



MALAWI GOVERNMENT

**FINAL REPORT OF
THE PRESIDENTIAL COMMISSION OF INQUIRY
ON LAND POLICY REFORM**

UNDER THE CHAIRMANSHIP OF
MR PATRICK M. SAIDI

VOLUME 1

**MAIN REPORT
(EXECUTIVE SUMMARY)**

TO HIS EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF MALAWI

31ST MARCH, 1999

Price: K200

EXECUTIVE SUMMARY

THE COMMISSION

1. **Chapter 1** presents the establishment, membership of the Commission, terms of reference and a summary of its method of work. The Commission interpreted its terms of reference as requiring it to conduct an inquiry into the historical factors that have shaped land policy and law in Malawi; the nature and causes of land problems; the nature and performance of prevailing land tenure systems; the nature, operation and effects of the prevailing systems of land inheritance; and the performance of public institutions responsible for aspects of land administration. The process of inquiry involved public hearings, receiving written memoranda from government departments and non-governmental agencies, correspondence from the general public, review of existing studies and studies specially commissioned by the Commission; and workshops.

EVOLUTION OF LAND POLICY AND LAW

2. **Chapter 2** examines the evolution of land law and policy in Malawi. The Commission notes that the general thrust of colonial policy was to appropriate all land to the British sovereign and facilitate access to it by the settler community on the basis of private title, while preserving African rights to it strictly as "occupation rights" thus ensuring the availability of cheap labour for settlers. The Commission is of the view that original settler acquisitions were fraudulent and laments the absence of a legal remedy in the framework of restitution. However, for political and economic expediency it recommends that titles derived from Certificates of Claim should not be disturbed: instead a social development fund should be set up for the alleviation of poverty and land pressure among the indigenous populations in the areas affected by the Certificates of Claim.

3. The Commission argues that English law has stultified the growth of customary law in Malawi. In this regard it calls for a redesign of the country's basic land law which should be broad enough to allow for the orderly evolution of customary land law. The Land Act (Cap 57:01) and the Registered Land Act (Cap 58:01) should therefore be repealed.

4. The emergence of sectoral policies with regard to land is noted. The Commission argues, however, that these policies cannot stand without a basic referential policy framework on land. It, therefore, recommends the development of a national land policy instrument which would form the reference point for all sectoral policies, resource management plans and programmes.

OVERVIEW OF LAND PROBLEMS IN MALAWI

5. **Chapter 3** highlights land problems which transcend tenure categories, land use systems and production sectors. These problems are land scarcity, land management and land auditing. The Commission argues that without dramatic changes in technology and shifts in population, land pressures are likely to increase and with them competition for and conflicts over land resources. To ease pressure on land it recommends the development of a realistic programme of population management, the restoration of idle leasehold and freehold land to customary status for use by the landless and land-deficient, enhancement of smallholder agricultural productivity; and the diversification of economic activities away from agriculture.

6. To check widespread land degradation the Commission recommends the institution of poverty reduction programmes, sensitisation programmes on environmental protection and community participation in resource management.

7. The Commission finds the existing framework for land auditing ineffective as it operates without clear and consistent policy guidelines. It therefore calls for the formulation of local and national land use guidelines and the aggressive implementation of the Environmental Management Act 1996.

CURRENT LAND TENURE SYSTEMS

8. **Chapter 4** discusses existing land tenure regimes and land classification. The Commission notes that the classification of land into public, customary and private imposed by colonial legislation has been carried over into the post-independence period, and that public and customary land is vested in the President in perpetuity. In the Commission's opinion this is out of step with contemporary views. It therefore recommends that public land be vested in the people of Malawi to be administered by the government as a public trust; and customary land be vested in Traditional Authorities as trustees for their respective communities.

9. The Commission notes government efforts to privatise customary land through the creation of agricultural leases and the ndunda system. Ministerial power under the Land Act (Cap 57:01) to create leases out of customary land is condemned as a fundamental source of insecurity in customary land holding and use. Since the ndunda system did not bring about the anticipated increases in agricultural productivity, the Commission recommends that the experiment be abandoned and lessons learned from it used to design a mechanism more appropriate to Malawian cultures for recording and authoritatively determining corporate or community interests in specified property whether within or outside the domain of customary law. The Commission also recommends that all customary land converted to leaseholds should be restored to Traditional Authorities as these leases expire and/or are surrendered so as to increase the available stock of customary land. Stern administrative action is recommended to eliminate bribery, corruption and fraud in the administration of customary land.

10. An examination of the characteristics of freehold tenure and the utilisation of land under that system leads the Commission to recommend that freehold tenure over agricultural land should be abolished and that no more freehold grants should be made. Freehold estates already owned should be converted to 99 year leases. As regards urban land the Commission recommends that it should be held on leasehold tenure only, and that existing urban freeholds should also be converted to 99 year leases. In the Commission's view the conversion of freehold into leaseholds will enhance state sovereignty over land and lay a basis for addressing historical wrongs while taking into account political and economic realities.

11. In the case of leasehold tenure the Commission recommends that the duration of leases over public land (other than agricultural) should be standardised and in any event should not exceed 99 years. The duration of leases for agricultural purposes should depend strictly on the period it would require to execute an economically viable programme but should not in any event be less than five years. Private leasehold arrangements in the agricultural sector (except in respect of customary land) should be regulated by the market.

