CHAPTER 1

THE COMMISSION

1.1 APPOINTMENT AND MEMBERSHIP

The Presidential Commission of Inquiry on Land Policy Reform was established on March 18, 1996. Under Government Notice No.20 contained in the Malawi Gazette Supplement of that date, His Excellency Dr Bakili Muluzi, State President of Malawi, appointed 13 Commissioners and one Secretary under the Chairmanship of Mr Patrick M Saidi. The notice was subsequently amended to cater for the addition of two more Commissioners.

The Commission as originally appointed was composed of the following members.

MR PATRICK M SAIDI	-	Chairman
PROFESSOR PAUL A K KISHINDO	-	Vice Chairman
MR VIPYA HARAWA	-	Member
DR CHARLES MATAYA	-	Member
MR HETHERWICK M MBALE	-	Member
CHIEF NCHILAMWELA	-	Member
CHIEF MALENGACHANZI	-	Member
MRS JOYCE C ANDERSEN	-	Member

MR GEORGE T BANDA	-	Member
HON BASHIR J KHAMISA, MP	-	Member
MR JODDER R KANJERE	-	Member
REVEREND STEPHEN S KAMANGA		Member
DR ANDREW B MZUMACHARO	-	Member
DR VERA CHIRWA	-	Member
MR EDWARD GWAZANTINI	-	Secretary

In the course of the Commission's work, several changes have occurred in the membership. First, the Commission was saddened by the death on July 20, 1997 of Commissioner Reverend Steven S. Kamanga. Second, the Commission lost the services of Commissioner Ruth F. Takomana who had to proceed for further studies abroad before the completion of this task. Before her departure, Commissioner Takomana rendered dedicated service to the Commission. And third, the original Secretary of the Commission, who also had to proceed for further studies abroad, was replaced by Mr. Edwin T. Kafuwa.

At the time of preparation of the Final Report, the membership of the Commission was as follows:

MR PATRICK M SAIDI	-	Chairman
PROFESSOR PAUL A K KISHINDO	-	Vice Chairman
MR VIPYA HARAWA	-	Technical Secretary (Member)
DR CHARLES MATAYA	-	Member

MR HETHERWICK M MBALE	-	Member
CHIEF NCHILAMWELA	-	Member
CHIEF MALENGACHANZI	-	Member
MRS JOYCE C ANDERSEN	-	Member
MR GEORGE T BANDA	-	Member
HON BASHIR J KHAMISA, MP	-	Member
MR JODDER R KANJERE	-	Member
DR ANDREW B MZUMACHARO	-	Member
DR VERA CHIRWA	-	Member
MR EDWIN T KAFUWA	-	Secretary

1.2 THE TERMS OF REFERENCE AND INTERPRETATION

The Commission's Terms of Reference as set out in Government Notice Number 20 of 1996 were as follows:

"1. The Commission shall act in accordance with the provisions of the Commission of Inquiry Act and subject thereto, shall undertake a broad review of land problems throughout Malawi, and recommend the main principles of a new land policy which will foster a more economically efficient, environmentally sustainable and socially equitable land tenure system.

2 Without derogation from sub-paragraph (1), the Commissioners shall have power:-

(i) to hold public meetings, receive oral presentations and take evidence in open or closed sessions, from members of the general population and government officials throughout Malawi concerning the nature and causes of land problems in rural and urban areas, and to make recommendations for solutions thereto;

(ii) to consider current customary tenure practices as well as leasehold and freehold tenures, review relevant regional and international experiences and propose a more appropriate arrangement to provide equal protection to all categories of title holders, while ensuring the operation of market transactions in land;

(iii) to determine the basic causes of land conflicts and disputes, suggest ways of resolving them and recommend changes in dispute resolution mechanisms;

(iv) to consider present inheritance systems and, in conformity with existing or proposed legislation, recommend appropriate procedures for inheritance of land;

(v) to review the functions, powers and organisational structures of public institutions responsible for aspects of land administration, identify any bottlenecks or weaknesses in their operational

procedures and recommend ways of streamlining these to improve efficiency;

(vi) to consider the main principles of a new land policy and suggest guidelines for basic land law and associated subsidiary legislation to give effect to the new policy; and

(vii) to request special studies and technical assistance on any other issues pertinent to land matters that the Commissioners may deem appropriate.

3. The Commissioners shall have power to determine:-

(a) their procedure;

(b) their quorum at hearings;

(c) the place or places where, and the time or times within which, the inquiry shall be held;

(d) whether or not the inquiry shall be held in public, with reservations nevertheless to the Commissioners to exclude any person or persons or any matters or particulars if they deem fit for the due conduct of the inquiry, the preservation of order or for any other reason;

(e) the form of the report they will render upon the inquiry;

(f) such other matters as the Commissioners deem expedient for the purpose of the inquiry.

4. The Commissioners may co-opt, for such period or periods as they think fit, any number of experts or other persons as, in the view of the Commissioners, are required to assist them in the performance of their functions.

5. Upon completion of the inquiry, the Commissioners shall make a written report of their findings to the President."

The first task of the Commission was the interpretation of its Terms of Reference. After much deliberation the Commission proceeded on the understanding that it was neither a legislative body, a court, nor a land distribution agency. Its focus was rather to carry out an inquiry and recommend a new land policy and legislation guidelines for Malawi. Consequently, the Commission interpreted its Terms of Reference as requiring comprehensive inquiry into all land matters in Malawi with particular reference to:

(a) the historical factors that have shaped land policy and law in Malawi,

(b) the nature and causes of land problems, if any and, at whatever level of social organisation these may arise whether individual, community, or state and in whichever use context whether agricultural non-agricultural, or common heritage these may arise;

(c) the nature and performance of prevailing land tenure systems whether customary freehold or leasehold, and in whatever management context these may operate whether individual community, or state.

(d) the nature, operation and effects of the prevailing systems of land inheritance in Malawi whether these are statutory, customary, or hybrid; and

(e) the structural framework of land administration at all levels whether at chieftaincy, public administration, designated line Ministries or private/parastatal sectors

On the basis of that inquiry, the Commission understood further that the primary output of its work was to develop and recommend:

(a) the main principles of a new land policy that would foster economic efficiency, environmental sustainability, and social equity through, inter alia,
    - the reorganisation of existing tenure arrangements in order to accord equal protection to all land users while facilitating land market operations; and
    - the design of appropriate dispute processing mechanisms,
    - the adoption of new and socially acceptable inheritance procedures,
    - the streamlining of land administration systems and procedures, and

(b) guidelines for a basic land law and associated legislation to give effect to the new policy

1.3 THE COMMISSION'S METHOD OF WORK

Although officially gazetted in March 1996, the Commission was not able to commence work until a number of logistical and substantive issues involving funding, working conditions and infrastructure were resolved by the government of Malawi and its bilateral and multilateral partners. Work therefore began after January 8, 1997 when the Project Support Document was signed.

Urban work eventually started, the Commission proceeded in several modalities some of which were executed concurrently:-

(i) ORIENTATION SEMINARS

Between January 20 and June 13, 1997, the Commission conducted three major seminars to orient its members, District Commissioners and Chiefs throughout the country on the terms of reference of the Commission, the processes of land policy development and their respective roles in civic education on land policy matters.

(ii) PUBLIC HEARINGS

From June 21 to November 29 1997, the Commission conducted 205 (out of 237 scheduled) public hearings in all regions, districts, Traditional Authority, and sub-Traditional Authority areas, Bomas, and the major urban centres of Lilongwe, Blantyre and Mzuzu. Public hearings were well patronised except in the major urban centres where attendance was poor.

(iii) SPECIAL HEARINGS

At various stages throughout its work, the Commission found it necessary to schedule special sessions to receive oral or written memoranda, to conduct investigations into issues of particular concern to individuals or groups, to consider research reports submitted to it or at its request, or to deliberate on urgent matters. All correspondence, written memoranda, existing studies, and research commissioned on behalf of the

Commission by the UN Food and Agricultural Organisation, were treated in this manner.

(iv) PLENARY SESSIONS AND COMMITTEES

From time to time throughout its work, and particularly after the conclusion of public hearings, the Commission held numerous plenary sessions, inter alia, to review its work, deliberate on emerging issues, consider routine administrative matters, peruse various drafts, and approve the preliminary as well as this report. In all some 38 regular plenary sessions were held. These sessions were held mainly in Blantyre and Lilongwe. The Commission also made use of committee, panels and task forces. These facilitated the work of the Commission by attending to logistical issues, special hearings and the drafting of reports. One such committee output was the Preliminary Report of the Commission which was submitted to His Excellency the President in April 1998.

(v) WORKSHOPS

After the release of the Preliminary Report and on receipt of comments and reactions from various agencies the Commission organised four workshops: three at regional, and one at national level. The Northern Region workshop took place at Mzuzu from 4th to 7th October 1998; the Central Region workshop took place in Lilongwe from 12th to 15th October; while the Southern Region workshop took place from 18th to 21st October in Blantyre. The national workshop took place in Blantyre from 16th to 19th November 1998.

Invited to the regional workshops were chiefs of the rank of Traditional Authority, District Commissioners and stakeholders such as estate owners, religious organisations, smallscale farmers, women's organisations and business people. The regional workshops were organised to enable stakeholders to discuss the Preliminary Report and validate its findings.

The national workshop was intended to discuss all submissions received by the Commission and to make recommendations on the various issues identified. The participants at this workshop were Paramount Chiefs, Principal Secretaries, Town Clerks, religious leaders, leaders of women's organisations, estate owners, academics, individual prominent women, lawyers, disadvantaged groups, representatives of the Asian community, and consultants that had prepared major land utilisation studies on behalf of the Commission.

(vi) COMPARATIVE EXPERIENCES

In addition to these modalities, the Commission was expected to undertake visits outside Malawi to gain regional and international experience from other countries that have undertaken similar land reform programmes. Due to constraints of time and funding, the Commission was unable to conduct such visits. Nonetheless, the Commission was able to draw substantial insights from public reports on how other African countries, particularly South Africa, Botswana, Namibia, Zimbabwe, Tanzania and Kenya have carried out their land reform programmes.

A full description of the Commission's methodology is provided in Volume II of this Report.

CHAPTER 2

EVOLUTION OF LAND POLICY AND LAW

2.1 THE COMMISSION'S MANDATE

The Commission's Terms of Reference require it to conduct a broad review of land problems throughout Malawi and recommend the main principles of a new land policy which will foster a more economically efficient, environmentally sustainable and socially equitable land tenure system. Preliminary assessment of the very considerable literature that already exists on the land question in Malawi indicates that although many of those problems are the result of contemporary social, political and economic dynamics, the more important of these are rooted in the country's pre-colonial and colonial history. An analysis of the evolution of land policy and land law in Malawi is therefore essential if the current issues surrounding land, its ownership, use, management and administration are to be placed in context. This Chapter is designed to provide that context.

2.2 BACKGROUND TO THE COUNTRY

Malawi is a landlocked country wedged between Zambia to the west, Tanzania to the east and Mozambique to the east and south. For 584 kilometres on its eastern border runs Lake Malawi, one of many water bodies of the Great Rift Valley and the second largest in Africa. Physiogeographically, the country's terrain is characterised by undulating

terrain culminating in five large plateaux; namely Dedza, Mulanje, Zomba, Vipya and Nyika.

Malawi occupies an area of 118,324 square kilometres of land and water. Land accounts for 94,080 square kilometres, of which 53,070 is considered suitable for cultivation. Current estimates indicate that the country's population, which now stands at approximately 11 million people, is growing at an alarming rate of 3.2% per annum. At this rate of growth the population of the country will more than double by the year 2020. And given the fact that more than half of that population is below 15 years of age, the potential for further growth due to demographic momentum is already built into the structure.

Being a predominantly agricultural country, land and its use lie at the centre of Malawi's economy, and the livelihood and aspirations of its people. An estimated 87% of the country's population lives in the rural areas and hence relies on agriculture for food, cash incomes and other needs. An appreciation of the evolution of land and land use policy and of the legal regime governing the country's land resources, is therefore an important first step in the development of future policies.

Legend has it that the original inhabitants of the country which came to be known as Malawi were Akafula or Abathwa, a short nomadic people who lived by hunting animals and collecting wild fruits and berries. These nomadic people are believed to have been driven southwards into what is now Namibia by pastoral and agricultural groups which began to enter the country from the Great Lakes region in the 9th century. New

groups continued to come into the country from all directions. The 19th century saw the largest of these influxes comprising the Yao, Ngoni and Lomwe.

Although population densities were low, territorial claims by different communities over specified areas were fairly well defined and effectively defended. Land changed hands by military conquest, or resettlement of abandoned lands. Strong communities acquired the best lands, not through treaties or documented negotiations, but on the basis of capitulation and progressive encroachment.

2.3 COLONIALISM AND SETTLER LAND CLAIMS

The take-over of Malawi commenced with the missionaries during initial expeditions by David Livingstone in Central Africa. According to one study

> the production of cotton for the Lancashire textile mills by peasant farmers ripe for conversion to Christianity was David Livingstone's message for cash cropping in the Lake Malawi Region.(ELUS 1997)

In the event, it was not cotton but tea and coffee estates that were established through grant of concessions by chiefs.

To indigenous communities these concessions were essentially in the nature of occupation licences not at all conferring property rights to the

foreigners. Although it is possible, and even likely that coercion was also used in bringing about consensus in respect of these concessions, the foreigners clearly understood that communities and their chiefs had ownership and control over their land.

The consideration offered in respect of these transactions was, to say the least, trivial. Judge Nunan who presided over Supervisor of Native Affairs v. Blantyre East Africa Company Ltd [British Central Africa Gazette, April 30th 1903] found that the 60,000 acres which were the subject of the judgement were sold for fifty pounds in trade goods – viz., a quantity of cloth, coloured stuff, guns, powder, brass wire, beads and other things being at a rate of one fifth of a penny per acre. Similarly John Buchanan who, in 1881, is credited with having acquired the first estate, "bought 2460 acres in Michiru for one gun, 32 yards of calico, two red caps and other things" (ELUS)

Regardless of the process used to accomplish European settlement, it did not, at this point, translate into the formalisation of legal titles to the land in the sense in which we understand it today. Possession was the essence of the relationship.( )

As more British missionaries, planters, and traders came into the country, the need to provide for their protection increased. This was emphasised by the presence of settlers of other European nationalities particularly the Portuguese whose claims were larger and stronger. Numerous petitions by British settlers to place Nyasaland, which they

perceived to be a valuable commercial asset, under the protection of the British flag, failed on account of the Portuguese claims.

The growth of Portuguese influence over Nyasaland forced a vigorous agitation by pressure groups aligned to British settlers in Nyasaland. They drew attention to the predicament in which the successors of David Livingstone found themselves because of the renewed activity of Portuguese explorers. This agitation and a combination of other factors led to the proclamation of British Protectorate status in 1891. The formal declaration, however, did not come until 1893 when the Africa Order in Council, 1893 was issued.( )

2.3.1. THE NATURE OF COLONIAL POLICY

Long before this formal declaration. British imperial power had, under the Africa Orders in Council 1889 and 1892, appointed a Commissioner for "British Central Africa" who, in exercise of the Africa (Acquisition of Lands) Order 1898 and later the Nyasaland Order in Council 1907, purported to acquire and make grants of lands in the name of Her Majesty. A number of grants were thus made to white settlers who were unable or unwilling to negotiate with indigenous chiefs for concessions. Settlers soon mounted pressure for the clarification of their rights under both grants and concessions.

The response of colonial authorities was to call for the submission of claims and supporting documentation, if any, in respect thereof. A number of claims, including those arising from negotiated concessions,

were submitted to the Commissioner in response. These were then examined and in most cases, "certified" by the Secretary of State as an acceptable basis of occupation. The resultant "Certificates of Claim" were therefore accepted as an interim method of conferring land rights before a formal system of land law was established.

Although the exact nature of tenure conferred by Certificates of Claim was never defined or clarified, it was assumed that something akin to freehold title had, by reason of the Secretary of State's approval, been granted. The general theory of the case was that since declaration of protectorate status had transferred radical title to the whole of British Central Africa (later renamed Nyasaland) and vested it in the imperial sovereign, rights of any tenure could now be issued in respect thereof. It is worth recording, however, that it was not until 1950, following the enactment of the Nyasaland Protectorate (African Trust Land) Order in Council, that Certificates of Claim were defined in colonial law. From then on it was considered settled that the Certificate of Claim was equivalent to a grant hence conferred freehold title.

2.3.2 POLICY ON AFRICAN LAND RIGHTS

The formalisation of white settlement through the issue of Certificates of Claims deprived indigenous communities of more than 1,482,102 hectares of land. Of this 1,080,000 hectares was expropriated by one company: the British South Africa Company. What was interesting about these Certificates is that they were issued in respect of land that was not totally vacant. The question soon arose as to the status of

indigenous communities that were and had always been in occupation of the subject land. The certificates themselves proclaimed that

> no native villages or plantations existing at this time of grant should be disturbed or removed without the consent of the Commissioner…

Upon consent for removal being given, the site of such villages and plantations reverted to the holder of the Certificate.

The meaning of this protection clause was considered by two Land Commissions, the first appointed in 1903, and the second in 1920. While the former lamented the fact that Certificate holders routinely ignored that clause and had in fact turned "natives.. into tenants at will without security …." The latter recommended that rights of indigenous communities in areas subject to Certificates of Claim be extinguished, and that instead sufficient land be reserved, outside such areas, to support the communal way of life to which "natives" were accustomed. The 1920 Commission was emphatic, however, that "reservation" of land for "native" occupation should avoid permanent loss of unalienated land to "natives" since this would lead to mass movement to these areas and the loss of labour to the settler community. Although these and other Commissions recommended some kind of legislative protection for Africans residing on settler land e.g. the Land Ordinance (Native Locations) Act 1904 and later the Africans on Private Estates Ordinance 1952, these were routinely ignored by the settlers.

The effect of these policies was therefore two-fold. First, indigenous communities lost ownership and control of land the subject of Certificates of Claim even though in point of fact, that was not the understanding of chiefs when they granted concessions in the first place. Second, and perhaps more subtle and devastating, such communities lost all unalienated land to the colonial state under the fiction that the title to the whole of Malawi was now vested in the British monarch.

2.3.3 THE COMMISSION'S CONCLUSIONS

Having explored the issues surrounding the question of the legal character, if any of the land concessions that were granted to early settlers by local chiefs, the Commission is of the view, however, that

(i) those concessions were essentially frauds perpetrated on indigenous communities and remain a source of legitimate land grievances particularly in the Southern Region of Malawi, and

(ii) because a legal remedy for that fraud may not now be possible or advisable, solutions to the land problems of the Southern Region may have to be sought outside the framework of land restitution.

2.3.4 THE COMMISSION'S RECOMMENDATIONS

The Commission consequently recommends that

(i) for reasons mainly of political and economic expediency, the Government and people of Malawi should, "let sleeping dogs lie!" and hence refrain from disturbing titles derived from Certificates of Claim.

(ii) Consideration should be given, instead to the setting up of a social development fund and plan to be contributed to and managed jointly by freeholders on a voluntary basis and the Government, for the reduction of poverty and alleviation of land pressure among the indigenous populations in and around Thyolo, Mulanje and Chiradzulu and to assist them purchasing any land in these areas that may come into the market.

2.4 THE EVOLUTION OF LAND LAW

2.4.1 THE RECEPTION OF ENGLISH LAW

The general thrust of colonial land policy may be summarised as follows. Its concern was to:

- appropriate all land in Malawi to the British Sovereign
- place the administration of such land in the sovereign‘s local representatives; first the Commissioner and later the Governor
- facilitate access by the settler community on the basis of private title
- preserve native rights strictly as “occupation rights” and to discourage the establishment of permanent settlements, and
- ensure the availability of cheap labour for settler agriculture.

