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Abstract
Power relations and security of tenure in Malawi's Land Law

Security of tenure has been identified as a key variable for motivating investment in agriculture and improving food security. In discussions security of tenure is sometimes taken to mean individual freehold. This is a misunderstanding. Security of tenure can be achieved for all forms of tenure, including commons. Security of tenure is, however, closely tied to the organisation of legitimate power in a society. Security of tenure requires rule-of-law and transparency of public management decisions. The paper will outline the structure of legitimate power over land rights as defined by Malawian statutory law and customary law. Security of tenure is a basic part of both customary and statutory law.

In 1995 Malawi started a process of land policy reform. Based on various investigations the government issued its policy document "Malawi National Land Policy" in 2002. Increasing the security of tenure is a major goal. The proposal of the government will be studied and assessed in relation to how it will affect security of tenure.

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Power relations and security of tenure in Malawi's Land Law

Introduction

Security of tenure has been identified as a key variable for motivating investment in agriculture and improving food security. In discussions security of tenure is sometimes taken to mean individual freehold[1]. This is a misunderstanding. Security of tenure can be achieved for all forms of tenure, including customary tenure for families and village lands held jointly or in common. Security of tenure is, however, closely tied to the organisation of legitimate power in society. Security of tenure requires some kind of rule-of-law and transparency of public management decisions. As societies change through modernisation, development, and economic growth, customary tenure also needs to adapt to provide security of tenure in a new situation.

BOX 1 Security of tenure in urban areas:
Commenting on the plot where a local church was located and the residential buildings crowding it, the local guide explained rather matter-of-fact that those residences were built on church lands. But, said he, some people are good at persuading the authorities that they should be allowed to build on the apparently vacant land. Now we are discussing possibilities for buying the nearest houses. "We hope to persuade our brethren in the US to fund this buyback." He said.

What impressed me were not so much the facts, as the matter-of-fact account. Apparently, to Malawians, this is the way the world functions. It was nothing remarkable, nothing extraordinary. The authorities mandated to allocate land to people (most urban land is publicly owned) can apparently reallocate land without informing or negotiating with those currently possessing use rights even though it is illegal.

The example might occasion a question about markers distinguishing between private and public space. Maybe the signal marker for private space is the active agricultural usage of an area. If this is missing, perhaps the land will automatically be assumed to be vacant or unallocated?

A different type of process would seem to be at work where the water authorities had to buy back their rights to the forest reserve that the water supply depended on (forest reserves are public land). After democracy was introduced the neighbouring villagers had cut down the trees and started gardens in the area causing large scale siltation of the city's water reservoir. This was their right in a democracy. After all, they reasoned, the land belonged to the people.

Two processes in particular are seen to contribute to the experience of tenure insecurity. One is the increasing scarcity of land due to population increase and lack of urban economic growth. The other is the track record of land grabbing among powerful persons and the perception of power, tentatively described as personal and capricious, not bound by the rule of law. If people believe that powerful people can grab land with impunity the problem of security of tenure does not start in the law but in the way power

[1] An estate in land is freehold if it is without time limitation (Black's law dictionary 1990).

performs and in the way people react to how power performs. The remedy will be reform of power over land rather than land titling.[2]

In 1996 Malawi started a process of land reform (Kishindo 2004). Based on various investigations the government issued its policy document "Malawi National Land Policy" in 2002. This was followed in 2004 by "Malawi Land Reform Programme Implementation Strategy (2003 – 2007)" and in 2006 the Khaila report presented drafts of the law reforms. Increasing tenure security and equitable[3] access to land, is a major goal[4]. The proposal of the government will be studied and assessed in relation to how it will affect security of tenure. Before going into this, the paper will outline the system of land tenure and the structure of legitimate power over land as defined by Malawian statutory and customary law. Security of tenure is a basic part of both customary and statutory law.

On theory and methods used

This report started out as an effort to understand the land tenure system of Malawi. It is based on secondary sources. Results obtained by the Saidi commission (Saidi 1999a and b) and the Malawi volumes from the "Restatement of African Law" series (Ibik 1970 and 1971) have been particularly helpful. Besides these sources, published statutory laws, public statistics, newspapers and available "grey" literature has been consulted. The reading has been done on a background of institutional theory (e.g. North 2005, Ostrom 2005, Gibson et al 2005) and history (Pakenham 1991, Phiri 2004).

Land tenure systems have long roots and develop with complex pressures. From pondering the available literature a few basic hypotheses has come to guide my interpretations. And it must be emphasised: some of the hypotheses, while theoretically plausible, are very much tentative conjectures based on very little evidence, at least evidence known to the present author. The hypotheses are concerned with how history may be seen to shape the informal institutional rules governing choices that people make. The choices are always done within a present context with certain constraints. And the problem we are considering, security of tenure has certain intrinsic characteristics that need to be factored into our considerations.

Three historical legacies have to be kept in mind:

1. While many countries now report an incipient scarcity of land in many parts of Africa, and perhaps most developed in the southern part of Malawi, the historical experience for most of Africa has been land abundance. The ability to just pull up your stakes and leave for virgin lands is a powerful check on many kinds of power. And it has implications for the kind of tenure system you need. With land abundance there will for example be little need for trade in land.
2. The historical experience of power may be of two kinds. From time immemorial and in a situation with land abundance where exit was easy, the local power had to be

[2] Indeed there is, for example, in Kenya a reaction precisely against this kind of misuse of power. Kopp (2002:286) observes "Many local movements like that of the Nandi nationalists are increasingly defining civic virtue as a willingness to combat unaccountable land accumulation from the centre."

[3] ""Equity" denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men" (Black's Law Dictionary)

[4] See Ministry of Lands, Housing, Physical Planning and Surveys (2004:8). In Ministry of Lands, Physical Planning and Surveys (2002:12, paragraph 1.3.5) it is said "Failure to reform and secure the tenure rights of smallholders has long been established as the primary cause of under investment, reliance on primitive technology and a fundamental reason for low wages in most rural areas." And Kishindo (2004:216) says "While members of local kinship groups enjoy lifetime use of land allocated to them in their communities (…), non-indigenous people do not enjoy much security, particularly in the early years of settlement."

charismatic. With growth in population and territory this was bolstered by military power and ideology. A link between the charisma of powerful persons and belief in their abilities at witchcraft may have been part of the power ideology. Judging from how people today behave in relation to powerful persons there seems to be just two options, unconditional loyalty or exit. Voice (to borrow Hirschman (1970)'s phrase) do not seem to be acceptable. A perception of power as a personal and capricious thing, not bound by the rule of law, may be a strong undercurrent in how people behave.

3. The English land laws introduced between 1893 and 1963 are an important part of the current thinking about security of tenure. One part of this legacy is the persistent belief 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." (Saidi Report 1999a:i). Another part, and rather paradoxically in view of the previous point, is the comparative neglect of the role and evolution of customary law after independence. The effort seemed to go into developing statutory law in the English tradition.

