

Land reform in a regional context:
Malawi experiences

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1. Background Information

(a) Land Under Various Categories (Hectares)

Total Land and Water	=	11,832,167
Total Land Area	=	9,398,721
Protected Area	=	1,781,937
Forest Reserves	=	768,476
Wildlife Reserves	=	389,730
National Parks	=	622,377
Proposed Forest Reserves	=	238,907

(b) Land Balance (Hectares)

Suitable Customary Land	=	4,100,000
Unsuitable Customary Land	=	2,100,000
Public Land	=	1,800,000
Estate Land	=	1,100,000
Urban	=	300,000
Total	=	9,400,000

(c) Population

10.5 Million People

2. Historical Background

On 18 March 1996, the appointment of a commission of inquiry into land policy reform was gazetted. The objective of the commission was to recommend a national land policy that would promote equitable access to land, security of title to land, and improved land administration. Thus the government had recognized the need for a guided future in land administration, distribution and management.

Historical accounts indicate the original inhabitants of Malawi were the Akafula or Abathwa 300AD-1500AD. In the 9th Century, pastoral and agricultural groups (among them first Chewa groups) from the great lakes region began to enter the country. These groups are believed to have driven the Akafula into Namibia. New groups continued to come in the country, the largest influxes being in the 19th and 20th centuries, namely the Yao, Ngoni, Sena and Lomwe (policy document 2.2).

The effects of these influxes were intensified wars among various groups over territory and slave trade. Land was acquired by military conquest and occupation of unoccupied or abandoned land. Strong groups acquired the best lands not through treaties or documented negotiations, but on the basis of capitulation and progressive encroachment. (Commission report vol. 1 p.14) Between 1891 and 1896 British colonial forces intervened to end these ethnic wars.

Malawi had been under British rule for 73 years 1891-1964. Europeans intent on setting

up commercial and agricultural enterprise established estates through grant of concessions. “To indigenous communities, these concessions were essentially in the nature of occupation licences, not at all conferring property rights to foreigners. The foreigners clearly understand that communities and their chiefs had ownership and control over their land and history indicates that coercion was also used in bringing about consensus in respect of these concessions” (Commission p.15)

The colonial land policy was to appropriate all land in Malawi to the British sovereign, place the administration of such land in the sovereign’s local representative, facilitate access by the settler community on the basis of private title, preserve native rights strictly as occupation rights, and ensure availability of cheap labour for settler agriculture. (Commission p.21)

The effects of these concessions and colonial policies were that indigenous communities lost ownership and control of land, all land or the whole of Malawi was now vested in the British sovereign. Land was categorised as public land, private land and customary land. This was the position indigenous communities found themselves in at independence in 1964.

For thirty years 1964-1994 Malawi was under the dictatorial regime of Dr Banda. In 1965 the government passed the land act (cap.57.01), but it did not change the situation as it repeated the existing categories of private land, public land and customary land. All it did was to replace the governor and commissioners who previously exercised power on behalf of the British sovereign, with minister of the Malawi government.

In 1967 an attempt was made to provide Malawi with a comprehensive body of land law (Registered Land Act cap. 58.01). Its purpose was to make provision for the registration of title to land for dealings in land so registered. This Act (Cap 58.01) was a reproduction in its entirety of legislation of the same name that had been enacted in Kenya in 1963 (Commission p. 23)

Soon after independence the government embarked on an aggressive process of expansion of large-scale, or estate agriculture through alienation of land under customary land tenure. This has seen a lot of customary land being lost to private land. Land is now concentrated into the hands of a few individuals e.g. Camforzi and Barrow together occupy almost one third of Thyolo total land area. The former head of state, Dr. Banda owned Khasu, Mudi and Kasonjola estates in Lilongwe, Chamwabvi, Chimbwazi and Lisandwa estates in Kasungu.

