CIVIL SOCIETY ADVOCACY TASKFORCE ON LAND AND NATURAL RESOURCES

FINAL SUBMISSIONS TO THE SPECIAL LAW COMMISSION ON LAND RELATED LEGISLATION

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1. Introduction and Background

The Civil Society Advocacy Taskforce on Land and Natural Resources[1] (the Taskforce) is a network of civil society organizations that are interested and concerned with land and natural resources issues. In particular, the Taskforce was created to provide a forum and space for civil society involvement in the implementation of the Malawi National Land Policy (MNLP) and the formulation of land related legislation. In this respect the Taskforce has undertaken a number of activities to solicit views from civil society, local communities and local government authorities on the content of the new land law currently being formulated. The Taskforce also commissioned a review of land related legislation, which acted as an issues paper and provided guidance during stakeholder consultations.

The stakeholder consultations involved organizing civil society workshops, community meetings and feedback meetings at Assembly level to take stock of community concerns and validate recommendations and priorities. The Taskforce also made preliminary presentations to the Special Law Commission on Land that is considering new land legislation. The Special Law Commission made some observations on the Taskforce findings. These were further analysed and investigated by the Taskforce. The recommendations, observations and proposals from these meetings have now been refined and we present below a summary of these findings. We have also presented key elements for drafting the new land law

2. Analysis of Local Community Issues

We outline below key concerns of local communities; some of these could be incorporated in the drafting proposals we have presented below; but we have presented them upfront for background information and perhaps show the direction for the new land law and its implementation.

2.1 Leasehold Land

The procedures for acquiring and management of leasehold land attracted considerable interest among local communities. Many of them wanted to know about and alleged they were unaware of the procedure for obtaining a lease. This may be due in part to community interest to lease land with the perceived advantages attached to such land; it may also be motivated by the common perception that such landholding has exacerbated landlessness; and how come local people are kept in the dark about resources around them? It may also be partly due to the fact that many of leaseholders are not originally from the areas they obtained the land. Hence though information was given during the consultations in response to these concerns, many other issues were raised including corruption and discrimination in awarding leases to ‘foreigners’.

[1] Members of the Taskforce are CCJP, OXFAM, Malawi CARER, WESM, TSP, CARD, EDETA, CONGOMA, Greenwigs, Matindi Youth, Greenline Movement, CEPA, CURE and ELDP

In addition, traditional leaders in at least two districts (Kasungu and Rumphi) voiced concern over the loss of customary land to Government as a result of proliferation of leases in their areas. Others (Mangochi and Mulanje) were mainly concerned about the large number of foreigners in occupation of leased land over which they have no control. This was partly attributed to the provision in the Land Act, 1965 which provides that the reversionary interest on the expiry of any leasehold land is public land. The implications are many.

Firstly, as soon as the traditional authority signs a form for application for a leasehold and the lease is granted, the community is permanently deprived not only of use of such land but also that the authority and decision making power over such land. The Land Act provides that the Minister can declare that such reversionary interest should return to customary status but this would be rare in practice.

Secondly, unlike in case of customary land, and even when the land is idle, abandoned or underutilized, the traditional authorities have no power to reallocate the land to any other person. Hence traditional leaders informed the Taskforce that many of the estates were opened in the 1970s and 1980s when population levels were low and at the peak of tobacco farming which required leasing land. Yet despite high population growth and the resulting increasing landlessness, the decline in tobacco farming and resulting increase in idle leasehold estates, there is nothing that they can do to assist the landless people in their areas. Of course there is moratorium on establishment of new agriculture leases in some districts in the country. But this may have come too late for most areas where the land had been completely swallowed up by agriculture leases.

The main recommendation is that Government, the Assemblies and civil society organizations should conduct a survey of idle leasehold estates that should then be repossessed and redistributed to the landless. Traditional authorities further recommended that the law should be changed to provide that all leases when expired should revert to customary land. In both cases the committees proposed in the MNLP should take the responsibility to consider fresh applications for renewals and also determine the redistribution of the repossessed idle estates.

2.2 Inheritance of Land

This issue featured prominently; the Taskforce had identified it as a major gap in the MNLP; it also featured prominently among the issues the communities felt needed to be addressed. The Taskforce was informed in some districts that the major problem is the slow but steady decline of customary governance systems arising from its unwritten status and the difficulties associated with its enforceability. The lack of institutions where the customary regime could ‘grow’ and be nurtured has added to its ineffectiveness. Inheritance is one area in which customary norms should and do feature highly. Indeed even the Wills and Inheritance Act relies heavily on customary law, though it does not apply to

customary land inheritance. But there has been little attempt to ‘grow’ customary law, as is the case with received law.

Local communities insisted that their prevailing cultural practices need to be preserved, recognized and protected under the new land law. Of course each group insisted on its local norms and in one area (Mangochi) a suggestion of recourse to religious norms was made. We explained that there is currently a parallel commission considering inheritance law and that it will add to their views for change to the law of inheritance in general and to land inheritance in particular.

The main recommendation was that the new land law should enhance customary land law governance including customary land inheritance. In some ‘urbanized’ areas local people expressed interest in procedures for writing wills as a way out to avoid abuse of deceased estates. It was also recommended that the new land law should protect rights of orphans despite the nature of existing customary norms since land is the basis for livelihood and children in particular should be protected.