The presence of European settlers led, as elsewhere in British Colonial Africa, to the need for a regime of law that the settlers would be comfortable with. This led inexorably to the general reception of English

law supplemented by specific enactments based on English property law at the time. Thus the Nyasaland Order in Council, 1902 provided, inter alia that:

> Subject to the provisions of this order and of any law for the time being in force in Nyasaland the civil and criminal jurisdiction of the High Court and of courts subordinate to the High Court, shall, so far as circumstances admit be exercised in conformity with
>
> a. the statutes of general application in force in England on the 11th day of August 1902 and
> b. the substance of English common law and doctrines of equity and with the powers vested in and according to the rules of procedure and practice observed by and before courts of justice and justices of the peace in England.

This clause remained the sole source of the substantive law of property in Malawi until 1964 when the Supreme Court of Appeal Act (Cap.3:01) came into effect and incorporated it.

In 1951, a Land Ordinance was passed by the Nyasaland Legislation Council. The purpose of this legislation was to formalise the

reality which had been created by treaty, convention, agreement or conquest pursuant to the British Central Africa Order in Council of 1902. The Ordinance defined land as either public, private or customary. But so-called "customary" land, was in essence a mere species of "public land." A concession was thus being granted to the natives in that some form of tenure was being defined for them for the public land which they occupied. Such land did not however come under the legal control or ownership of the natives; rather, it remained under the control and management of the Governor. This position was reenacted in the Land Act (Cap.57:01) which came into force in 1965. No body of substantive law was included in that Act and instead all it did was to replace the Governor and Commissioners who previously exercised power on behalf of the British sovereign, with the Minister of the Malawi Government.

In 1967, however, an attempt was made to provide Malawi with a comprehensive body of land law for the first time. That Act, the Registered Land Act (Cap.58:01), was a reproduction in its entirely of legislation of the same name that had been enacted in Kenya in 1963. Its purpose was "to make provision for the registration of title to land and for dealings in land so registered! Apart from providing for land registry practice, the Act also covered the following substantive law areas, namely,

- incidents of registered ownership,
- dispositions (including leases, charges, transfers, easements etc)
- transmissions and trusts,
- restraints on disposition

- prescription and
- rectification and indemnity

It also made provision for conveyancing and searchers. To date the Act has only been applied to the Lilongwe Agricultural Development (ndunda) Area, the Capital District of Lilongwe and the City of Blantyre. Application of the Act to three areas means that conversion of land therein from other registries if any, or first paragraph of any land depends entirely on the efficiency of land administration personnel.

Because the Registered Land Act does not provide for voluntary conversions and given the restricted manner in which it has been applied over the last 25 years, the vast majority of private land parcels remain governed by the Common Law of England in accordance with the reception clause cited above.

2.4.2 THE DOMAIN OF CUSTOMARY LAW

If "customary land" remained, in law, an integral part of "public" (or crown) land, what regime of law governed its occupation and use? An answer to that question is to be found in the fact that since under colonial law Africans had no title to land, the only issue of concern was how to regulate occupation rights among them. This was clearly a personal (not property) law issue governed by customary law. For example, the Nyasaland Protectorate (African Trust land) Order in Council 1950 which had attempted, albeit for a very brief period, to separate title over areas

occupied by Africans from public (or crown) lands, required the Governor to administer such land:

> for the common benefit, direct or indirect, of Africans… [in accordance with]… African law and custom so far as they are applicable and are not repugnant to justice or morality.

The domain of customary law was therefore very severely curtailed. That is the position in which indigenous communities found themselves at independence in 1964.

At independence the Governor ceased to exercise any power in Malawi. It was now open to the new administration to define its own land policies without direct intervention from the colonial administration.

The Land Act 1965 did not change this situation. It merely repeated the existing categories of private, public and customary land adopted in the Land Ordinance of 1951.. A 1981 amendment to the Act introduced Section 25 which declared customary land to be the lawful and undoubted property of the people of Malawi and vested it in perpetuity in the President.(Msisha, M. 1998)

2.4.3 THE COMMISSION'S CONCLUSIONS

After a careful review of the law assisted by a comprehensive study of land legislation in Malawi from colonial to post-colonial times (Msisha, M op.cit), the Commission concludes, as indeed many others have done, that:

(i) the imposition of English Law in general and English property concepts in particular, has stultified the evolution and growth of customary land law,

(ii) in addition, since not enough property law was received to provide Malawi with a robust juridical basis for the interpretation of land rights and the determination of claims arising therefrom, the corpus of land law in Malawi remains rudimentary and underdeveloped

(iii) the Registered Land Act remains a statute of very Limited application.

2.4.4 THE COMMISSION'S RECOMMENDATIONS

The Commission agrees and recommends that

(i) there is need to design and enact a basic land law that would provide a broad framework for the determination of property rights, the conduct of proprietary transactions, the control and management of land and the settlement of disputes over land, and

(ii) care should be taken in that framework to provide mechanisms and guidance for the orderly evolution of customary land law and for the sustainable management of land held under customary law, and

(iii) upon the enactment of that law, the Land Act and the Registered Land Act should be repealed.

A full elaboration of these recommendations is contained in Chapter 9 of this Report.

2.5 LAND POLICY IN CONTEMPORARY MALAWI

2.5.1 DEVELOPMENT WITHOUT LAND POLICY

There is currently no single or comprehensive policy on land: its ownership, use, management, control and transmissibility in Malawi. That is not, in the least, surprising. Colonial land policies being concerned mainly with how best to resolve conflicts between settlers and indigenous peoples, were necessarily eclectic in nature and short term in objective. At independence, little attempt was made to re-examine the land issue in a holistic manner, and this presumably because the Government assumed that as long as agriculture, and especially, estate agriculture was performing well, nothing could possibly have been wrong with land relations in the country.

Some attempt was, however, made to formulate policy for the development of customary land. This was guided by the view, common with many development agencies at the time, that customary tenure relations were an impediment to rapid agricultural development. A programme for the privatisation of customary land was therefore designed

on two fronts. The first involved systematic adjudication and registration of land rights, and the second the conversion of customary land into leaseholds to be privately held. The former saw the birth of the "Ndunda" system which was enacted into law in the form of the Customary Land (Development) Act, (Cap.59.01) the local Land Boards Act (Cap.59:02) and the Registered Land Act (Cap 58.01). The first an adjudication statute, was meant to pave the way for the conversion of customary land to freehold while the second provided a mechanism for the regulation of land market activities expected to arise from that conversion. Customary land converted to freehold under the Customary Land (Development) Act would then be registered under the Registered Land Act (Cap. 58:01). To avoid complete privatisation of title or registration of land in individual names, as was done in Kenya in the 1950s and 1960s, provision was made for the registration of land under a specified family or clan head.

The view that registered title was the basis of agricultural progress led to the birth of the Lilongwe Land Development Programme (LLDP). The programme, funded by the World Bank, was intended to raise agricultural productivity by increasing the yields of the area's most major crops through the adoption of improved agricultural practices and consolidated holdings under a registered title. It was believed that increased security of tenure provided by a registered title would guarantee collateral borrowing which would result in increased rural incomes and improved standards of living of the people in the development area. This system of registered title on consolidating holdings is known as ndunda. The pilot phase of ndunda was implemented in the Lilongwe West Land

Development Project Area of LLDP. The effect of this policy intervention is examined at 5.3.1 below.

2.5.2 SECTORAL LAND USE POLICIES

The obvious lack of guidance on land, notwithstanding, sectoral land use policies have always been in existence. Indeed in recent times, many of these have been designed and approved for implementation by the Government. These relate to agriculture, forestry, irrigation, environment physical planning and housing. An attempt at the formulation of a national land use and management policy has also been made.

(i) AGRICULTURAL DEVELOPMENT POLICY

Perhaps the most comprehensive of these sectoral policies is on agricultural development.

Throughout the colonial period and well into the 1980s, agricultural development policy in Malawi has always been dualistic, emphasising only food self-sufficiency in small-holder areas, and capital intensive export production in the large-scale (estate) areas. Food self sufficiency in this context was synonymous with self-sufficiency in maize production.

Between 1960 and the early 1970s, a number of experiments designed to promote production in the small-holder areas was conducted by the Government. The most prominent of this was the Integrated Rural Development Programme (IRDP), which were carried out inter alia in Lilongwe (1968-1969), the Lakeshore (1968-1969), Shire Valley (1969-1970) and Karonga-Chitipa (1972-1973).

Although conceptualised as a multifaceted programme, the IRDP failed for lack of forward and backward linkages with sorrounding area economies, absence of meaningful consultation with and incorporation of stakeholders, and cost overruns. The IRDP was followed by the National Rural Development Programme (NRDP) in 1978 which sought to combine agricultural production policy with ecologically based management of natural resources. The strategy was, however, silent on inter-sectoral coordination, monitoring and evaluation of its activities to ensure compliance with multidisciplinary concerns. As was the case with its predecessor, the NRDP did not lead to dramatic changes in smallholder agriculture. On the basis of current trends, therefore the smallholder farmer remains a small producer who is often unable to meet his/her own food requirements.

Large-scale (or estate) agriculture has long been the focus of agricultural development policy in Malawi. Indeed soon after independence, the government embarked on an aggressive process of expansion of this sector through the alienation of land under

customary tenure, the procurement of inexpensive capital from commercial banks, and the extraction of surplus from smallholder agriculture through commodity price control administered by a statutory agency – the Agricultural Marketing and Development Corporation (ADMARC). The 1980s witnessed an acceleration in the rate of expansion of estates and in their overall land area. Thus land occupied by estates increased from 759,400 hectares between 1980 and 1989, to 1,148,000 hectares between 1990 – 1993.

As a result of these policies and the fact that estate operators have always had the best land and resources for intensive capital development, and extensive use of cheap labour, this sub-sector has been a major source of economic growth in the last two decades. For example, between 1973 and 1994, the sub-sector grew at an annual average rate of 5.6% and contributed 60% of the income coming from agriculture thus raising its share of the GDP from 13 to 30%. The estate sector therefore remains an important pillar in Malawi's overall economic development.

More recently, an attempt was made to design an agricultural development strategy which would treat the sector as an integrated whole. An Agricultural and Livestock Development Strategy and Action Plan was therefore published in 1994 whose objectives are:

- the improvement of food self-sufficiency and nutritional status for the population,

- self-reliance through broad-based agro-industrial and business development,
- expansion and diversification of crops and livestock products, and
- enhanced farm incomes through the promotion of economic growth and the sustainable management of natural resources.

The strategy and plan, however, remain largely untested.

(ii) OTHER SECTORAL LAND USE POLICIES

Fairly full treatment has been given to the evolution of agricultural development policy for obvious reasons. It is and will remain the major land use category for a long time to come. Nonetheless, Malawi has not ignored other land use sectors. A number of important policy framework have, in the last four years, been published by the Government. These include:

- The National Land Use and Management Policy,
- The National Environmental Policy and Action Plan,
- The National Forestry Policy,
- The National Irrigation Policy and Development Strategy, and
- The National Housing Policy.
- The National Physical Development Plan.

What is perhaps of interest in respect of these policies is the fact that all of them have something to say about land, particularly, tenure policy. The policy prescriptions proffered in each context

are not, however, entirely consistent, nor capable of supporting intersectoral or holistic programming. For example, the National Land Use and Management Policy proceeds as if a physical development plan and a comprehensive environmental management policy, and a new law do not exist. So does the National Forestry Policy. But this is not at all surprising since many of these policy documents are the result of line Ministry attempts to set goals for their particular operational mandates.

Malawi is not alone in the league of countries in the region that have developed sectoral land use policies before a basic land policy is put in place. That is the case in Uganda, Kenya, Tanzania and Zimbabwe, to mention but a few. In all these countries, land bureaucracies have proliferated, jurisdictional conflicts intensified, and land users left to wonder as to what Government policy on any issue really is.

2.5.3 THE COMMISSION'S CONCLUSIONS

The Commission has reviewed all sectoral policies and laws relating to land and land based resources and is of the view that

(i) without a basic or referential policy framework on land, the physical solum upon which all these sectoral activities operate, it is not possible to mobilise an internally coherent and co-ordinated scheme for the implementation and supervision of plans designed on the basis of discrete sector requirements, and

(ii) because sector bureaucracies are generally prone to a strict interpretation of their own mandates, the implementation of sectorial policies without a national framework could have adverse consequences for the environment.

2.5.4 THE COMMISSION'S RECOMMENDATIONS

The Commission therefore recommends that

(i) a comprehensive national land policy instrument should be developed, discussed by the public and all levels of government and be presented for parliamentary approval as a basis for the sustainable management of Malawi's land and land-based resources,

(ii) existing sectoral policies should be reviewed and revised to ensure consistency with that national instrument, and

(iii) an attempt should be made in future to develop resource management plans, guidelines and programmes (including laws designed for their implementation) in accordance with the provisions of that national instrument, as from time to time, amended.

An outline of the principles that should govern the development of such a national land policy instrument is elaborated in Chapter 8 of this Report.

2.6 CONCLUDING REMARKS

It is perhaps unfortunate, but not at all surprising, that in Malawi, as elsewhere in colonial Africa, law often preceded clear policy even on matters as crucial as land relations. The prevailing conventional wisdom is that clear and unambiguous policies should precede plans, programmes and implementation instruments

Throughout the region, therefore, land policy development has become an important item in the national development agenda. The establishment of this Commission, with a mandate to recommend a framework for land policy that would foster economic efficiency, environmental sustainability and social equity, is therefore an important step in Malawi's preparation for the 21st Century.

CHAPTER 3

OVERVIEW OF LAND PROBLEMS IN MALAWI

3.1 THE COMMISSION'S MANDATE

The Commission's Terms of Reference require to hold hearings throughout Malawi concerning the nature and causes of land problems conflicts and disputes in rural and urban areas and to make recommendations for solutions thereto. In the course of enquiry, the Commission became increasingly aware of the fact that land problems were generally symptoms of a much deeper malaise in society and that when these exploded in the form of conflicts and disputes, substantial restructuring of land relations may become necessary.

In this chapter, the Commission confine itself only to those problems that are of a cross-cutting nature, i.e. those that tended to straddle tenure categories, land use systems, and production sectors. Specific problems arising within discrete settings are therefore left for discussion in their respective contexts.

3.2 MALAWI'S POPULATION AND LAND BALANCE

According to the National Statistical Office (NSO) Malawi occupies an area of 118,324 sq km of land and water of which land accounts for 94,080 sq. km. The country's population which was estimated at 11,052,900 in 1997 and was growing at 3.2% per annum. This means that by the year 2020, the population will rise to a staggering 20.8 million! The Table below gives the

current distribution of population and land by region in the country. By the year 2020, the overall national population density is expected to be 220 persons per square kilometre.

Distribution of Population and Land by Region

	Population	Area Sq. Km	Density Per Sq. Km
Malawi	11052900	94080	117
Northern Region	1261548	26870	47
Central Region	4304361	35520	127
Southern Region	5486991	31690	173

Source NSO and Land Commission Estimates

In common with other Southern African countries Malawi inherited a rural settlement structure in which some of the most fertile and well-watered lands were held by white farmers. Although the total land area was not expropriated to the extent experienced in South Africa, Swaziland or Zimbabwe, the effect of colonial settlement and subsequent expansion of estate agriculture after independence was a relatively skewed distribution of land in the country. An analysis of Malawi's land distribution is therefore an important starting point in any discussion of the country's land problems.

An analysis of district and traditional authority statistics shows, that per capita arable land availability varies from a low of 0.024 hectares in TA Mpama in Chiradzulu to no more than 1.451 hectares in STA Mkondowe in Nkhatabay. The only other area with a per capita land availability of more than 1 hectare was in TA Mwenewenya (1.126 hectares).

Curiously, however, the Customary Land Utilisation Study (CLUS) estimated that 2.6 million hectares of suitable agricultural land remains uncultivated in the rural areas. This mean that 28% of the country's total land area is lying idle. The question that arises is why this agriculturally suitable land is not cultivated, given the land pressure in many areas of the country. CLUS researchers hypothesised that the overlap between shifting cultivation dwellings, government buildings and grounds in both estates and urban areas explain much of what had been labelled "available and suitable". Another possible explanation for this uncultivated land was that people did not want to move into areas where access to drinking water was a problem. The exact status of the 2.6 million hectares therefore remains unclear. The reality on the ground, nonetheless, is that families have access to very little land for cultivation.

The above profile suggests that in the absence of dramatic changes in technology, and shifts in population, such as rural-urban migration, or emigration to neighbouring countries for work and residence, land pressure is likely to increase and with it, competition for and conflicts over land resources. Signs of this are already emerging in the tea growing districts of Mulanje and Thyolo in the Southern Region which have some of the highest population densities in the country. As a result the spectre of historical land claims, fuelled by ethnic nationalism is already becoming unsettling in these two districts.

The Commission heard extensive oral evidence regarding problems that have arisen as a result of Malawi's current land balance and what should be done about them. These fall into three broad categories, namely, scarcity, management and auditing.

3.3 PROBLEMS OF LAND SCARCITY

A detailed examination of the extent to which various tenure regimes have responded to pressure for land for particular use requirements is undertaken in Chapter 4. This section is concerned with the general effect of land pressure on people's perception of land rights across tenure categories.

3.3.1 COMPETITION AND CONFLICT OVER LAND

One consequence of land pressure was intense competition for resources among and between different categories of land users, family members, and administrative authorities, both local and national. The Commission received evidence of that competition in terms of adaptation measures which rural population were failing to cope with perceived or actual land scarcity.

The first was threat of, or actual encroachment onto private land, gazetted forests, national parks and other protected areas contiguous to land pressure zones. The Commission found that leasehold and freehold land were often deliberate targets of encroachment by land hungry small scale operators. This was particularly serious in the tea growing areas of Mulanje and Thyolo, and the tobacco estates in Kasungu. Local communities sometimes argued that estates, in general, had far too much land for their needs; and that a good amount of this was not being put to productive use. Similarly, encroachment onto national parks and wildlife reserves was common in many areas. The Nyika, Kasungu, Lengwe and

Liwonde National Parks were particularly vulnerable to such encroachment. The fact that the creation of some of these parks involved the displacement of entire villages, some of which (such as sub-chief Kachulu's in Rumphi) were forced into valleys of uncultivable gradients, was a particular source of grievance in some communities. Indeed many communities in Rumphi, Chitipa, and Karonga, often complained that the government was more interested in the protection of wild animals than in human welfare. The environmental as well as the economic importance of national parks was generally not appreciated.

The second was fraudulent disposal or "pilfrage" of customary land by kinsmen and women, headmen, chiefs or even the Commissioner of Lands' office, in favour of people desperate for land. It was alleged that fraud at higher levels existed in the form of forged signatures of traditional leaders on the Consent by Chief Forms, exaggerated extension of boundaries by surveyors, and desk preparation of Deed Plans without survey or field verification. Corruption and bribery was said to exist at every stage of the lease application and approval processes. At lower levels pilfrage occurred through unauthorised "loaning" of land, conversion of community land into private leaseholds without adequate or any consultation, and systematic extension of cultivation into land belonging to other families and communities.

3.3.2 INSECURITY OVER LAND RIGHTS

The other was substantial insecurity and uncertainty over land rights despite attempts by communities to consolidate access rights both

physically and juridically. For example, many freehold estate owners responded to the possibility of encroachment by clearing all land that could be considered idle or under utilised rather than relying on the ordinary legal system to protect them. In the process, indigenous forests were often destroyed. These land owners clearly hoped that with virtually all their land in some form of physical use, no further claims could be made against them. They did not seem do realise that encroachers sometimes thought that they had legitimate claims to such land.

In customary tenure areas there was evidence of landholders fencing off their smallholdings, or growing sisal all around the holdings to mark boundaries and keep out would be encroachers. There was also evidence that access rights were becoming more restrictive than before. This was evident, for example, in the fact that land users not related to core lineage members in their communities, referred to as akudza or obwera, were increasingly becoming targets for eviction, and were often compelled to share land legitimately allocated to them with newer immigrants or members of the core lineage. It was difficult under these conditions for akudza to accumulate land.

