Protection of Peasant and Pastoral Rights in Land: A Brief Review of the Bills for the Land Act, 1998 and the Village Land Act, 1998

By

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Introductory

The bills for the Land Act, 1998 (LA) and the Village Land Act, 1998 (VLA) are very long pieces of legislation. The Land Act runs into some 187 sections and the Village Land Act to 68 sections (Compare with the Land Ordinance, which has some 24 sections only). In some

respects, the Acts go into great detail to regulate even minor issues of procedure. In other respect, some major substantive laws (for example, mortgage and leases), that used to be governed by English law, have been codified.

On fundamental policy questions, the bills, in my view, represent no departure from the existing principles, which were laid down in the Land Ordinance of 1923. Land in Tanzania Mainland continues to be vested in the President. Its management and administration is strongly placed in the executive arm of the state. In some respects, under the bills, the Ministry of Lands, and particularly the Commissioner, have wider and more far-ranging powers over land than what he has now. Reducing approvals facilitates marketability of land. But it is left to the discretion of the Minister to determine which dispositions require approval.

On the whole, bureaucracy has been given greater discretion in making decisions while elected and representative bodies have been undermined or made merely consultative. Top-down managerial type administration over land has been entrenched in law.

By and large, the Acts do not represent a major departure from the existing system. In short, what was regulated administratively has now been codified. This has increased the potential for the expansion of bureaucratic machinery with powers concentrated in the Ministry of Lands. It is therefore debatable as to how the bills address various problems of land tenure and abuses of administration, which gave rise to the Presidential Commission of Inquiry into Land Matters

Only some of these features of the bills will be brought out in this paper, which deal primarily with the protection of peasant and pastoral land rights.

Criteria for assessing the bills

In dealing with the topic at hand and how the bills deal with the issue of protecting peasant and pastoral community rights, I apply the following criteria. But first we must be clear as to:

Why is it important for Tanzania as a society and economy to protect the land interests of peasant and pastoral communities?

1) Largely an agricultural economy with 85% of the population land-based.
2) Agricultural economy important for providing food for domestic needs and for export.
3) Important to create enabling environment for accumulation of capital and investment from within the agriculture sector and from among peasant and pastoral community.
4) Any large-scale landlessness is likely to create social-strife and instability since the current Tanzanian economy is unlikely to absorb people thrown out of land.
5) Therefore, the central objective of the law should be to provide security of tenure, first and foremost, to peasants and pastoralists and, within these groups, to the most vulnerable and disadvantaged, particularly women and children. The security of women and children in relation to land is tied up with the question whether the rural community as a whole has such security in the first place.

In the light of the problems of land tenure and administration identified by many studies, including the Land Commission, and complained about the people and known to the leaders, the following questions may be posed:

I. ***How do the bills deal with the problem of alienation of land to (1) so-called investors; (2) outsiders from outside the village i.e. the issue of land grabbing?***

III. How do the bills provide for security of tenure to peasants and pastoralists as individuals and communities?

IV. Do the bills make sufficient provision for the participation of land users themselves and particularly village communities in the administration, management and decision-making on land and land matters?

V Does the bill deal with the existing major land disputes and disputes arising from the villagisation programme and or provides transparent and participatory machinery for resolving these and other disputes?

I will briefly deal with these questions in relation to village land. However, I ought to draw the attention of the Honourable Members of Parliament to the fact that the published version of the bills contains numerous printing errors, so much so that in some places the sections are not clear at all.

I. Some problems of definition:

Definition of "general land" and "village land".

FIRST definition of "general land" as a residual category has impact on what constitutes village land. The definition of general land in the two bills is conflicting.

In LA cl. 2 "general land" means all public land which is not reserved land or village land and **includes unoccupied or unused village land**;

In VLA cl. 2 "general land" means all public land which is not reserved land or village land;

The one in the LA is problematic and could lead to expropriation of village land under the guise that it is "unoccupied and unused". Who decides that the said land is unoccupied and unused?

SECOND: the land that constitutes "village land" in cl. 7 of the VLA tries to follow closely the *existing boundaries* of village land, howsoever demarcated. This has three problems:

1) The existing boundaries are not necessarily those accepted by the villagers. There is, for example, a long-standing problem of village boundaries in Tarime that has at times led to violence.