2.3 Traditional Land Committees

The MNLP has recommended the establishment of Traditional Land Committees to be headed by the traditional leaders at village, group village and traditional authority level. These committees will be the focus of local community land administration and management and will be responsible for land tenure issues and, land mapping and land transaction records keeping. For this purpose, a Traditional Land Clerk will be appointed by a District Assembly for each traditional authority to provide technical advice. The Taskforce consultations have revealed that some traditional leaders (in Thyolo and Rumphi) have expressed strong reservations to these committees for fear that their (traditional leaders’) powers will be usurped. They also expressed concern with Traditional Land Clerks.

It seems the main issue may be inadequate information given to these leaders. The MNLP provides that traditional leaders shall be heads of these committees while members shall be elected in accordance with tradition; this would seem to suggest that the traditional leaders will continue to exercise their functions but now under statute. The main concern however will be how to harmonize the committee members who are to be elected by ‘tradition’ and the customary appointment of advisors to the traditional leaders. In addition, these land committees must be seen in the context of the overall framework of community-based management of natural resources and the National Decentralization Policy.

The main recommendation is that the land committees should be established as sub committees of the decentralized institutional framework. The draft land bill should stipulate the functions, powers and responsibilities of the committees and

ensure that these are properly harmonized with those of the decentralization framework. A Traditional Leaders' Law should be drafted by an appropriate authority and should clarify the roles, powers and responsibilities of traditional leaders including institutional framework for accountability and transparency in land and other administration powers.

2.4 Dispute Settlement

As a consequence of the erosion of customary land governance systems mentioned above, it was further observed that most disputes end up at the High Court where there is congestion and access by local people is very limited. At least two districts made this observation (Mangochi and Rumphi). Hence though it was widely observed that traditional leaders spend a large part of their time attending to land disputes, local people are aware that such dispute settlement is not binding. Consequently those with resources take legal action at the High Court for redress. This clearly is to the disadvantage of the party with no financial means to have access to the High Court. This problem has of course been compounded as a result of abolition of traditional courts but even when these were in operation their jurisdiction over land was very limited. The solution therefore lies with the Law Commission currently considering a traditional courts bill.

We recommend therefore that the new land law or traditional courts law should specifically provide for jurisdiction of local courts over customary land. Whether traditional leaders become part of the traditional courts system will depend on the new traditional law courts that will emerge, especially considering their alignment to the executive branch of Government and, in recent times, to the political party in power. Traditional leaders may however be incorporated into the alternative dispute settlement regime being introduced by the judiciary so that their rulings are not scoffed at by those with financial resources.

2.5 Local Community Claims Over Protected Areas

There were thinly veiled claims for community access to protected areas such as forests, national parks and wildlife reserves; in some cases clearly encouraged by local politicians such as Members of Parliament. Traditional leaders were in the forefront (Kasungu and Rumphi). The basis of the claims were many, for example:

- Injustices perpetrated during the gazetting of the protected areas when no consultation were undertaken and local people were bundled out with no access to ancestral cites and no consultations;
- Government preoccupation with animal welfare rather than the welfare of its people;
- Rigid laws to 'protect' animals even when there were no animals in most of the protected areas; and
- Wrong maps which swallow up customary land.

What was clear however is that local people considered protected areas as waste/idle land that they should gainfully use for farming. This may be partly due to the fact local people have no access to and do not participate in the management of these protected areas. This is now being addressed under the Forestry Act and the National Parks and Wildlife Act as amended in 2004. However local people continue to make these claims even when it is clear most districts have idle estate land that can be used for those who are landless; protected areas are seen as vintage and soft targets for exploitation.

There is clearly need for civic education targeting politicians, traditional leaders and local communities on the intrinsic value of protected areas. Where there are genuine claims of wrong maps the departments of lands, surveys, and national parks and wildlife reserves should deal with such claims and ensure that no unintended expropriation is done. While legislation cannot change political behavior we consider that Government should take leadership to forestall incitement to land invasions or escalation of conflicts around protected areas.

2.6 Taskforce Observations on Local Community Concerns

The Taskforce is of the view that the new land law should provide appropriate responses to issues raised by local communities relating to procedures for grant, expiration, renewal and surrender of leases. In particular, and in keeping with the decentralization policy and the need to ensure that matters of local livelihood should be considered at that level there is need for leases to be subject to local institutional frameworks as proposed by the MNLP where traditional leaders and customary norms will be utilized.

In the same vein, the new law should consider appropriate responses to inheritance issues, the applicability of customary norms thereto and the need to protect the vulnerable such as women and orphans. Finally, we have made reference to cheap political statements by some local leaders that can undermine sustainable environmental management. In some cases this may be due to lack of information on sustainable resource utilization and indeed on what resources are available for the local population. As local population expand and local politicians are pressed for answers they need access to information to enable them provide informed advice and responses to requests.

3. Summary of Research Findings on the New Land Law

Members of the Taskforce held workshops, meetings and attended consultative meetings with local communities and traditional leaders where they had a chance to listen to concerns on land law and policy. A review of land related the Taskforce also commissioned legislation and members provided input based on their field experience and interaction with local communities they work with. We present below a summary of these findings and comments.