The increase in disputes over land rights between family members implies that access rights were becoming substantially distorted either in terms of vesting or in space. This was particularly evident in matrilineal social systems where spouses in patrilocal or matrilocal residence were beginning to question rules that prevent them from retaining access to land on the demise of their partners. The introduction of leasehold in customary tenure areas, particularly in the Central Region, thus opened up

opportunity for fraudulent access to land by parties that would otherwise not have had access to it.

The Commission also identified much confusion and as to whether customary rights to a variety of natural resources including fish, firewood, game, fruits and other forest produce in protected areas and leasehold estates still existed. Many villagers continued to harvest these in the belief that they were entitled under customary law to do so.

The Commission also heard evidence of encroachment by nationals from Tanzania, Zambia and Mozambique into the districts of Rumphi, Mzimba, Kasungu, Mchinji and Ntcheu. In the border district of Mulanje it was noted that Malawians were crossing to the Mozambican side and establishing gardens there. An important explanation for this phenomenon is the fact that many border communities had linguistic and blood ties with one another and hence claimed reciprocal rights of access to land from their kinsmen. Thus the effect of "international" boundaries and territoriality was often blurred, or simply ignored. In the case of Mulanje and Milanje another explanation was that land pressure and consequent compensation for resources was higher in the former but not in the latter thus providing incentive for out migration.

3.3.3 THE COMMISSION'S CONCLUSIONS

Since land scarcity whether actual or perceived can have serious implications for land tenure and land relations, the underlying causes and

consequences of that condition must be addressed. The Commission is of the view therefore that:

(i) ways and means must be found to ease land pressure in areas especially prone to it, as a way of managing competition and conflicts,

(ii) since rapid population growth will exarcebate problems of land scarcity, a realistic programme of population management will be necessary as an additional strategy for reducing those problems,

(iii) respect for the law and protection of the integrity of accrued property rights are fundamental to the maintenance of democratic values in Malawi.

(iv) the restoration of a stable land tenure system and of production relations under it, is an important factor in the stimulation of agricultural development in rural Malawi

3.3.4 THE COMMISSION'S RECOMMENDATIONS

The Commission therefore recommends that:

(i) abandoned, unutilised or underutilised leasehold or freehold land in or contiguous to customary land areas should be restored to or acquired for use in areas of severe land scarcity,

(ii) a mechanism for cheap and expeditious resolution of land conflicts and disputes within and across tenure categories should be designed and implemented account being taken,

however, of the crucial role of the chieftaincy in land matters and the constitutional guarantees of access to justice and legal remedies.

(iii) Before a proper system of demarcation of village boundaries is put in place, administrative measures be taken to eliminate encroachments or and invasions of other people's land for whatever reason

Some of these recommendations are elaborated upon more fully in subsequent Chapters of this Report.

3.4 PROBLEMS OF LAND MANAGEMENT

3.4.1 LAND DETERIORATION

The Commission received evidence of underutilisation of land, destruction of land use cover (including watersheds and catchment areas), illegal obstruction of water-courses, erosion of agricultural soils, siltation of estuaries, destruction of indigenous forests and unplanned or unregulated urban and peri-urban settlements. These were occurring in the context of all land tenure categories and land uses.

In the freehold estate areas, the notion that owners had absolute immunity against Government intervention in matters of land use was a major factor behind the destruction of indigenous forests and, in some cases, illegal construction of dams. This also encouraged freeholders to explain away the existence of unutilised or underutilised land in terms of

their freedom to decide how best to use such land. Leasehold estates were particularly prone to abandonment and underutilisation especially since many holders obtained grants that were far in excess of what they were in a position to develop. There are also cases of leasehold grants which were made without verification as to the suitability of the demised premises for the purposes for which they were sought. In addition, the Commission found that many leaseholders sometimes embarked on developments that were not approved under their terms of grant. According to the Estates Land Utilisation Studies, many of these estates have simply been abandoned.

Land deterioration was particularly evident in customary land areas. The main reasons apart from the paucity of good land and high densities in some areas, were their basic resource and technological poverty, the breakdown of community resource management systems, and the general marginalisation (as a matter of national policy) of the smallholder agricultural sector. Thus the Commission received evidence of the disappearance of village forests as a result of fuel-wood demand, charcoal making and building materials; and destructive methods of fishing especially along the Bua River. In Nkhotakota, Salima, Ntchisi and Mwanza where per capita arable land availability ratios were slightly higher than elsewhere, huge tracts of land lay barren and unutilised due to water scarcity arising from wanton destruction of catchment areas. To compound all this, managerial conflict was not unusual between villagers and government officials and other agencies as regards jurisdiction over natural resources, especially forests originally planted by villagers, but later transferred to central government control.

Particularly disturbing was the fact that communities were not sensitised to the need for proper land management practices especially in situations where continuous damage to land resources was sinking them deeper into poverty. The fact that they were both users and owners hence had a stake in the preservation of land quality was not readily apparent to them.

3.4.2 MISMANAGEMENT OF LAND

The lakeshore, which extends from Karonga in the Northern Region to Mangochi in the Southern Region, has from time immemorial been under the jurisdiction of traditional authorities. In recent years there has been a rush by individuals and companies to erect private leisure cottages and hotels. The effect of allocation of land by traditional authorities, without any physical development plan, has been haphazard and uncoordinated development, often resulting into negative environmental impacts, for example water pollution from waste disposal. It was in an attempt to achieve coordinated, effective and efficient development of the lakeshore so as to mitigates three negative effects that a Land (Development of Lakeshore) Control Orders of 1988 were designed. Detailed lay out plans were prepared for suitable areas as identified in the Lakeshore Physical Development Plan, and provisions were made for open areas as access corridors to the lake for the local people. The safe datum level along the lakeshore was established above 480m contour line.

The Commission noted that despite these regulations traditional authorities continued to allocate land along the lakeshore and that there was inadequate monitoring of development in the area. In addition the guidelines were routinely ignored by developers. As a result of inadequate monitoring and poor enforcement of covenants a number of problems have gone unchecked, for example:

(i) unabated cottage/hotel development along the waterfront and associated fencing, resulting into obstruction of public access and use of beaches by local communities
(ii) the displacement of local communities to make way for private land developers
(iii) uncontrolled waste disposal and water pollution.
(iv) developments located below the safe flood risk zone of 480m contour line.

Further evidence of unregulated development was also found around the peri-urban areas i.e. belts of land around the cities of Blantyre, Lilongwe and Mzuzu, the Municipality of Zomba, the townships and administrative headquarters (bomas). The Commission found that there were many players in the administration of these areas: chiefs, central government, local authorities and sometimes, the Malawi Housing Corporation (MHC). That confusion did not always end with the declaration of such areas as planning areas, a process which, in law, converted customary land into public land. Because many communities continued to treat land in peri-urban areas as if it was still customary land,

building regulations were generally ignored, leading to a proliferation of sub-standard structures.

3.4.3 THE COMMISSION'S CONCLUSIONS

It is the Commission's view that the rather sorry state in which land quality has sunk in Malawi is attributable to the following factors:

(i) the general state of poverty in the rural areas of Malawi,

(ii) inability to absorb the costs associated with implementation of or deliberate refusal and/or wanton disregard of existing land use planning and environmental management regulations especially along the lakeshore and protected areas,

(iii) poor orientation and general lack of commitment to sustainable land management goals by most land users irrespective of them tenure status.

3.4.4 THE COMMISSION'S RECOMMENDATIONS

In addition to the recommendations contained in 3.5.4 below, the Commission recommends that:

(i) poverty reduction programmes including the stimulation of small scale agriculture and rural agro-based enterprises and the provision of support services should be pursued as the primary strategy for the sustainable management of the environment,

(ii) a nationwide sensitisation programme on environmental protection including the introduction of relevant curricula at all levels of education and involving the full participation of traditional authorities, should be implemented,

(iii) local communities and their leaders should be fully involved in the management of their own resources in order to appreciate and enjoy the benefits of environmental protection.

3.5 PROBLEMS OF LAND AUDITING

3.5.1 THE LEGAL BASIS AND PERFORMANCE RECORD

The state of Malawi's land resources led the Commission to inquire into the performance of institutions and agencies entrusted with land auditing. Land auditing involves the ability to monitor and evaluate the performance of land users against goals, principles, and norms set out in or prescribed by approved policies, and laws at national, local or sectoral levels. Effective land auditing presupposes, therefore, that explicit policies exist and adequate laws and institutions are in place.

The Commission noted that in recent years Malawi has endeavoured to formulate many policies concerned with the sectoral management of natural resources. Some of these are listed in Chapter 3. The Commission's attention was also drawn to a series of legislations dealing with the sectoral utilisation or preservation of various natural resources. These include legislations on forests (Cap.63.01), game (Cap.66.03), minerals (Cap.61.01), plant protection (Cap.64.01), noxious weeds (Cap.64.02), wild birds (Cap. 66.04), water resources (Cap.72.03),

national parks (Cap.66.07) and fisheries (Cap.66.05). In 1996, an Environmental Management Act (No.23 of 1996) was passed to give effect to the provisions of the Constitution relating to the right to a clean and healthy environment.

The Commission noted that all of the legislations listed above create obligations based on either ownership or actual use of the resource concerned which require compliance with specified quality or performance standards. Penal sanctions are prescribed for failure to comply with these obligations. Institutions are also created by each legislation to ensure the administration of functions and enforcement of obligations thereunder. The passing of the Environmental Management Act has added a new dimension to this scenario in that institutions under these legislations, referred to as "lead agencies," must now perform their functions in conformity with the provisions of the new Act.

Despite the potentially large bureaucracy that has been created by legislation in this area, the Commission found little evidence in the field of their presence or efficiency. Lack of resources and personnel was often given as the primary reasons why forest rangers were unable to detect and avert fires, chiefs unable to prevent the cultivation of marginal land or ecologically sensitive areas, and environmental "lead agencies" unable to perform their statutory functions. Although it is also possible that the cost, to Government, of land audit operations was also high, the Commission was, in some cases inclined to the view that some of these agencies simply did not bother or were unwilling to perform their statutory functions.

The Commission also heard disturbing submissions from private land owners particularly those with freehold titles that the State had no business trying to audit the manner in which they were using their "properties." Indeed these land owners often justified underutilisation or even non-use of land as part of the freedom of choice supposedly implied by this tenure category. In these cases attempts to audit performance was sometimes met with open hostility.

3.5.2 FISCAL OPTIONS

The Commission also considered the possibility of introducing indirect, mainly fiscal methods of ensuring compliance with the land quality requirements contained in these legislations. At issue was the fact that a great deal of land was not merely degraded or mismanaged, but was lying idle, underutilised or unused. The efforts of land audit agencies alone would not bring such land into productive use. The introduction of tax measures on unused or underutilised land might assist these agencies in restoring Malawi's environment. The Commission opined that by increasing the cost of retaining idle land, such a measure would induce land owners to sell or bring such land into productive use. Besides, the measure would level the playing field between all tenure categories since all and not simply leaseholders would be liable to tax. It might even prove to be a good source of revenue for the government or local authorities.

The Commission found great ambiguity as regards this issue. While most people thought that some sort of equity would be done by imposing such a tax on freehold land, many had no idea as regards the

conditions that would be necessary for its implementation. Some of the issues over which agreement was not reached included the operational definition of "idle land", who would be liable to tax in respect of customary land, whether or not such a tax should be preceded by the compilation of a fiscal cadastre, the level of government at which such a tax would be levied, and how revenue obtained from land tax would be used.

3.5.3 THE COMMISSION'S CONCLUSIONS

On the basis of that inquiry the Commission has concluded that:

(i) the institutional framework and procedures for land auditing in Malawi are operating without clear and consistent policy guidelines.

(ii) the sectoral nature of that framework has led to the proliferation of a dormant, but potentially huge and complex land use bureaucracy riddled with jurisdictional overlaps and internal conflicts.

(iii) the reliance by that framework on penal sanctions is clearly ineffective since many of these laws are routinely ignored by those to whom they are directed, and

(iv) the land tax issue requires further and more exhaustive research before clear policy recommendations one way or another can be made..

3.5.4 THE COMMISSION'S RECOMMENDATIONS

The Commission therefore recommends that:

(i) in the interim, and before the entire land use framework is rationalised in the manner indicated in 2.5.4 above,

  (a) national and corresponding local level land use and environmental guidelines should be formulated, discussed with all relevant stakeholders, and put into effect for immediate use at the district, Traditional Authority and village levels, and
  (b) special management regimes supervised and co-ordinated by a national level authority (for example, the National Council) for the Environment should be established to police watersheds and catchment areas, and the lakeshore,
  (c) the Minister for the time being in charge of environmental affairs should ensure that the Environmental Management Act 1996 is aggressively implemented,

(ii) consideration should be given to the introduction of incentives for exceptional compliance with land use environmental quality standards, and

(iii) a programme of training and resource mobilisation for environmental enforcement should be designed and implemented as part of a long term solution to the problems associated with land auditing.

3.6 CONCLUDING REMARKS

The Commission wishes to emphasise that land problems in Malawi are not confined to issues of scarcity, management and auditing only. As intimated above, other and more specific problems will emerge in the context of the Commission's treatment of matters falling under other Terms of Reference. Some of these problems will require urgent and short-term responses by the Government and sections of civil society. A great majority, however, can only be resolved or at least managed in the context of comprehensive land policy development including proposals for the reorganisation of existing settlement patterns, improvement in production technology and the design of new laws.

CHAPTER 4

CURRENT LAND TENURE SYSTEMS

4.1 THE COMMISSION'S MANDATE

The Commission's Terms of Reference require it to consider current land tenure practices in Malawi namely customary, freehold and leasehold, review regional and international experiences, and propose a more appropriate arrangement that would provide equal protection to all categories of land users while ensuring the operation of land market transactions.

4.2 CLASSIFICATION OF LAND

4.2.1 LAND CATEGORIES

The Commission noted that the Land Act (Cap. 57.01) classifies all land in Malawi as either public, private or customary. Public land is defined as

> all land which is occupied or used or acquired by the government,
> and any other land, not being customary land or private land and includes-
> (a) any land held by the Government consequent upon a reversion thereof of any freehold or leasehold estate and,
> (b) any land which was .. public land within the meaning of [Nyasaland or Malawi African Trust Land] Orders (now repealed)

It is worth noting that under this Act no distinction is made between "state" and "government" land as is the case in some former British colonial possessions. That is not surprising; for there is no historical basis for that distinction. That distinction only arose in circumstances where on decolonisation, the metropolitan power held land directly in the territory, quite separately from land that was held even in a representative capacity by the administration on the ground. In those circumstances at independence the former, if it had not been transferred to the local administration, was declared "State", while the latter became "government" land. As a protectorate, the British authorities assumed that any land for which private title could not be established was "public" meaning "protected" by government. In practice, however, and except for private acquisitions by means of concessions which later surfaced in the form of "Certificates of Claim" (infra), the authorities proceeded as if that protection was equivalent to ownership. It is in this spirit that Section 2 of the British Central Africa Order in Council declared "public lands" "crown land". Hence although the phrase "crown land" was not retained in the form of "government land" after independence, that in reality is what "public land" was, even after independence! It is not surprising therefore that Section 8 of the Land Act vests all public land in the President of Malawi in perpetuity!

The classification of land as "public land", however, does not in itself define the specific tenure category under which such land is held. For example, land could be public while it is at the same time being used under leasehold tenure. What that classification signifies is control and territoriality. In the one case it means that radical title in respect of such land is held by the President and in the other, that in terms of location, this comprises of unalienated land that is not private or customary, forest resources, national parks, wildlife resources, rivers

and domestic bodies of water and any land in actual "occupation or use" of the Government. Since the Act does not indicate (as it does in respect of customary land) the capacity in which public land is thus vested, it is to be assumed that that vesting is an attribute of sovereignty. In other words "public land" does not belong to the people of Malawi; it is not in law, held in trust for them. Rather such land is "private to the Government" hence may be disposed of or otherwise dealt with entirely at the President's discretion and direction. That indeed is the position which the Government of Malawi appears to have taken in its dealings with 'pubic" land over the years. Politically it is a most precarious position for Government to be in. In many African countries, the public now regard such land as held in trust for them whatever the legal position might be. Recent developments in Kenya are a poignant illustration of that perspective.

Private land, on the other hand, is defined as all land which is owned, held or occupied under freehold title, or a leasehold title or a Certificate of Claim or which is registered as private under the Registered Land Act (Cap. 58.01). There are essentially three (not four) categories of private land here. Holders of Certificates of Claim have always argued that what way hold are "fee simple" interests hence equivalent (or even superior) to freeholds granted after the declaration of protectorate status in 1891. Leaseholds are private in the sense that whether granted out of "public" or freehold land, they confer rights of private use for the duration for which they are issued. The Land Act is silent as to whether leases or similar arrangements in respect of customary land could qualify as "private land" under it. That is at least debatable since the same Act does not exclude the category of "private land" from the definition of "customary land". Land registered under the Registered Land Act could be an amalgam consisting of "customary, freehold" or "ndunda" brought onto the register under the Customary

Land (Development) Act (infra), direct grants registered under that Act, or conversions from the Deeds Registration System. Whatever species such land may be, its character as "private" land does not change.

As regards customary land, a brief historical note is appropriate in common with other British possessions, all land, in Malawi was, at the beginning of colonialism declared to be "crown land." Unlike in Kenya where "native lands" were taken out of the category of crown land in 1938, the situation in Malawi never really changed. Thus when the Land Act was passed in 1965 to codify the basic land law up to that point, customary land remained essentially part of "crown" or "government" land even though that legislation now created a new category called "public land" which was defined to exclude customary land." Thus customary land is now defined as all land which is held occupied or used under customary law but does not include any public land. Customary land, therefore, consists of all land which is not "private" or "public" as herebefore defined.

There are two things to note here. First "customary land" is defined in relation to the law applicable to its occupation, retention and use i.e. customary law. The content of that law is, however, not defined. Second, it does not include "public land" even though, presumably parts of that category of land could be held, occupied and used in accordance with customary law. In the light of what appears in 5.3.2 below, this is an entirely logical possibility. According to current statistics, customary land constitutes approximately two thirds of the country's total land area i.e. some 6.5 million hectares.

4.2.2 LAND TENURE CATEGORIES

What emerges from the above classification is that there are only three tenure categories viz. customary, freehold and leasehold, recognised in Malawi. By its very nature, customary tenure will vary from one community to another even though, as the Commission notes below, general principles are similar. The incidents of leaseholds (other than those issued under customary law) and freeholds are generally determined by the Common law of England since Malawi has no basic land laws. It is the performance of these three tenure categories which the rest of this chapter examines.

