

# **THE LAND ACTS 1999: A CAUSE FOR CELEBRATION OR A CELEBRATION OF A CAUSE?**

By

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## **Introduction**

The Land Act, 1999 and the Village Land Act, 1999 (the Land Acts, 1999) have been passed by the National Assembly with great fanfare, celebration and ululation. Members of the public, particularly those in the villages, may not know what is it that our honourable members of parliament were celebrating until they see the fruits of the new law in practice. But they do know their land problems. Over the last fifteen or so years, these problems have become part of public discourse.

In January 1991 the then President of the Republic appointed a Commission of Inquiry into Land Matters, perhaps the first of its kind since independence. The Commission was mandated to listen to the grievances of the people in relation to land and make recommendations on a new land policy and tenure.

The Commission visited all the twenty regions of Mainland Tanzania and all districts except two. It held some 277 public meetings in 145 villages and 132 urban centres. The total attendance at the meetings was estimated to be around 83,000, comprising 58,000 men and 25,000 women. Over 3,000 persons submitted their complaints and opinions in public meetings while some 800 sent written complaints. All told, the commissioners spent some 300 working days on regional tours. The transcript of the evidence collected by the Commission runs into some 4,000 pages.

The final report was in two volumes. The first volume deals with land policy and land tenure structure while volume 2 has 40 case studies of major land disputes all over the country and a summary of some 800 letters of complaints. Both volumes were published by the Ministry of Lands, Housing and Urban Development in co-operation with the Scandinavian Institute of Africa Studies. Volume I is available. But some 300 copies of volume 2 produced at the same time are sitting in the Ministry and have never been released for public circulation.

Since the Commission's report there has been considerable public debate on the land question in the country. In June 1995, the Ministry of Lands published the National Land Policy, which did not come into public domain until much later (see *Change*, for discussion of the Policy). The policy apparently was the basis of the bills, which were drafted by a consultant hired from Britain. Both the National Land Policy and the bills ignored the major recommendations of the Land Commission while taking in details in an ad hoc fashion.

The question which we now need to pose is whether the new Acts address the problems of land raised by the people before the Commission and elsewhere. In this paper, I can only touch on a few major issues and offer my views on whether, and to what extent, the Acts address the fundamental problems of the large majority of landusers, namely, peasant and pastoral communities. I have no doubt that given the centrality of land in our lives and economy, the land issue is not going to go away with the new Acts. The debate on land will continue, as it should.

I will first very briefly summarise the main features of the two Acts. I will then group under seven heads the main problems raised by the people and try to assess the way the Acts address these. Finally, I will in passing refer to the “virtues” and benefits of the new acts as presented by politicians and the mainstream press, and, which apparently was the cause of celebration in Dodoma last week.

My presentation is based on the published bills, which were sent to parliament. I understand that the Acts passed have undergone some changes. I have seen the changes proposed by the Ministry of Lands at the eleventh hour. I understand some more changes were made on the floor of the National Assembly. It will be some time before we know these latter changes. I have of course not taken these into account but the fundamentals of the Acts, as I have learnt from different quarters, remain unchanged. And I am interested in the fundamentals as, I am sure, you too are.

## **The Acts in a nutshell**

As we know there are two Acts, the Land Act and the Village Land Act. There is no matter of principle involved in the decision to have two instead of one Act. As a matter of fact, the original proposal for the bill drafted by the consultant was one bill. This ran into nearly 300 sections. Apparently, therefore, the decision was made to lift the part of village land and make it a separate Act.

The following salient features of the Acts may be noted.

### **1. Fundamental Principles of Land Policy**

Both Acts, right at the front, enumerate a number of what are called ‘fundamental principles of land policy’. Most of these are unobjectionable. I refer to some of these in the course of this paper. What should be kept in mind, though, is that this provision is declaratory. Whether the hard provisions of the law actually translate the principles into a binding legal and institutional framework is another matter and has to be investigated and analysed, not assumed. The test of the pudding is in its eating, as they say.

### **2. Public Land owned by the State**

The Acts confirm that all lands in Mainland Tanzania “shall continue to be public land and remain vested in the President as trustee for and on behalf of all citizens of Tanzania.” (Cl. 4(1)) Thus the Acts explicitly continue the fundamental colonial tenet of land tenure of merging property with sovereignty, which was the cornerstone of the land tenure system established by the Land Ordinance of 1923.