In the present social situation the historical legacies are joined by three other forces exerting pressure and pushing for development of the land tenure system:

1. One is the population growth fuelling the perception of land scarcity. Demand for land is very closely determined by the number of people as long as there is no growth in urban employment.
2. A second pressure is the prevailing ideology on land tenure entertained by international institutions such as the World Bank and most large international development agencies. Their perception of land tenure seems to be a rather simple version of the western land market with a distinction between private and public lands, and a belief that the key to a functioning market in private land are title deeds, surveys, valuations, contracts and mortgages. The complexities of western land tenure systems, and in particular the reasons for their complexity, are, it seems, forgotten on arrival in Africa. The simple ideas become policy advice.
3. The third pressure comes from the activities of a small group of inventive individuals out to grab all opportunities to make a profit on land transactions. The size of the group is of course unknown. But if just a few get into positions of power in the land management system their activities will be felt throughout society and will confirm a belief in power as not bound by rule of law.

Both in relation to historical legacies and contemporary pressures we have to keep in mind two general and perhaps culturally invariant forces shaping land tenure systems:

1. If people put time and effort into tilling land, and planting crops, they want to be sure to harvest the outcome.
2. If people invest in the land, they will most likely harbour a strong interest in passing on to their children[5] the lands that have sustained the family.

One way or another people craft their land tenure systems to comply with these requirements. But people do so within the parameters set by the historical legacy and the current societal pressures. Tenure at customary law is no different in this.

[5] In the European tradition this always meant children born to the couple or legally adopted by them. In African family systems it may have a wider meaning, e.g. brothers sons in patrilineal systems and sisters daughters in matrilineal.

Background on Malawi

From 1889(formally from 1891) to 1964 Malawi was a British protectorate, from 1907 called Nyasaland. From the very start in 1889 the British administration operated with 2 categories of land[6]:

- The land "owned" in fee simple by the white settlers, and
- Crown land[7] consisting of
    - Land used for public purposes and
    - The rest of the land; from 1936 defined as African Trust Lands with the Governor as trustee

One of the reasons for creating the protectorate (besides the competition for territory with Portugal and Germany) was to bring some law and order to the scramble for land among settlers. In the late 1880s this was becoming more and more fraudulent. And even when not openly fraudulent the land acquisition by the white settlers certainly was based on a fundamental misunderstanding of native land law: that the chiefs could sell the land in the same way as a landowner in England could sell his land.

Britain was in her policy influenced by the missionaries and their fight against slavery and unchristian and criminal behaviour of many white settlers. Thus the first commissioner, Harry Johnston, on arrival prohibited further land transactions and asked all that had taken land to submit a claim. Upon review most claimants were awarded a certificate of claim. The legal effect was more or less to give them the land they claimed in fee simple[8]. In this way some 15% of Malawi came to be owned by white settlers. In a letter to C.J. Rhodes in May 1893 Johnston estimated that of the territory "about one fifth belonged to the chartered company (as heir of the Lakes Company[9]) and a further fifth was in the hands of various planters and missions; another fifth to the Crown and the remaining two fifths were owned by the natives subject to the provision that they cannot part with their land without consent of H.M. Government." (Phiri 2004:236). Of course, it is rather uncertain what total area he was comparing it to. At the end of Johnston's review of all land claims in 1894 he had granted 59 certificates summing to a total of 3,705,255 acres of freehold land, or about 15% of the land of contemporary Malawi. Of this the African Lakes Company alone held 2,704,376 acres (Griffiths 1983:10). One condition included in the grants was that Africans living on the land should have the right to continue living there undisturbed. They remained, but were barred from moving their village and had to labour on the estate to pay their taxes to the government.

Thus Johnston came to be equally unpopular among white as well as black. Among white settlers he was unpopular for restraining their "purchase" of land from the local chiefs, and among the local population for allowing the white men to take not only large areas of the most fertile land but also to enforce labour contracts that were only marginally better than slavery (thangata).

[6] The history from the introduction of the protectorate in 1889 to independence is basically taken from Griffiths 1983.

[7] The 1902 order in Council defined Crown land as "all public land subject to the control of His Majesty by treaty, convention or agreement and all land acquired by His Majesty for the public service." (Griffiths 1983:11).

[8] The term "fee simple" is derived from Fee or Fief or Feud. Today it means a freehold estate (se note 1). Originally it meant that the land was held of a superior lord, as a reward for services, and on condition of rendering some service in return for it. Fee is used in contradistinction to allodial. Allodial means the land owned and possessed in the man or woman's own right without owing any rent or service to any superior.

[9] In 1878 the Livingstonia Central Africa Company (later the African Lakes Corporation) acquired 7000 acres in Blantyre from the local Chief (Griffiths 1983:8)

Between 1902 and 1912 the Crown gradually shifted its policy from granting freehold land to granting leases. After the Crown land ordinance of 1912 the rule would be leases of up to 99 years. Thus the distribution of land in 1920 did not seem quite as bad as what Johnston guessed at in 1893.

The 1924 East African Commission drew attention to the lack of security of tenure for the African population and strongly recommended that the bulk of the Crown lands should be redefined as native trust lands. The government agreed, but only in 1936 "The African Trust Lands Order in Council" was enacted. This transferred the bulk of the crown land to a new status where the government's administration now had to take African law and custom into consideration.

Table 1 Land distribution on owner classes in 1920

	Acers	Converted to hectare	%
Total land area given by Msisha(1997)[10]	25161924	10182669	
Held by private owners under a form of grant made immediately before the establishment of the Protectorate between 1892-94	3705255	1499464	14.7
Of this:			
Held by British South Africa Company in North Nyasa	2700000	1092651	10.7
Disposed by Government in freehold	139472	56442	0.6
Held by Government under leases	118504	47957	0.5
Unalienated	21198600	8578769	84.2
Sum	25161831	10182632	100.0

In the Report of the Land Commission (Nyasaland) of 1946, Sir Sidney Abrahams found that the overriding problems were congestion and the status of natives on private estates. He found that about 10% of the African population was living on private estates. While the population density in Malawi on average was 16 persons per square kilometre, on the private estates in the Shire highlands it was 60 per square kilometre and on native trust lands in the area as high as 68. At the same time Europeans were holding vast tracts of undeveloped land. Abrahams recommended that the Government should acquire private land and to repeal the rules that allowed the thangata labour contracts. In 1948 the Acquisition of Land for Public Purposes Ordinance was enacted and the government started acquiring privately held lands. By 1954 the percentage of privately held lands had dropped to 4% and at independence in 1964 it was less than 2%. Thangata was not abolished, but the 1952 order in Council (Africans on Private Estates) improved the situation somewhat. Thangata was finally abolished in 1962 in the last year of the protectorate. In 1963 it got self-government and in 1964 independence.

[10] Source: The Land Commission of 1920 as reported by Msisha 1997:19. The figures given by Msisha do not add up. The area owned by British South Africa Company in North Nyasa is obviously also included in the figure of the land owned by private owners. Even so the total land area is 93 acres larger than the sum of the subcategories. And the total land area figure is larger than the official size of Malawi today (9398721 hectares). The difference of 783948 hectares or 1.937.177,7 acres is unaccounted for.

In 1964 the distribution of land according to types of owners were

1964 Source[11]	%	Total land area= 9,42 mill ha or 23277327 acres
Customary	87.00	20 mill acres
Public	11.13	
Leasehold	0.9	200 000 acres
Freehold	1.78	410 000 acres
	Sum = 100.81	100% = 23174713 acres

The East African Royal Commission working from 1953 to 1955 introduced a series of new themes to the land law discussion. They recommended reforms of the tribal system of tenure allowing Africans to hold individual title to land. They noted that population pressure and cash farming would in any case profoundly affect the tenure system. One problem encountered was in the native inheritance system. The discussions of land reforms continued but nothing was done before independence. However, the discussion provided a foundation for the 1967 law reforms both to the land law and inheritance law.