4.2.3 THE COMMISSION'S CONCLUSIONS

The Commission has considered this classificatory scheme and is of the view that:

(i) the political baggage which it has carried over from the colonial era is clearly out of step with contemporary views on what the proper role of the government in land matters should be, and

(ii) the vesting of both "public" and "customary" land in the President in "perpetuity" is not only outmoded and confusing

4.2.3 THE COMMISSION'S RECOMMENDATIONS

The Commission therefore recommends that:

(i) "Public land" should, in law, be truly public hence radical title to such land should vest directly in the people of Malawi and not in the President

(ii) legislation should be enacted setting out the public interests for and conditions under which public land may be used and administered by the Government as a public trust, and

(iii) the legal foundations of customary land be secured; inter alia, by

  (a) divesting the President of title in respect of customary land and vesting the same, in perpetuity in respecting Traditional Authorities as trustees for their respective communities,

  (b) abolishing the authority of the Minister to effect any transactions in respect of customary land,

  (c) specifying very clearly the nature of obligations of trust which Traditional Authorities owe to their people in respect of the land vested in them and the legal and political options available for them in enforcing those obligations, and

4.3 CUSTOMARY TENURE PRACTICES

4.3.1 CHARACTERISTICS OF CUSTOMARY TENURE

Customary land tenure is a complex mixture of community rules of conduct, leadership codes and management principles relating to access to and control of land in a given social context. In Malawi customary tenure implies and always has done that the land is not owned as such but held by various communities under the authority of their chiefs. The essence of community ownership and control was and still is that all members of particular communities had access to land and all its products without exception and that the role of chiefs was to ensure not only political protection for the group but more essentially, equitable distribution of that land among present members and between them and the future generations. An often cited statement attributed to a Nigerian Chief applies equally to Malawi. When asked who owned land in his community, the chief is reported to have responded that:

> I conceive that land belongs to a vast family of which many are dead, few are living, and countless members are yet unborn.
>
> ( )

Thus although customary tenure rules often varied in terms of detail from one community to another there were general rules about control and resource preservation and conservation that were and remain similar across communities. These general rules are inter alia, that

(i) every individual has, by virtue of membership in a given community, access to the land resources of that community in space and time,

(ii) access rights to which individuals are entitled, are transmissible to designated heirs in perpetuity,

(iii) chiefs and headmen have the power to allocate use rights to individuals or families, but the land itself cannot be permanently alienated, and

(iv) non-community members cannot acquire prescriptive or other divestitive rights in community land by long use, but may be granted limited access under clearly defined conditions.

Customary land tenure in Malawi has, over the last century been sustained by a very strong tradition of indigenous chieftaincy. Indeed, chieftaincy itself has always been constituted and manifested through the control and administration of land. Hence the stronger the chieftaincy was, the more clearly defined was the system of tenure in respect of which land was held and vice versa. It was thus unthinkable to have a chief without territory to allocate and administer. It is not surprising that the current Chief Mwase Kasungu whose chieftaincy was restored without territory told the Commission that "to be a chief without land is to be without authority". In other words authority means in the first instance sovereignty over territory and only by reason thereof, governance over people. So complete is this coincidence between chieftaincy and land that even in Malawi today, the country can and often is referenced in terms of Traditional Authority jurisdictions.

The Commission heard evidence to the effect that serious tensions, now exist within this traditional arrangement. Abuses that would have been frowned on in traditional society such as bribes, frauds, discrimination and arbitrariness were said to be routine and pervasive. Clandestine sales, pledges (pinyolo) and lease-like arrangements in favour of outsiders had crept into customary tenure practices much to the chagrin of community members. Community resource management efforts, particularly in respect of sensitive ecosystems appear to have given in to competition for individual control over the same. In addition, population pressure and the introduction of new crop technologies especially in the Southern and Central Regions respectively, have added to that tension by creating demand for more nucleated control of community land. Thus traditional land allocation and dispute settlement procedures are, in many cases,no longer effective or respected; a result which has led, as the Commission points out in Chapter 4 above, to serious land conflicts and disputes in rural Malawi.

Despite this apparent breakdown in the ability of traditional authorities to manage land, the Commission received strong representations to the effect that rural Malawi is not ready to discard the system of land relations that revolves around the chieftaincy. It was suggested that the present tension in the system was as much the functions of colonial and post-colonial neglect and suppression of customary land tenure and land relations, as it was of social, economic and technological externalities. The expropriation of land from this sector coupled with the neglect and the impoverishment of the rural economy through the rediversion of its labour and capital towards the development of the export

sector of the economy and the imposition of inappropriate experiments, right through to the 1990s, ruled out any possibility of organic, institutional and normative development of customary law. Two examples will suffice here.

The first, which dates back to colonial times, concerns government interpretation of the status of customary land in the Malawi legal system. Under colonialism there was never any doubt that customary land could be appropriated at any time, for foreign settlement and other uses. Under the Land Act, however, this was made more explicit Under Section 25, thereof original title in customary land was removed from chiefs or other community based "owners," and vested it, instead, in the President "in perpetuity." The Act then, gave the Minister responsible for lands, the power to grant leases not exceeding 99 years in respect of customary land without consultation with Chiefs or actual land users. This power was then interpreted to mean that Ministerial grant of leaseholds in respect of customary land ipso jure converted such land into public land. It followed that on the expiry of such leases, the land reverted not to their erstwhile customary land users, but to the government, as public land. The effect, as indeed was the case under colonialism, is that customary land simply became a vast reservoir for "public" and "private" land. Thus between 1967 and 1994 more than 1 million hectares of customary land has been lost in this manner.

Alarmed at the rate customary land was being converted into leasehold estates, government began to take measures to slow down the pace of creation of new agricultural leases. In 1985, there was a

Ministerial directive to the effect that no more leasehold estates should be opened in Kasungu district. The Control of Land (Agricultural Leases) Order which was issued in 1989 partially formalised that directive except that it did not apply to customary land occupiers who wished to convert their land into leaseholds. This Order was amended in 1996 to prohibit the conversion of customary land to leaseholds except in very special cases. Despite this move, a lot of land had already been lost to customary tenure.

It was suggested to the Commission that in respect of customary land, the President, is merely a trustee for the people of Malawi and that this arises from the fact that the provision declares customary land "to be the lawful and undoubted property of the people of Malawi." That may well have been the intention. But having inserted no obligations of trusteeship in that provision, and as history has confirmed, the people of Malawi have no means of enforcing that trusteeship.

The second is of more recent origin. The Commission took evidence in Lilongwe West Development Project Area where the ndundaU experiment was being carried and is pursued that this system has further weakened customary land relations. The Commission noted that:

(i) no family ndunda, which in most cases comprise scattered and fragmented holdings, has been accepted by any bank as collateral for development loans.

(ii) in so far as existing land rights and interests were ascertained and registered without regard to disparities in family sizes and needs,

the ndunda system legalised an undesirable unfair distribution of land.

(iii) without appreciation of the real value of land, some family members are engaged in seasonal land rentals in exchange for money for agricultural inputs, leaving too little for themselves.

(iv) the registration of title per se did not influence high productivity in the area: productivity gains were attributable to intensive modern farming methods gained through the extension service of the Ministry of Agriculture.

(v) while the original objective was to achieve individual titles ndunda actually encouraged corporate ownership of land.

It was also evident to the Commission that it would be difficult to replicate the ndunda system in other parts of the country for a number of reasons. First, there was strong evidence that it had the effect of eroding customary social values and institutions especially in the matrilineal descent systems which are predominant in Malawi. The mischief here was that ndunda land registries often contained names of parties that were not considered "family members" for purposes of succession to customary land. Attempts to enforce rights conferred by registration would almost certainly split families asunder. Second, the system often lowered the threshold of boundary disputes from villages to ndundas. That was often cause for a lot of inter-family feuds. Third, the system was necessarily accompanied by a lot of transaction costs to ndunda members. These

included demarcation, registration, and title uplifting fees which members were sometimes unable to raise. And fourth, because the system is essentially corporate in nature, it is doubtful whether it is capable of enhancing at least in the short run – the value of land beyond its customary law status (CLUS op.cit.)

Ironically, the only significant "benefits" which communities in Lilongwe West, sometimes cited but which could not possibly have been in the Government's master plan, were that tenure conversion had taken both the chiefs and the Minister off their land; the latter especially, since leases could no longer be issued in respect of such land!

The combined effect of the persistence of colonial land law and post-independence attitudes towards customary land is in essence, that such land exists not as a distinct legal category but as a reservoir for private and public land. It has become a truly insecure basis for any form of land development.

4.3.2 THE UTILISATION OF CUSTOMARY LAND

It is not surprising if for reasons of insecurity of tenure alone, that customary land areas should be in such a poor state of development as 4.4 above documents. But the Commission head evidence of other land use constraints. First, cultivable land sizes were generally low. These averaged less than 1.45 hectares for about 75% of the farm families and in more than 50% of the cases was less than 0.45 hectares. Second, throughout the 1970s and 1980s massive chunks of some of the best

customary land were expropriated and converted into leaseholds to facilitate tobacco expansion by non-resident elited with access to influence and public or private resources. This normally had two detrimental effects. It created further pressure on hence fueled even more competition for available land especially in the Central Region which was the prime target of this expansion. In addition, since under the Special Crops Act (Cap. 65:01) customary land holders were excluded from growing tobacco, they were consequently pushed deeper into subsistence farming, mainly maize, even as they were rapidly losing their most productive land. In addition since most customary land holders were, by and large, resource and implements poor, used but the most rudimentary and simple technologies of production, and applied low farm inputs the use of which key could not in any event sustain productivity of customary land is necessarily limited. (CLC 1998).

The Commission also took evidence that showed that in the customary land areas lies the key to rapid social and economic development for the majority of Malawians. This is because these areas account for 80% of the country's food production, 80% of its worksforce, 90% of agricultural employment and 65% agricultural GDP(IFAD 1995). Indeed the opening up of cultivation to customary land users has demonstrated that they can respond effectively to new economic opportunities. Between 175,000 and 200,000 smallholder households are now involved in burley production. The Commission believes that further liberalisation of agricultural policies will enable this sector make its proper contribution to the national economy.

4.3.3 THE COMMISSION'S CONCLUSIONS

On the basis of the data and information at its disposal, the Commission is satisfied that:

(i) the Land Act is a fundamental source of insecurity in customary landholding and use throughout Malawi;

(ii) because of the alienation of chiefs from their traditional roles as custodians of customary land through the transfer of effective authority over such land, first to the Governor, and later to the Minister, these traditional roles, their functions and powers have been severely eroded and, in some cases, irreversibly compromised;

(iii) the privatisation of customary land through the creation of the ndunda system, did not lead to the development of a robust land market, nor did it in itself lead to increased agricultural productivity.

4.3.4 THE COMMISSION'S RECOMMENDATIONS

The Commission recommends therefore that:

(i) the available stock of customary land should be increased by restoring all land converted to leaseholds from customary land to the respective Traditional Authorities as these leases expire and/or are surrendered, and

(ii) stern administrative action should be taken to eliminate bribery, corruption, and frauds in the administration of customary land in the country.

(iii) the ndunda system having produced noticeable value – added after nearly thirty years of experimentation should be discarded and lessons learnt from it used

(a) to design a mechanism more appropriate for Malawi's land culture for recording and authoritatively determining corporate or community interests in specified property whether within or outside the domain of customary law,

(b) persuade development planners to permit a more organic rather than intervensionist transformation of customary tenure.

4.4 FREEHOLD TENURE PRACTICES

4.4.1 CHARACTERISTICS OF FREEHOLD TENURE

The freehold is an estate obtained by grant from the sovereign who in turn retains radical (or original) title to such land. The freehold is therefore NOT an allodial estate i.e. an estate without superior title. In Malawi, freehold titles are derived from three sources:

(i) the Certificates of Claim which were presented and approved by the Secretary of State after declaration of Protectorate status in 1893,

(ii) direct grants made by the Governor after 1902, and

(iii) direct grants made by the President of Malawi after independence in 1964.

It is important to emphasise that in the case of Certificates of Claim, what gave them legality was not their "contractual" nature; supposedly having been sale transactions with "natives." Rather, the basis of legality of those certificates was approval by the Secretary of State which under colonial law then in force in "British Central Africa," operated as a grant. Their validity today derives only from the fact that the Land Act expressly mentions, and the constitutions of Malawi 1966 and 1994 guarantee them.

Because freehold estates are generally granted free of any conditions repugnant to title, it has sometimes been argued that freeholders have unlimited rights of use, abuse and disposition over their land. Indeed the Commission received representations from owners of freehold estates particularly from Thyolo, Mulanje and Chiradzulu, to the effect that their properties were held free of any superior title, and that the Government of Malawi has no legal right and that it would be "a breach of faith" to pass legislation affecting the conduct of use of such properties.

The Commission is not persuaded by that argument. It cannot possibly be the case that only in Malawi, of all the former British colonies,

did the colonial government divest itself of original title upon the grant of a freehold estate to private settlers. Not even in England, from where that jurisprudence is derived is such a result arrived at. There are three arguments which are worth repeating here. First, political sovereignty per se has always been accepted as implying a residual power to legislate for the judicious management of the land resource within the state irrespective of tenure category. That is what is described in ordinary legal parlance as the "police power" of the state. Second, having obtained their land rights by direct or "deemed" grants, freehold land in Malawi is open to resumption for public purposes should this become necessary. And third, and most compelling here the Constitutions of Malawi 1966 in Article 2(2) and 1994 in Article 44 both recognise the authority of the state to abridge private property rights in either of the above ways. The Commission wishes to put in on record, therefore, that a freehold grant, while conferring the most ample proprietary freedom known to the law of Malawi, does not oust the residual power of the State to ensure, at the very minimum, that the land resources to which that grant relates, are not abused.

4.4.2 THE UTILISATION OF FREEHOLD LAND

The Commission observed that most freehold land in rural and urban areas is still owned or controlled by individuals or corporations that are not of Malawian nationality and that such land is situated on prime arable or urban land areas. Rural freehold estates, on the one hand, are concentrated in the tea growing areas of Mulanje and Thyolo, which at, 256 and 348 people per sq. km respectively compared to the national average of 117 per sq. km have some of the highest population densities in

the country. These tea plantations range in size from 700 – 8,000 hectares. In addition many of these estates are held by corporate entities which are controlled by foreign capital, and which until recently relied essentially upon expatriate personnel for middle and senior management positions while drawing upon Malawians for manual labour and non-essential managerial tasks. Urban freeholds, on the other hand, are generally undeveloped; a phenomenon which suggests that speculative hoarding may be widespread. The existence of undeveloped land in the major urban centres, especially in Blantyre may be a major factor in the emergence of squatter settlements.

Despite these characteristics, rural freehold estates, particularly those under tea, coffee, tobacco and macadamia, are an important component of Malawi's economy. Recent studies indicate that freehold estates are substantially utilised, up to 80% in the case of those under tea, coffee and macadamia, and that these are responsible(together with tobacco and sugar which are largely on leasehold estates) for more than 80% of Malawi' total agricultural exports (ELUS, 1997) That also means that substantial revenues acrue to the Treasury as a result of export taxes levied upon them. It is also recognised that freehold estates support a substantial population of residents and seasonal employees and their families. Indeed the Commission was pleased to note that many of these estates had made long term investments in the future of Malawi.

4.4.3 THE COMMISSION'S CONCLUSIONS

After careful review of the law governing freehold tenure and the contributions of freehold estates to the economy of Malawi, the Commission is satisfied that:

(i) there is no law or practice in Malawi or countries with similar legal systems, that would prevent the State, represented by the Government, from enacting laws that create an environment for the sustainable management of land of all tenure categories including freeholds;

(ii) because most rural freehold estates are concentrated in Mulanje, Thyolo and Chiradzulu districts where population densities are very high and land pressure severe, it is not surprising that indigenous populations in those areas are beginning to agitate for land restitution ;

(iii) it was difficult to isolate the contribution of freehold tenure status per se to developments observed in the freehold estates from those that were the result, of the very considerable resources that their owners had invested in them over the years, and

(iv) from a purely production stand point, however, the freehold estates are an important sector in Malawi's economy

4.4.4 THE COMMISSION'S RECOMMENDATIONS

The Commission therefore recommends that:

(i) as regards agricultural land,

(a) non-citizens of Malawi (and this includes corporate entities not owned or controlled by Malawi citizens) should be barred from acquiring and owning freehold estates,

(b) freehold estates already owned by non-citizens should be converted to 99 year leases unless the holders thereof become Malawi citizens prior to that conversion.

(c) no more freehold grants should be made, even to Malawi citizens, except as stipulated in (d) below,

(d) applicants for freehold grants should first receive a lease for a period equivalent to the time it would take to execute specific development (conditions) contained therein, and upon full and effective compliance thereof, be at liberty to convert the said lease into freehold.

(ii) as regards urban land,

(a) all urban land should be held on leasehold tenure only,

(b) existing urban freeholds, or any freehold land which becomes urban should be converted to 99 year leases.

The Commission is aware that some of these recommendations may require amendments to the Constitution of Malawi or the exercise of powers of eminent domain thereunder. It is the Commission's firm belief,

however, that that is part of the price Malawi must pay in an effort to address historical wrongs as well as to ensure that a basis exists in law for effective supervision of land use in the country by the state and individual users.

4.5 LEASEHOLD TENURE PRACTICES

4.5.1 CHARACTERISTICS OF LEASEHOLD TENURE

Leaseholds are contractual agreements which confer rights to use land for a specific period subject to express or implied conditions acceptable to both parties. The leasehold relationship therefore implies the existence of a landlord and a tenant and a set of covenants to which both are parties. Such leases may relate to any category of land: public, private or customary. Because of the difficulty in obtaining good information on leases issued in respect of private or customary land, the Commission's inquiry was directed essentially at leases issued by the Minister responsible for lands under the Land Act.

Under the Land Act Regulations (GN166 of 1965 as amended by GN 87 of 1986) there is implied in every lease issued under the Act, a number of covenants relating to compliance with general requirements relating to the purposes for which the lease is granted. Those Regulations, however, appear to have been drafted mainly with physical i.e. urban based developments in mind. One must therefore look to the specific

conditions inserted in every lease to appreciate the nature of development control imposed by the lease.

Leases issued by the Minister are generally of two categories. The first are direct issues in respect of public land, and the second, those pertaining to land converted from customary tenure. The former are generally confined to urban areas while the latter have almost exclusively been agricultural – mainly for tobacco cultivation.

The standard agricultural lease provides, inter alia, that the lessee,

(i) agrees to comply with the covenants contained in the Land Act Regulations as from time to time amended,
(ii) will observe rules of good husbandry and land management,
(iii) will crop all arable land on a four year crop rotation basis,
(iv) will maintain not less than 10% of the demised land under trees,
(v) will comply with all directives by the Minister in respect of the demised premises, and
(vi) will not demand vacant possession from the Minister in respect of any part of the premises affected by trespass or encroachment.

In short, agricultural lessees are expected to fulfil not only the development conditions for which the grant is made, but also to ensure that the land, the subject of the grant is sustainably managed.

4.5.2 THE UTILISATION OF LEASEHOLD LAND

Agricultural leases have, in the post-independence era carved an important niche in the economic development of Malawi. This is the mechanism, which made the dramatic expansion of burley and flue –cured tobacco possible. Since 1970 the number of leaseholds has increased from fewer than 250 to more than 30,000 the vast majority of them on customary land. The leases were of varying durations: 7 years, 21 years, 33 years and 99 years. Newer leases tended to be of shorter duration.

A number of factors have contributed to the expansion of leasehold estates :

(i) opportunity to lease large areas of land at low cost
(ii) the restriction of burley growing to estate owners
(iii) favourable access to low cost finance based on the willingness of banks to lend against the value of the crop
(iv) the existence of a substantial supply of cheap labour brought about by reduced opportunities for migration, population pressure in some areas, and the low working capital visiting tenant system.

The performance of leasehold land as a tenure category is generally difficult to assess. In agriculture, for example, most studies treat leasehold land use as part of estate farming; a classification which also includes freeholds. Nonetheless evidence from the nearly 1.2 million hectares of tobacco estates which are held mainly on leases suggests that

this tenure category has made important contributions to Malawi export growth. Until recently, almost all of the tobacco grown in Malawi was on leasehold land and this accounted for over 60% of the country's domestic export earnings in 1996. Although the fortunes of tobacco in the international market are becoming increasingly uncertain, the tobacco industry will for along time remain crucial to Malawi's economic development.

The Commission heard, however, that despite this impressive performance, tobacco estates, compared to those under tea and sugar were generally in a poor state of husbandry. Comprehensive land use planning was rare, even when leasehold covenants required it, and land conservation measures were not vigorously followed. As much as 29% of these estates were also underutilised. Many estates particularly in the North were simply abandoned. Part of the explanation, the Commission heard, was that a significant number of leaseholders never really took up tobacco farming and that others simply turned their estates over to maize. Indeed, evidence was presented to the effect that as much land on "tobacco" estates was devoted to that crop as was deployed for maize.