### **3. Right of Occupancy**

The Acts also provide for the use and occupation of land through the system of right of occupancy as was the case under the Land Ordinance. The state as the ultimate owner of land grants rights of occupancy (the so-called granted rights of occupancy) and tolerates customary occupation and use of land (the so-called deemed rights of occupancy). The Acts go further and place customary tenure on the same level as granted rights of occupancy. We would need further analysis, which time does not permit, to assess as to what this means in practice.

### **4. Classification of Land**

For the purposes of management only, all public land is categorised under three heads: General Land, Reserved Land and Village Land. It must be emphasised that this is not a classification of tenure.

### **5. Land Administration**

As the ultimate owner of all land, the President, in his **capacity as the head of the executive**, remains the repository of the radical title. He then delegates his powers to the ministry officials to administer and manage land in all the three categories. The central office in the administration of land is the Commissioner for Lands. His role is described in the Acts as both that of a professional as well as an administrator.

General land can be said to be directly under the Commissioner. Reserved lands come under statutory or other bodies set up with powers over these lands. But the commissioner has ultimate powers of allocation on reserved lands as well. Village land comes under the administration of village council. For all intents and purposes the village council acts as an agent of the Commissioner in administering village land, albeit under there are certain constraints requiring the Commissioner to consult village bodies.

### **6. Land Allocation**

Powers of allocating land on general land and even reserved lands (for example, granting rights of occupancy) are given to the Commissioner for lands. No local government authority has any powers of allocating land unless the same is delegated to it by the Commissioner. The Commissioner allocates land with the advice of a Land Allocations Committee. The composition, tenure etc. of the members of the Land Allocations Committee will be stipulated by the Minister for Lands through regulations. The technical procedure of applying for and eventually getting a title is spelt out in great detail in the Acts.

**Thus, as has always been the case, the Acts now entrench in law what was the practice. Which is to say that the administration, management and allocation of land are placed squarely in the Executive arm of the Central Government under a centralised bureaucracy.**

### **7. Village Adjudication and Titling**

The acts envisage issuing of certificates of village land to village councils. These are not certificates of title or ownership. They are like the existing certificates of village registration, which confirm the management power of the village council over village land.

Villagers in the villages, it seems, will be issued with certificate of customary right of occupancy. But this is not automatic. A process of adjudication and titling is envisaged. Three

types of village adjudication are provided for. These are called spot adjudication, village adjudication and central adjudication. Time does not allow going into details. Suffice it to say that the process of adjudication envisaged in the Village Land Act is a top-down process, bureaucratically managed and involving considerable outlay of resources. It is certainly not a process, which can be managed at the village level and, therefore, it is unlikely that the number of ordinary villagers will be able to obtain certificates in the reasonable future.

The village adjudication is likely to be used by outsiders and or richer and powerful members of the village community to get certificates with the motive of alienating land to outsiders, either directly, or indirectly through creating derivative rights.

Next I turn to some of the major land problems of ordinary villagers and other land users and see how the Acts have responded to them.

## **Land Problems**

### **1. Problems of State Ownership and Public Administration of Land**

Vesting of the radical title in the President is the most fundamental question, which remains unaddressed. This is a colonial fiction by which the conqueror expropriated the property of the conquered. The colonial state declared all lands 'public lands' vested in the Governor. After independence, we replaced the 'Governor' with the 'President'. Under the Acts, we call the President a 'trustee' of all lands. In essence, there is no difference whether the property/land owner is a despotic colonial Governor or an elected President or a fatherly trustee.

A political sovereign has no business to own land. The Government must of course regulate the ownership, use and distribution of land. But regulatory powers can be exercised without vesting of the radical title in the state.

Incidentally, the notion of 'public lands' is not '*ardhi ya umma*' as politicians are fond of translating. 'Public lands' in colonial parlance and post-colonial practice simply means that the land is under the control and management of 'public administration', that is to say, the central state bureaucracy. Centralised state administration of land has given rise to enormous problems in land management.