3. Problems that the New Land Policy is Addressing

Section 3 of the land policy has this overview of land problems in Malawi:-

1. **Residual effects of colonial land policy:** white farmers holding some of the most fertile lands, concentration of freeholds in districts settled by white farmers and skewed distribution of freeholds in the country.
2. **High population of land ratio:** The population is not evenly distributed. By 2020 the population may rise to 20.8 million given the present population of about 11 million and growth rate of about 3.2% per annum overall national population may exceed 220 persons per square kilometre.

3. **Fragmented and uneconomic family holdings:** The 1992/93 national sample survey of agriculture indicated that 78% of households in the smallholder sub sector owned or controlled less than 1 hectare of land. This is clearly inadequate to meet the annual food requirements of an average household of five members using existing technologies.
4. **Poor utilization of leasehold estates:** Many holders obtained grants that were far in excess of what they were capable of developing, besides some leasehold grants were made without verification as to the suitability of the demised premises for the purposes for which they were sought.
5. **Land scarcity in spite of idle lands:** Land is left idle for extended periods due to poor soil fertility, overlap between agriculture, human settlement and infrastructure. In the absence of dramatic changes in technology and shifts in population, land pressure is likely to increase and with it, competition for and conflicts over land resources.
6. **Provocative trespassing:** Encroachment onto private land, forest reserves and national parks has become frequent and sometimes violent in the belief that estates have far too much land for their needs, or the government cares more for wild animals than humans.
7. **Corrupt administrative practices:** Fraudulent disposal of customary land by traditional chiefs and government officials often deny critically needed access to people most desperate for land.
8. **Insecurity over land rights:** Increases in land pressure have substantially increased tenure insecurity and uncertainty over land rights despite attempts by communities to consolidate access rights both physically and legally.
9. **Privatizing access to customary land:** Land users not related to the core lineage members in a community referred to as “akudza or obwera” becoming increasingly targets for eviction or compelled to share land legitimately allocated to them with newer immigrants or members of the core lineage.
10. **Denying access to community resources:** Natural resources like water, fish, firewood, game and fruits are God given, or ancestral. Should any person or institution have any right to constrain villager’s access to such resources?
11. **Cross border encroachment by immigrants:** The commission of inquiry received evidence of encroachment by nationals from Tanzania, Zambia and Mocambique into the districts of Rumphu, Mzimba, Kasungu, Mchinji and Ntcheu, the effect of international boundaries and territoriality is often blurred or simply ignored.
12. **Monitoring of conservation and protected areas:** Encroachment onto national parks and wild life reserves are common in many areas. The environmental as

- well as the economic importance of national parks is generally not appreciated, probably because the creation of some of these parks involved the displacement of entire villages being forced to move into valleys of uncultivable gradients.
13. **Land degradation:** There is evidence of destruction of soil cover in watersheds and catchment areas, erosion of agricultural soils and destruction of indigenous forests in all tenure categories.
 14. **Ignorance and insensitivity:** Communities are not sensitized to the need for proper land management practices especially in situations where continuous damage to land resources is sinking them deeper into poverty.
 15. **Mismanagement of land development:** Underutilization of land, obstruction of water courses, illegal development and unplanned buildings in urban settlements indicates a failure of development controls occurring in the context of all land tenure categories and land uses.
 16. **Reckless allocation of lakeshore lands:** Traditional authorities continue to allocate land along the lakeshore, individuals and companies erect private leisure cottages and hotels. There is inadequate monitoring of development along the lakeshore from Karonga to Mangochi.
 17. **Lakeshore Development Control:** Cottage/hotel development along the water front and associated fencing has resulted into obstruction of public access and use of beaches by local communities. The displacement of local communities to make way for private land developers, some located below the safe flood risk zone of 480m contour line and uncontrolled waste disposal has heightened water pollution and environmental damage.

4. The Policy Document

The author of the land policy is Rexford A Ahene, PhD, University of Wisconsin, Senior land Policy Advisor, AHEAD Consulting Services. This land policy reform is funded by various donor agencies through the World Bank and carried out by AHEAD Consulting Services, Inc. Bethlehem, Pennsylvania.