3.1 Review of Land Related Legislation

Structure of Land Law

3.1.1 The country's land law follows a pattern that is common in the common law jurisdiction[2]. Primary land law covers subjects such as tenure regimes, land administration, control mechanisms and dispute resolution. The Land Act, 1965 provides for almost all these and the institution responsible for land matters is the lead agency.

3.1.2 The Land Act is supported by other legislation addressing specific aspects of land holding such as tilting and registration, surveys, town and country planning and land acquisition. Legislation such as the Registered Land Act, Adjudication of Title Act, Customary Land (Development) Act, Land Survey Act, the Local Land Board Act, and the Land Acquisition Act are in this category. Again the institution responsible for land matters administers these.

3.1.3 Then there are land use management laws that are sector specific. These include legislation governing water, electricity, forestry, mining environment and administrative justice and local government are in this category.

3.1.4 The legislation outlined in paragraph 3.1.3 are not administered by the institution responsible for land matters and this often leads to gaps and conflicts that adversely affect well meaning provisions. It is also important to mention that a large part of land law is found in the common law and doctrines of equity (judge made) that provide the framework for interpreting the statues.

3.1.5 The main thrust of our land law is reflected in two features: the state as supreme authority (eminent domain) over land and transformation of customary land relations into the received land law. Hence the nature and form of customary has changed so much mainly reflecting received land laws and property. Hence a land market under customary law is developing where there was previously none.

3.1.6 Is there a case for a basic land law? The August 2003 civil society conference on land law recommended drafting of a single piece of legislation. This of course has no merit on its own except that it will provide a 'one stop' shop for land law, though even this achievement is doubtful depending on one's definition of a basic land law. Perhaps one may argue that a large portion of the matters dealt with under the National Land Policy should go into one piece of legislation.

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[2] See generally L. A Wily & S. Mbaya (2001) Land *People and Forests in eastern and southern Africa at the beginning of the 21st Century: The impact of land relations on the role of communities in forest future* (Nairobi, IUCN-EARO).

3.2 Land Law and the National Land Policy

3.2.1 The Constitution and Land Law

The Republic of Malawi Constitution vests all land and territories of Malawi in the Republic (section 207). On the other hand section 208 provides an exception that states that the Government shall have title to all rights in property that are vested in the Government of Malawi at the commencement of the Constitution. The Constitution further provides every person the right to acquire property and prohibits arbitrary deprivation of property (section 28). The right to acquire property must be read together with the non-discrimination provisions of the Constitution such as section 20. Further, the right to acquire property is subject to the power of Government to compulsorily acquire property so long it follows due process and pays compensation that is fair.

The Constitution also gives every Malawian right to economic activity, to work and pursue a livelihood anywhere in Malawi (section 29). It also provides a right to development that enjoins 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. The Constitution also imposes fiduciary responsibilities on persons exercising state functions (sections 6, 7 and 12). The main limitation of these fiduciary duties is that they are mainly located in Part III (section 12) of the Constitution, which is merely directory in nature. Hence the need to enact legally binding provisions under the new land law to support and implement these principles of national policy.

The Constitution does not specifically provide for access to land; however sections 13 (a) on gender equality, section 24 on rights of women and section 30 on the right to development implicitly provide for this right. More significantly is the fact that certain vulnerable groups such as women and children require special consideration in matters of rights to property in general (sections 13. a and 24) and access to basic resources in particular (section 30). We therefore recommend that these provisions find expression in the new land law, firstly by elaborating specific responsibilities of the state as to what actions should be taken to redress specific injustices, and secondly by stipulating specific rights and entitlements that have concrete meaning and content for livelihoods and economic empowerment of these vulnerable groups.

3.2.2 Highlights of the National Land Policy

Cabinet approved the Malawi National Land Policy in January 2002 to guide land reform in Malawi. A policy is a statement of intent for achievement of stated objectives. It has no force of law but is often the basis of legislation. It may be implemented without legislative instruments in form of administrative guidelines or directions or projects or programmes as long these do not conflict with existing law. The Land Policy has made a number of recommendations that will have to be enacted into legislation. Some of these include:

Distinction between Government and Public Land

The current categorization of land under the Land Act is that land is divided into public, private and customary categories. The Presidential Commission on Land, in accordance with section 207 of the Constitution, recommended that all land should be vested in the people of Malawi as follows:

- That radical (absolute) title to all land be vested in the people (citizens) of Malawi and not in the President;
- Public land be held (and not owned) by the Government on trust for citizens of Malawi; and
- Customary land be defined territorially and held (not owned) by traditional authorities on trust for the members of the communities resident in their jurisdictions.

Thus the Commission recommended retention of the current categorization of land into public, private and customary categories.

The Land Policy has to some extent retained the above categorization but has made substantial changes including, for example, the definition of government land which is as follows:

> ***Government Land*** *will henceforth refer exclusively to land acquired and privately owned by the government to be used for dedicated purposes such as government buildings, schools, hospitals, public infrastructure or made available for private use by individuals and organizations.*

It may be noted that private ownership of land by Government may encourage wrong perceptions about the ownership of such land and therefore promote unauthorized dealings in public property. It may imply to some that such land belongs to the Government in power. Land acquired and used by the Government for schools, hospitals or National Parks to which the public has access should remain public land. The usual legal restrictions on access to and use of such land should continue to apply and, where necessary, strengthened.