First, it was this land tenure system which enabled the colonial state to alienate land with impunity. After independence, the system allowed the state to meddle with land and carry out its experiments like villagisation without the authority of law. Land problems resulting from that process are still haunting us.

Second, the administration of land by the central bureaucracy, as if they were owners, has thrown up all the problems associated with corruption, nepotism, unconscionable allocations etc. about which people have complained all over the country. Linking land to the executive has meant that it is fraught with uncertainty. Changes in the structures of the government have immediate and adverse effect on the administration of land as happened with the decentralisation experiment of 1972 and reintroduction of local government ten years later. It wreaked havoc in the administration of land.

Third, genuine and meaningful participation of landusers becomes virtually impossible when land is administered from the top. Thus one of the declared fundamental principles of land policy to involve people in the administration of land remains what it is – a declaration without substance.

The best managers of land are those who own it and use it. Let people be given back their land. Let land be vested in their own organs such as village assemblies – which would truly mean *ardhi ya umma* - and let the people enjoy full rights of use, control and management over their lands. Public administration should do what it is meant to do: advise and give technical assistance to the people as “obedient servants”, not control, manage and lord over people’s lands.

## **2. Villagisation**

Problems of land tenure arising from villagisation have two limbs. One, the fate and security in law of those who were resettled and allocated land during villagisation. Two, the grievances of those whose land was taken away arbitrarily and without any recompense. It is the latter group who have been going to courts, winning cases and evicting current occupiers in their hundreds giving rise to a near violent situation in such places as Karatu, Hanang, Babati, etc.

The Acts try to validate (legalise) the allocations during villagisation. But so long as it is not entrenched in the Constitution, the validation can be challenged in courts on ground of unconstitutionality. As for the second limb, the Acts are totally silent. Behaving ostrich-like and not addressing the problem of abuses committed during villagisation will not make the problem go away.

## **3. Land-Grabbing**

There is the problem of large-scale land alienation (or land grabbing) done during the 1980s and 1990s, which the villagers have never accepted. This problem is all over the country but particularly acute in the Arusha region in such places like Lolkisale, Monduli, Simanjiro, Kiteto, etc. The 381,000 acres alienated to Steyn in 1979 immediately come to mind. There is also the case of Tanganyika Cattle Company, which was allocated some 25,000 acres in Kiteto district. More examples are given in volume 2 of the Land Commission’s report, including examples of dubious allocations of large tracts of village land to political leaders and other influential non-villagers. Villagers have never accepted these alienation.

The Acts do not address these problems and how to resolve them. At best, it appears, the Acts confirm these allocations to what the Village Land Act calls non-village organisations. To add salt to the wound, the Act takes away the land so allocated from the management and administration of the village council and places it directly under the Commissioner for Lands.

## **4. Village titling**

The other set of problems has to do with village titling. Sometime in the middle of 1980s, as a result of CCM directive, the Ministry of Lands embarked on surveying, registering and titling of village land. Although the original intention of CCM under Mwalimu was perhaps to protect village land, the project itself was flawed. First, it was unpractical to survey and register some 8,500 villages. Second, the Ministry planners took the opportunity to circumscribe the boundaries of village land so as to merge village land into non-village land under their direct control. Third, the process gave rise to many boundary problems, which to

this day remain unresolved. Fourth, granting rights of occupancy for 99 years to village councils, which is what was being done, amounted to making double allocation. In effect, customary rights of villagers were being expropriated through the back door.

Fifth, no one had given thought as to what kind of rights would the villagers hold from the village council's main title.

The Land Commission recommended that the whole project was misconceived and should be abandoned. Eventually, it seems, it was abandoned but meanwhile some 10 per cent of villages have been granted titles. The Land Commission had made recommendations on how to convert this to titles under the new tenure system recommended by it. The Land Acts have made no transitional or conversion provisions. What will happen to the titles vested in village councils once the new Acts are brought into force?

As already observed, the system of adjudication, titling and granting of certificates of customary rights stipulated in the Village Land Act is unpractical. It is likely to result in a chaotic situation at best, and loss of land rights of indigenous people, particularly weaker members of the village community, at worse. That is the lesson, which has to be learnt from the Kenyan experience, which embarked on a similar exercise some 40 years ago.