4.5.3 THE COMMISSION'S CONCLUSIONS

After careful examination of leasehold tenure, the Commission is of the view that:

(i) indiscriminate conversion of customary land into leasehold estates has contributed in no small measure to artificial land

pressure in many areas especially in Mchinji and Kasungu districts;

(ii) the fact that agricultural leases are of varying durations, suggests some confusion as regards agricultural leasehold development policy;

(iii) not only are many of the development conditions contained in leases of all categories (urban and agricultural) generally ignored by lessees, but sufficient machinery for their implementation and enforcement does not appear to be in place.

4.5.4 THE COMMISSION'S RECOMMENDATIONS

The Commission therefore recommends that in addition to measures recommended in 4.4.4. above,

(i) the duration of leases over public land (other than agricultural) should be standardised, but should not in any event, exceed 99 years,

(ii) the duration of leases for agricultural purposes should depend strictly on the period it would require to execute an economically viable production programme, but should not in any event, be for less than five years,

(iii) consideration should be given (after a careful study of the urban housing market) to the establishment of mechanisms for the adjudication of disputes arising from landlord and tenant relations in urban areas,

(iv) private leasehold arrangements in the agricultural sector (except in respect of customary land) should be regulated by the market, and

(v) leasehold arrangements in respect of customary land where permitted under particular regimes, should be recorded in the village land registries.

4.6 CONCLUDING REMARKS

Tenure is the normative and structural parameter which explains how individuals and communities relate to the land and the natural resources upon it in both historical and contemporary social settings. The reorganisation of tenure arrangements therefore requires careful consideration and design. Experience in Malawi and elsewhere in the region suggests that interventionist approaches which are not sensitive to culture and technology have little chance of success. There is also evidence that such approaches may reverse evolutionary trends towards the emergence of more appropriate regimes, for example, by re-entrenching sub-optimal production practices and creating antagonism towards any further attempts at social and economic reform.

CHAPTER 5

THE SYSTEM OF LAND INHERITANCE

5.1 THE COMMISSION'S MANDATE

The Commission's Terms of Reference require it to review present inheritance systems and, in conformity with existing and proposed legislation, come up with recommendations for appropriate procedures for inheritance of land.

5.2 THE LINK BETWEEN GENERATIONS

A system of inheritance provides for the transmission of property and resources within and across generations. It ensures that property and resources remain within a social group. Eligibility rules within an inheritance system define who has the right to inherit. The right to inherit is inextricably linked with kinship. Major differences in inheritance patterns exist between patrilineal and matrilineal social systems. The Wills and Inheritance Act creates a statutory regime which is supposed to replace customary law.

Throughout Africa, customary systems of land inheritance have come under severe criticism for a variety of reasons. Land reformists have condemned them for being the primary source of continuous subdivision of land from generation to generation often leading to units of sub-economic size ( ) Gender analysts consider them insensitive to the resource needs of married women, daughters, and children generally, in that these members of society have

no direct control over land on which they are often the primary cultivators. And on spousal death or divorce, married women often find themselves without access to land hence forever excluded from economic participation in a predominantly agrarian society ( ). Although the mandate of the Commission was not to evaluate these criticisms notice must be taken of them in the examination of land inheritance problems on the ground. This, the Commission hopes should facilitate the formulation of recommendations that would foster efficiency, sustainability and equity in the use of land resources.

5.3 THE STATUTORY REGIME

5.3.1 THE CONSTITUTIONAL CONTEXT

The law of inheritance in Malawi, whether statutory or customary, must now be read in the light of Article 24 of the 1995 Constitution. That provision confers upon women full and equal protection against discrimination on account of gender or marital status and prohibits, in particular, any law or practice which discriminates against women in respect of access to property, including property obtained by inheritance.

It worth observing here that the implementation of similar provisions elsewhere has not been uniform. While Courts in Tanzania have declared particular rules of customary law that exclude married women or daughters from inheriting land from their spouses or parents void (Shivji, 1992), those in neighbouring Kenya have been reluctant to declare similar rules discriminatory. The Uganda Land Act, 1998 which contains similar explicit prohibitions is yet to be interpreted by the Courts.

The more difficult challenge is to ensure that the underlying social and cultural context which supports and reinforces those inheritance practices are eradicated. The enactment of a gender neutral law without more is seldom enough to provide redress for such deep-seated cultural norms.

The Commission therefore took a lot of evidence on this issue especially as it relates to equality between and equity among various gender and age categories in Malawi. Because of the existence of both matrilineal and patrilineal systems of marriage and inheritance, which are more fully described below, the issue was contentiously argued by both men and women. The Commission's recommendations will not fully resolve those arguments by any means. Indeed, it is expected that Article 24 of the Constitution will remain the focus of active political and legislative discourse, particularly on customary law, for a long time to come.

5.3.2 THE WILLS AND INHERITANCE ACT

The statute that governs matters of inheritance in Malawi whether of land or other forms of property is the Wills and Inheritance Act(Cap. 10:02). There are three things to note about this Act. First, it came into effect in 1967 i.e. almost three decades earlier than Article 24 of the Constitution above. This may have implications for some of its inclusions or exclusions. Second, it purports to be a statute of general application in respect of all testamentary matters in Malawi. Says one source,

> the Act expressly extinguishes any claims to the estate of a deceased person based on customary law. All claims must be

exclusively based on the provisions of the Act itself (Mshisha, M. 1998)

Third, the Act excludes issues of devolution of customary land and crops from its otherwise uniform requirements. The effect therefore is that succession to "customary land" (as defined in the Land Act) is based exclusively on the rules of customary law applicable in each community. In other words a testator cannot provide for the devolution of his or her interest in customary land by will.

The Commission was unable to establish the policy basis for this rather curious exclusion, but was advised that similar provisions exist in Kenya's Law of Succession Act 1972. There, the reason for exclusion was that Parliament found the issue of succession to land too hot to handle particularly in the face of opposition from members of their own ranks. The very strong interest in customary land by traditional authorities may well have played a part in securing that exclusion in Malawi's Wills and Inheritance Act.

Distinction must therefore be made between two regimes: that relating to property other than customary land, and that governing customary land. As regards the former a further distinction must be made between testate and intestate succession. Testate succession refers to situations in which the deceased has made a will. In such situations the property of the deceased, including non-customary land, will devolve in accordance with stipulations contained in the deceased's will because

testamentary freedom is assured, such stipulations are not generally subject to challenge.

In intestate succession the deceased will not have made a will. In such a situation the devolution of property proceeds in the manner provided for in the Act. This would include anything which forms part of the deceased's estate. This means that private land (i.e. leasehold and freeholds) would also devolve in the same manner. Since only customary land and crops are excluded from the provisions of the Act, there are other properties that would have been the subject of customary law rules of succession had the Act not been passed. Consequently, two separate procedures are provided for in situations of intestate succession.

The first relates to situations in which customary law would, but for the enactment of the legislation, have applied. Section 16 of the Act lays down the criteria for distribution of a deceased estate in such circumstances. The Section apportions the estate to beneficiaries on the basis of where in Malawi the marriage was arranged. The Act does not provide a definition of "arranged." In the days of the Traditional courts (infra) the tendency was to use the practice prevailing in the woman's home of origin as a basis for the distribution of property. The proportions received by beneficiaries varied depending on whether the marriage was arranged in a patrilineal or matrilineal social system. If the marriage was arranged in the patrilineal districts of Chitipa, Karonga, Rumphi, Nkhata Bay, Mzimba and Nsanje the wife, children and dependants of the deceased were entitled to half of the property; and heirs under customary law the other half. If on the other hand the marriage was arranged in the

matrilineal district which are dominant in the rest of the country, the distribution was 3/5 to customary heirs, and 2/5 to the wife, children and dependants. There is no indication in the Act as to who these "customary heirs" are. Since subordinate courts have no jurisdiction over matters of customary law and in the absence of traditional courts, this must await determination by the High Court which has original jurisdiction in matters of customary law.

The second relates to situations in which customary law would not have applied. Section 18 of the Act provides that in such situations, a particular order of priority is to be followed. This would apply to estates of foreigners and Malawians monogamously married under the Marriage Act. The Act is unclear about the status of children of unions that do not fall neatly into either customary or statutory categories.

As regards the latter, i.e. the regime governing the devolution of customary land, it must be assumed that this would be the rules of customary law in force in the area in which the land is situated. Such rules may, but need not, be similar to those relating to other customary property. In order to determine this therefore, the Commission examined the two systems of matrilineality and patrilineality on which rules of succession to land are based.

5.3.3 THE COMMISSION'S CONCLUSIONS

Having examined and analysed the statutory instruments governing succession in general and the devolution of land in particular, the Commission concludes that:

(i) the full import of Article 24 of the Constitution has not been internalised by the general public including gender activists in Malawi.

(ii) the Wills and Inheritance Act may will be a dead letter in rural Malawi as there was no indication in the literature or in evidence, that rules under it especially those relating to intestate succession were being followed. On the contrary, it is more than likely that customary law was being applied in all cases covered by the Act.

(iii) the absence of subordinate courts with original jurisdiction over issues of customary law following the abolition of traditional courts, has created a vacuum that needs to be filled.

5.3.4 THE COMMISSION'S RECOMMENDATIONS

The Commission therefore recommends that:

(i) a general review and evaluation of all laws should be conducted to determine whether or not they are in conformity with Article 24 of the Constitution,

(ii) the Wills and Inheritance Act should be reviewed with a view to limiting its scope to testate succession only and that express provisions be made as a result thereof for the protection of potential heirs against abuse of testamentary freedom,

(iii) as a general rule the basic law of intestate succession should revert to the personal law of the deceased, subject to such guarantees and qualifications as exist, in the Constitution and any other written law, and

(iv) an amendment should be introduced to the Courts Act (Cap.3:02) to give subordinate courts jurisdiction over matters of customary law other than those relating to land for which separate recommendations have been made in 7.6.4(infra)

5.4 THE MATRILINEAL REGIME

5.4.1 MATRILINEAL DESCENT GROUPS

Malawi's ethnic groups are predominantly matrilineal. Most of the central region is matrilineal even though Kasungu, Ntcheu, Dowa, Dedza and Mchinji have pockets of patrilineal social systems. The Southern Region, except for Nsanje, parts of Mwanza and parts of Chikwawa, is matrilineal.

5.4.2 THE SYSTEM OF MATRILINEAL SUCCESSION

In matrilineal systems rights to customary land for women tend to be primary. User rights are held by, or through women. This is reflected in the pattern of marriage residence whereby men live in their wives' villages. This is called chikamwini. Under chikamwini a man gains access to land through his wife. In the event of divorce or death of the wife the husband is expected to return to his own village and loses all rights to the land he cultivated with his wife. The children of the union remain in the village as they are considered part of their mother's matrilineage. The death of a man living under chikamwini does not affect the status of the land. If the wife dies the land will be shared among her daughters. However since the male children are expected to leave the village eventually to live in their wives' village they continue to be co-users of the land until the said eventuality. The widower would normally be required to return to his own village. Chikamwini remains the norm among the Yao and the Lomwe.

The system provides the option of chitengwa whereby the woman goes to live in her husband's village. This option is usually allowed after a period of residence in the woman's village, and after her matrikin have satisfied themselves that their kinswoman would be adequately looked after in her husband's village. The chitengwa option, which has become the norm in Lilongwe district, in the Central Region, gives a man direct rights to land in his maternal village. However, on the man's death this land reverts to his sisters. His own children and widow are usually required to leave the village and return to the widow's village. This is

done because, according to custom, children rightfully belong to their mother's matrilineage. Their real home is therefore their mother's village.

Attention of the Commission was drawn to the fact that apart from chitengwa, neolocal residence was an option that is being increasingly adopted by families constrained by the effects of chikamwini, but which cannot at the same time go to live in the man's village for various reasons, including scarcity of cultivable land. This arrangement involves settling in a place neutral to the husband and wife. Land for such settlement would be obtained from the village headmen of the area. Under this arrangement, as in chitengwa, the male head of household has direct rights to the land. These rights normally pass to the children of the deceased. But in recent years there have been increasing instances of village headmen evicting widows and children once the husband dies.

Although inheritance of customary land does not seem to cause serious problems, leasehold land does, especially if the leaseholder dies intestate. Under the matrilineal system a man's rightful heirs to property are his sisters' children. On the death of the leaseholder, nephews of the deceased will claim the farm and other property. On the other hand, the children of the deceased, who may have lived on the farm and helped in its development, expect to be beneficiaries and regard their cousins as usurpers.

The incompatibility of matrilineal inheritance rules to modern social patterns is demonstrated by the fact that in all matrilineal areas visited by the Commission there was overwhelming expressed preference

for one's children as heirs to property such as farms, as opposed to sisters' children. This preference for own children did not, however, extend to social positions such as chieftaincy and village headmanship.

5.4.3 THE COMMISSION'S CONCLUSIONS

After careful consideration of the matrilineal system the Commission is of the view that certain characteristics inherent in it impede fail and equitable devolution of land. It particular:

(i) the customary practice that land reverts to sisters or daughters discriminates against male children who then become dependent on their wives' land, or have to migrate in search of land,

(ii) the rule that a man's rightful heirs, are his sisters' children and not his own, is a major cause of conflict within families, over property,

(iii) the customary practice that the male spouse in chikamwini or the female spouse in chitengwa returns to his/her original village after divorce or death of the other spouse often entails landlessness to the returning spouse in the original village.

(iv) competition over acquired (i.e. non-customary property is beginning to cause strains in matrilineal rules of succession.

5.4.4 THE COMMISSION'S RECOMMENDATIONS

The Commission therefore recommends that:

(i) matrilineal descent groups should be encouraged to accord secure property (including land) rights to men and children in the areas of their ordinary residence,

(ii) model uniform codes of succession to customary property (including land) should be developed, discussed and introduced, into traditional authority decision –making fora throughout the country

(iii) the model code recommended in (ii) above should suggest mechanisms for ensuring security of tenure for families in neo-local residence, and

(iv) except as indicated above changes in economy and society are likely to stimulate development that would assist matrilineal systems in confronting the problems identified in 6.4.3. above

5.5 THE PATRILINEAL REGIME

5.5.1 PATRILINEAL DESCENT GROUPS

The whole of the Northern Region; parts of Kasungu, Ntcheu and Dedza in the Centre; parts of Mwanza and Chikwawa, and Nsanje districts in the south are patrilineal. The essential feature of the patrilineal system is that descent is reckoned through the male line, and property and

authority are passed down the same line. This means that land and chieftaincy will pass from father directly to sons. What is intriguing is the fact that some of these groups are descended from the same stock as those that practice matrilineal forms of succession. In some cases, elements of matriliny were practised alongside those of patriliny. Thus among certain Ngoni groups in the south, chieftaincy-devolved patrilineally while residence and land inheritance remained distinctly matrilineal. This situation sometimes led to confusion and argumentation during public hearings.

5.5.2 THE SYSTEM OF PATRILINEAL SUCCESSION

In patrilineal social systems, direct access to land rights is through male members of the community. Women gain access through their husbands by reason of marriage into the community.

A man's rightful heirs are his own children. The eldest son is given priority in the inheritance of a deceased father's land. This inherited land must be shared with the widow who, according to custom, must remain in the deceased husband's village if lobola was paid. The payment of lobola, which traditionally is in the form of cattle, cements a woman's status in the lineage of her husband without severing the bonds that tie her to her own. Thus the system contains clear rules for the determination of heirs before death occurs.

In the case of polygamous marriages, it is the eldest son of the first wife who inherits the land. Where there are no sons, one of the brothers of

the deceased inherits the land. It is assumed that female children will acquire land rights in their husbands, villages to which they will belong on marriage. Since the system is founded on the principle that all female children will marry, no provision is made for those that do not, even though in practice chiefs have been able to allocate land to spinsters, and widows and divorcees expelled from their husband's homes.

5.5.3 THE COMMISSION'S CONCLUSIONS

In the light of that analysis, the Commission concludes that:

(i) the patrilineal system is inherently discriminatory of females in the inheritance of land,

(ii) the general sentiment in all regions, however, was that the patrilineal system of inheritance offers better opportunities for the consolidation of and fair distribution of wealth among families,

(iii) sub-division of land among brothers in patrilineal social systems usually results in sub-economic parcellation of land which sooner or later impacts negatively on agricultural production

5.5.4 THE COMMISSION'S RECOMMENDATIONS

The Commission therefore recommends that in addition to recommendations made in 5.4.4. above

(i) patrilineal systems should be encouraged to adopt corporate forms of family properly protection instead of continuous subdivision among heirs,

(ii) the rules of succession to property (especially land) should not discriminate even on the basis of residence, between males and females, and rights once acquired should not lapse by reason only of sex or residence, and

(iii) property acquired other than by reason of customary law status should devolve strictly upon the surviving spouse, and children, both male and female, in trust for each other in equal shares.

5.6 CONCLUDING REMARKS

It will be clear from this presentation that rules of inheritance are not only tied up with community perceptions of identity, and how land resources should be used and controlled. In many cases in Malawi, these rules also determine the devolution of power and authority in traditional settings. Oftentimes the Commission was reminded that as inequitable as some of those rules may appear, they were part of "our culture" and farther, that the authority of chiefs derived from their control over land. Any attempt to change inheritance rules by legislation therefore requires careful design. The dilemma is that any changes in other aspects of land tenure are doomed unless these are synchronised with socially acceptable rules of inheritance. That appears to be one major lesson which Malawi has learnt from the ndunda system of land tenure.

CHAPTER 6

THE SYSTEM OF LAND ADMINISTRATION

6.1 THE COMMISSION'S MANDATE

The Commission's Terms of Reference require it to review the functions, powers and organisational structures of public institutions responsible for aspects of land administration in order to identify bottlenecks in their operational procedures, and recommend ways of streamlining these operational procedures for improved efficiency,

6.2 LAND ADMINISTRATION FUNCTIONS

Land administration is concerned with the delivery of land rights, the demarcation and survey of parcels, the registration and maintenance of land information and the resolution of conflicts concerning the ownership and use of land. This chapter examines the first three of those functions. The last is examined in the next chapter.

The powers of administration over public land and customary land are vested in the Minister responsible for land matters. In urban areas agencies such as the Malawi Housing Corporation (MHC), and local authorities allocate and manage plots in areas under their control.

Under Section 26 of the Land Act the Minister's administrative powers over customary land are delegated to chiefs, who must exercise these powers according to the customary law of their areas. Since customary law is not defined and varies from place to place eligibility criteria and allocation procedures are not uniform

The administration of private land is carried out by individuals and institutions, subject to Ministerial approval for those lots leased from public land. Charges, mortgages and subleases on lots leased from public land are subject to Ministerial consent. No such consent is required on freehold land. Conveyancing procedures in respect of private land is governed by the Conveyancing Act (Cap. 58:03) which merely applies to Malawi the Conveyancing Act, 1911 of the United Kingdom. That Act does not, however, apply to land registered under the Registered Land Act (Cap. 58:01).

6.3 LAND DELIVERY FUNCTIONS

6.3.1 ALLOCATION OF CUSTOMARY LAND

Under Section 26 of the Land Act, the Minister responsible for land matters is responsible for the administration and control of all customary land and all minerals under or upon it "for the use or common benefit, direct or indirect, of the inhabitants of Malawi" A proviso to that section stipulates, however, that

> A Chief may, subject to the general or special directions of the Minister, authorise the use and occupation of any customary land within his area, in accordance with customary law

In practice, allocation of rights to customary land has always been done by traditional authorities.

To facilitate his functions, the village headman delegates some of his responsibilities to lineage leaders. In matrilineal systems the head of a matrilineage, known as mwinimbumba, has the right to allocate pieces of land to individual households in that section of the village allocated to the matrilineage.