The policy objectives intended to be achieved by the concept of Government land as defined in the Land Policy may be met by adopting the categorization recommended by the Commission and clearly stipulating the terms of trusteeship to which the Government and traditional authorities are subject including the usage, access to and dealing in such land.

It is recommended therefore that there should be no difference between Government land and Public Land and that the recommendation of the Commission in this respect should be adopted in the new legislation. The Commission recommended that radical title to all land should be in the people of Malawi but that Government should hold all title to Public Land on trust for the

people of Malawi. Similarly traditional authorities on trust should hold all Customary Land title for the people in the relevant jurisdiction. The legislation should stipulate in some detail the terms of such trusts so that the rights of access, use and control including powers of allocation and management are spelt out.

The Land Policy categorizes some customary lands as public land. It states that:

> *In the case of customary land managed by Traditional Authorities, common access land reserved as **dambos,** community woodlots, etc, will be classified as public land exclusive to members of the Traditional Authority*

This may undermine local ownership or holding of customary land and seems to suggest that government control of customary land in existing law will continue. This runs counter to current notions of decentralization and community based management of natural resources. In addition this formulation will expose customary land to the kind of exploitation that led to the loss of customary land to private land under current law.

So long as there is clear stipulation of the duties and responsibilities of traditional authorities in respect of management of customary land including *dambo land* and village woodlots, the policy objectives of sustainable land management can be met without defining such customary land as public land.

Customary land should be defined in the manner proposed by the Commission. The law can then stipulate in clear terms how the land will be managed and the responsibilities of the institutions created or identified by the law and in a manner that promotes transparency and accountability in land management.

3.3 Review of Key Concepts in Land Related Legislation

Titling

3.3.1 Title to land is critical. Not only does it determine ownership and therefore eliminate possible conflicts between holders and claimants, it also determines investment patterns and, in some ways, its management. Thus the duties, rights and responsibilities of various stakeholders are intimately related to title. Title determines security of tenure and therefore one's long term responsibilities and planning. This principle applies to all categories, namely, customary, private or public land.

3.3.2 While the Land Act, 1965 clearly defines customary land; it fails to clearly articulate the rights and responsibilities of the holders of such land. The Act vests title in customary land in the President as trustee for the people of Malawi. This may be somewhat at odds with the Constitution which

vests all land in the Republic of Malawi, the state. Such titling is of course too general and may be questioned on ground that a state as compared to a Government is not a legal entity on which land can be vested. That is perhaps why the Land Act, 1965 had vested customary land in the President as head of state. The Presidential Commission on Land proposed that customary land be defined territorially and be held (not owned) by traditional authorities on trust for their people. This proposal should be taken seriously as it will provide a firm basis for community based natural resources management.

3.3.3 The National Land Policy proposed that customary land be registered. This will reduce land conflicts and enhance certainty in land transactions. The Policy also proposes measures to ensure that registration does not lead to landlessness as new titleholders may readily sell their land. Legislation needs to specifically provide for this and empower local land committees responsible for land to control such transactions

Defining Customary Land

3.3.4 The Land Act definition of customary land is localized. Customary land is defined as 'owned' under customary law, while 'customary law' is customary law applicable in the area concerned (section 2 of the Land Act, 1965). While this definition ensures that customary land is community owned and managed this has not prevented 'strangers', including Government, from invading this community based resource to the extent that an order had to be issued to stop leasing of customary land in some areas (See Control of Land (Agriculture Leases) Order, 1990).

3.3.5 If the localized nature of customary land is strictly adhered to it might be considered discriminatory on grounds of tribal or some such origin and run foul of section 20 of the Constitution. How to resolve the apparent dilemma? We should retain the community-based approach and ensure that community control and management are protected and facilitated. There should also be a provision giving priority of access to local resources to local residents. Further, while state supervision of such land is essential, the sweeping ministerial powers provided under sections 25 and 26 of the Land Act completely watered down community-based management. These powers should be abolished and decentralized to local authorities and traditional leaders while the Minister retains policy supervision powers.

Land Use and Management

3.3.6 The only provision that provides for use and management of land in the Land Act is section 31. This is an enabling provision giving the Minister power to make regulations for use and management of land of any

category. However, the only regulations made so far are in respect of leases for which government apparently feels responsible. Hence that Land Act Regulations, the Control of Land (Agricultural uses) Control Order and such other regulations provide for the use and management of leaseholds and control orders for specific areas or development projects, but not private land or customary land in general. This is a major anomaly that needs to be revisited.

3.3.7 Further, although the powers in section 31 provide flexibility to the regulatory authorities, so much of land use and management is well established and should be concretized in a piece of legislation such as a Land Use and Management Act that should cover all manner of category and usage of land. It is also necessary that the law be updated so that it provides for matters that were not considered by the draftsman in 1965, for example that Malawi would have cities.

3.3.8 The Town and Country Planning Act is a major complementary legislation to the Land Act. It provides for zoning, development control and designation of special areas. The National Land Policy proposes that the whole country be designated a planning area, so as to eliminate the existing gap that planning regulations only apply in designated areas. The problem for the regulator is that they had to move with the developer or investor's interest. The Environment Management Act on the other hand provides for environmental impact assessment, audits as well as declaration of protection orders where the Director is of the opinion that environmental degradation is threatened.