The emphasis on land policy reforms is part of the structural adjustment in Malawi under the tutelage of the World Bank. The draft national land policy for Malawi compares extremely favourably with national land policies from other countries including Tanzania, Zimbabwe, Zambia, Swaziland, South Africa and Ghana (Robin Palmer, Land Policy Adviser, Oxfam GB, July 12, 2000).

The document is generally clear, well written and consistent. It emerges quite logically, following the 1999 Report of the Presidential Commission of Enquiry in land policy reform and earlier studies. It seeks to build on and utilise the work of the Presidential Commission and its recommendations. Often times it uses the very same words as those in the report. The commission consulted widely, there is no doubt about that, and I want to compliment them for the wide consultation. But however, isn't there need to do the same for the policy. What is the process of policy formulation in a democratic country anyway?

The national land policy is long overdue in Malawi judging from all manner of land conflicts intensifying, and if one goes back to history, past land policy reforms have failed to attain legitimacy from the colonialists to the present day.

Malawi's draft national land policy is an aspirational document, representing something from an ideal world rather than facing the nasty, messy, conflict-ridden real world. Of course there is nothing wrong in being aspirational.

The national land policy suggests (among suggestions):

1. establishing a social development fund for poverty alleviation in Thyolo, Mulanje, Chiradzulu and other affected areas.
2. enacting a comprehensive land law which will institute an accountable land administration system that makes local and district assemblies the principal agents for land administration.
3. elevate customary tenure to full common law status. Thus customary land will be categorised as private land.
4. placing some constraints on foreign ownership (but they can obtain citizenship {policy document 6.21 iv}).
5. placing ceilings on land holdings. (This will apply only to future land holdings not those who currently hold thousands of hectares (the past is gone, the present is ours, the future looks grey).
6. supporting and strengthening customary land tenure and placing its administrative integrity on a firm, transparent and equitable foundation.
7. establishing village land committees and village and T.A. land tribunals.
8. democratising village land allocations.
9. ending village headman's exclusive authority to allocate land.
10. comprehensive registration and titling of customary land interests.
11. equal rights for men and women (no victimisation of male child in the matrilineal society on land inheritance, and no victimisation of the female child in the patrilineal society on land inheritance).
12. all children to inherit land equally.
13. establishing sensible protective measures for the lakeshore.
14. a much more relaxed attitude towards survey laws and regulations, including exploring community based approaches.

The Land Policy Goal

The primary goal is to ensure tenure security and equitable access to land, and to facilitate the attainment of broad based social and economic development through optimum and ecologically balanced use of land and land based resources (Policy 5.1).

The Malawi Constitution Article 28 guarantees secure tenure and equitable access to land to all citizens.

1. Every person shall be able to acquire property alone or in association with others.
2. No person shall be arbitrarily deprived of property.

The national land policy (NLP) operates within this. Robin Palmer argues:

“Whilst I fully understand the political rationale behind this, I wonder how realistic this

will prove to be in the future, given the already dense population, land ratio and the very high population growth predicted (already the highest in Africa) even after taking account of HIV/AIDS. It is a problem facing all African governments and most are reluctant to challenge the deeply entrenched belief that every person has an inalienable right to land. In Zimbabwe though, there has been a recognition that this is no longer feasible and that many people will necessarily have to derive their livelihoods off the land. This is true also in Rwanda, which has also just drawn up its own draft national land policy.

Malawi's total land area is 11.8 million hectares only. 2.4 million hectares of this is occupied by Lake Malawi and other smaller lakes. With a population of about 10.5 million growing at about 3.2% per annum, the population may rise to 20 million by 2020. How does one ensure tenure security and 'equitable access to land'?

A fundamental principle of the policy is to codify the tenets of customary land law and to elevate the customary estate (customary law) to full ownership status. Thus with the coming in force of this new land policy, the categories of land recognised in Malawi will be defined as follows: government land, public land and private land (Policy 6.3). Thus the policy suggests comprehensive registering and titling of customary land interests. This makes sense as a defensive measure to offer some security in a context of growing conflict and competition, including family conflicts, insecurity and uncertainty, and ethnic nationalism.

