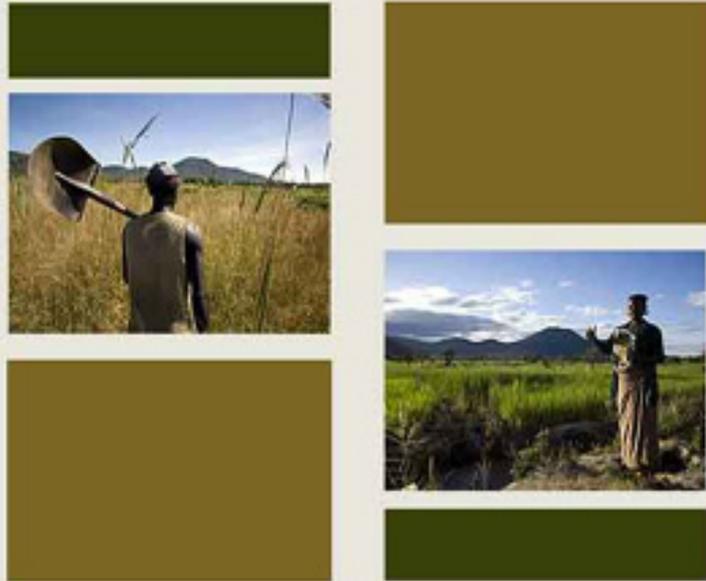


FOCUS ON LAND IN AFRICA BRIEF

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Tanzania

Lesson 2: Village Land

INTRODUCTION

In 1999, Tanzania enacted the Village Land Act and the Land Act which recognize customary tenure and empower village governments to manage Village Land. These laws are a marked departure from the Land Ordinance of 1923, yet many villagers and communities still do not have security in their customary land. The laws have not been effectively implemented and enforced, leaving some community advocates to call for reform. This lesson looks at the history of customary land rights and examines the current conditions regarding Village Land and customary tenure arrangements.

CUSTOMARY LAND TENURE HISTORY

Most land in Tanzania is held under customary tenure arrangements. Yet under colonial rule and in the first nearly four decades of independence—a total period of more than a century—all land was vested in the government. In 1999, the Land Act and the Village Land Act were passed, recognizing land held under customary tenure arrangement and legally empowering village governments to manage Village Land. While a welcome relief from the past, these laws have several shortcomings. Perhaps most problematic, they are not effectively implemented or enforced. As a result, the Acts have done little to improve the security of customary land for most poor rural populations.

In the late 19th century, Imperial Germany conquered the regions that are now Rwanda, Burundi and Tanzania (excluding Zanzibar) and incorporated them into German East Africa. Various Anglo-German agreements delineated the British and German spheres of influence in the interior of East Africa. The German East Africa Company was established at the start of German colonization to run the new colony, but in 1891, the German government took over direct administration of the territory and appointed a governor with headquarters at Dar es Salaam.

The German authorities promulgated a series of land decrees. The Imperial Decree of 26 November 1895 converted all territorial lands into “Crown Lands” and vested them in the German Empire. Germany assumed that all lands to which private ownership could not be established by documentary evidence were ownerless. Communities could prove ownership through occupation and use, but land that was not used continuously was considered ownerless. As a result, 1.3 million hectares of land were alienated from communities. Thereafter, the German authorities issued freehold grants to settlers along the coast and in the northern highlands.

With the defeat of Germany in World War I, the Supreme Council of the League of Nations mandated the United Kingdom in 1920 to administer Tanzania. Under the League of Nations Mandate, British jurisdiction over Tanzania came with limited authority over land. The Mandate required the British to protect the land rights of the indigenous inhabitants of the territory; no land occupied by an indigene could be transferred to a non-indigene without the prior consent of the public authorities.

The British government passed the Land Ordinance of 1923, which governed Tanzanian land matters for most of the country’s modern history. By the Land Ordinance, all lands, whether occupied or unoccupied, were declared to be public lands “under the control and subject to the disposition of the Governor.” It required, however, that public lands “be held and administered for the use and common benefit, direct or indirect, of the natives of the Territory” and that the Governor “have regard to the native laws and customs existing in the district in which such land is situated.”