During the 1950ies and until independence the amount of privately held land declined from about 15% to 2.7%. Public land increased from 0.5% to 11%. Unallocated land or land under customary tenure remained at about 85%. After independence the development took a new path. Land under customary tenure declined. Land was being redefined as public land. Thus between 1965 and 2000 one million ha of customary land was redefined as public land. Also the proportion of private land increased but only by increased leases of public land. The area under freehold continued to decline. In 2000 it was down to 70000 ha.

A big chunk of this land went into National Parks and Forest Reserves. In 2002 "Parks, Forest, and Game Reserves" comprised 18% of the total land area. But much of it was also leased to persons or companies going into commercial agriculture. In 2002 the estate lands comprised 13% of the land. (Table 1, Ministry of Lands, Physical Planning and Surveys 2002:16). The rest, 69% would then be classified as customary land.

Table 2 Land area of Malawi distributed according to tenure system in million ha; Source: Statistical Yearbook 2004[12].

Year	**1965**	**1970**	**1975**	**1980**	**1985**	**1990**	**1995**	**2000**
Land area	9.42	9.42	9.42	9.42	9.42	9.42	9.42	9.42
Type of land								
Customary	8.01 85.0%	7.69 81.6%	7.53 79.9%	7.50 79.6%	7.40 78.6%			7.04 74.7%
Public	1.17 12.4%	1.54 16.3%	1.66 17.6%	1.70 18.0%				2.02 21.4%
Private	0.24 2.5%	0.20 2.1%	0.34 3.6%					0.36 3.8%
-Leasehold	0.08	0.08	0.24					0.29
-Freehold	0.16	0.12	0.10					0.07

[11] Griffiths 1983:52 & 211; Griffith's figures do not quite add up. His percentages add up to 100.81. If 20 mill acres is 87% then the total land area is 23174713 acres. However the current official figure is 23277327 acres (9.42 mill ha). This means that 102614 acres are unaccounted for. Since this is less than 0.5% of the total and the figures are obvious approximations it is deemed acceptable.

[12] Statistical Yearbook 2004, table 1.1; it is notable how the statistics disappear between 1980 and 2000.

The process transferring land from status as customary to public and further from public to leasehold is straightforward as described in law. However, the impact that the transfer of one million ha from small scale farming to protected areas and large scale estate agriculture within one generation has had on the villages and livelihood of the small scale farmers affected is not well documented[13]. At the very least it has intensified the perception and experience of land scarcity. In one study they observed "The people themselves find it difficult to say whether the change in land allocation practices was prompted by the presence of estates or by natural population growth. But in all the four sample-EAs in the south the people unanimously attributed the land shortage to the estate economy: "We have land shortage because our land has been taken by the estates. Otherwise we would have enough land to cultivate."" (BDPA in Assoaciation with AHT International 1998:21).

Customary Land Tenure in Malawi

The prevailing view on land rights in Malawi is expressed thus by Phiri (2004::233) "In pre-colonial days all land was held on a tribal or village community basis. This meant that land belonged to the tribe as a whole or the village as a whole. Each family was allocated part of the land to cultivate. The fruits of labour were the family's own. Your right to own part of the land depended on your membership of tribe or village. The apportionment of the land was done by the chief or sub-chief … But the land was not his in the sense that he could do with it whatever he liked. He could do with the land only what the tribe of his community expected of him. If strangers came asking for part of the land, the chief would only give them the land after approval from his people. Such terms known in European land laws as freehold, leasehold were unknown."

Box 2 A General Definition of Property Rights

Property rights provide legitimate allocation to particular owners, of material or immaterial objects supplying income or satisfaction to the owner. They comprise a detailed specification of rights and duties, liberties and immunities citizens have to observe. These are partly defined by law, partly by cultural conventions, and they are different for owners and non-owners. Property rights are ultimately guarantied by the legitimate use of power.

For historical reasons property rights to land are called land tenure.

The same view was presented by Griffiths in his dissertation on "Land Tenure in Malawi and the 1967 Reforms". He says that "the general system of land tenure in Sudanese and Bantu Africa is communal. Land is communally owned and usually inalienable. However the words "communal" and "ownership" must be used guardedly lest the true concept of African land tenure be misunderstood. The word "communal" is widely used to describe African land ownership. This is so as no one person can own, in the English sense of the word, or alienate land. As the land is often described as being held in trust for the community as a whole, the word communal is often used." (Griffiths 1983:4)

While it is correct that under customary law in Malawi no person can own land, in the English sense of the word, or alienate land, the statement is remarkable only because it is necessary to state it. Why should anyone expect to find English common law replicated in British Central Africa?

In pre-colonial days there was no land market; hence trade in land was impossible. Rather, as Phiri observes: "Land was abundant, and the use of the hoe precluded the opening of vast

[13] Or I should say: the present writer has not found much about this. Some observations are presented in BDPA in Assoaciation with AHT International 1998. Also see Peters 2002.

estates. People practiced what is known as shifting cultivation. A piece of land was cultivated for several years. When its yield started to decline the farmer abandoned it, went and opened a new garden elsewhere. In those days when land was plentiful and population was small, shifting cultivation was possible, not these days." (Phiri 2004:246)

Land abundance was one of the material conditions the land tenure system had to accommodate. In addition the tenure system had to find solutions to the two other universal worries: the security of tenure and the devolution of land rights to new generations of users. If we keep this in mind and start looking at the details of customary land law (Ibik 1971) the similarity to medieval European land law is in some respects striking. Apparently those who know Customary Land Law intimately have no knowledge of medieval land tenure in Europe.

One important deviation is in the classification of land. In Malawi there are three categories of tribal land. One is called reserve land or unallocated land. The two others are private family lands owned by the (extended) family, and common village lands (the village commons). The presence of unallocated lands is no doubt a consequence of the abundance of land and the practice of shifting cultivation. However, the reserve lands are now vanishing. How much land the chiefs have left in their fund of reserve lands is an empirical question. For most of the southern parts of Malawi it is for all practical purposes zero[14] (Peters 2002). And for much of the rest of the country it would seem probable that most reserve land is waterlogged or of poor quality for the kind of agriculture currently being practiced.

That families are owners of their land is true, not in the sense that this means the same as in contemporary Europe, but in the sense implied by the definition of property rights in Box 2. Malawian smallholders have the maximum protection of their interests that the society can afford. In general, one need to keep in mind that ownership always has to be defined and interpreted relative to the "state" power that is its ultimate authority. This provides for variation in security of tenure. But the tribal "state" as well as the medieval feudal "state" gave the land users the maximum protection of their rights that it could provide. This view will make security of tenure a function of the character of the state rather than the character of the property rights.