3.3.9 Further, the relationship between land allocation and administration planning and development control including the relationship between the responsible sectors is far from clear. This has led to situations where Department of Lands has allocated land to an individual who proceeds to develop without planning permission or EIA as the case may be. The new legislation must eliminate this loophole by specifically providing that land allocation or grant is not a license to develop and that such is or may be subject to EIA or planning permission, as the case may be. Such provisions should also be inserted in lease agreements or land grants made by Government.

<u>Land Finance</u>

3.3.10 The quest for orderly development of land will be of little use if there are no facilities for financing that development or infrastructure. For this reason land law must regulate and facilitate the financing facilities available. While market forces are the determinant of finance, some measures need to be introduced to ensure that both providers and users of finance are treated fairly. For this reason, there is need for revision of

provisions of mortgage finance under the Registered Land Act and possibly the Building Societies Act. The right of a spouse who contributed to the acquisition of mortgaged property but whose name does not appear on title documents should be protected by legislation. This would protect rights of women and children especially where the spouses are estranged.

3.3.11 In particular, the circumstances under which a mortgagor may repossess properties are too stringent and do not differentiate between dwelling properties or business assets. We propose that the law should differentiate between the two uses. Currently the only difference is that interest rates for dwelling properties are slightly lower than those for business, but even this is not a statutory requirement.

3.3.12 On the other hand, consideration should be given to creating a ceiling for recovery of interest to promote social and economic development and poverty reduction in particular. The guiding principle should be that once a finance house has obtained an appropriate return on its investment, interest on defaults should not be *ad infinitum*.

Land Inheritance

3.3.13 The Land Act does not provide for inheritance of land, hence inheritance issues must be dealt with under the Wills and Inheritance Act. The latter Act of course mentions land only in passing (such under section 62 dealing with small estates), and treats it as any other property but it specifically excludes customary land. The question is whether land law needs to deal with inheritance of land separately. The main argument for taking land inheritance out of the Wills and Inheritance Act is that Land is so critical to livelihoods and poverty reduction that it deserves separate provisions intended to take special recognition of the vulnerable and the disadvantaged such as women and children

3.3.14 The above does not answer why such provisions cannot be made under the Wills and Inheritance Act. However, the local institutions proposed under the National Land Policy may be well placed to deal with land inheritance and since their powers and responsibilities will be dealt with under new land legislation, it should be that legislation which should deal with land inheritance. This is a little more convincing and merits serious consideration, though we are not seriously committed to the idea. There is a Special Law Commission dealing with inheritance and is considering the same issue.

3.3.15 It is worth noting that recent amendments to the Wills and Inheritance Act have made significant strides to strengthen enforcement machinery to curb property grabbing. Fines of up to K20, 000-00 can be imposed for violation of the Act. In addition the Act provides for the appointment of

Special Prosecutors to operate at local level who can take up matters on their own cognizance without waiting for claims or complaints. This machinery can be used under a new land law, since the Special Prosecutors can be empowered to prosecute 'land grabbing' claims.

3.3.16 It is important to mention that the scheme of inheritance under the Wills and Inheritance Act is too complicated for local use and limited in use since it excludes customary land. Many have however been dispossessed and landlessness has increased due to incidents of land grabbing upon death of a spouse; this may have been exacerbated by lack of regulation of customary land inheritance. Hence the need to seriously consider separate inheritance provisions under the new land legislation to be administered by local bodies. It will be important however to bear in mind the difficulties of creating an omnibus inheritance scheme that can work well in all cultures as the Wills and Inheritance Act does. Perhaps it may be necessary to devolve regulatory powers to land committees, the land legislation should only apply where local ones are not available.

Land and Decentralized Institutional Framework

3.3.17 The proliferation of community based natural resources management institutions is a cause for concern. Forestry, fisheries, water and land have or propose to have local institutions for resource management that often target the same people. This duplication of committees needs to be eliminated. On the other hand, the National Decentralization Policy and the Local Government Act provide for development committees at village, area and district level. Integrating land related institutions into this decentralized management system offers the chance of cross sector co-ordination and efficient utilization of human resources at local level. In addition, the decentralized framework should provide for access to information at that level available in the vernacular of the area concerned.

Traditional Leaders and Land Administration

3.3.18 Traditional leaders were concerned with the absence of legislation mandating them to take leadership in land administration and management. Thus while political statements are made as to how critical the involvement of traditional leaders in land and other natural resources issues, the Chiefs Act that regulates powers of traditional leaders is silent on powers and responsibilities of traditional leaders. This is also true of other pieces of legislation such as the Forestry Act, Water Resources Act or the National Parks and Wildlife Act. The MNLP has proposed the enactment of a Traditional Leaders Law for this purpose. This is a very important proposal. The new land law must however be explicit regarding powers and responsibilities of traditional leaders.

Cross Sectoral Management

3.3.19 There has generally been lack of co-ordination between the institution responsible for land and other sectors that use land. An often-quoted case is the forestation clause under the Land Act Regulations that imposes an obligation on holders of government leases to put 10% of their land to forest. This clause has generally not been enforced yet the mechanism for enforcement is quite flexible since proof of non-compliance with any lease covenant entitles Government forfeit the lease.