### **5. Dispute Settlement**

One of the common grievances of villagers is that there is no known, efficient and legitimate process of settling their land disputes. They wanted machinery which would be accessible, participatory and in which they would have faith. The Acts acknowledge these criteria in their Fundamental Principles. But the Acts go on to provide for dispute-settlement machinery in two sections (now one section), which make no practical, political or legal sense.

Mediation councils, now rechristened "village land councils" under the changes made by the Ministry, provided in the Land Act at the village level have no mandatory jurisdiction. The lowest rung seems to be the Ward Tribunals. Ward Tribunals were established in 1986 and have not worked in many regions. The Acts make mention of the "District Land and Housing Tribunal". It is not clear what this refers to. For housing tribunals are established to regulate relations between landlords and tenants. They are hardly suited to resolve problems of land tenure and land use.

As for boundary disputes, one of the core land disputes in rural areas, the Minister has sole powers to resolve them through mediation and ad hoc commissions of inquiry. Among other things, the rural folks are thus denied the benefit of separation of power principle in resolving their disputes.

### **7. Village boundary**

There are numerous boundary disputes in rural areas. Boundaries between villages, between villages and reserved lands and between villages and what is now called general land. While the definition of reserved land in the Acts is fairly clear, that of general land is quite contentious. The definition of 'general land' in the Acts (assuming that this did not change at the reading stage) is highly suspicious. The Land Act says 'general land' is all land, which is not reserved land and village land "*including unoccupied and unused village land*". These last words do not appear in the definition of general land given in the Village Land Act. Besides there being obvious conflict between the two Acts, the inclusion of those words in the Land

Act cannot be innocent. It would be one of the ways, which has often been used by planners in the past, to expropriate village land under the guise that it is unused or unoccupied.

That brings us to the more contentious issue as to who sets the boundaries of village land. In the past, ministry planners have insisted on doing so thereby depriving villagers of their traditional lands under the guise that they are unused, unoccupied and not wanted. The rationale of course was to bring those lands under their control. It is not clear from the Acts how this thorny issue will be resolved.

### **8. Gender, youth and Children**

This is one of the central issues and problematic areas. The Land Commission received many complaints from women in relation to land. They related to mainly; (1) disposal of land by men without consultation with and regard to the interests of their female spouses and children; (2) lack of participation of women in the distribution of the fruits of their labour on land; (3) lack of rights of women to inherit land on the death of their male spouses; and (4) lack of rights in the distribution of land following divorce. The Land Commission addressed these problems by providing, among other things, (a) entrenched representation of women on village decision-making bodies and (b) by recommending that the law should make it mandatory that certificates of customary rights should carry the names of both spouses.

The Acts do not have any provision relating to (b) but provide for women participation on village land councils and national advisory board as well as make numerous declaratory statements as to the equality of men and women. While the latter has some educational value, it does not add anything new so far as the law is concerned since the Constitution provides for equality and the Courts have been striking down gender discriminatory statutory or customary laws and practices. As for representation, women have virtually equal representation with men under the Acts but **on bodies, which have very little power**. This is a classical sop of ruling classes: give representation without power. **Is this that was being celebrated in Dodoma as a great victory for gender equality?**

### **The “virtues” of the Acts**

Three issues have been highlighted and widely sung about by politicians and mainstream media as the virtues of the Land Acts. One, the proclamation of gender equality in relation to land; two, that foreigners cannot and will not be able to own land and, three, that the Acts recognise that land has value and that the Acts will facilitate markets in land.

It is true that the Land Acts are profuse in proclaiming **gender equality**. These are mostly declarations of intent with little meaning in the hard provisions of law. **Equality with men is necessary but not sufficient to ensure equitable access to land**. If, for example, the land rights of village communities themselves, including men and women, are threatened, then the equality of men and women means little. It will be equality in landlessness! The law must foremost provide security of tenure to the communities as against other state and non-state powerful intruders.

Some gender NGOs recognised this, and to the last moment, stood against driving a wedge between men and women, which was a clever ploy of vested interests, both men and women. Other gender NGOs, innocently or otherwise, allowed them to be so manipulated and ended up, in my view, celebrating a hollow victory with their manipulators.