Table 3 Power Base and Management Authority in Customary Land Tenure

Nested land areas	Nested levels of authority over land areas	Power base for property rights	Authority of land management at collective level	Authority of land management individual usage
Tribal territory	Tribe/ Chief	X	X	
Village commons	Village/headman		X	
Gardens/ crop land	Family/lineage head			X
Gardens/ crop land	Household			X
Gardens/ crop land	Individual			X

Ideally and as far as the tribe's power can reach it will work to ensure that lands are held in perpetuity and can be devolved on new generations according to established rules for their

[14] Peters (2002:165) observes "Because there is virtually no empty or unused land, the ideal typical image of a chief or headman holding customary land in trust for his subjects and allocating and reallocating fields to them according to need is no longer accurate."

family system. Considering how Malawian family systems are more complex and how most of their pre-colonial tribal "states" were simpler than even medieval European states, one will expect the system of land holding to be correspondingly different. Yet the similarities are striking. One notable deviation from land rights known in Europe is the lack of rights for the husbands in uxorilocal and matrilineal marriages.

The basic distinction between the arable held individually and the non-arable held jointly (the commons) is the same. The list of material profits that the commoners can take from the commons comprises at the core the same items (pasture, firewood, game). Ibik (1971) also lists right of way as a profit. In Europe, at least outside England, the right of way within the non-arable is not considered either a profit or an easement, but rather belongs to a category called all people's rights. Within the arable areas, however, it will usually be seen as an easement (appurtenant).

Land allocations depended on conforming to a legitimate procedure with the tribal chief as the final authority. The legitimate powers of the chief grew out of the organisation of society in relation to military conquest or defence of territory. Depending on the size of the tribe and its territory chiefs would delegate their power of allocation to sub-chiefs and village headmen who then had legitimate authority to allocate land to those village members that legitimately could hold land. And as far as Ibik (1971) describes it, there are few restrictions. Even a stranger can get land if he gets consent relevant for the intended usage of the land. This can be seen as a result of land abundance. Current practice seems to be to elaborate on requirements that non-locals have to fulfil (Peters 2002). For all people ownership depends critically on continuous usage. Rules of forfeiture and surrender are clear.

Within the villages gardens and other areas tilled for agricultural production are private in the meaning that individuals or households have rights and duties to control access to them, while the pastures and firewood producing areas are held jointly by the village households with the village head as trustee. These lands can reasonably be described as village commons.

As a working hypothesis it seems reasonable to conclude that the system of customary land tenure revolves around two sets of questions:

- The procedures used to make a legitimate allocation to a person or to transfer rights to land resources (community rules of conduct, leadership codes, eligibility rules for awarding access to land within the village area), including the extent of rights of exclusion and the legitimate means for doing it.
- The definition and ranking of the group of legitimate heirs for the individual lands upon death or emigration of the current owner. This last question is further complicated by the presence of both patrilineal and matrilineal tribes and even one tribe where they practice a combination of the two customs (Tonga)

Judging from the observations of Peters (2002) rules and procedures for transfer and inheritance of land resources in customary law areas are badly in need of clarification.

Table 4 Case descriptions of authority relations in customary land law in Malawi (but local variations are many)

Source: Ibik 1971 Cases (**Boldface** signifies matrilineal marriage systems): 1. **Chewa,** Ngoni* and **Yao** of Kasungu, Salima, Mchinji (Fort Manning) and Lilongwe 2. **Chewa,** Ngoni* and **Yao** of Dedza and Ncheu 3. Tumbuka, Ngoni, and Tonga of Rumpi., Mzimba and Nkhata Bay 4. Yao of Mangochi (Fort Johnston) 5. Ngonde, Nyakyusa, and Tumbuka of Karonga 6. Sena of Nsanje (Port Herald), **Mang'anja** of Chikwawa, and **Lomwe** of Mlanje *Ngoni in Dedza and Lilongwe are said to be mainly matrilineal		
Chain of authority in Cases 1, 2, 4, 6	**Chain of authority in Case 3**	**Chain of authority in Case 5**
1. Chief	1. Chief	1. Chief
2. Village headman	2. Village headman	2. Village headman
3. Head of extended family	3. Head of extended family	3. Leader of age grade, *do not apply to Tumbuka*
4. Senior maternal uncle	4. The father of a married man	4. Head of extended family
5. Uxorilocal husbands have only exceptionally any authority over land		5. The father of a married man
6: A father, *only for case 6*		

Commons in Malawi

In discussions of land tenure a "commons" is usually understood to be a piece of land (or more generally a flow of goods generated by natural processes), held in common or jointly by a well defined group of people larger than a household. The details of how rights are defined and held and the kinds of objects to which rights are defined are highly variable. Thus common property takes many forms.

Malawi has commons in the fresh water fisheries of the big lakes (Njaya 2005), the village forests and the State forest reserves (on public land, the rights of common are few and well defined). The general impression imparted by those who work with these resources or study them is that they are in the process of being destroyed. Not much shall be said on that. Here it will be focused on the commons of the customary law areas: the villages of rural Malawi.

Land classifications in customary law (they are the same in all cases 1,2,3,4,5,6; see Ibik 1971)

- Common lands for joint use of the villagers
- Lands granted to families for individual use or use in common
- Reserve lands

Rights of common (they are the same in all cases 1,2,3,4,5,6; see Ibik 1971)

- Right of way
- Grass for thatching
- Pasture
- Firewood
- Stones, soil, mud for building materials
- Cut and remove branches of wild non-economic fruit bearing trees
- Water
- Hunting game

From observations of Peters (2006) it may be added

- Sand and gravel from riverbeds
- Medicinal herbs and roots
- Honey
- Mushrooms
- Caterpillars

The village commons as defined in customary land law conforms to the commons definition. Its main goods are building materials for houses, pasture (dambo) and firewood. In customary law (as formulated by Ibik 1971) the commons also includes what in modern society will be classified as public property (communal meeting places, roads, foot paths)

Rights of common also exist on the reserve lands and on individually owned land, for example grazing after the harvesting of the crops. However, in this case the exercise of the right requires approval, explicit or implied, by the owner. Ibik (1971:25, case 2) says "Where the right relates to profits-à-prendre on allocated land, it can only be exercised with the consent of the occupier of such land, but no consent by the chief or village headman is required." Similar remarks are found for the other cases[15]. For case 3 (page 40), 5 (page 65) and 6 (page 77) it is added "The rights to profits-à-prendre do not apply to cultivated and tended produce of the soil, e.g. orange trees" and further for case 4 (page 40) that "Among the Tumbuka and Ngoni of Mzimba district, the occupier's permission is presumed where the profits-à-prendre consist of untended produce". And in case 5 (p 65) it is noted that it is not an actionable wrong to appropriate profits-à-prendre without permission as long as no damage to protected goods occur (note 17, page 65). And in case 6 (page 78) it is said that prior consent to appropriate the profits-à-prendre is not necessary, as long as no damage is done to self-acquired property.

From Ibik's (1971) description of customary land law we see that one may expect to find that village commons in particular provide pasture and firewood. In addition there are rights of common to profits-à-prendre on both reserve lands and individually owned lands. The details of the description of the profits-à-prendre on individually owned land is interesting. The variations among the cases in the requirement for consent of the owner and the owner's protection of his produce, fences and buildings suggest that this is (or at the time of recording were) a field where the debate defining and redefining property rights takes place.

[15] For case 1 in page 13, case 3 page 40, case 5 page 65, case 6 page 77 in Ibik 1971.