3.3.20 The lack of enforcement may be due to the perception in the institution responsible for land that forestation is not their core function. On the other hand, the National Forestry Policy, 1996 provides that the Director of forestry shall enforce the forestation clause in consultation with the institution responsible for lands. This provision is however not reflected either in the Forestry Act or the Land Act and does not seem to be operational. The new land legislation needs to devise a workable mechanism to ensure that institutions can harmonize their work programs and either develop and implement joint management or outsource services that it cannot provide in-house to ensure that cross sector issues are dealt with. Decentralization of this function to local communities or Assemblies may offer better chances of enforcement.

Dispute Resolution

3.3.21 Disputes over land whether during registration process or after need to be resolved at local level first before going through the formal judicial process. The new land law should provide for mediation, reconciliation and arbitration using the local land institutions. Moreover the jurisdiction of magistrate courts in land matters needs to be expanded since the current status compels parties to travel long distances to lodge claims in High Court registries in Blantyre, Zomba, Lilongwe and Mzuzu only.

3.3.22 Under section 39 of the Courts Act a magistrate court has no jurisdiction to try or determine any matter if title or ownership to land is in issue. The only exception is if the land in question is registered land and its value is not more than K400.00 (see section 156 of the Registered Land Act). Clearly this limitation in jurisdiction is not justifiable in current economic circumstances. At the time this law was passed in 1967 £200.00 was a lot of money. This needs to be progressively adjusted. Moreover the jurisdiction should be extended even in relation to unregistered land.

A summary of the key recommendations has been provided in the Appendix attached to this report for quick reference.

4. Key Elements for Drafting

The following are our drafting recommendations based on the consultations and dialogue with local communities, traditional authorities and local government authorities. They are also based on our research findings and views from civil society members in the Task Force. They respond to specific provisions under the current Land Act but this does not however suggest our support for an amendment bill.

4.1 Need for a Comprehensive New Land Law

It has been pointed out by Brooke-Taylor (Land Law in Malawi, p. 5) that the Land Act is a codifying and amending statute; it was built firmly on the law as it stood at that date. 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 in England since the 1925 Law of Property Act of that country that does not apply to Malawi. Considering the importance of land to local livelihoods and economic development, Malawi will be failing in its quest for equity and efficiency in land use and management if it is to continue to rely on old notions of medieval English property law.

The new law must also be easily accessible to most Malawians and they must therefore not be told to look to statutes in England prior to 1902 which are replete with unnecessary technical jargon such as uses, rule in Shelly's case etc. We therefore recommend a comprehensive piece of legislation that blends 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, gender equality in land transactions, among others. The draftsman must take a bold step to rewrite the law rather than amend 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 us in the first place.

4.2 Definitions

4.2.1 The MNLP has introduced new concepts that need to be considered in the draft land bill. It defines **Customary Land** as land falling within the jurisdiction of a recognised Traditional Authority that has been granted to a person or group of persons and used under customary law. The definition does not cover unallocated or abandoned customary land under the jurisdiction of a Traditional Authority. The MNLP categorises unallocated and abandoned land within a Traditional Authority area as public land. This definition clearly undermines community-based management of local land resources.

4.2.2 We therefore recommend that the definition of customary land should include all land under the jurisdiction of a Traditional Authority that is held or occupied under customary law of the area.

4.2.3 The next question is whether the definition of customary land should include private land (leasehold or freehold) within the jurisdiction of a Traditional Authority that has been surrendered or whose term has expired. This seems to be the conclusion, at least in respect of leasehold land, according to section 4.10 of the MNLP. Our recommendation is that the definition of customary land should include surrendered or expired private titles. This will strengthen local control of land resources.

4.2.4 It is quite possible in certain areas that such reversions may include very well developed lands where cash crops were being grown and processed for export market and it may be considered inappropriate to transfer the reversion to Traditional Authorities. In such a scenario a scheme for the disposal and management of such land can be organized by Government in consultation with Traditional Authority concerned and the local community.

4.2.5 This brings us to the definition of **Public Land.** The MNLP recognizes unallocated land as Public Land. We do not see the rationale for this and clearly goes against notions of community based management of land resources and the decentralization policy. If the definition of Public Land includes unallocated customary land then there should be a clear provision that the land will be administered by traditional leaders in accordance with local customary norms; yet this is not the understanding of Public Land which suggests direct state control and therefore available to all citizens of the country.

4.2.6 Public land should also include land outside the jurisdiction of a Traditional Authority that reverts to Government upon surrender or termination of the relevant private title. This may be land under the jurisdiction of an Assembly.

4.2.7 Further in accordance with the proposed introduction of **customary estates** as private land, the definition of private land needs to change accordingly.

4.3 General Principles

It is necessary for the draft land bill to stipulate at the very beginning the general principles that will guide the administration and management of land resources. These will act as the inspiration behind the entire bill against which those charged with duties and responsibilities under the new law will be judged. In fact this is the format most current legislation is taking and especially those relating to natural resources management. Examples include the Forestry Act, 1997, the Fisheries Conservation and Management Act, 1997 and the Environment Management Act.

The guiding principles could relate to promoting access to land, access to land resources information, promoting transparency and accountability in land administration, capacity building, planning, land resettlement, among others. The current Land Act does not have general principles to guide the administration and management of land resources; there are policy guidelines in the MNLP that could be formulated into guiding principles for this purpose.