6.3.2 LEASEHOLD AND OTHER GRANTS

Perhaps the most important method of land delivery in Malawi is the issue of leases by the Minister. These may be made in respect of either public or customary land. Private land owners (i.e. freeholders or leaseholders) may also issue leases or subleases. Much of the Commission's inquiry, however, was directed at the issue of leases over customary land. As already indicated in Chapter 4, this was the method used, for the aggressive expansion of tobacco growing between 1967 and 1994.

Under Section 5 of the Land Act, the Minister has power to issue leases in respect of public or customary land for periods not exceeding 99 years. The Minister's power to thus dispose of customary land is not, in law, exercisable in consultation or conjuction with the community with rights of user over the affected land. The effect of disposal is to convert customary land, on the basis of zero value, first to "public" and then to "private" (i.e. leasehold) land.

The processing of leases in respect of customary land is, in practice, a complicated and rather tedious affair. The initial step is for the prospective leaseholder to identify the land in respect of which a grant is sought. That exercise is expected to involve consultations with traditional authorities and, especially the village headman and chief who are required to signify their consent by signing the "Consent by Chiefs Form". This form enters the Government machinery through the District Commissioner (DC). The Commission heard that in some cases the land that village headmen gave to prospective leaseholders was land actually under cultivation, which gave people the suspicion that village headmen and even chiefs received bribes to effect transfer of lands to rich people, or actually sold it. It also heard that DCs and politicians exerted pressure on village headmen to allocate land to influential persons. The District Commissioner transmits the signed consent form to the Department of Lands which is expected to initiate the following subsequent procedures:

- an investigation of the land's suitability by the Ministry of Agriculture in the case of agricultural leases,
- verification by the Department of Physical Planning,

- demarcation and survey by the Department of Survey,
- formal grant of the lease by the Minister, and
- registration of the lease by the Department of Lands itself.

According to the Estate Lands Utilisation Studies, this procedure involves a total of 33 steps – 4 for the applicant and 29 for the Government, before a lease can be issued. The Commission was informed that some of these steps were never really taken. Where surveys were carried out, approvals often took more than one year to obtain. All agricultural leases were actually issued on the basis of sketch plans only.

As regards other grants, two points need to be mentioned. The first is that private transactions involving the conveyance of interests in land of any tenure is regulated by the common law of England being the residual law of property in Malawi. Where these involve sale or assignment of leases of private land, Section 24A of the Land Act requires that the Minister be given prior notification before this is concluded. Although the purpose of this stipulation is to give the Government the right of first refusal in respect of such intended sale, the prevailing interpretation within Government and the Deeds and Lands Registries is that ministerial consent is a condition precedent to a valid sale that being the official interpretation. The Commission found that where private land was owned or controlled by corporate entities, this requirement was often circumvented simply by effecting changes in shareholding! The second point to note is that no subleases may be issued out of Government leases without the consent of the Minister. Such leases may, however, be converted into freeholds on application to and approval of the minister. It

is to be noted that no guidelines exist for the exercise of that ministerial function.

6.3.3 THE COMMISSION'S CONCLUSIONS

The Commission received very strong views as regards the processing of leases generally and in respect of customary land in particular. On the basis of those views and other available information, the Commission has concluded that:

(i) under the guise of facilitating ministerial inquiries chiefs and village headmen were in fact routinely involved in the sale of land to outsiders in those areas where cultivable land was available, thereby compromising their traditional role as trustees and custodians of customary land

(ii) there were serious delays in land delivery particularly as regards leases due to the large number of offices and inefficiency of the officers involved in the exercise.

(iii) the requirement under Section 24A of the Land Act that prior notification be given to the minister before transactions on private land are effected is an impediment to land delivery through market mechanisms.

6.3.4 THE COMMISSION'S RECOMMENDATIONS

The Commission therefore recommends as follows:

(i) as regards the control and allocation of customary land,

(a) the authority of traditional chiefs to allocate land among members of their respective communities including those who have access rights under custom (e.g. obwera or akudza) should be fully restored and protected by statute;

(b) the statute should contain clear rules indicating the circumstances under which traditional chiefs may lease community land to, or otherwise authorize occupation by persons other than community members.

(c) all transactions involving customary land should be clearly recorded in the village land registry set up as recommended in 6.5.4 below.

(ii) as regards the processing and issuing of government leases, the process be simplified by confining approvals to the Minister, the Commissioner for Lands and Registrar of Title/Deeds only.

(iii) as regards conversion of government leases to freehold, and transactions involving private land,

(a) clear guidelines be formulated to ensure that ministerial discretion to authorise conversion is transparent and beneficial to the state.

(b) Section 24A of the Land Act be repealed in order to liberalise the market for land transactions.

6.4 DEMARCATION AND SURVEY FUNCTIONS

6.4.1 DEMARCATION PROCEDURES

Before any survey is done in accordance with the provisions of the Land Survey Act (Cap.59.03) it is usual practice to carry out preliminary investigations involving demarcation and or the preparation of sketch plans. That procedure is, in any case, required in respect of all land to which either the Adjudication of Title Act (Cap.58.05) or the Customary Land (Development) Act (Cap.59.01) applies. In either case demarcation involves preliminary survey of land to be adjudicated or allocated and in particular, the determination of boundaries thereof, adjustment of those boundaries, reallocation (where necessary) of parcels between different claimants, resolution of incidental disputes, reservation of land for public purposes, and the preparation of a Demarcation Map. Both legislations provide that the Demarcation Map must show:

> every separate piece of land identified by a distinguishing number except that rivers and public roads shall not be required to be identified

by a number (Sections.13 and 14 of Caps 58.05 and 59.01 respectively)

That presumably, is the procedure which is required to be followed in respect of the issuance of leases over customary land.

The Commission took evidence which indicated that demarcation procedures are rarely carried out. In the case of leases over customary land, the Commission heard that instead of demarcations, only sketch-plans were prepared, sometimes by Land Husbandry Officers who are not qualified to perform such services. Sketch plans so prepared were then filed away as survey requests. As a result no accurate records existed of the number and areal extent of dispositions thus made.

6.4.2 SURVEY AND PREPARATION OF PLANS

According to Rule 68 of Land Survey Rules made under Section 4 of the Land Survey Act (Cap. 59:03) survey requests in respect of public and customary land can only be undertaken on the authority of the Surveyor General. The Department of Surveys provides a service for cadastral surveys on public and customary land mostly where government issues leases on land in these two categories. It is a statutory requirement that land be surveyed before title can be granted.

Survey requests normally come through the Department of Lands, although some private landholders have asked the department to carry out

surveys on their freehold land because the rates are cheaper than those charged by the private sector.

Surveys for title have to undergo a rigorous examination process to check for errors and consistency with survey rules. Subdivisions from approved perimeter surveys within the estates of the Malawi Housing Corporation, Municipal or Town Council are exempted from examination. Subdivisions or boundary alterations carried out under Local Land Boards are not exempt from examination. Surveys carried out for agricultural leases are not subject to examination but are regarded as survey requests.

6.4.3 THE COMMISSION'S CONCLUSIONS

On the basis of the information reviewed above, the Commission is of the view that the process of demarcation and survey is far from satisfactory. In particular, there is convincing evidence that:

(i) leases are in fact issued on the basis of sketch plans rather than deed plans as the Department of Surveys is unable to cope with the workload.

(ii) there are long delays between survey requests from the Department of Lands to final approval by the Surveyor General

6.4.4 THE COMMISION'S RECOMMENDATIONS

The Commission recommends therefore that:

(i) a crash programme for the training of surveyors and survey assistants be instituted as a matter of urgency. This will require amendment to the Survey Act.

(ii) the requirement that the consent of the Surveyor General be obtained before leases and other dispositions of public and private land are granted which serves only to delay land delivery, be dispensed with immediately.

(iii) survey services should be extended to customary land at the request of traditional authorities as a means of clarifying occupation rights in those communities

REGISTRATION FUNCTIONS

6.5.1 THE DEEDS REGISTRATION SYSTEM

Registration of land rights or of evidence of the existence of such rights is an important factor in the solidification of tenure security. It also facilitates the operation of a robust market in land where this is considered essential for economic development.

The registration of deeds was therefore introduced quite early in Malawi's property system. This was and still is governed by the Deeds Registration Act (Cap.58.02). Under this system all dealings in a

particular piece of land are recorded. Consequently title deeds tend to get longer and more complex as particular parcels go through several transactions. What is recorded under the system, however, is not the land itself, or interest in the land, but rather transactions affecting that land. Thus registration does not cure any defects in the transaction. It involves the use of proven technical terms to record evidence of titles and to trace their originals. It is consequently left to legal expertise to correctly record the title in question on a given deed, and the Deeds Registry merely records the completed work. That is done at the Central Deeds Registry in Lilongwe. The deeds registry system requires substantial legal expertise.

6.5.2 THE TITLE REGISTRATION SYSTEM

In 1967 the Registered Land Act was passed to facilitate the progressive registration of title in Malawi. It was also intended to simplify the system of recording land holdings and the methods of carrying out land transactions. In place of deeds, a system of land certificates which were considered much simpler was introduced. Land Registries were opened in Lilongwe (1973), Blantyre (1987) and subsequently in Mzuzu.

The title registration system is acclaimed for its conceptual superiority over the deeds system in that:

(i) it simplifies searches by discarding the need to trace the root of title

(ii) it protects registered proprietors against damage occasioned by official human error including wrong entries onto the register

(iii) unlike the deeds system title registration has an in-built mechanism for parcel identification by providing a Registry Map which runs side by side with the Register

(iv) conveyancing practice under title registration has been made simpler through prescribed forms for each land transaction

(v) strictly speaking the Deeds Registry is a record of deeds and not titles, whereas registration in the Land Registry creates land rights

One significant feature of the Registered Land Act is that it attempts to create land titles in respect of customary land. This is done in conjunction with the Customary Land (Development) Act. Under this latter process holdings are registered in the name of individuals or family representatives selected by the communities themselves.

In summary, the systems of land registration in Malawi are currently as follows:

(i) Private Land

Once the requirements (supra) of Section 24A of the Land Act are complied with, and the Minister's "consent" is obtained, the vendor's lawyer proceeds to prepare documents for stamping and subsequent registration under the Deeds Registration Act or the Registered Land Act.

For assignment of leases on public land the lawyer submits a draft application in duplicate indicating the new beneficiary of the lease to the Department of Lands, which in turn seeks the approval of the Minister. Once approval is granted the Department of Lands prepares a consent and sends back to the lawyer one copy of the draft assignment to enable him prepare the final draft. The stamping and registration then follows once the draft is approved.

(ii) Public Land

Where land is being leased for the first time, the Department of Lands is responsible for the preparation of documents, stamping and registration.

(iii) Customary Land

In the case of leaseholds in respect of customary land, documents for stamping and registration are prepared by the Department of Lands. Ground rent for a year or part thereof is paid together with stamp duty, registration fees, drawing fees and survey fees.

6.5.3 THE COMMISSION'S CONCLUSIONS

Having examined all the procedures involved in the registration of land rights and transactions in Malawi, the Commission is convinced that:

(i) procedures for the registration of title are not necessarily simpler, nor have they reduced the costs associated with deeds registration, since the same administrative delays experienced under the latter have persisted under the former,

(ii) a single and uniform system of land registration (whether cumbersome or not) is all that Malawi needs hence a policy decision needs to be taken and implemented as to whether the country will retain the Deeds or switch over completely to the Title registration system.

6.5.4 THE COMMISSION'S RECOMMENDATIONS

The Commission recommends therefore that:

(i) there is need for devising less cumbersome methods of recording and tracing title so that the public can access and understand registration procedures without the necessity for professional assistance,

(ii) if the decision is to adopt the Title registration system; (the route which many countries in the region seem to have taken), then a compulsory and systematic process of conversion would be the most acceptable option.

(iii) either way there is need for further decentralisation of land registration functions involving, inter alia, the creation of land registries in all district bomas for title/deeds registration;

(iv) village land registries should be established under the supervision of District registries and ultimately the National Land Registry for the orderly and authoritative record of transactions involving community land as recommended in 4.3.4 above.

6.6 CONCLUDING REMARKS

The proper discharge of land administration functions is fundamental to the preservation and sustainable utilisation of land as a basic resource and factor of production. In Malawi, the performance of those functions has been severely hamstrung by the sheer number of operators involved. These include Village Headmen, Chiefs, all departments of the Ministry of Lands, Housing, Physical Planning and Surveys, District Commissioners, Local Authorities and parastatal bodies. The bureaucracy that has arisen from this array of offices is often the cause of delays, errors of judgement, lack of co-ordination, rampant corruption and dereliction of duty. In many cases crucial functions cannnot even be performed because of serious shortages of qualified or adequate staff in sections of that bureaucracy. It is the Commission's experience that no land reform programme however technically well designed will succeed unless an efficient and effective system of land administration is in place. This is one of the most important challenges which land policy development in Malawi must face.

6.6.3 THE COMMISSION'S RECOMMENDATIONS

CHAPTER 7

SETTLEMENT OF LAND DISPUTES

7.1 THE COMMISSION'S MANDATE

The Commission's Terms of Reference require it to suggest ways of resolving land conflicts and disputes and to recommend changes in dispute resolution mechanisms.

7.2 THE NATURE OF LAND CONFLICTS AND DISPUTES

Note has been taken in Chapter 3 of the character of land problems in Malawi. The Commission found that these often led to a number of conflicts and disputes. The first was the phenomenon of boundary encroachment which appears to have been rampant mainly in areas of land under customary tenure. This often occurred when the offending party attempted to obtain more land at the expense of his/her neighbour, or in situations of undermarcated boundaries, such a party was unable to determine with accuracy, or was otherwise uncertain about the exact location of the boundary between them. Boundary disputes were also reported between villages and traditional authority areas. Here some Village Headmen were reported to be in the habit of taking advantage of lack of boundary demarcation between villages, to allocate and by so doing extend administrative jurisdiction over land and people not belonging to their own areas. Thus village boundary disputes were

reported in Chitipa, Rumphi, Nkhatabay, Kasungu, Mzimba, Salima, Mchinji and Dedza Districts.

The second was increased land use conflicts particularly between crop cultivation and grazing. The Commission received evidence of the invasion of grazing areas and the conversion of dambos into dimbas. Apart from the fact that this deprived livestock owners of gazing land, it was often a source of serious conflict between different land users in some areas. This was particularly evident in Chikwawa, Nsanje and Mangochi districts. For example, in TA Chowe's area in Mangochi, a definite rift had occurred between livestock owners and cultivators with the result that injury to animals thought to be trespassing on crops, was common.

7.3 SETTLEMENT OF CUSTOMARY LAND DISPUTES

7.3.1 DE FACTO PROCEDURES

Disputes involving customary land are, in the first instance heard by the village headman. In matrilineal systems these disputes will first be heard by the mwini-mbumba if it involves only members of the matrilineage before they are referred to the village headman. A party who is not satisfied with the decision of a village headman may appeal to the Group Village Headman, and up to the Traditional Authority (TA). These appeals follow the hierarchy of chieftaincy provided for in the Chiefs Act (Cap.). A dispute that cannot be resolved by the Traditional Authority is referred to the District Commissioner. In the case of Ntcheu and Mzimba districts disputes that cannot be resolved by Traditional

Authorities are referred to Inkosi ya Makosi Gomani and Inkosi ya Makosi Mbelwa respectively, who are Paramount Chiefs. In most cases the two paramount chiefs are the final arbiters in land disputes in their areas of jurisdiction.

The Commission heard however that although formal and informal mechanisms for dispute settlement existed at community and higher levels, these were not always effective or authoritative. There was general confusion as to which disputes in respect of what land could be settled by traditional authorities or the courts. There were even situations in which traditional authorities appropriated jurisdiction in the settlement of disputes over private (i.e. leasehold or freehold) land in ignorance, or disregard of the fact that these lay within the province of the courts. The Commission heard that apart from chiefs, District Commissioners were also involved in settling disputes arising between leasehold estate owners and customary land users although this practice has now been stopped. The evidence before the Commission indicates that forum shopping was common leading to inconclusive determination of particular claims.

7.3.2 TRADITIONAL COURTS

From 1962 to 1994 all disputes involving customary law, were heard by Traditional Courts Act (Cap.3:03 now repeated). Under Section 8 of that Act, Traditional Courts had civil jurisdiction over all causes and matters in which all the parties were Africans and in which the defendant was at the time the cause of action arose resident within the jurisdiction of

the Court. The law applicable was the customary law prevailing in the area of the jurisdiction of the court. Between 1962 and 1967 Traditional Courts were established in all Traditional Authority areas in the country.

Traditional Courts had at least one important merit. They provided a forum within which customary law could be developed and clarified. In many countries in the region there is evidence that such courts offered opportunity for the evolution of general principles across various customary law regimes, hence a chance for the standardisation of important areas of law. The conferrement of criminal jurisdiction on Traditional Courts in Malawi, however, gave them a totally different character. They became quite simply a tool for the execution of "political justice" especially when they were permitted to try capital offences without the usual guarantees as to admissibility of evidence and presumption of innocence. These courts therefore lost favour with the public and human rights activists worldwide. Their abolition in 1994 was therefore inevitable.

7.3.3 THE COMMISSION'S CONCLUSIONS

The Commission believes that although the de facto procedures of customary land dispute settlements have the backing of culture and society, they are, without modification, ill-equipped for this role. In particular, the Commission believes that:

(i) traditional authorities are no longer impartial and transparent in the resolution of disputes even those involving members of the same family and besides, appeal hierarchies in that system are lengthy, sometimes inaccessible and quite often fairly costly.

(ii) the abolition of Traditional Courts though necessary and landible, has left a vacuum in customary land dispute settlement which needs to be fulfilled, and

(iii) there is need for a structured, expeditious and authoritative forum for the resolution of customary land disputes in Malawi.

7.3.4 THE COMMISSION'S RECOMMENDAIONS

The Commission therefore recommends that:

(i) disputes over customary land:

(a) should, in the first instance be heard by land tribunals constituted at the Traditional Authority level and presided over by the Traditional Authority assisted by at least four other members of the community one of whom should have had legal or administrative experience;

(b) appeals from Traditional Authority level tribunals should lie to tribunals constituted at the District level consisting of all resident Traditional Authorities and at least three other members of the district one of whom should have had legal or administrative experience,

(c) appeals from District level tribunals should lie to the High Court, and

(ii) all Traditional Authorities and their Chiefs should undergo special training on the ethics of dispute management and the need to separate their land delivery from functions dispute processing powers.

7.4 SETTLEMENT OF OTHER LAND DISPUTES

7.4.1 ADMINISTRATIVE AND QUASI-JUDICIAL PROCEDURES

The settlement of other land disputes usually depends on the nature of the dispute itself. The Commission found that disputes involving the local population and private landholders were normally settled administratively by District Commissioners although such disputes are expected to go to the courts. The most common disputes that have come before District Commissioners relate to trespass and encroachment. Referring disputes of this nature to the District Commissioner may be convenient to the private landholder in terms of the time and money they would save by not going to court.

District commissioners were also involved in the resolution of issues involving the transfer or other disposition of customary land registered after demarcation and allocation in accordance with the Customary Land (Development) Act (Cap. 59:01). Under the Local Land Boards Act (Cap. 59:02), District Commissioners are also required to preside over all issues regarding transactions in registered customary land including disputes over the partition of registered family land.

Under Section 18(2) of the Registered Land Act the Registrar has powers on the application of any interested party and on such evidence as he considers relevant, to determine and indicate the position of an uncertain or disputed position of any boundary. Courts are prohibited from entertaining any action or other proceedings as to the boundaries of registered land unless the boundaries have been determined as provided under that provision.

7.4.2 THE HIGH COURT AND SUBORDINATE COURTS

The Commission noted that disputes over private, or any land in urban areas are generally under the jurisdiction of the courts. Under Section 39(2) the Courts Act (Cap.3:02) subordinate courts have no jurisdiction to deal with, try or determine any civil matter wherein the title to or ownership of land is in question save as is provided by section 156 of the Registered Land Act. That Section allows either the High Court or a subordinate court held by a Resident Magistrate to try civil suits and proceedings relating to the ownership or the possession of land, or to a lease or charge, registered or registrable under the Registered Land Act where the value of the subject matter does not exceed 200 pounds.