Some General Comments on Customary Land Tenure

Customary land tenure does not differ in principle from ordinary land tenure even if the language used to describe it may be different. The key terms are "legitimate allocation" and "legitimate use of power" (see box 2 above). The "legitimization" part is always grounded solidly in the beliefs of people: their belief in the agency that provides the ultimate power defending their property rights, and their beliefs about what constitutes a fair and equitable allocation of rights. Neither customary nor statutory property rights work properly without a high degree of legitimacy. Indicators of deteriorating legitimacy are increasing rates of crime against property, increasing frequency of litigation over trespass, and increasing expenditures on private security (guards, fences, locks, alarms).

Box 3 Ownership
Legitimate "Ownership" is always defined relative to the social system organising the population. Ownership in the sense that western societies take for granted is a function of the power of the state and the cultural understanding of property rights. Effective possession is tied to legitimate ownership by way of beliefs in the rightness of the connection and ultimately backed by the power of the state.

Based on the fact that it is some 40 years since Ibik's observations were recorded and given the fact of increasing land scarcity and declining number of cattle one might venture some predictions:

1. Reserve lands will in the most densely populated areas have disappeared.
2. In areas with high population density and no cattle or few animals also the village commons will be in the process of disappearing.
3. Disappearing village commons will cause grazing rights on the remaining commons such as road banks and along foot paths to become more important
4. Where the number of cattle is low the right of common to pasture is probably being forgotten. The concept of commonable lands may disappear.
5. With decline in forested areas the right of common to firewood increases in importance. This will mean that the requirement of consent for collecting firewood on individual lands probably is being strengthened
6. With declining populations of game the right to hunt will decline in importance

One development in the commons is very clear. For some products of the commons the increasing scarcity has led to increasing commercialisation. This is very obvious for firewood and building materials such as sand, gravel and mud. For other products where the demand is more flexible it may not be quite as obvious (medicinal herbs and roots, honey, mushrooms, etc).

Based on observations from medieval Europe and contemporary parts of Europe that are sparsely populated, one might also add the following generalisations:

- In pre-modern agricultural societies the legitimate allocations of land rights usually occurs at village level.
- A person wanting land needs to fulfil some minimum requirements (such as being a member of the village) before land can be allocated to the person.
- There is a significant distinction between lands used for intensive agriculture (garden and crop land) and lands used for extensive harvesting (pasture, firewood). English language does not have a word that distinguishes between these two classes of land. In Scandinavian languages words similar to the Norwegian "innmark" and "utmark" captures this distinction with the added connotation of differences in property rights. We shall here use arable to mean all land that currently is cultivated, fallow or

allocated for future cultivation, and non-arable to denote the rest including pastures, forests, mountains, rivers, and small water bodies.

- It is usually the case that most of the arable is privately owned or controlled, while the non-arable often is publicly or collectively owned or controlled. However, moving from the village square to the midway point to the next village one will often find a graduated shift from clear and strong individual control of plots to open access. There often will be grey areas where rights are contested and in the process of being redefined. One will for example often find that there is a perimeter band of non-arable land around the arable that is more individually than collectively controlled.

These tendencies are observed in the history of European countries, and it conforms to the case of Malawi as described in the various background documents of the Presidential Commission of Inquiry on Land Policy Reform (Saidi 1999a, b) and the more formal descriptions of customary land law provided by Ibik (1971)

The similarity between commons in certain parts of Europe and Malawi is interesting. The similarities are in Europe today observed in sparsely populated mountain regions such in Norway, Sweden, Scotland, and Navarra. It is not observed in England or Denmark. This suggests that the persistence of the distinction between arable and non-arable depends either on low demand for land (no real scarcity) or a lot of land not suitable for arable but perhaps for extensive exploitation as pasture or firewood production.

Observation of the same features of customary land tenure in Malawi as in medieval Europe might in part be caused by the usage of the technical language of European land tenure. But it does not seem quite likely that this can give a complete explanation. If the similarity indeed is (partly) true, it will be relevant for the discussion of the evolution of individual property rights. The labour theory of property rights (see e.g. Becker 1977) states that the more time and effort people invest in a plot of land the more is it justified to award them property rights to that plot. This will be true regardless of land scarcity.

A scarcity argument of property rights states that if there is no scarcity there are no gains from defining and enforcing property rights. Combining these two arguments and applying them to Malawi we se that as Malawi is one of the most densely populated countries in Sub-Sahara Africa the scarcity of land should be more pronounced here than in other African countries, and hence the evolution of individual rights in land should be more advance here than in surrounding countries. The other observation is that population densities within Malawi vary much, from 173 persons per square kilometre in the south to 47 persons per square kilometre in the north (data from 1997, Saidi 1999a:37). If data were available on degree of individualisation of property rights to plots within villages, the prediction would be that it is most pronounced in the south, least in the north. Peters' (2002, 2004) studies of southern Malawi support the individualisation argument. And already the Jackson report[16] of 1921 noted that "in certain areas of Malawi where land is scarce individual rights were being asserted" (see Griffiths 1983:5). However, comparative data are not available. And a confounding factor will be the differential presence and size of commercial estates. It is largest in the south. Many will attribute the land scarcity in the south to the presence of many and large estates rather than to population size, and with some justification.

[16] Report of a Commissioner to inquire into and report upon certain matters connected with the occupation of land in the Nyasaland Protectorate (Jackson Report) 1921

Box 4 Powers of land ownership according to the land law
In the 1965 Land Act (including revisions up to 1995) it is said

"All public land is vested in perpetuity in the President" (Part III §8) and "All customary land is herby declared to be the lawful and undoubted property of the people of Malawi and is vested in perpetuity in the president for the purposes of this act." (Part V §25).

In §26 it is described how the Minister holds all powers to "administer and control" customary lands and §27 gives the Minister power to declare any customary land to be public land. Previously it has been detailed how only corporate bodies authorised by the president may hold land and how the Minister may "make rules prescribing the particulars to be furnished, the forms to be used, and the fees to be paid" (§4). Further on it is said that the Minister "may make and execute grants, leases or other dispositions of public or customary land for any such estate, interest or terms, and for such purposes and such terms and conditions, as he may think fit: Provided that the Minister shall not make any grant of customary land for an estate greater than a lease for 99 years." (§5). "Wherever it appears to the Minister that any customary land is needed for a public purpose, that is to say a purpose which is for the benefit, direct or indirect, of the community as a whole, or a part of the community, he may declare, by notice under his hand and published in the Gazette, that such land is public land, and thereupon such land shall become public land."(§27) And in (§28): "Any person who, by reason of - (a) any grant, disposition, permit or licence of or in respect of customary land, made or given by the Minister under section 5; (b) ... (c) ... suffers any disturbance of, or loss or damage to any interest which he may have or, immediately prior to the happening of any event above mentioned in this section, may have had in such land, shall be paid such compensation for such disturbance, loss or damage as shall be reasonable."

Power over land in statutory law
The chiefs are the custodians of customary law, and the managers of customary lands according to customary law. Above the chiefs there is only the president and his Minister of lands.

The powers over land management of the President and the Minister of Lands have few, if any, practical bounds. They can do very much as they want to as long as they do not make "any grant of customary land for an estate greater than a lease for 99 years". However, the restriction of lease for 99 years does not apply to public land. Hence the restriction on customary land can obviously be circumvented by declaring the land for public land.