4.4 Duties and Responsibilities of Key Stakeholders

The current Land Act merely provides powers of the Minister and, through delegation, powers of the Commissioner for Lands, Secretary for Agriculture or the Program Manager to undertake activities on behalf of the Minister. It is important for the new law to stipulate in some detail the duties and functions of the senior official (Director) responsible lands.

We believe however that most of the powers exercised by the Minister should be given to a senior officer 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 Act needs to outline the relationship with other agencies such as those responsible for water, forestry and agriculture rather than the current framework that is merely by delegation and very limited in scope and does not provide for cross sector management guidelines.

4.5 Rights and Duties of Malawi Citizens in Matters of Land

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 MNLP where Government seeks to promote access to land.

The formulation of such a right 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 this time with more concrete provisions regarding mechanisms for facilitating such access. In addition, mechanisms for facilitating transparency and accountability in land dealings should be introduced 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.

4.6 Granting Land to Non Citizens

4.6.1 Our preliminary submission to the Special Law Commission on Land already dealt with this point at some length. 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. This should cover the dilemma as to whether non-citizens can be lawfully prevented from acquiring freehold land.

4.6.2 Section 24B of the Land (Amendment) Act 2004 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. Section 24C on the other hand 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 so as to be derogable under section 44 of the Constitution. The answer seems to be in the positive looking at the practice in most countries the limitations in this section are not objectionable.

4.6.3 We believe that these provisions are not unconstitutional as they 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 shamelessly subsidize production of their citizens’ enterprises. This we believe is geared towards local empowerment, a policy incorporated in the Malawi Poverty Reduction Strategy.

4.6.4 Section 24D 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. Section 24E on the other hand 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 ahead of the comprehensive land bill. Their effect is to deny non-Malawians freedom to transact in the same manner that Malawians can.

4.6.5 The Taskforce is 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. We propose however that 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 different types of investment and required land grants.

4.6.6 One measure for monitoring foreign landholding for companies may be to require the Registrar of Companies and or the Malawi Stock Exchange to provide relevant information to the Ministry of Lands. This information would however be provided after the fact and if used to invalidate transactions would bring uncertainty to the investing public.

4.6.7 To be effective, the information should be provided on applying for shares; the question would still remain whether bureaucracy would not delay investment. The answer must lie in consulting with the Malawi Stock Exchange and how other countries have dealt with such issues. In general however there are unlikely to be many transactions of this nature to overwhelm bureaucracy and thereby delay investment decisions.

4.7 Power of a Corporation to Hold Land: Section 4 Land Act

4.7.1 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. Corporate persons are created under the Companies Act, the Trustee Incorporation Act and special statutes. These invariably provide power to hold land and the Land Act specifically exempts them from obtaining licenses from the President.

4.7.2 Hence limited companies, normally used for profit business, NGOs, religious and other charitable bodies are not covered by section 4 of the Land Act, 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.

4.7.3 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 to 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.

4.8 Power to Dispose of Public or Customary Land: Section 5, 27 Land Act

4.8.1 This section is no longer tenable in the context of decentralization; the Minister has been given too much power under the Land Act and there is therefore need to devolve these powers to the Assemblies and traditional leaders. Further the Minister’s power to make grants out of customary land should be limited to uses of national interest as it is widely recognized that this power was abused by granting numerous leaseholds to the detriment of local communities many of whom were consequently dispossessed. In any case such a decision should be subject to local consent granted at a public hearing duly convened for the purpose.

4.8.2 In addition the Act gives sweeping powers to the Minister at the expense of other stakeholders. Firstly, in a number of cases there has been conflicting jurisdiction where a land grant was construed as development permission or a project commenced in areas designated by other agencies as ‘protected’ areas such as catchments. Secondly, only in few areas does the Act expressly state the Minister’s powers shall be exercised in consultation with other agencies. In the first case the problem may not be because of lack of necessary legal provisions but just lack of or inefficient enforcement framework. In the second case necessary provisions may be required to oblige the Minister to consult before a grant or decision can be made.

4.8.3 Section 27 gives power to the Minster to acquire customary land for public purposes whereupon the land becomes public land. Subject to the general limitations to the power suggested in this submission, it is important to emphasize the need for the power to be given to the Assemblies as well and that whoever exercises that power should do so in consultation with local communities affected by the proposed acquisition.

4.8.4 Further, the powers of the Minister were exercised without clear fiduciary obligations even though under the current Act such powers must be exercised on trust for the communities in the area in which the land is situated or indeed all the people of Malawi as the case may be. 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.

4.9 Vesting Public or Customary Land: Sections 8 and 25 of the Land Act

4.9.1 Vesting land in the President under section 8 and 25 of the Land Act 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.

4.9.2 According to section 207 of the Constitution all land in Malawi is vested in the Republic; this seems to be at variance with the Land Act. However, what the Land Act is doing is merely to vest land in the personification of the Republic, the President, and 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 common law as expressed by the Land

Act seems to be enacting this position. It is our view that section 207 as a number of other provisions is a quasi legal statement expressing a general policy statement that will not be in conflict with legal vesting of Public Land in the President or Customary Land in the Traditional Leader of the area where the land is located.