Because of the jurisdictional restrictions imposed on subordinate courts original jurisdiction over disputes on urban land lies for all practical purposes with the High Court.

As a result, a vacuum also exists below the Resident Magistrate's Courts in respect of the settlement of non-customary land disputes.

7.4.3 THE COMMISSION'S CONCLUSION

The Commission is of the view here, as in the case of customary land dispute settlement, that there is need for a clear and structured framework for the settlement of the land disputes. The Commission believes in particular that

(i) jurisdiction over land matters which do not fall within the customary law domain should be clarified

(ii) the tendency to resolve disputes through mediation by district administration agencies although relatively inexpensive and time saving is essentially undesirable and lacks finality and

(iii) the authority of the Land Registrar to resolve boundary disputes is often problematic since such cases often turn on issues of substantive rights as well.

7.4.4. THE COMMISSION'S RECOMMENDATIONS

The Commission therefore recommends that the settlement of non-customary land disputes including those across tenure categories should:

(i) commence in the subordinate courts, hearing at first instance depending on value,

(ii) lie on appeal to the next level court and ultimately to the High Court.

7.5 CONSIDERATIONS OF CHOICE OF LAW

7.5.1 THE REALITY OF LEGAL PLURALISM

It is important to emphasise that Malawi's legal system will remain not only dualistic but pluralistic for a long time to come. Attempts to legislate customary land out of customary law into a regime defined by principles of English law have, as the Commission notes, not succeeded. Indeed, the failure of the ndunda system as a vehicle for the transformation of customary tenure practices demonstrates just how resilient customary law is. The Commission is persuaded, that the vast majority of landholders in rural Malawi consider it part of their cultural and social heritage. The application of other principles, and in particular, those derived from English law, in the are of land relations, alongside customary law cannot therefore be avoided.

7.5.2 TOWARDS A COMMON LAW OF MALAWI

The Commission believes, however, that the basic principles of customary law should and ought to be encouraged to evolve into some sort of common law of Malawi. There were strong indications that nuclear families were beginning to develop protection mechanisms for children

and spouses in situations of matrilineal inheritance. The development of neo-local residence was clearly one response to the moral pressure arising from this system. There was also evidence that land allocation rules were beginning to recognise in-migrants from other communities even though their residential security was often not assured. It is incremental changes of this kind that require an institutional framework for growth and legitimation. That development would also enable Malawi to redistribute its rural settlements without recource to radical land redistribution measures.

7.5.3 THE COMMISSION'S CONCLUSIONS

The Commission is of the view therefore that

(i) as a body of law, customary law still offers the most effective framework for the resolution of disputes over customary land,

(ii) customary law is nonethelesss unsuitable for the resolution of disputes across land tenure categories

(iii) the statutory system of dispute settlement should continue to govern registered land as specified in the appropriate law.

7.5.4 THE COMMISSION'S RECOMMENDATIONS

The Commission recommends therefore that the basic land law envisaged in 2.4.4 above should:

(i) provide for a two-tier system of land dispute settlement both terminating with appeals to or review by the High Court

(ii) further provide for the application of customary and statutory principles of land law for various categories of land as indicated in 7.5.3 above

7.6 CONCLUDING REMARKS

The commission received evidence to the effect that regular courts have not always functioned well as fora for the resolution of customary land disputes; and this especially because of their rather complex cultural context. The Commission is also aware, however, that administrative or quasi-judicial mechanisms can also be the subject of grave abuses, especially if they are operated by inexperienced functionaries. It is partly for this reason that the Commission has not recommended a quasi-judicial system of dispute settlement for all categories of land. What is required is to ensure that dispute settlement mechanisms are accessible, staffed by people who understand the issues involved and who are able to devote time to the exercise. It is also important that these institutions be subject to the supervisory jurisdiction of the High Court both in its regional and appellate jurisdiction.

CHAPTER 8

TOWARDS A NEW LAND POLICY AND LEGAL FRAMEWORK

8.1 THE COMMISSION'S MANDATE

The Commission's Terms of Reference require it to recommend the main principles of a new land policy which will foster more economically efficient, environmentally sustainable and socially equitable land tenure system and to suggest guidelines for basic land law and associated "subsidiary " legislation to give effect to the new policy. This requires some elaboration.

First, the Commission is not required to draft a land policy instrument and a basic law. These are tasks that can only be executed after submission of the Commission'Report to the President and its acceptance by the Government. What the Terms of Reference require is that the Commission should develop, from its conclusions and recommendations, appropriate principles and guidelines from which policy and law can, respectively, be designed. Second, the Commission reads the words"subsidiary legislation" to mean not statutory instruments, but laws complementary to the basic law. The development of statutory instruments must, of necessity come after full legislative drafts are available.

8.2 THE NEED FOR POLICY AND LAW

This inquiry has given the Commission a unique opportunity to appreciate not only the completely of land issues in Malawi, but also how the people would like to see problems arising from them resolved both in the short and long term. A situation analysis based on the Commission's main conclusions suggest that after more than a century of fairly dramatic social and political development, remarkably little has changed as regards land policy and law in Malawi. No comprehensive land policy framework nor enough corpus of land law have ever existed to guide and facilitate decision-making in matters of land development. While under colonialism land policy development was ad hoc and driven largely by the interplay between settler demands and "native" protests in the post-colonial era, except for attempts to transform customary land tenure practices in the ndunda experiment very little occurred on that plane.

The Commission noted that in the event, the Land Act, 1965 advanced issues of land ownership and use no further than the British Central Africa Order in Council 1902 had done. Indeed by locating radical title to both public and customary land in the President, that Act effectively converted Malawi's most important community resource into an estate private to the Government. Besides the failure, in that Act, to address issues about the content of property rights under various tenure categories, means that the juridical status of customary land and tenure remains precarious, the validity of certain categories of freehold contentions, and the process of land administration generally chaotic. Opportunity to rectify that situation by subjecting all land (other than customary) to the regime of the Registered Land Act has been squandered by reluctance to extend that legislation to cover the whole of Malawi.

The Commission noted further that while sectoral land use policies and law had, in more recent times, proliferated, no formula for their effective implementation is yet to be devised, nor has a culture and ethic of sustainable land use practices beyond mere consumptive utilisation emerged in all tenure categories. In the meantime, Malawi's land resources continue to deteriorate especially as the country's rural population slides deeper and deeper into poverty.

The Commission agrees, therefore, that there is need for systematic, long-range, policy and legal development in this area. Specifically, the commission agrees that a national land policy instrument, a basic law, and as much complementary legislation as would make that law effective, should be designed, discussed, agreed upon and implemented. What the main principles and guidelines that should form part of that policy, law and complementary legislation are, the strategy that Government should follow in developing them and the main outcomes to be expected from that process, are the subject of this Chapter.

8.3 THE DESIGN OF A NEW LAND POLICY

8.3.1 BUILDING ON THE BASICS

To be realistic and meaningful, the new land policy must take account of and be fully integrated into the country's overall national development framework. Its foundation must, therefore, be firmly embedded in the basic policy paradigm which defines the country's vision and which guides its macro-level planning and strategy development.

At the national level, Malawi's development framework is defined by a number of important documents. These have, in the past, included short and medium –term plans covering five to ten year periods. Among these are the first Statement of Development Policies (DEVEPOL) covering the period 1971 to 1980, the second covering 1987 to 1996 and sectoral policy instruments listed in 2.5.2 above. Because of their short-term nature, efforts have been made in recent times to formulate long-range development paradigms for Malawi. The most recent of these is the National long-term perspective study otherwise known as Vision 2020.

After an exhaustive critique of the country's economy, environment, human resources and social and political sectors, and assessment of the strategic challenges facing the country and options open to it, Vision 2020 has formulated the country's Vision Statement as follows:

- By the year 2020, Malawi as a God-fearing nation will be secure, democratically mature, environmentally sustainable, self restraint with equal opportunities for and active participation by all, having social services, vibrant cultural and religious values and being a technologically driven middle income country. To attain that level of development, Vision 2020 propose a wide range of strategic options in the areas of governance, sustainable growth and development, physical planning, food security population management, equity and the environment (Government of Malawi, 1998). Malawi's new

land policy must fit into and contribute to the attainment of that vision.

At the regional and international levels, that framework is guided by the numerous treaties, conventions, and agreements to which Malawi is a party or a signatory and which enjoin it, if only in honour, to pursue sustainable development practices. Important among these are obligations arising from membership in the Southern African Development Community, the Common Market for Eastern and Southern Africa, the Organisation of African Unity and the Unity Nations. Malawi's commitment to the Rio Declaration and Agenda 21 and the conventions arising from the Earth Summit negotiations, is a particularly important source of sustainable development obligations even though under Article 211 of the Constitutions the principles enunciated at these levels may not automatically bind the Government unless they have been enacted into domestic law. The Commission believes, however, that in this day and age, land policy development at any level cannot ignore what amounts to common principles accepted by states on the basis of equality and reciprocity. Malawi's new land policy must, therefore, draw inspiration from these regional and international instruments as well.

8.3.2 THE GOAL AND OBJECTIVES OF THE NEW LAND POLICY

(a) THE GOAL

The most important task in the design of any policy is to identify the goal which that policy proposes to attain and the objectives which specific strategies drawn from it are expected to satisfy in fulfillment thereof. Goal definition facilitates purpose – oritiented decision – making at macro-levels while at the same time providing a rational basis for discreet sector level activities.

In view of the country's long-range development vision and commitment to sustainable development principles regionally and internationally, the Commission proposes that the primary goal of land policy in Malawi should be to:

- attain broad based social and economic development through optimum and ecologically balanced use of land and land based resources.

That formulation directs attention to several important expectations. The first is that the indices of social and economic development will improve by reason of implementation of specific land development strategies in combination with others. Social development should be broad enough to reach communities that depend on land for their livelihood. And overall, land use in all tenure categories should make its proper contribution to the

national economy. The second is that the full productive potential of land will be exploited. That requires availability of a combination of factors including management skills, appropriate technology and support services infrastructure. Available evidence indicates that these are always essential if optimum use of land is to be attained. The third is that capability will be developed to ensure that the quality of land and land based resources are constantly renewed even as they are being used. That is the ultimate qualifier in that goal formulation.

(b) THE OBJECTIVES

For that goal to be attained, land development strategies will need to be designed with specific objectives in mind. A number of these are given in the Commission's Terms of Reference while others appear evident from the inquiry itself. The Commission proposes that given the above goal the main objectives of land policy in Malawi should be to:

- facilitate efficient use of land under market conditions,
- promote the infusion and internalisation of environmentally sustainable land use practices,
- guarantee secure and equitable access to land without discrimination, and
- ensure accountability and transparency in the administration of land matters.

(i) EFFICIENCY

The Commission views efficiency under market conditions as an important economic and social imperative. In the one case, its pre-requisite is freedom of choice and in the other responsibility in the management of that freedom. These are important both for operational and supervisory decisions concerning land use. Efficiency is therefore the baseline for land resource exploitation. A good land policy framework must built these requisites into the structure of land relations as a whole.

(ii) ENVIROMENTAL SUSTAINABILITY

Environmental sustainability is at the heart of contemporary land use paradigms. As a long-range and continuous concern, its pre-requisites are the elimination of wastage, sensitivity to ecological balance, effective performance auditing, and proper information management. A great deal of what this eutarls will depend on what happens outside the land use framework stricto sensu especially in the contexts of technology production, reproduction and distribution, land and population balance, and the distribution of human settlements. Although it is common to provide for environmental sustainability criteria in resource management rather than basic land legislation, the design of an overall land policy framework should seek to build these in the property structure as well.

(iii) SECURITY AND EQUITY

Security and equity have always ranked high in the agenda of land policy development in Africa. This, however, is sometimes for quite the wrong reasons. The importance of these principles is not because land relations in Africa are inherently insecure and inequitable. Rather, it is because any system of property that does not guarantee any of these qualities is unlikely to provide an efficient and environmentally sustainable basis for land development. What policy must define is what security and equity mean and who should enjoy those advantages. The Commission believes that security should relate to expectation of continuous and uninterrupted access to the land resources available to the community of which one is a member, and equity to the fair allocation or distribution of that access and the products thereof. In the context of customary land use, security and equity also have a transgenerational dimension. For the land resources of any community must be made available not only to the present but to future generations as well. Security and equity concerns must therefore be built into land tenure, transmission and administration strucutres.

(iv) ACCOUNTABILITY AND TRANSPARENCY

A great deal has been said about accountability and transparency in relation to the political framework of government in Malawi and elsewhere in Africa in the last ten years.

Governance issues, however, permeate all levels in which public agencies are charged with the duty to manage, protect or deliver services of whatever nature to the public or within themselves. Since public agencies are a necessary factor in land development in any country, land policy design, to be complete, must define not only the nature of land administration structures but more importantly, the level of efficiency expected of them and how they can secure public confidence in the discharge of their functions.

8.3.3 PRINCIPLES OF THE NEW LAND POLICY

The goal and objectives outlined above point to a number of principles around which the new land policy should revolve. The Commission considers that these are best presented in terms of the critical issues which land policy in Malawi should address. Presented in that form the design and implementation of the policy instrument through the instrumentality of politics, administration and law are also likely to be easy and rational. There is no doubt that all matters that were the subject of this inquiry raise critical issues about policy. What the Commission seeks to do is merely to refine them with a view to determining their hierarchy in the prospective policy instrument. The Commission proposes therefore that the new land policy should address the following issues:

- sovereign control over land
- tenure regimes
- management systems
- land administration procedures

- dispute processing procedures
- institutional arrangements, and
- sectoral linkages.

These require some elaboration

(a) SOVEREIGN CONTROL

The Commission has concluded that the issue of sovereignty over land (not the country) in general and customary land, in particular, should be clarified. In particular, the Commission is of the view that provisions of the Land Act that vest radical title to public and customary land in the President are out of step with contemporary ideologies of property in land. The fact that the Land Act contemplates that freeholds may revert or otherwise "fall-in" to Government hence become public land, only deepens the mystery.

The 1994 Constitution has compounded that mystery by providing in Article 207 that

> Subject to the provisions of this Constitution, all lands and territory of Malawi are vested in the Republic

The exception which appears immediately in Article 208 is that

> The Government shall have title to all rights in property which are vested in the Government of Malawi on the date of commencement of this Constitution……

Although this particular Article does not define "Government," it is to be presumed that this includes (as it indeed does in Article 209) the President. Consequently the President's title under the Land Act would appear to fall within that exception. It should be pointed out, however, that Articles 208 and 209 were not intended to balkanise Malawi respectively into lands owned by the Republic and those owned the President! A more acceptable way of reading those two is to resort to imperial jurisprudence and read the one as conferring title to the whole country in the Republic, and the other as vesting property rights in certain parts of that territory in the President. In that sense private individuals and even communities would also have access to some category of property rights within that territory!

Given this fundamental legal and political confusion and in view of public perceptions about where title to land in their communities lie, the Commission recommends that the following principles be included in the new land policy namely that:

- radical title to all land be vested in the citizens of Malawi,
- land categories remain public, customary and private and be subject to eminent domain and the police power of the State

- public land be clearly defined and be held not owned by the Government, on trust, expressly defined, for the citizens of Malawi,
- customary land be defined territorially and be held not owned by Traditional authorities, on trust, expressly defined, for members of communities resident within their jurisdictions
- tenure rights in any land, as derivations of radical title be obtained only in accordance with written law.

(b) TENURE REGIMES

Tenure regimes define the manner and conditions under which land is held. That means that it is tenure that defines the incidents of proprietary rights obtainable under each category, who may have access to what bundle of rights, and how those rights may be disposed of or transmitted from one generation to the next. Tenure rules are therefore crucial to land development. For it is these rules that facilitate effective exercise of proprietary functions, guarantee security of access to the resources to which proprietary rights relate, enhance the intrinsic value of land, and determine whether social and political equity exists in respect of access to those rights in particular contexts. The Commission has examined all three tenure regimes in operation in Malawi, namely customary, freehold and leasehold and has concluded that while as categories these should continue to operate, there are a number of deficiencies which require correction. The Commission

recommends, therefore, that the following principles be incorporated in the new land policy; namely, that:

- tenure regimes remain customary, freehold and leasehold
- customary tenure rights be obtained through membership and residence without discrimination and that security of such rights depend on actual use
- freehold tenure rights be reserved to Malawi citizens only and that security of such rights depend not on title but on use
- leasehold tenure rights be determined by agreements freely negotiated by respective parties subject to the police powers of the State
- all tenure categories permit freedom of alienation and transaction without discrimination as long as these do not compromise the essential characteristics of the regime
- a "cross over" mechanism be built into each tenure category to permit voluntary conversion as and when internal rules change.

(c) MANAGEMENT SYSTEMS

Liberal economic theory believes that property rights is all that is needed to ensure efficiency and environmental sustainability in land development . The argument here is that individual

freedom is the sine qua non of rational decision – making in land development. Property rights are indeed important. But this inquiry has demonstrated quite clearly that proprietary decision – making across all tenure categories require facilitation, control and constant auditing. This can be done in a variety if ways including standard setting, planning, management regulation, imposition of exclusionary principles and institutional co-ordination. The Commission recommends, therefore that to ensure that nationally recognised land management practices are internalised and applied across all tenure categories, the following principles be included in the new land policy; namely, that:

- macro-level management be confined to standard-setting, monitoring, evaluation and information management on land and land resources as an integrated whole
- management schemes including planning, regulation and auditing be participatory and people friendly and implementation be based on persuasion and incentives rather than threats , sametime and penalties
- management systems be targeted at discreet resource sectors rather than operate at the level of generalities
- where possible land use standards be built into the content of property rights under each tenure
- management schemes be accompaned in every case, with detailed plans and decision – making principles.

(d) LAND ADMINISTRATION PROCDURES

The centrality of land administration has already been noted. Land administration procedures create, deliver, abridge, record and extinguish property rights especially when these are derived from title held in the public domain. These procedures also facilitate private sector transactions in property rights in land, protect community memory as regards transactions within and transmissions across generations, and ensure that the physical and proprietary boundaries of land parcels are clear and unambiguous. Land administration procedures are also used extensively in the maintenance and management of land information systems. Malawi cannot afford to carry land administration procedures that are slow, opaque, inaccessible, labyrinthine and practically "privatised". The Commission therefore recommends that the new land policy should incorporate the following principles, namely, that:

- land administration procedures be transparent and open to public scrutiny without cost
- land administration functions be decentralised at least to district levels.
- land delivery (especially the processing and issue of leases) be simple, expeditions and at minimal transaction cost to the land using public
- land survey and demarcation facilities be available both as a public service and on request to all land users

including those on customary land, and that capability exist for that purpose

- conveyancing procedures be simple, easy to operate and readily accessible to the land using public
- land registration procedures be accurate authoritative and open to public inspection.

(e) DISPUTE PROCESSING PROCEDURES

The Commission has observed that land problems and disputes are generally symptoms of much deeper malaise in society. For example, the categories of disputes observed in customary land areas were essentially products of land pressure, confusion and breakdown in community systems of control and competition over territory perceived to be available for first settlement. Disputes over property rights, simpliciter, including those arising from allocation of property rights among private holders or across tenure categories, though presently rare are likely to intensify as society becomes, more sophisticated and interactive. Indeed it is likely that such disputes are already common in urban and peri-urban areas particularly at the inter-face between customary and public land administration in those areas. Clear, structured, expeditions and authoritative dispute processing procedures are therefore a necessary component of efficient land administration. The Commission recommends therefore, that the following principles be included in the new land policy; namely, that:

- informal dispute processing mechanisms especially in respect of customary land be encouraged
- the substantive law of any dispute be the law governing that category of land
- dispute processing institutions (Courts or tribunals) operate on the basis of clear rules and procedures
- dispute processing personnel receive proper tracing in the law and etiquette of dispute management
- the supervisory jurisdiction of the High Court extend to all dispute processing fora whether under customary law or general law
- jurisdictional conflicts and overlaps be avoided at all levels of the dispute processing process.

