. They need to be revised in order to make the bills bear the intended meanings.