SYSTEMS OF LAND INHERITANCE

12. **Chapter 5** reviews the three regimes governing inheritance in Malawi, namely the statutory, the matrilineal and the patrilineal. In respect of the statutory regime the Commission recommends a general review and evaluation of all laws to determine whether or not they are in conformity with Article 24 of the Constitution. It also recommends that the Wills and Inheritance Act should be reviewed with a view to broadening its scope in relation to both testate and intestate succession. 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 or any other written law. An amendment should be introduced in the Courts Act (Cap 3:02) to give subordinate courts jurisdiction over matters of customary law other than those relating to land.

13. As regards the matrilineal regime the Commission recommends that matrilineal descent groups should be encouraged to accord secure property (including land rights) to men and children in the areas of their ordinary residence. A mechanism should be developed to ensure security of tenure for families in neolocal residence.

14. In the case of the patrilineal regime the Commission recommends that patrilineal descent groups should be encouraged to adopt corporate forms of property instead of continuous subdivision among heirs; and that the rules of succession to property should not discriminate even on the basis of residence, between male and female, and rights once acquired should not lapse by reason only of sex or residence. 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. The Commission emphasises that any attempt to change inheritance rules needs careful design in view of the fact that these rules are embedded in local culture.

THE SYSTEM OF LAND ADMINISTRATION

15. **Chapter 6** reviews the functions, powers and organisational structures of public institutions responsible for aspects of land administration. The Commission notes many shortcomings in these institutions including cumbersome procedures and arbitrariness in decision-making. To improve efficiency in the control and allocation of customary land the Commission recommends that the authority of traditional authorities to allocate land among members of their communities including obwera or akudza should be fully restored and protected by statute. The statute should contain clear rules indicating the circumstances under which chiefs may lease community land to, or otherwise authorise occupation by, persons other than community members. All transactions involving customary land should be clearly recorded in a village land registry which the Commission recommends should be established in every village. The processing and issuing of government leases should be simplified by restricting approvals to the Minister, the Commissioner for Lands and the Registrar of Title/Deeds only.

16. To facilitate demarcation and survey functions, which in the view of the Commission take too long to execute, it is recommended that a crash programme for the training of surveyors and survey assistants be instituted as a matter of urgency; and that provision should be made for delegation of survey requests for public and customary land to private surveyors to alleviate the problem of shortage of government surveyors, and to allow the Surveyor General more time on examination procedures. The Commission also recommends that survey services should be extended to customary land at the request of traditional authorities as a means of clarifying occupation rights in those communities.

17. The Commission finds the existing system of recording and tracing title very cumbersome. It therefore recommends that less cumbersome methods should be devised which would enable the public to access and understand registration procedures without the necessity of professional assistance. It further recommends that title/deed registration should be decentralised to the district headquarters, and village land registries be established under the supervision of the district registries and ultimately the National Land Registry for the orderly and authoritative record of transactions involving community land as recommended in Chapter 4. A decision must be made to adopt either the title registration or deeds registration system, whichever is the more acceptable option, rather than the current dual system.

SETTLEMENT OF LAND DISPUTES

18. **Chapter 7** reviews existing procedures of resolving land conflicts and disputes and recommends changes in them. The Commission argues that although the de facto procedures of customary dispute settlement have the backing of tradition they are in practice inefficient as they are unstructured, have lengthy appeal hierarchies, are sometimes inaccessible and often costly. It is recommended that disputes over customary land should in the first instance be heard by land tribunals constituted at the village headman level assisted by at least four other members of the community. Appeals should lie to tribunals constituted at the Traditional Authority level, which should also be tribunals of first instance and presided over by the Traditional Authority assisted by at least four other members of the community, at least one of whom should have legal or administrative experience. Appeals from the

Traditional Authority level 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 legal or administrative experience. Appeals from district tribunals should lie to the High Court. All Traditional Authorities and their village headmen should be required to undergo training in dispute management, which should be treated as a separate function from land delivery.

19. Land disputes, other than those over customary land should commence in the subordinate courts, hearing at first instance depending on value, and lie on appeal to the next level court and ultimately the High Court.

TOWARDS A NEW LAND POLICY AND LEGAL FRAMEWORK

20. **Chapter 8** recommends the main principles of a new land policy and suggests guidelines for basic land laws and associated subsidiary legislation to give effect to the new policy. The Commission recommends that the new land policy should be fully integrated into the country's overall development policy. It must also be guided by the numerous treaties, conventions, and agreements to which Malawi subscribes to pursue sustainable development, such as the Rio Declaration and Agenda 21 and the conventions arising from Earth Summit negotiations. The primary goal of the land policy should be to attain broad-based social and economic development through optimum and ecologically balanced use of land and land based resources. The new land policy should address the following issues: sovereign control of land; tenure regimes; management systems; land administration procedures; dispute processing procedures; institutional arrangements and sectoral linkages.

21. The new land law should be built on the existing regimes of substantive land law. The goal of the new land law should be to provide legitimacy to the basic principles of public policy governing land as elaborated in the new land policy and to provide a framework for its implementation. The goal of complementary legislation should be to make better provisions for the management of sectoral land uses within the framework set by the basic law.

STRATEGY FOR POLICY DEVELOPMENT

22. In **Chapter 9** the Commission presents the agenda and time frame for action. The importance of adhering to the proposed sequence of actions is emphasised, namely, first to establish policy, then law and finally complementary legislation.