(f) INSTITUTIONAL ARRANGEMENTS

The Commission's Terms of Reference do not require it to consider the possibility of institutional strengthening in land development except in the context of land administration. Nonetheless, the Commission believes that there will be need for new arrangements to co-ordinate inter-sectoral strategies and to provide a context for continuous oversight in land development matters. The Commission is aware that some of these functions fall within the mandate of the National Council for the Environment. The design and implementation of a new land policy and a basic law, however will require

reconsideration of all sectoral arrangements now in force. The Commission recommends therefore that the following principles be incorporated in the new land policy, namely, that:

- broad jurisdiction for inter-sectoral co-ordination be vested in a new institutional arrangement or be reserved entirely to the National Council for the Environment
- periodic reviews of national and sectoral land use policies be the responsibility of that arrangement
- the proliferation of institutional arrangements as a general principle, be avoided

(g) SECTORAL LINKAGES

Whether or not a new institutional arrangement is desirable, the design of a new land policy and basic law, per se, will require that sectoral policies and laws be reviewed and revised to ensure consistency with that development. In particular, sectoral policies and laws should not impede or fuel competition between developments in discrete resource areas. Rather, they should contribute to the optimum development of those resources in the context of an overall national framework. The Commission recommends, therefore, that the following principles be included in the new land policy, namely , that:

- the linkage with sectoral land use policies be defined in terms of goals and objectives in the new land policy
- sectoral land use policies be constantly revised and updated as the national land policy and the specific technologies of sectoral resource uses change

8.3.4 THE COMMISSION CONCLUSION

What the Commission has offered are principles which it considers fundamental to the design of a new land policy and which are consistent with the goal and objectives of such a policy as elaborated in 8.3.2. Other and more specific principles can and should be developed from these. That will be the responsibility of the craftsman of that instrument. It will also be his/her responsibility to determine how aspects of that policy will relate to specific land development decisions. The Commission is satisfied that a sound basis exists for the commencement of both of those exercises. What now remains is to consider how those principles would shape the design of a basic land law.

8.4 THE DESIGN OF A BASIC LAND LAW

8.4.1 BUILDING ON THE BASICS

The Commission has noted that there are at least three regimes of substantive land law in Malawi, namely, customary law, the common law

of England, and the Registered Land Act. Customary law is of course a mixed bag of complex social and political rules about land which vary, in terms of detail, from one indigenous community to another. The Commission recognises that customary land law is not about to disappear soon, nor is it possible to legislate it away as the Customary Land (Development) Act (Cap.59:01) had assumed. But this body of law is changing as social transformation continues to exert pressure on its edifice. It is the duty of legislation to shape and guide that change. The common law of England applies only to land (mainly freehold) which is registered under the Deeds Registration Act (Cap. 58:02). The rights and obligations of parties under leasehold tenure including subleases issued in respect of land converted from customary land are also governed by that law. The Registered Land Act is both a registration and substantive law statute whose application, as the Commission has noted, is currently limited to Lilongwe West, the Capital City of Lilongwe/Blantyre and most recently Mzuzu and only in respect of parcels of land actually brought into the register maintained under it. The regime of the Registered Land Act is essentially derived from the English Law of Property Act of 1925 hence draws fairly heavily on the common law. None of these tenure regimes address the question of sovereign control of the land resources of Malawi; this being left to the rather ambiguous provisions of the Constitution and the Land Act.

The Commission believes, however, that the existing terrain as defined by the Conveyancing Act (Cap. 58:03), the Deeds Registration Act (Cap. 58:02), the Land Act (Cap.57:01), the Land Acquisition Act (Cap. 58:04) the Land Survey Act, the Registered Land Act, (Cap 58:03)

the Wills and Inheritance Act (Cap. 10:02) and customary law provides a useful framework from which a new basic land law can be designed. There is no need to subject Malawi to the queries of the Common Law of England as a separate legal category. What is necessary is to rationalise and inject clarity into that corpus with a view to providing a more contextually based land rights system. What Malawi needs us a genetic law which can provide for the various bodies of law applicable to each land tenure category.

8.4.2 THE GOAL AND OBJECTIVES OF THE BASIC LAW

Given that scenario the goal and objectives of the basic law are quite obvious. That goal is to

- provide legitimacy to the basic principles of public policy governing land as stated and elaborated in the new land policy and to provide a framework for its implementation.

The Commission proposes that the main objectives to be derived from that goal should be to:

- clarify the juridical foundation of land rights in various tenure categories,
- provide a structured basis for the evolution and development of customary law into a common law of Malawi,

- create an enabling framework for a statutory system of land rights,
- define a framework for the sectoral management of land development.

Specific objectives can and should be developed from these in the course of drafting. From these however, a number of guidelines for the basic lad law and complementary legislation can be formulated.

8.4.3 GUIDELINES FOR THE BASIC LAND LAW

The formulation of guidelines must, as in the case of policy principles, begin with an identification of the critical issues, which the law should address. The Commission proposes that the various principles of policy elaborated in the previous section require that the law should address the following issues:

- sovereignty over land
- tenure rights over land
- alienation of land
- management of land
- land administration
- settlement of land disputes
- transitional issues

These are further elaborated herein

(a) SOVEREIGNTY

There are two dimensions to the issue of sovereignty over land, namely (i)in whom is radical vested and (ii) how are various categories of land held? These questions do not address the basically political problem of title to the national territory which is the province of Article 207 of the Constitution. The Commission recommends that the following guidelines be followed in resolving more two questions:

- declare all land a national resource and vest the same in the citizens of Malawi, preferably through a Constitutional amendment.
- classify land as public, customary and private and vest control respectively in the Government, Traditional Authorities and registered proprietors.
- provide that rights to land in any category may only be obtained, used or disposed of in the manner provided for in the basic law.

Fidelity to those guidelines may require amendments to the Constitution and the enactment of legislation setting out details of the public trust thus reposed in the Government and Traditional Authorities.

(b) TENURE

Tenure raises three main questions, namely,(i)what tenure systems are recognised (ii) what are their incidents and (iii) what law applies to the determination of rights and obligations under each category The issue of how tenure rights may be exercised is treated separately. The Commission recommends that the following guidelines be followed on this issue:

- categorise tenure systems as common trust, customary, freehold, and leasehold.
- classify common trust as of two kinds i.e. (i) public land held by government and (ii) the whole of the territory covered by each Traditional Authority.
- define the incidents of common trust land tenure.
- define the incidents of customary tenure
- define the incidents of freehold tenure
- define the incidents of leasehold tenure
- indicate that the law governing determination of rights under customary, freehold and leasehold tenure is the basic law and such other body of law as may be specified under it.

(c) ALIENATION

The term “alienation” is used here to signify activities ranging from derivation of title, transfers, restraints, and transmissions, to

prescriptive claims. The concern here is to indicate for each tenure category the extent of proprietary freedom implied therein. The Commission recommends that the following guidelines be followed:

- specify that tenure rights can be obtained:

    - in the case of common trust over public land by grant or allocation,
    - in the case of customary land by allocation, membership and residence, and prescription,
    - in the case of freeholds by purchase, conversion or prescription.
    - in the case of leaseholds, by grant, purchase or prescription,
    - and in all cases by transmission in mortis causa

- provide that tenure rights in all categories are exclusive of any other rights as long as the land to which they relate is in effective use,
- set our procedures for and conditions of validity of transaction in each tenure category and ensure the integrity of such transactions.
- provide for overriding interests, the creation of servitudes and encumbrances and the imposition of restraints to the extent appropriate in each tenure category.

(d) MANAGEMENT

Land management is first and foremost a proprietary matter. Concern here therefore is essentially with the modalities for the supervision of that obligation. The Commission is persuaded that apart from standard setting monitoring, evaluation and information management at the national level, management issues are best dealt with at sectoral land use levels. The Commission recommends therefore that the following guidelines should be taken into account in the design of the basic law:

- create, in the basic law, a national level institution to set, monitor, and evaluate land management standards and to provide a national land use planning service.
- require proprietors in all tenure categories to comply with laws governing land management,
- provide for the supremacy of the basic law over all sectoral laws.

The point to stress here is that the basic law should not contain detailed rules of land management. Like Uganda Land Act 1998, it should only provide a normative link for sectoral laws on specific resources.

(e) ADMINISTRATION

In the design of a basic law, it is always advisable to confine the concept of land administration to land delivery, survey

and demarcation and registration. Dispute processing is therefore treated separately. Since land administration agencies merely provide a service to the land using public, it is important that they be prevented from converting this into private property. The Commission therefore recommends that the following guidelines be taken into account in the design of the basic law:

- vest general power of administration in the Minister with authority to delegate to Traditional Authorities,
- impose obligation to establish land offices, and to appoint and gazette land officers at all district levels,
- provide a mechanism for public scrutiny and inspection of land administration functions.
- impose obligation to promulgate clear rules for allocation, processing and recordation of transactions in respect of all tenure categories.
- establish a Central Land Registry in Lilongwe, specify its organisation and personnel and define its general powers.
- establish district and Traditional Authority level registries, specify their organisation and personnel and define their general powers.
- impose an obligation to establish survey offices, appoint and gazette surveyors and specify their general powers
- provide for the extension of survey functions to Traditional Authority areas on request and design a

framework for the proper maintenance of survey records.

(f) DISPUTES

It is always important that citizens should know where to go to for the redress of grievances and to be clear as to the law that will apply in each specific case. The current situation with respect to land disputes is not satisfactory. The Commission's recommendation therefore is to create clear and structured fora for each land category. The following guidelines should therefore be taken into account in the design of the basic law:

- create tribunals to adjudicate on all matters arising out of customary land in accordance with the customary law prevailing in the place where the land is situated,
- promulgate detailed rules for engaging tribunals, for the production and proof of evidence, the examination and recall of witnesses, independent procurement of evidence, the challenge of evidence so procured and for physical verification of assertions,
- provide for appeals from and finality of decisions of tribunals.
- extend the jurisdiction of Sub-ordinate Courts under the Courts Act (Cap. 3.02) to adjudicate on all matters arising from public and private land.

Note should be taken care of the fact that the Commission does not recommend that Traditional Courts be restored.

(f) TRANSITIONAL

The basic law, when enacted will have drawn from a lot of existing legislations and other bases of law. Consequently provision must be made for such miscellaneous matters as are consequential upon its enactment. The Commission therefore recommends that the following guidelines be considered:

- provide for consequential amendments, repeals and modifications of specific laws,
- provide a general power to make rules and regulations, and
- allow for a phased implementation process.

A very tentative outline of the proposed Basic Land Law could read as follows:

Part I Preliminary

- Short Title
- Application and Commencement
- Interpretation
- Scope in relation to other laws

Part II Ownership and Control

- Property in all land vested in the people
- Control of public land vested in the Government

- Control of customary land vested in Traditional Courts
- Control of private land vested in proprietors

Part III Acquisition of Tenure and Incidence of Tenure

- Acquisition of Tenure Rights only under the Act
- Tenure rights of different categories
- Incidence of common trust tenure
- Incidence of customary tenure
- Incidence of freehold tenure
- Incidence of leasehold tenure
- Discriminatory restrictions in tenure inoperative.

Part IV Alienation of Land

- Alienation to be broadly
- All tenure rights are alienable
- Alienation is by transfer or transmission
- Alienation of common trust rights restricted
- Spouses and children in residence on customary land protected
- All alienations to be recorded.

Part V Land Management

- General management conditions to be implied in all tenure categories

- Overall responsibility for standard – setting, planning, monitoring, evaluation, audit and information management vested in a statutory authority (or the Minister)
- Proprietors to comply with sectoral management laws.

Part VI Land Administration

- Power of land administration vested in the Minister
- Establishment and organisation of land offices, and powers of land (delivery) officers
- Land delivery procedures
- Establishment and organisation of survey offices and powers of survey officers
- Land survey procedures
- Establishment and organisation of land registries and powers of land registrars
- Land registry procedures
- Public inspection of land administration offices and procedures
- Enforcement of accountability requirements.

Part VII Disputes Settlement

- The High Court to have original and appellate jurisdiction in all land matters
- Land Tribunals to hear customary land disputes in accordance with relevant customary law

- Composition and powers of Land Tribunals
- Subordinate Courts to hear all other land disputes in accordance with applicable statute law
- Orders of all dispute settlement agencies to be recorded and transmitted to relevant registries.

Part VIII Miscellaneous and Consequential

- Specify Acts to be repealed or amended
- Provide power to make rules
- Provide for savings and transitional matters

Obviously, the Basic Land Law contain a lot more than this. That detail must, however, await the design of the new land policy.

8.4.4 THE COMMISSION'S CONCLUSION

The drafting of a basic law is more than just a technical exercise. The process must ensure that the principles of policy accepted by the government and the public are understood and legislated, accrued property rights protected to the extent consistent with those principles, and that capability exists, on coming into force, for its immediate implementation. The last of these consideration is particularly important. Experience with the Uganda Land Act 1998 indicates that lack of implementation capability at the time of promulgation is costly and can be politically dangerous.

8.5 THE DESIGN OF COMPLEMENTARY LEGISLATION

8.5.1 BUILDING ON THE BASICS

The conceptional link which the Terms of Reference requires the Commission to make is to recommend how national policy can be formulated and translated into basic law and what consequential changes in the legal system are required as a result of the enactment of that law. The Commission is persuaded that the last task in that chain should be limited to land and land related legislation other than those dealing with property rights. This is an area in which Malawi has its full complement of legislation. These include:

- Chiefs Act (Cap. 22.03)
- Cotton Act (Cap. 65.04)
- Customary Land Development Act (Cap. 59.01)
- Environment Management Act (Cap 110.23 y 1996)
- Fisheries Act (Cap 66.05)
- Forests Act (Cap. 63.01)
- Game Act (Cap 66.03)
- Malawi Housing Corporation Act (Cap 32.02)
- Mines and Minerals Act (Cap 61.01)
- National Parks Act (Cap. 66.07)
- Noxious Weeds Act (Cap 64.02)
- Petroleum (Exploration and Production) Act (Cap 61.02)
- Planning (Subdivision Control) Act (Cap 59.04)

- Plant Protection Act (Cap 64.01)
- Public Health Act (Cap 34.01)
- Special Crops Act (Cap 65.01)
- Tobacco Act (Cap 65.02)
- Town and Country Planning (Cap 23.01)
- Water Resources Act (Cap 72.03)

There is therefore a sound basis on which the development of guidelines may proceed.

8.5.2 THE GOAL AND OBJECTIVES OF COMPLEMENTARY LEGISLATION

The basic principle identified in 8.3.3(g) above is that the range of complementary legislation necessary for the full implementation of the basic law is essentially sectoral in nature and relate primarily to resource management issues. The primary goal of developing guidelines is therefore to:

- make better provisions for the management of sectoral land uses within the framework set by the basic law.

The Commission proposes that the objectives necessary for the attainment of that goal be to:

- identify sectors that are most vulnerable to unregulated exercise of proprietary functions,

- identify sectors that are ecologically sensitive or which are unusually sensitive to anthropogenic activities, and
- create a framework for effective supervision of and administration of an internally consistent and properly co-ordinate management regimes for those sectors.

8.5.3 THE RANGE OF COMPLEMENTARY LEGISLATION

Those objectives point to several areas of land use or resource constellation. These are:

- agricultural and livestock use,
- water development and management,
- environment and common heritage protection,
- wildlife conservation and management,
- lakeshore development.

Except for agriculture and livestock use, all these areas are already covered by specific legislations. What is required therefore is to review and revise them in the light of the provisions of the basic law. Agriculture and livestock on the other hand will need a brand new legislative instrument to define clearly what performance standards are expected from this important sector. The Agriculture (General Provisions) Act is simply not adequate for this purpose. Care will need to be taken to ensure, however, that agriculture and livestock legislation is fully synchronized with water, environment, forestry and wildlife legislations.

8.5.4 THE COMMISSION'S CONCLUSION

The review, revision or further drafting of any of the complementary statutes identified above must await the design of national policy and basic law. Such an exercise must also take account of any revisions of sectoral policies that may become necessary as a result of the national policy. The Commission is persuaded, therefore, that this is a matter that will require further consideration and analysis.

CHAPTER 9

A STRATEGY FOR POLICY DEVELOPMENT

9.1 POLICY DEVELOPMENT OUTCOMES

In this concluding chapter the Commission turns to the question as to how Malawi should proceed with policy development in respect of matters covered by this Report. There are perhaps two issues to consider here. The first is to define the ultimate outcomes of the policy development, and the second to engage that process by setting an agenda and time frame for it. The one is discussed in this section and the other in the next

The first step to take is to identify those recommendations, which require purely political, administrative and other immediate responses. Some of the recommendations in this category include capacity development for traditional authorities and other land administration personnel, provision of rural infrastructural and development support, environmental education, elaboration of resource management guidelines under existing sectoral policies, and restoration of abandoned "customary" land under lease to respective traditional authorities. There are other recommendations in respect of which government can and should take action in the ordinary course of business. Taking that course means that the country will not have to sit through another long drawn out process before concrete deliverables can come out of the inquiry.

The most important outcomes of this inquiry, however is the need for a new land policy instrument and the draft of a basic law. These two would have to be developed sequentially. A policy instrument alone will not do, nor would a basic law without explicit policy. The two must be pursued in tandem. The Commission has in Chapter 8 set the benchmarks within which those two tasks will rest. What now remains is to engage the policy process.

9.2 THE POLICY DEVELOPMENT PROCESS

Land or legislative policy development is like any other: It requires consensus building up-front to be meaningful and worthwhile. This has a number of advantages. First it ensures or raises the presumption that agreement on important elements of the policy can be reached. Second, consensus-building is itself an important educational exercise. For apart from expanding the social and political horizon of participating stakeholders, it legitimises both process and its primary outcomes. Consequently, those outcomes, when implemented, have more than a fair chance of success since ownership in them will be widely shared. The Commission wishes to stress therefore that policy and law are interactive.

The Commission is aware, however, that public decisions can and often are made and implemented without explicit policy. This happens routinely in the area of legislation where it is often assumed that the issues at stake are clear and solutions to them readily available. The vast amount of legislations in the statute books of most countries of the world are outcomes of this approach. In recent times, however, and particularly in this region, it has come to be accepted that legislating in important areas of political economic life require policy development before concrete rights and duties are written into the black letter law.

Land as the fundamental basis for social production and reproduction belongs to this category. This is the road which South Africa, Tanzania and Uganda in the region have followed. Malawi is well advised to do the same.

Malawi therefore needs to set an agenda and a time frame for this process. The Commission proposes the following tentative agenda.

- receive and study the Report.
- prepare a comprehensive response to the conclusions and recommendations of the Commission.
- publish the Report and Government response simultaneously for public discussion.
- prepare a Green paper based on recommendations eventually accepted and circulate for public discusssion.
- prepare a Cabinet White (Sessional) Paper for discussion by Parliament.
- prepare draft basic law based on the White Paper and present it to the public for discussion
- present the draft basic law to Parliament.
- re-examine the issue of complementary legislation in the light of the basic law.
- Organise the resources necessary for the implementation of the basic law ahead of promulgation.

The Commission recommends that the time frame for this should not exceed twenty-four months; the actual modalities for doing this being left entirely to the government to determine.

9.3 CONCLUDING REMARKS

The Commission has endeavoured to provide guidelines on how government can proceed from receipt and consideration of this report, through the design of a new land policy instrument to the draft and enactment of a basic land law. Some misgivings were expressed around the country and at the Regional Workshops the Commission convened, about the seriousness with which the Government intends to take the recommendations of this inquiry. The Commission can only hope that this Report will not join others on official shelves!