The law is written, if not by English lawyers, then at least by people trained in England and hence with the English understanding of the difference between the President as an officer holding land as trustee and the president as a private person with interests and activities unrelated to public resources and activities. Crown lands are different from the private estates of the King/ Queen. In Malawi such an understanding seems to be at best intellectual.

According to the land law the power of the President and his Minister of Lands is absolute. Customary land can be declared public and leased to commercial farming (estates). Any President reading the law and not being able to distinguish between his role as a private citizen and his role as president will not only be tempted to make dispositions benefiting himself, he will not be able to see anything wrong with it either. The law mandates and legitimises activities that may be inconceivable for someone growing up to take for granted the distinction between public and private resources. For somebody with less than perfect moral rectitude the system will tempt to shady and sometimes corrupt deals.

The way of thinking about power, that power is the personal tool of the person in power leads to such use of power that people come to believe power is capricious, just as they in reality expect power to be, based on their historical legacy in the village life that still dominates 90% of the population. Thus "everyone" expects power to work this way. In the interaction with western societies with a different thinking about power the outcome is corruption.

The power politics of land and customary law

In a case starting in 1997 between the former president Dr H. Kamuzu Banda and the government we get a glimpse of how the power of land allocation of chiefs and presidents worked in relation to a powerful person (see box 5 below).

In this case, the former president Banda prevailed against the government. But it does not seem likely that chiefs, village headmen or ordinary farmers on customary land would have the same incentives and resources to resist government decisions about converting their land to public land. Their security of tenure would be less, not because the legislation affecting them is different, but because power is, and is seen to be, unbound by the rule of law[17].

Box 5 Kamuzu Banda vs Attorney General 1997-2004

The power of the President and his Minister of Lands is currently undoubtedly absolute (see Box 4). Any President reading the law and not being able to distinguish between his role as a private citizen and his role as president will not only be tempted to make dispositions benefiting himself, he will not be able to see anything wrong in it either. The law mandates it. His role in relation to land is just like that of a chief. How this view on the powers of the president might play out in practice is detailed in the case of Dr H. Kamuzu Banda vs Attorney General (2004) where the Government tried to repossess an estate on customary land run as a cattle farm by the previous president Banda (Dr H. Kamuzu Banda died on 25th November 1997).

It started in 1974 when President Banda held a public meeting in the Chikwawa district which was attended by Chiefs from Nsanje as well as that district. The people of the area gave him a number of gifts including heads of cattle. At the end of the meeting he informed the Chiefs that in order to assist them improve their cattle he had decided not to move the cattle out of the area. Instead he would import a better breed of cattle which could cross breed with the local cattle. He therefore asked them to find land where the cattle could be accommodated. After an extensive search for suitable land in both districts the Chiefs identified the customary land at Paiva Village and gave it to him. The land was not suitable for cultivation because it was stony and was not fertile. It had not been used for cultivation since time immemorial. According to customary law the land now belonged to Banda and could not be taken back as long as it was used as agreed.

The new president thought otherwise. The government started its proceedings in 1995. As a result of a request from the government by Minister Itimu, Banda in 1996 voluntarily surrendered a part of the farm called Section C for redistribution to the neighbouring villages. In August 1997 the Minister asked Banda to vacate the whole estate. This resulted in the court action against the Government. The Chief of the area; Ngabu, in his testimony before the court, said among other things, that "Section C is not being cultivated. In spite of Minister Itimu's statement that it would be given to the people to cultivate, that has not happened. Instead there has been serious deforestation. The trees have been cut down uncontrollably." And he was afraid the same would happen to the rest of the farm if the government were allowed to take over.

Besides the legal arguments from customary law and Malawi's constitution protecting the property rights of Banda, the judgement highlights two interesting aspects: the uncontrolled and rapid deforestation of the land surrendered to government, and the fact that the judgement was not pronounced until 11 January 2004 in the twilight of president Muluzi's reign.

[17] The "land grabbing approach" taken by powerful public persons is hardly unique. Compare for example the sale of the East African Tanning Extract Company (EATEC) farm in Kenya in 1994 as described by Kopp 2002.

Current pressures on customary law

The problematic ideas about how social power is created and works compounds the impact of the pressure from the two long term trends of population growth and transfer of good arable from customary lands to public lands and then reserving it for wildlife or leasing it for commercial agriculture. These trends are in complex ways interrelated. Commercialisation, displacement of people and degradation of the environment are closely linked.

In Malawi the big commercial estates growing tobacco, tea, and coffee, created displacement of people to more marginal lands or they left villages with less land than before. Commercial estates are created as long term leases of public lands. Public lands can be created from customary lands by the president and the ministry of lands. Thus one might see the causal chain as: Commercial interests ➲ Government decision ➲ Displacement of local village farming ➲ Shortage of suitable arable ➲ Insecurity of tenure ➲ Demand for land tenure reform

During times of social change the informal institutions sustaining the customary tenure system will be expected to become weaker. This both lowers the legitimacy of decisions and furnishes the people exercising power temptations to serve personal interests rather than the community's interest. Also, the customary law rules on land tenure were fashioned in a society where there was abundant land. Thus they should not be expected to have strong defences of individual rights or to work reliably in a modern society with land scarcity. However, the culture of abundance may perhaps be more present in the minds of the urban elites than in the minds of villagers that are now experiencing the impacts of land scarcity. If that is the case, the necessary cultural and social adaptations may be delayed and may also be behind some of the arguments for .transfer of lands from customary to public that the elites have been pushing through. In the villages a culture of abundance in a de facto situation of scarcity will entail that consequences of scarcity are aggravated.

In the villages the scarcity of suitable arable creates competition for land. This translates into market value for land. Given enough cash it may not be too difficult to find a chief or village head willing to reallocate a plot of good garden land[18]. In addition we note that shifts in populations (e.g. relocations, or immigration due to unrest in neighbouring countries) and/ or changes in culture due to modernisation, education, and urbanisation, affects the traditional ties guiding decisions of the village head. Catering to special interests (including personal) becomes easier. The values and morals of traditional authorities are tested severely. The result is the large scale, and sometimes fraudulent, reallocation of customary lands to commercial agriculture that land authorities have been able to execute with impunity.

Chiefs have always had the ability to both use and misuse their power. Their accountability depends on public opinion in the villages. But public opinion will not be a reliable guard of the rule of law if powerful people are assumed not to be bound by the law. The capricious power of the chief and his village headmen/ headwomen seems to be accepted as a fact of life. Thus it seems likely that the cultural beliefs that bolster the security of tenure that previously was a matter of fact, have been weakening for quite some time. The Chiefs' legitimacy in land management has probably been weakened by their increasing involvement in the political system of the state. The office of Chief is hereditary but without any fixed line of succession. According to the Chiefs Act[19] Chiefs are appointed by the government, but from among those

[18] Ministry of Lands, Physical Planning and Surveys (2002:18) notes that "Fraudulent disposal of customary land by headpersons, chiefs and government officials often deny critically needed access to people most desperate for land."