My question, however, is: are the suggested activities feasible and sustainable considering finances and personnel. TAs will be required to register all land transactions occurring within their jurisdiction, maintaining a traditional land records storage and management system. TA will be required to establish estate management offices to collect and account for land revenue due to the community from leases and royalties paid for the use of communal land (Policy 8.14). I would imagine some TAs demanding computers for such busy offices.

Malawi certainly needs a land policy that would promote equitable access to land, security of title to land and improved land administration. Malawi needs a land policy that provides an environment for coordinated planning, proactive interventions and dynamic monitoring at all levels of land administration. Presently the document is said to be with the cabinet for 'approval'.

The agenda and time for the process is not so much the agenda and time process that the Presidential Commission of Inquiry on land reform proposed. The commission's proposal to the government was that the government should have made a comprehensive response to the conclusions and recommendation of the commission, these two would simultaneously be published for public discussion.

So we would say the Malawi National Land Policy lacks publicity. The literacy rate in Malawi is 60%, much less in some rural areas. The article is in English and has been seen by a few individuals. Thus the document will be approved before ordinary Malawians know the contents and implications of the policy on their lives.

Since the document lacks publicity, it is difficult for the ordinary citizen to judge whether the policy protects the interests of the Malawian citizen in the first place, as constitution

of Malawi Article 12 states:

*“This constitution is founded upon the following underlying principles.
All legal and political authority of the state derives from the people of Malawi
and shall be exercised in accordance with this constitution solely to serve and
protect their interests”*

The government intends to encourage an open market in land that will cause land values to move towards their highest and most desirable uses. In a capitalist country, the rich become richer while the poor become poorer. Per capita income in Malawi is estimated at \$210. Chances are that those with money will continue to acquire more land, those with little will lose the little that they have - “there is no brother in business.” The greatest victims will be the poor women and children.

It might be premature to discuss policy options for Malawi at this juncture since the National Land Policy is otherwise in draft form and it is still with the Cabinet. Perhaps our questions would be:

Now That the Policy is with the Cabinet, What Do We Do?

The role of chiefs in Malawi has been to allocate land and settle land disputes. Chiefs are not as democratically elected as a member of parliament or state president in Malawi. The policy has embraced governance with democratisation, this implies surrender of significant elements of authority to more democratic institutions of land tenure management. This will directly impact state-people relations culturally, socially, politically. This becomes more so complicated if one considers that in Malawi we have matrilineal society and patrilineal society.

To suggest that children inherit land equally is very ideal but may not be very practical at the moment, although it would address the position of women in property holding, since they are the primary producers of agricultural wealth. As a way forward, donor, civil society and SADC could help in the following areas:

1. That the process of the land policy formulation be community based using participatory strategies. Communities are the ones to come up with best solutions to chieftaincy, patrilineage and matrilineage private and common ownership in the matter of land tenure.
2. Civic education to help people embrace governance with democracy and move from common property to private property if they wish to embrace ‘the magic of private land’. The solutions suggested by the policy are nationally designed and imposed, they may be very good indeed but for one thing, they are not community based solutions.
3. Lobbying and advocacy so that the basic land law to be drafted will primarily protect the societies underprivileged, particularly women who are the primary producers of agricultural wealth.

APPENDIX: SALE OF MALAWIAN LAND

Background Information

Land Under Various Categories (hectares)

Total land and water	11,832,167
Total land area	9,398,721
Protected area	1,781,937
Forest reserves	768,476
Wildlife reserves	389,730
National parks	622,377
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Land Balance (hectares)

Suitable customary land.	4,100,000
Unsuitable customary land	2,100,000
Public Land	1,800,000
Estate land	1,100,000
Urban	300,000

Population:	About ten million people
Growth rate:	3.2% per annum
Protection:	Over 20 million people by 2020
Age:	About 60% of the population is below 15 years of age.
Per capita income:	210 USD

Before the take over of Malawi by the British land was acquired by military conquest and occupation by unoccupied or abandoned land. There were no treaties or documented negotiations. Simply put, strong groups acquired the best lands.