2) There are numerous boundary disputes among villages and between villages and with "reserved land" and "general land". Under the VLA, where there are boundary disputes, it is the Minister for Lands who has the upper hand to set the machinery for resolving the disputes in motion through (a) appointment of a mediator or (b) an inquiry.

This method of resolving boundary disputes, once again, repeats (a) an ad hoc (b) top-down approach in which (c) people do not participate and, therefore, the dispute continues brewing. The question to ask is: **How is the bill an improvement on the present situation in resolving this very thorny issue? In my view, it s not an improvement and its chances of success are not very high.**

3. There are long-standing disputes between villagers and those who have been "allocated" village lands (NAFCO v. Barabaig, Tanganyika Cattle Co. v. Kiteto, Steyn Farm; land problems in Lolkisale village, see volume 2 of the Land Commission report). How does the bill resolve this? In terms of cl. 17(2), these granted rights of occupancy are

confirmed and will be under the management of the Commissioner not the village council. **Therefore, the bill maintains the existing state of affairs**.

Definition of reserve land:

Cl. 6 of LA: “Reserve land” includes land under various legislation such as the Forest Ordinance, National Parks Ord., Ngorongoro Conservation Area Ord., Wildlife Conservation Act, 1994, etc. This means some 58 million acres or 25% of the country area is within “reserved lands”. To this may be added any area of land which may be declared by the Minister to be hazardous land.

This definition gives rise to three problems:

FIRST – the bill recognises that customary land rights may exist on reserved land but the administration and management of “reserved land” is directly under the Commissioner. This means that customary landholders on reserved lands have no right to participate in the administration of land.

SECOND – the power of a public authority to regulate land in reserved land is not restricted. The issue here is at what point the regulatory power ceases and becomes expropriatory. (see Shivji & Kapinga: *Maasai Right in NCAA).*

THIRD – the Commissioner has powers to grant rights of occupancy on reserved land (cl. 25(3)). He only has to consult the public authority in charge but the final decision is his. This means (1) that customary owners are not even consulted and (2) the Commissioner can grant land to any one on reserve land (regardless of customary right owners’ interests except perhaps compensation) without having to go through the procedures of “transferring land”.

Comment: **In short: (a) the communities living in and around reserved land have no say or participate in decision-making regarding reserved land. It is the exclusive domain of the Commissioner. And (b) customary land rights on reserved land have very little security.**

This is the situation at present and has given rise to many disputes and grievances (see vol. 2 of the Land Commission report). The bill does not help to resolve this problem.

II. Alienation of land

1) Under the bills, alienation of village land to non-citizens can only be done by the President by effecting transfer of village land to general land under cl. 4 for public interest.

Note: Public interest includes “investments of national interest” – a vague and wide term opening to abuse.

Representation to be made to the Village Council or the Commissioner – how feasible is this in practice?

Less than 100 acres, village council has to approve;

101- 500: village assembly has to approve.

More than 500, Committee of or National Assembly has to approve. Why Committee?

Not quite clear what happens if the approval is not granted, i.e. whether the President can still proceed with the transfer.

2) Alienation of village land to non-village organisations possible. Non-village organisation can be granted certificate of customary right of occupancy (cl. 22)

A non-village organisation – if a corporate body, majority shareholders must be citizens. By manipulation of shareholding possible for non-citizens to get effectively a certificate of customary right. But perhaps more likely non-village organisation – a joint venture of citizens from outside the village with foreigners.

These provisions are basically meant to facilitate alienation of village land to "outsiders" to the village.

3) A non-villager or organisation can also get a *derivative right* from a villager and the parties may stipulate that customary law shall not apply to such a right. Thus customary land may effectively be removed from the domain of customary law.

III. Titling of village land

1) It appears there are two types of certificates of customary title – *granted* and deemed. Provisions relate largely to granted type. **Issue: What happens to deemed? Note that there is no provision for an automatic registration of existing customary rights of villagers except through the process of adjudication.**

2) Three types of land adjudication: spot, village and central: Closer analysis reveals that the procedure involved etc. is to facilitate, largely, registration the land of richer members of the village, and or through them, (and through the village council in case of unallocated land) alienation to outsiders. Cl. 48 etc.