As to the issue of ownership of land by foreigners, it must be pointed out that the Acts do not put a blanket ban on this. The Investment Promotion Centre can grant foreigners land up to 99 years under rights of occupancy. (The last minute changes introduced by the Ministry in this respect have further added to the confusion. It seems to suggest that IPC will be allocated land – under what tenure? – and then IPC in turn will grant derivative rights – derived from what title?- to investors.) The President can grant land to a foreigner on general or even reserved land for public interest whose definition includes in the interest of investment. Secondly, existing foreign ownership of land on village lands has been confirmed, including some dubious allocations of hundreds of thousands of acres of land. My quick reading of the bills suggests that foreigners can also get *derivative interests* (for example, a long term lease) from the titles of citizens – both granted as well as customary. (However, this requires a closer study of the final form of the Acts.)

The third “virtue” is the proclamation that land has value. This is a complex question of political economy. Put in simple terms, when we say land (referring to bare land) has value, it simply means that the land owner who has monopolised access to a particular piece of earth has a right to, and can charge *ground rent*. Right to ground rent has little to do with land use or occupation. By declaring land to be public land vested in the state, the state became the overall landlord and, therefore, with a sole right to ground rent. But unlike a private owner, the state can extract both direct and indirect, forms of ground rent depending on its overall policy. So, while a private person may be compensated only for development on land (i.e. unexhausted improvements), the state may charge premium for bare land as well. The question then arises, in this context what is the meaning of land having value and a land market. If it is to refer to the state selling land, I see no objection provided it is applied in a discriminatory fashion depending on national policy. The Acts have no such conception. If it means private persons having customary or granted right of occupancy are able and permitted to sell bare land, the whole thing would run counter to the logic and policy of the land tenure system based on state ownership.

What is more, it is precisely this type of land markets, which is likely to be abused resulting in, among other things, poorer land occupiers in villages losing their lands. The most affected in such a case are usually pastoral communities and women and children.

Thus the blanket song on recognising that land has value is meaningless unless it is contextualised within the larger question of land tenure and national policy.

In our context there are two groups who see themselves benefiting from the blanket policy on land value. The first group are the state bureaucrats whose powers of land allocation and administration, which they have guarded so zealously in the new Acts, allows them to extract “rents” – i.e. kick-backs and commissions. The second group is the politically and economically powerful citizens who have developed the ambition and appetite for getting rich quickly through joint ventures. Their monopoly of land ownership **as citizens**, they believe, would allow them to use land as equity in joint ventures or enable them simply to become a kind of absentee landlords getting rents under the guise of joint ventures as happens in Dubai.

**Was this then the cause of celebration in Dodoma?**

Whatever the case, in my view, the whole issue of land markets and land values has been either totally misunderstood or clearly manipulated with ulterior motives. In either case, it is



difficult to see how the large majority of land users in this country, that is peasants, pastoralists and middle level rural entrepreneurs, stand to benefit. For them, land indeed has value. The land value that they treasure most is to be able to subsist on land and, hopefully, produce surplus for the domestic market so as to get their other needs. This is a very different concept of “land has value” than the one in the dominant song, which dreams of using land values as equity in the so-called real or apparent joint ventures with foreigners!

## **Conclusion**

The Acts have passed. They still need to be brought into force and implemented. The Land Question, however, remains as burning as ever. The great value of the debate and NGO activism behind the Land Acts lies not so much in getting the law that they advocated but rather in bringing the land question on the public agenda. In this, I believe, for the first time civil society has scored a reasonable victory. It is a victory of the Cause and a legitimate cause for celebration. The politicians did not have a field day. At every step, they had to justify and answer even if most of the time they did not convince anybody, not even themselves. But I am sure they have learnt a good lesson in good governance, to use the jargon. The activists of the civil society have also learnt a lesson on “how to pressurise your rulers without being manipulated”.

In this sense, therefore, there is a cause for celebration. We would be justified in celebrating even more if the Land Debate and the Land Lobby were to mark the beginning of a tradition of civil society activism giving a voice to the voiceless, replace hopelessness with vision and spark off an insurrection of initiative and ideas in place of a culture of silence, compliance despondency, mimicry and apism.