From the British take over, Europeans intent on setting up commercial, agriculture and mission stations established themselves through grant of concessions by chiefs. A concession is right given by owner (s) of land, or by government to do something e.g take minerals from land.

The Presidential commission of enquiry on land policy reform makes this observation:

“To indigenous communities these concessions were essentially in the nature of occupation licences not at all conferring property rights to the foreigners. The foreigners clearly understood that communities and their chiefs had ownership and control over their land, and history indicates that coercion was also used in bringing about consensus in respect of these concessions.” (Report p.15)

In other words, regardless of the process used to accomplish European settlement, it did not, at this point, translate into the formulation of legal titles to the land in the sense in which we understand it today.

British protectorate status in Malawi was proclaimed in 1891. A commission of British Central Africa was appointed, who in exercise of the acquisition of lands order 1898, purported to acquire and make grants of lands in the name of the British sovereign. According to the commission report, a number of grants were thus made to white settlers who were unable or unwilling to negotiate with indigenous chiefs for concessions. The effect of that British policy was that indigenous communities lost control and ownership of land and eventually leading to the fiction that the title to the whole of Malawi was now in the British monarch.

In 1951, a land ordinance was passed by the Nyasaland Legislative 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 African Order in council of 1912. The ordinance defined land as either public, private or customary. But the 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 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 the commissioners who previously exercised power on behalf of the British sovereign, with the minister of the Malawi Government." (Commission report p23).

An attempt however was made in 1967 to provide Malawi with a comprehensive body of land law, the registered land act (cap.58.01). It provides for land registry practise, the incident of registered ownership, dispositions, transmissions and trusts, restraints on dispositions prescriptions, and rectification and indemnity.

On 18th March, 1996 the appointment of a commission of inquiry into land policy reform was gazetted. The objective of the commission was to recommend the national land policy that would promote equitable access to land, security of title to land and improved land administration.

The commission presented its report to government in 1999. Presently we have the national land policy in draft form, currently being studied by cabinet.

The goal of the new land policy is to ensure tenure security and equitable access to land, and to facilitate the attainment of broad based social and economic development through optimum and ecologically balanced use of land and land based resources.

A fundamental principle of the policy is to codify the tenants of customary land law and to elevate the customary land to full ownership status. Thus with the coming in force of this new land policy, the categories of land recognised in malawi will be defined as follows: government land, public land, and private land. The policy suggests comprehensive registering and titling of customary land interests.

The government intends to encourage an open market in land that will cause land values to move towards their highest and most desirable uses. In capitalism the rich become rich

and the poor become poorer. Per capita income in Malawi is estimated at 210. Chances are that those with money will acquire all the best land as was the case before British takeover when the strongest acquired the best land.

It is not secret to say that not less than 80% of the Malawi population are poor, there are black Malawian citizens, who, if they have any property, it is the land where they have built their hut or have their small garden. Chances of being tempted to sell that piece of land are therefore very high. What ever will be realized from the sell will straight away go to the mouth. What will be seen later will be 80% of the population being poor and landless, while 20% of the population (foreigners and multinational companies) taking over the land.

Some people have been saying that land issues are very sensitive. I would tend to agree with them looking back at our history. I recall to mind four periods of our history:-

- a) 300-1500 AD during the time of the Akafula or Abatwa when they were either killed or driven into Namibia as we are meant to believe.
- b) 1500 AD - 1891 when land was acquired through military conquest, without negotiations or documentation.
- c) 1891 - 1964 where the British acquired land in the name of the British sovereign through grants and concessions.
- d) 1964 - 1994 when the government embarked on an aggressive process of expansion of large-scale, or estate agriculture through alienation of land under customary land tenure. This period has seen customary land being lost to private land.
- e) This time of ours here today. What lessons do we make from the past? From here where do we go? Let us learn from past mistakes in order to prepare a better future for the young generation. 'Lero lomwe linadetsa nthenga'.