4.9.3 Section 8 can therefore remain the way it without violating the Constitution since the President holds the land merely as President of the State of Malawi and as sanctioned by its people. The President is a bare trustee, holding the title to the land to satisfy vesting requirements but no more, not for his benefit or for his Government but for the owners as directed by the Constitution.

4.9.4 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.

4.9.5 Further, customary land should be vested in traditional authorities on trust for the people in their jurisdiction as was proposed by the Presidential Commission on 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 subject if any remains in the area but should also include managing land that has already been allocated.

4.9.6 It is therefore our view that vesting land in appropriate offices/officers subject to relevant trust/fiduciary obligations would be consistent with the Constitution and landholding at common law. This will also ensure accountability, as we shall clearly identify duty-bearing individuals.

4.9.7 Finally, it is noteworthy that the Act exempts Government land reserved for use and occupation of the President from control of the Minister. There is no justification for this provision and may be prone to abuse; we therefore recommend that it be deleted.

4.10 Private Land

4.10.1 In accordance with the MNLP, we have already recommended that upon termination, surrender or falling in of leasehold or freehold titles, the reversion should vest in the Traditional Authority if situated in a Traditional Authority area or to Government or Assembly if located in a local government area.

4.10.2 In addition, many traditional leaders and local communities that we consulted felt that the administration and management of leaseholds in their areas should be given to them rather than Central Government. There is merit in this since it is fair to assume that resources are best managed from where they are. Hence where a leasehold is being renewed, we recommend that a public hearing presided over by the Traditional Authority should be conducted. This public hearing would hear communities' views and assess development on the land before renewal is effected.

4.10.3 The Act gives power to the Minister to relieve any person from performing any covenant, agreement or extend the time for performing such obligations. This discretion may easily be abused and it is idle to rely on judicial review. Hence the Act should provide guidelines for granting the reliefs.

4.11 User of Land: section 31, Land Act

4.11.1 Section 31 empowers the Minister to regulate, manage or control user of land. It is noteworthy that this is the only provision that gives powers to regulate use and management of all land. Some regulations have been promulgated on settlement patterns and the Land Act Regulations deal with regulation of use and management of leaseholds. However there are no regulations for agriculture, which is the biggest user of land.

4.11.2 Through the Land Resources and Conservation Department of the Ministry of Agriculture draft legislation was prepared to cover this gap but this has not been enacted. Our recommendation is that the Ministry of Lands in collaboration with the Ministry of Agriculture should either promulgate regulations under section 31 of the Land Act or a new Land Use and Management Act should be developed. In addition to Ministry of Agriculture there is need to incorporate local communities, Land Committees and other stakeholders interested in land use and management such as departments of water, forestry and environment.

4.12 Customary Land Committees

4.12.1 Village, Group Village and Traditional Land Committees have been proposed under the MNLP to oversee the formalization of customary land allocations and general land administration in their area of jurisdiction. It is noteworthy that the Local Land Boards Act provides for protection of customary land that has been registered as private land under the Registered Land Act. Their aim is to guard against unwise dispositions. Thus the Boards cannot act in place of the proposed committees that in any case only operated in very few areas in Lilongwe. The Local Land Boards Act will have to be repealed and its functions incorporated in the part of the draft Land Bill dealing with customary land administration.

4.12.2 According to the MNLP, traditional leaders will head the Committees composed of at least three 'recognized and respected' community elders one of whom will be a woman, elected in accordance with tradition. The Taskforce has previously queried the meaning of 'respected and recognized' elders elected in 'accordance with tradition and considered that it may be used to keep out the vulnerable in the community. Hence a normal electoral system or traditional selection may be utilized though the latter will invariably lead to appointment of the usual chief's men.

4.13 Dispute Settlement

4.13.1 The MNLP recommends the establishment of a land dispute settlement mechanism designed to obviate the problems of having to go to the High Court that currently has jurisdiction over most land matters. The proposed set up under the MNLP seems to be quite heavy starting with Village Land Tribunal all he way to the Central Land Settlement Tribunal. It is not clear whether these tribunals are judicial or administrative.

4.13.2 It is noteworthy however that the proposal that these be presided over by traditional leaders may run against the separation of powers since these exercise executive functions; in most cases they would also have allocated the land. They must therefore operate as administrative tribunals. Further, their composition must be carefully designed so as to avoid clogging the system and making it difficult to operate. The Taskforce recommended that women should be given a quota in the tribunals whether these are elected or not.

4.13.3 It is further to be noted that in accordance with the National Decentralization Policy and the Local Government Act there are already structures on the ground from which the tribunals may take inspiration as to how they may be constituted to ensure efficiency and coordination.

5. Conclusions

The Taskforce carried out reviews of land related legislation in Malawi. It consulted various stakeholders, especially local communities that are directly affected by land policy and legislation changes. The Taskforce made preliminary submissions to the Special Law Commission on Land Related Legislation and convened meetings with Assemblies where the views and concerns of local communities were analysed and validated. This submission has synthesized all the findings from these consultative processes and presents them to the Special Law Commission for its consideration.

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 effective cross sector management between the institution responsible for land administration and other agencies who operate

on land and whose activities have a bearing on land resources management. Another concern is 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. Inheritance is one theme that will benefit from local governance systems but in general this will greatly contribute to the implementation of the National Decentralization Policy.