[19] See Chiefs Act 22:03, Part II.4

eligible. By playing one pretender against the other the government may be able to control the behaviour of the chiefs. That Chiefs also get wages from the government does not help them in relation to their subjects' belief in their impartial application of the law. The Chiefs' lack of legitimate authority to resolve land allocation conflicts in a situation of scarcity may for example show up in an increasing appeal to authorities outside customary law such as District Commissioners or Resident Magistrate Courts. Also the suspension of the traditional courts will contribute to this. From 1962 to 1994 all disputes involving customary law, were heard under the Traditional Courts Act (Cap.3:03) This act was suspended in 1994 by an Executive action because its system of criminal prosecution had been misused on a large scale for political control during the Banda regime. But its suspension left a vacuum for development and clarification of customary land law. The local communities were deprived of a means for adapting to a changing world. Today appropriate land reforms may be the only way of catching up with this development.

Land Reform

The many pressures creating problems related to land tenure were felt rather than monitored by the political system. The 1967 land law reforms tried to introduce rules that should further the individualization and formalization of customary land rights. The Ndunda system created by the Customary Land (Development) Act (from 1967)[20] and tested out in Lilongwe West was not successful. The Saidi Report (1999a:69) observed "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 government leases could no longer be issued in respect of such land." After that not much happened until the introduction of multiparty democracy in 1994. This also inaugurated a process of land reform with the reports of the Saidi commission in 1999 as a first important step. Following up on this, the National Land Policy of 2002 makes, among others, the following main recommendations:

- A new system of classifying land will be introduced. Land will be classified into Government Land, Public Land and Private Land. Customary landholding is to be registered as private customary estates for entire communities, families or individuals[21].
- Land administration responsibilities will be decentralised, district land registers will be created to record transactions in land, and land administration role and responsibilities of Chiefs, Clan Leaders, Headpersons and Family Heads will be formalized, and made more democratic and transparent.
- Training, modernization and capacity building in surveying and land management professions to ensure adequate professional advice and support services are available for land use and environmental management decisions at all levels of government and by the private sector.

The National Land Policy document was followed by the Malawi Land Reform Programme Implementation Strategy (2003 – 2007). Part of this strategy was a "Special Law Commission on the Review of Land Related Laws". The commission was created in January, 2003. The

[20] The Customary Land (Development) Act, (Cap.59:01) worked together with the Local Land Boards Act (Cap.59:02) and the Registered Land Act (Cap 58:01).

[21] For a critique of the concept of customary estate as outlined in the Land Policy document see Silungwe 2005. A main objection is the Land Policy stipulation that "The rights in customary estates shall be "usufructuary in perpetuity" (Government of Malawi, 2002:25)."(Silungwe 2005:33). The proposals of the Khaila report sidesteps this objection by defining a customary estate as any interest in land large enough to entitle the person (or persons) holding the interest to be registered as proprietor(s) under the Registered Land Act. (Customary Land Act Part III.18).

report from this commission, "The Khaila Report", is currently in the process of being polished before being presented to the parliament. The report considers 16 existing acts and proposes to amend 10, two of which are more or less completely rewritten, and to repeal 3, two of which is replaced by one new act, The Customary Land Act.

Three proposals from the Khaila Report will be looked at in some detail: The Land Act, The Customary Land Act and the Land Survey Act.

The classification of Lands

The classification of lands proposed is a bit different from the one promulgated in the National Land Policy document. The Khaila report suggests that there should be only two types of land: public and private, each with sub-classes.

Table 5 Proposed classifications of lands.

CATE-GORY	DEFINITIONS	CLASS	DEFINITIONS
Public land	""public land" means land held in trust and managed by the Government or a Traditional Authority and openly used or accessible to the public and includes - 1. land gazetted for use as national parks, recreation areas, forest reserves, conservation areas, historic and cultural sites; 2. land vested in Government as a result of uncertain ownership, abandonment or land that cannot be used for any purposes; and 3. unallocated land within the boundaries of a Traditional Land Management Area";		
		Government land	"Government land" means land acquired and privately owned by the Government and dedicated to a specified national use or made available for private uses at the discretion of Government.
		Customary public land	Unallocated land within the boundaries of a Traditional Land Management Area.

Private land	"private land" means all land which is owned, held or occupied under a freehold title, a leasehold title or as a customary estate and is registered as such under the Registered Land Act or any other written law.		
		Freehold title	An estate in land is freehold if it is without time limitation (Black's law dictionary 1990).
		Leasehold title	"Leasehold": An estate in real property held by leasee /tenant under a lease (Black's Law dictionary 1990). "Lease" includes an agreement for a lease, and any reference to a lease shall be construed as a reference to a lease granted under this Act or the existing laws. (Land Act Cap.57:01)
		Customary estate	"Customary estate" means any customary land which is owned, held or occupied as private land within a Traditional Management Area under a freehold title and which is registered as such under the Registered Land Act (Cap. 58:01).

Source: If nothing else is said the source is the draft Khaila Report Volume II, "An Act to Amend the Land Act"

Two observations may be in order:

1. The distinction between public and private conforms to a basic theoretical distinction and may, if interpreted correctly, channel the local and individual adaptations in the right direction
2. The inclusion of customary land as an ordinary category of land divided between private customary land and public customary land is a confirmation of the de facto realities in the villages and will thus increase the security of tenure. The somewhat awkward labelling of the public customary lands as "unallocated land within the boundaries of a Traditional Land Management Area" might be improved. From the description in the preamble[22] it is clear that it is a type of commons and it could be labelled as village commons for example as opposed to state commons for the "land gazetted for use as national parks, recreation areas, forest reserves, conservation areas, historic and cultural sites". However, labels are not important compared to the kinds of actions the law mandates.

Devolution of power

1. Section 4 of the Land Act says that a body corporate can hold land only if licensed by the President to do so. The proposal for amendment suggests that the decision of the President can be subject to judicial review.

[22] "The Commission recognised that there shall be unallocated land within the jurisdiction of a Traditional Authority which shall be used as public land for communal purposes such as graveyards, *dambos* and grazing land but shall still remain customary land."(Draft of Khaila Report, Preliminaries for the Land Act, Section 2).

2. Section 5 of the Land Act gives the Minister authority to "make and execute grants, leases or other dispositions of public or customary land for any such estate, interest or terms, and for such purposes and such terms and conditions, as he may think fit: Provided that the Minister shall not make any grant of customary land for an estate greater than a lease for 99 years". The proposal for amendment suggests that in the future "local government authorities" shall have the same powers.
3. Section 8 of the Land Act vests all public land in the President. The proposal for amendment suggests it should be vested in the Republic to conform to the Constitution. The same is done for customary land in section 25.
4. Section 9 of the Land Act gives the minister the right to control the use and occupation of all government land. The proposal for amendments suggests this power should be removed explicitly.
5. The sections 11-24 dealing with private land the power of the central government is diluted by providing the same power to local government authorities as the Minister has. The same applies for the rest of the paragraphs in the proposal.
6. In sections 26 the Minister's power to administer and control all customary land is taken away and vested in the Chiefs except the power to "administer and control all minerals in, under or upon any customary land".
7. Part VII, sections 36-39, on trespass or unlawful occupation, are proposed repealed.
8. Section 38 of the Land Act gives the President the power to direct the Minister. The proposal for amendment suggests repealing the section.
9. Section 42 of the Land Act empowers the Minister to override other Acts to get other acts to conform to the Land Act. The proposal for amendments suggests repealing the section as unconstitutional. The Minister should not have the power to amend other Acts.

From the amendments proposed for the Land Act alone one may conclude that the powers of the President and his Minister to dispose of land rights has been severely curtailed, first by removing discretionary power or making it subject to judicial review, but most significantly by giving powers to local government and Traditional Authorities. Making the exercise of power subject to judicial review will increase security of tenure. But from the Land Act alone it is not apparent that the same will apply to local governments and traditional authorities.