The Land Ordinance conferred significant authorities over land to the colonial Governor and effectively centralized land administration. By the Ordinance, “no title to the occupation and use of any such lands shall be valid without the consent of the Governor.” The Governor was also given powers to grant the right of occupancy (the right to occupy and use land for a period of up to 99 years) to natives and non-natives, and to demand a rental for the use of any public lands granted to any native or non-native. Though all lands were public lands, the Governor acted as if the British government was the trustee and beneficiary, and he disposed of land virtually at will.

In 1928, the Land Ordinance was amended to formally recognize customary law. The right of occupancy was redefined to include, “the title of a native or a native community lawfully using or occupying land in accordance with the native law and custom” (deemed right of occupancy). Despite this recognition, a dualistic system of land governance evolved, whereby rights granted by the state were functionally superior to customary rights in land. Judicial decisions clarified that the two did not enjoy the same status in courts of law. Colonial administrators believed that customary land tenure was merely a stage in the historical evolution of societies and “would wither away as Western civilization became progressively dominant in African social relations.” Individualized freehold tenure was considered a good replacement for customary tenure.

POST-COLONIAL LAND LAW

Following Tanzania’s independence in 1961, the post-colonial government accepted and used many land concepts developed by the colonial authorities without major alterations. Rather than restructure land relations to better recognize the needs of rural communities and protect their customary land, the government re-entrenched and, in some cases, expanded the scope of colonial land policy and law. For example, the independent government simply replaced the word “Governor” with “President” in the 1923 Land Ordinance and inherited the provisions that centralized authority in the executive branch.

Julius K. Nyerere, Tanzania’s first president, ushered in a series of laws that expanded the domain of “public land” and abolished freehold tenure. The Freehold Titles (Conversion) and Government Leases Act of 1963 converted freehold titles (covering less than one percent of land) to 99-year leaseholds with development conditions. The Rights of Occupancy (Development Conditions) Act of 1963 obligated lessees to pay rent. The Rural Farmland (Acquisition and Regrant) Act of 1965 empowered the government to acquire undeveloped private land and transfer it to people who would occupy and develop it (in practice, land was transferred to state corporations,



parastatals and cooperatives). The Customary Leaseholds (Enfranchisement) Act of 1968 abolished feudal land tenure systems (e.g., Nyarubanja) that existed in Kagera, West Lake Region. In addition, the Government Leaseholds (Conversion to Rights of Occupancy) Act of 1969 converted leaseholds to rights of occupancy under government leaseholds.

From 1967 to 1973, the government implemented a villagization program (Ujamaa) which involved the relocation of about 80% of the rural population to 5,528 villages. The program aimed to create the structures for the establishment of large collective farms and the modernization of agriculture. The government did not create a new tenure regime, and local authorities were not legally vested with the powers to govern land. Often villages were allocated land in public meetings without following any formal procedures. Customary tenure systems were generally ignored and large portions of customary land were alienated. Disputes over existing land rights were disregarded. In 1992, the Village Act legalized ownership of the land granted to people by the government during the villagization program.

In the mid-1980s, the government ushered in new policies to liberalize the economy and promote foreign investment. This led to a rapid increase in land acquisitions by local, national and foreign investors. Progressively centralized land administration, increasingly inefficient state bureaucracy and past administrative measures had created widespread confusion with regards to land tenure patterns. In the rural areas, the confusion led to insecure land tenure and a justified fear that alienation of village land would result in landlessness. This, in turn, fuelled widespread rural discontent with land tenure policy and administration.

In January 1991, the government established the Presidential Commission of Enquiry into Land Matters to hear complaints concerning land, review land policies, assess land institutions and recommend changes. The Commission, which visited every region and all but two districts in Mainland Tanzania, presented its report to the President in 1993. Thereafter, the government prepared the country's first ever National Land Policy (1995/1997). The policy was developed with limited public participation and did not incorporate many Commission recommendations, including those regarding land decentralization and democratization.