3) The Commissioner and the District Council has very strong ultimate powers of controlling adjudication. The Commissioner can, for example, stop village adjudication and impose central adjudication. District Council, for example, can require the village council to carry out spot adjudication even where the village assembly rejects it, cl. 49(6) [p.262]

***Comment:* In short: the adjudication process seems to be the only one through which existing customary rights can be granted certificates. This process is practically cumbersome. Villagers do not have a decisive role. Although village adjudication is supposedly to be controlled by the village council, the Commissioner or the District Council can impose central adjudication under their control. Besides lack of ultimate power of the villagers in this process, how practical is it to title millions of customary rights in thousands of villages through the process of village adjudication as described in these provisions? It seems we are heading for the same problems that Kenya has faced so far as adjudication is concerned. In practice, spot adjudication initiated by outsiders through strong members of the village is likely to be the rule. *Result*: the situation is no better than what it is now where stronger members of the village or outsiders get village lands surveyed and obtain titles or offers of right of occupancy on village land. The only difference now is that they can get certificates of customary title through the process of (for example spot) adjudication.**

IV. Management of village land.

1. Certificate of village land does not vest any land in the village. It only gives the village council right to manage land. Land continues to be vested in the President. Thus the certificate of village land has no greater significance, so far as village land is concerned, than the existing certificate of village registration under the Local Government (District Authorities) Act, 1982. [see cls. 8]

2. Village assembly has only consultative role; no power of ultimate decision-making in the management of village land.
3. Commissioner has ultimate powers of management. The Minister through the Commissioner can remove the village council from managing village land and place it under the Commissioner, cl. 8(8)]
4. Thus the village council is not accountable to the village assembly but to the Commissioner. The village assembly, if it has any complaint against a village council, has to make such complaint to the Minister.

***Comment**: In short: (1) the most representative/democratic organ of the village, the village assembly, is made consultative. (2) the executive organ of the village, the village council, has greater powers. (3) the village council is ultimately accountable to the Minister and the Commissioner (bypassing even the district council) rather than its village assembly. How is this different from the existing situation where village councils have proved a failure in protecting the land interests of villagers; where complaints to the executive higher organs of the government leads to enormous delays and abuse, etc.?*

How practical it is to place ultimate powers of management of village land in the Commissioner? This is a recipe for enormous bureaucratic machinery, delays and abuse.

V. Dispute settlement:

The dispute settlement machinery is not clearly spelt out. In any case, villagers have little role in this. Resolution of many important disputes (foe example, boundary disputes) are still placed in the executive arm of the state (Minister or Commissioner) rather than the judicial arm. Thus rural masses continue to be denied the benefits of the principle of separation of power!

The village level body – Elders Council – has no mandatory jurisdiction over land disputes. Only power to mediate. Result: dispute settlement machinery provided in the bills is no improvement over the existing situation.

VI. Validation of villagisation

The VLA validates village allocations done during villagisation but without this being entrenched in the constitution, it is doubtful if this validation can survive a constitutional challenge in courts. The other most important omission is that there is nothing in the bills to address and redress the abuses against former customary owners committed during villagisation. Thus the problems arising from villagisation in such areas as Mbulu, Karatu, Babati, etc. have been ignored.

Conclusion

The most striking feature of the two bills is the enormous powers over the ownership, control and management of village land placed in the hands of the Ministry, and through the Ministry, the Commissioner. The Commissioner has even greater powers over reserved and general land. The role of more elective bodies, like the local authorities, and more representative and open bodies, like the village assembly, has been virtually done away. Village council manages village land more as an agent of the Commissioner rather than as an organ of the village accountable to the village assembly.

Thus the enunciation of fundamental principles of land policy that land management should be more participatory and that there should be greater devolution of power have been seriously undermined. Land administration is now firmly placed under the Executive arm of the government. Even the role of the national parliament over land is minimal. Such important matters as placing ceiling over land ownership is within the power and discretion of the Minister without consultation of the parliament at national level, or village assembly at village level.

Th least that could have been done was to delink, at least village land, from the executive arm of the state by vesting it in village assemblies.