The amended land act, however, will have to be read in conjunction with a proposed new act, the "Customary Land Act". The new act is to replace the "Customary Land (Development) Act (Cap.59:01), and the "Local Land Boards Act (Cap.59:02).

The powers of the Chiefs over land are through the customary Land Act made transparent and accountable by the introduction of land committees and land tribunals. Customary Land Committees are standing committees at the Group Village level. They are mandated to oversee the formalisation of customary land and may for example ascertain interest and rights in customary land. Customary land committees are also empowered to make and execute grants, leases or other dispositions of customary land and to scrutinize and approve, where appropriate, land transactions involving customary land held privately within a Traditional Management Area. The committees may control the user of customary land, and the sale, transfer, or lease of customary land held privately, and they may function as an informal tribunal mediating in land disputes.

The customary land tribunals are mandated to adjudicate in land disputes within its area. On failure to reach agreement the case goes to the tribunal at the next level. Chiefs play a crucial

role in the tribunals. In the Central Tribunal there has to be three chiefs as members. Here the Resident Magistrate is chair. At lower levels TA Chiefs are mandatory chairs. In the land committees the group village headman is mandatory chair. Both from membership and from position as chair of committees the influence of Chiefs will be large, certainly larger than it is today. In this the Chiefs have been successful as a lobbying group.

One may question if their positions as mandatory chairs give them too much power. The hope is that due to the wielding of power through a committee its use becomes transparent. At best their degree of influence will depend on good arguments and powers of persuasion. If this will come to pass, security of tenure will improve. But very much will depend on there being alternative sources of authority in the committees than the chief. If the chiefs can influence the appointment or election of board members, and in particular the Land Clerk, and coming out of a tradition of "Fraudulent disposal of customary land by headpersons, chiefs and government officials" as the Land Policy Document (note 18 above) writes about, the transparency of their activities may disappear. With increased power to the chiefs the security of tenure for the poor villagers may not improve at all. Within the proposed system one needs to think carefully about checks and balances to hold the chiefs accountable to their usage of power.

Above it was speculated a bit on the beliefs about, and reactions to power among ordinary people. The perception of power as personal and capricious may create problems for some kinds of decisions, perhaps more for the determination of land rights and the making of grants and leases than for mediation and adjudication activities. However, it is difficult to see any other way of educating people to exercising democratic governance than providing them the procedures to achieve it. It may not come overnight, but hopefully it will come.

Creating a land management bureaucracy

The third major area of the land reform process is the training, capacity building, and modernization of surveying and land management professions. This entails building a stronger bureaucracy. In western democracies these bureaucrats are the disinterested advisors and professional technocrats that provide fair decisions and speedy allocations of suitable lands – at its best. However, even western land survey bureaucracies will occasionally malfunction. It easily slides into red tape. And from many third world countries there are reports that label the land survey profession as the predatory state's best helpers. In some countries they become de facto proprietors of public lands, and are often able to exact extra duties from private actors for their services.

The proposed act concerns basically the training, certification and work procedures of the surveying and land management professions. There is little about when and how their services have to be employed. The one exception found is in the proposed section 44 that, rather sweepingly declares "(1) The boundaries of any area declared as a Traditional Land Management or Township shall be surveyed and registered under the Traditional Authority or local government authority of the area. (2) Where a Traditional Land Management area is registered, all the villages and the public land within such area shall be surveyed and registered."

The bureaucratic power grows out of mandatory tasks that communities, people, and corporations have to have done. In the best of circumstances surveying Malawi for land tenure purposes is an enormous task that probably will have to take generations. The lack of trained professionals, equipment, and public funds ensures that at best this will be a sleeping

paragraph. At worst it will diminish the authority of the law and create divisions among Traditional Land Management Areas if some of their tasks depend on the required survey.

In the proposed Customary Land Act it is suggested that the Land Clerk of the Traditional Land Management Areas has a duty to "prepare or cause to be prepared a basic map for each Traditional Land Management Area". The wording here makes for some leeway. The surveying does not depend on the professional surveying department. Based on the first locally created basic map the quality of the map may be increased as needs arise. The best way of using a professional service like the land surveyors is perhaps to take one step at a time and follow the advice: "If you do not have a problem, do not solve it". And if you have more problems than resources for solving them, take fist things first.

In relation to security of tenure one may come into problems if court proceedings or title deeds depend on some mandatory survey having been done. The way to avoid it may be to make it abundantly clear that customary rights do not depend on registration. They are as secure as ever even in the absence of formal registration. This is a basic tenet of customary law. The cost of not registering them is that customs may change and memories die away. Tenure security for customary rights has been diminished by many causes. Some may be dealt with but their embedding in customs and peoples knowledge makes them fragile under social change. That cannot be met by other means than formalization. But again, a little bit may go a long way. The Land Clerk's hand drawn map may work for many years until the need for a more accurate map may require a professional service.

Security of tenure in other legislation

Of the 3 new acts proposed and the 8 amended we have been looking at only three in any detail. For many acts the amendments are just to make them consistent with the devolution of power observed in the Land Act. That is not the case for the Physical Planning Act. The Physical Planning Act, however, will have to be dealt with another time. In the other acts it is worth to take note that it now is possible to make acquisition of land through prescription also on public and customary land[23]. The time for prescription is set at 12 years. This will obviously advance security of tenure for the poor more than for the rich. It is also notable how the new rules for assessing compensations for land takings in the Land Acquisition Act give increased security to landowners for their investments in the land.

Concluding remarks

Land reforms take time. Many lament that the process started in 1996 by the appointment of the Saidi commission still is running. But unless people understand what the land reform is about, what it intends to achieve and how it goes about achieving it, a land reform does not have any beneficial impact. Rather than steamroll a streamlined proposal through parliament in a couple of years it is better to use a dozen years to achieve a more messy compromise that has a chance of being used to coordinate land management and land usage.

The proposal that now is being polished for presentation to the parliament has some features of this, but as noted above, it also contains unsolved problems. The most difficult is probably the power of the chiefs. Another is the power of the professional land bureaucrats. The land bureaucrats are not yet a powerful lobby like the chiefs, so at least for them one might think about checks and balances. The easiest way might be to make their services optional rather than mandatory. This will certainly slow down their usage, but perhaps to a pace

[23] See the proposal for the amended Registered Land Act (Cap 58:01) sections 134 and 137)

commensurate with the capacity to educate a sufficient number of them. The Chiefs have, through lobbying, been able to change the proposed legislation to increase their power over land management considerably compared to the Land Policy document. Finding suitable checks and balances here is a challenge given the customary behaviour of people in relation to social power. The most practical way may be to make the activities of the Customary Land Committees mandatory transparent to all people. But this may not be enough. To secure some independent power over land management decisions one may even think of introducing a special ombudsman for customary land issues. But this is hardly likely outcomes of the parliamentary debates.

The poor record of land reforms in Africa may make us unnecessarily pessimistic. Therefore: any measure of success will be an achievement. On balance it is reasonable to think that the current proposal for reform in the long run has a chance of effecting some improvements. Only careful monitoring of developments in the land tenure sector will be able to confirm or deny this belief.

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