The National Land Policy led to the enactment of new land legislation—the Land Act of 1999 and the Village Land Act of 1999—which came into force on 1 May 2001. These two Acts provide the overall framework for the exercise and administration of land rights. In some areas, they represent a substantial reform of the prior tenure framework that had been in existence since the Land Ordinance of 1923. For example, by these laws, all Tanzanians above 18 years of age have rights to acquire and own land; all existing property rights are recognized and protected, including customary titles; and

land should be used productively and such uses should comply with the principles of sustainable development.

On other matters, however, the land laws retain the basic features and characteristics of the old system. Consistent with the old system, the Land Act places ultimate land ownership—“radical title”—in the president as a trustee for all Tanzanians, making land tenure a matter of usufruct rights as defined by various leaseholds. It retains rights of occupancy, the imposition of development conditions, land rent, and detailed bureaucratic control of all aspects of land use and ownership. Under the Land Act, only the Ministry of Lands, through the Commissioner of Lands, has the authority to issue grants of occupancy. It also restricts non-nationals from acquiring land, except acquisitions connected to investments that have approval from the Tanzania Investment Corporation under the Tanzania Investment Act of 1997.

GENERAL RESERVED AND VILLAGE LAND

The two land laws establish three basic categories of land: General, Reserved and Village Land. The Land Act provides the legal framework for General Land and Reserved Land. Reserved Land denotes all land set aside for special purposes, including forest reserves, game parks, game reserves, land reserved for public utilities and highways, hazardous land and land designated under the Urban Planning Act, and Land Use Planning Act No. 7 of 2007. Reserved Land constitutes 28% of all lands in Tanzania.

General Land is defined differently under the two land laws. Under the Village Land Act, General Land is a “residual category”; it is any land which is not otherwise defined as Village Land or Reserved Land. In the Land Act, however, General Land is defined as, “all public land which is not reserved land or village land and includes unoccupied or unused village land.” The Act does not define “unoccupied or unused village land,” but all General Land is under the authority of the Commissioner of Lands in the Ministry of Lands, Housing and Human Settlements Development. This distinction is of particular importance for communities holding land held under customary tenure arrangements, and has created considerable confusion and conflict.

The Village Land Act, which became effective with the enactment of the Village Land Regulations of 2001, provides the legal framework for the administration of Village Land. Under this Act, Village Land is: a) all land within the boundaries of the more than 11,000 registered villages (established by the Local Government (District Authorities) Act of 1982), including land either originally described as the village area or so demarcated since then; b) land of a given village according to agreement between that village and its neighbors; and c) any land which villagers have been using or occupying for the past 12 years. Village Land constitutes nearly 70% of all lands in Tanzania. The Act provides that customary rights of

occupancy automatically apply to village lands in perpetuity.

By the Village Land Act (and the Local Government (District) Authorities Act of 1982), Village Land is under the managerial authority of a Village Council elected by a Village Assembly. A Village Council is the corporate entity of a registered village; the Village Assembly includes all residents of a village aged 18 years and above. The Village Council is accountable to the Village Assembly for land management decisions. By the Village Land Act, village government has the responsibility and authority to manage land, including issuing certificates of Customary Right of Occupancy within their area, and establishing and administering local registers of communal land rights. They must apply local customary law, provided it does not conflict with the prohibition of gender discrimination.

The Village Land Act establishes the procedures for a number of transactions involving Village Land, and the Village Land Regulations provide more than 50 forms which are to be used by villagers in the administration of their land. Among the most important for rural communities are the procedures for formally registering customary land rights at both the community and individual/household levels. These include the procedure for registering Village Land by obtaining a Certificate of Village Land and the procedure for obtaining a certificate of “Customary Right of Occupancy.”

Village Land is formally registered by obtaining a Certificate of Village Land, although the Village Land Act provides that villages without this certificate possess customary rights over land which falls within the definition of Village Land. The procedure for registering Village Land requires villagers to identify their borders. If the boundaries are in dispute, the government appoints a mediator and, if necessary, an inquiry to resolve the matter. When the boundaries are established, the Village Land is surveyed and demarcated. Thereafter, the Commissioner of Lands issues a Certificate of Village Land which formally empowers the Village Council to manage the land.

The process of issuing Certificates of Village Land to registered villages has been slow, although it is picking up in some parts of the country. For example, according to the Office of the Regional Commissioner for Arusha Region in the north, 129 villages had been presented with a Certificate of Village Land as of March 2010. This figure represents 43% of the 300 villages in the seven districts of Arusha Region. A total of 251 villages (84% of total villages) had been registered, and 259 villages (86%) had been officially surveyed.

There are five steps for a villager or non-villager to obtain a certificate of “Customary Right of Occupancy” to Village Land. These are: 1) the landowner submits the prescribed application for a certificate to the Village Council; 2) The Village Council reviews the application; 3) the Village Council issues a letter of offer which stipulates fees, development conditions, yearly rent and other conditions; 4) the landowner submits a written agreement to these conditions on a prescribed form; and 5) the Village Council issues a certificate of “Customary Right of Occupancy.” Provisions in the Village Land Act pertaining to these certificates provide rules for the sale or grant of “derivative rights;” breach of conditions, revocation and other matters.

VILLAGE LAND ACT CHALLENGES

On many customary land issues, the Village Land Act is a significant departure from the Land Ordinance of 1923. Many villagers and communities, however, still do not have security in their customary land. Though passed in 1999 and in force since 2001, the Act is to a large extent not properly or effectively implemented. The Act is complex, detailed and held in a technical language. There is a general lack of knowledge about the law and regulations (including the procedures and forms for various Village Land transactions) among local government officials and villagers. As a result, the Act has not substantively changed the way that most customary land in Tanzania is administered or governed.

The Village Land Act provides that a “customary right of occupancy is in every respect of equal status and effect to a granted right of occupancy.” The “dualistic” statutory-customary character of land rights that has prevailed since the colonial era, however, remains. Government officials do not recognize customary land rights as equal to statutory rights, and they do not respect the legal authorities of village government over Village Land. Other laws, such as the Forest Act of 2002 and the Wildlife Conservation Act of 2009, contain provisions that encroach on the powers of village governments. As a result, large swaths of Village Land have been alienated and put to various uses by the government without the consent of village authorities.

The government can legally acquire Village Land in various ways, including willing seller—willing buyer purchases and by compulsory land acquisition. Under the Village Land Act, the government also has the authority to transfer Village Land to General Land or Reserved Land.

For such transfers, the Minister of Lands, Housing and Human Settlements Development publishes in the Gazette the location and extent of the land, and a brief statement on the reasons for the transfer. A copy of the Gazette is sent to the Village Council, and the Village Council is given a minimum of 90 days before the transfer can take place. If the targeted land is less than 250 ha, the Village Council must submit its recommendations to the Village Assembly for approval or refusal. If the land is more than 250 ha, the Minister must consider and respond to all recommendations from the Village Assembly.

The relative ease by which the executive branch of government can appropriate Village Land is perhaps the most criticized aspect of the Village Land Act. The procedure for transferring Village Land to General Land does not provide a strong guarantee that most villagers will be informed of the government’s intent, nor does it give the village government the final say in whether the land may be transferred. As government efforts to promote private investment accelerate, communities and local advocates are concerned that the government will exercise this authority to acquire land for economic development purposes.

While villagers do not have the authority to veto the transfer of Village Land to General Land, the Village Land Act provides that Village Land may not be transferred “until the type, amount, method and timing of the payment of compensation has been agreed upon between...the village council and the Commissioner.” If an agreement cannot be reached, the matter is referred to the High Court for determination. Often the court provides a preliminary level of compensation and allows the transfer to take place. Lacking financial and human resources, however, few village governments are able to mount any legal challenge against the government.

Tanzania’s Village Land Act has the potential to provide villagers with security in their customary land, but the law has yet to be effectively implemented. Moreover, the Act contains some worrying provisions, including those that empower the government to transfer Village Land to General Land without seeking and obtaining village government approval. Community activists and local advocates have called for reforms. In November 2010, Dr. Anna Tibaijuka, a land tenure expert and a former Under-Secretary-General of the United Nations and Executive Director of the United Nations Human Settlements Programme (UN-HABITAT), was appointed as Minister of Lands, Housing and Human Settlements Development, providing optimism that these reforms may soon materialize.



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