Pastoral Land Rights in Tanzania

A Review

RINGO TENGA

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R.W. Tenga
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Introduction

This paper gives an overview of the status of Pastoral Land Rights in Tanzania.[1] Due to certain historical reasons the subject of land rights for pastoralists has received little attention. Regulatory mechanisms necessary to bring cohesion to the law have not operated comprehensively with regard to pastoral rights.

This paper attempts to draw on statutory materials and existing case law to construct a legal position that is applicable to pastoral land rights in Tanzania. To some extent, therefore, this paper is an extrapolation of what the law could be. To this extent, this paper is speculative.

The paper does not delve into details of customary laws with regard to particular land rights existing in pastoral communities. Anthropological and sociological studies appear undecided whether the pastoral mode is vanishing or whether, as Jacobs puts it, that mode is "a vibrant and productive way of life."[2] It is accepted in this paper that there is a definite movement towards transition in these societies, but with adaptation responding to changing circumstances.

An attempt will be made to deal with the changing aspects of customary rights. It will also be possible to explore the implications of official policy and the effect of statutory provisions. No legal positions may be extracted from case law. The Tanzanian Court of Appeal in the case of *Methuselah Paul Nyagaswa vs Christopher Mbote Nyirabu* (1985), per Mustafa J A, when confronted with an issue concerning the exact determination of customary rights in urban areas, skirted around the issue and opined:

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[1] This study was sponsored by the Interim Pastoral Committee established at the Arusha Workshop on Pastoral Land Tenure in East Africa, December, 1988. See *Pastoral Land Tenure in EA*, Report of a Workshop, Arusha, Tanzania, 1-3 Dec, 1988. Institute of Development Studies, University of Sussex, UK.

[2] See Mustafa, K. "The Pastoralist Question in Tanzania", 1982, paper presented at the History Department Seminar, UDSM; cf Jacobs, Alan H. "Pastoral Development in Tanzanian Maasailand", 7 *Rural Africana* 1-14 (1980); Rigby, *"Persistent Pastoralists: Nomadic Societies in Transition"*, London: Zed Books, 1985.

> ... the law in Tanzania on land and land tenure is still developing and certain areas are unclear and would have to await the necessary legislation.[3]

It may be ventured here that the question of pastoral land rights is also a grey area of the law.

The paper is divided in three parts: first, the status of land law in Tanzania; second, the case of Pastoral Rights and; third, the conclusion touching on Acquisition, Use and Transfer of Land Rights in statutory law as briefly as possible.

1 The State of Land Law

1.1 The Land Ordinance, Cap 113

The governing legislation in Tanzania on matters of land is a British statute of 1923 (*Land Ordinance*, Cap 113). This statute has undergone some secondary amendments. For example, the *Government Rents (Summary Recovery) Act*, 1965, Cap 579, the *Land Laws (Miscellaneous Amendments) Acts*, 1970, No 28 of 1970; the *Urban Authorities (Rating) Act*, 1983, No 2 of 1983, etc. However, the essential primary provisions remain as they were in 1923.

There are several definitive treatises on the *Land Ordinance Cap 113*, and it will be unnecessary to delve into details here.[4] Certain structures, however, of this statute ought to be outlined for discussion purposes.

The *Land Ordinance* declares all land in Tanzania to be "Public Land" (Section 3). The final control of all such land is vested in the President who is given power to administer the land for the use and common benefit, direct or indirect of the

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[3] Nyagaswa vs Nyirabu, C A, Civ App No 14 of 1985 (unreported). See further analysis in G M Fimbo "Planned Urban Development v Customary Law in Tanzania" May 1988, paper presented to the Commonwealth Association of Planners (CAP), Africa Regional Conference at ARDHI Institute, Dar es Salaam; and R W Tenga "Land Policy in Tanzania: An Appeal for Action", May 1988, paper presented to the *Commonwealth Association of Planners* (CAP), Africa Regional Conference at ARDHI Institute, Dar es Salaam.

[4] Fimbo, G M, "The Right of Occupancy in Tanzania: The Political Economy of an African Land Tenure System" 7(2) East African Law Review 121-156 (1974); *also* Fimbo, G M, "The State and the Peasantry in Tanzania: A Study of Agrarian Law and Administrative Institutions" 1977, Faculty of Law, Mimeographed, UDSM; and Fimbo, G M, "Land Socialism and the Law in Tanzania" in G Ruhumbika (ed) *Towards Ujamaa: Twenty Years of TANU Leadership*, (Nairobi, EALB, 1974) pp 230-274.

natives of Tanzania (s 4). The term "Native" is defined under Section 2 to mean:

> "Any person who is a citizen of the United Republic and who is not of a European or Asiatic origin or descent."

The President is enjoined under Section 5 to give due regard to native laws and customs existing in a given district whenever exercising his powers under the Ordinance. This is an important direction to the courts which has been largely ignored over the years, especially with regard to pastoral lands.

Under Section 6 the President may grant Rights of Occupancy. This kind of tenure is defined under Section 2 as follows.

> "Right of occupancy" means a title to the use and occupation of land and includes the title of a native or a native community lawfully using or occupying land in accordance with native law and custom.

The effect of this definition is to split the form of land tenure known as the Right of Occupancy in two: the Granted Right of Occupancy on one hand, and the Deemed Right of Occupancy on the other. Granted Right is that issued by the President and the Deemed Right is that held under Customary Law where the law deems customary landholders as lawful occupiers. Even the definition of who is the occupier or holder of this land right is explicit in this dichotomy. Section 2 defines the Occupier as follows:

> "Occupier" means the holder of a right of occupancy and includes a native or a native community lawfully using or occupying land in accordance with native law and custom.

The Land Ordinance and other supplementary statutes such as the Land *(Law of Property & Conveyancing) Ord*, Cap 114; the *Land Registration Ord*, Cap 334; the *Town and Country Planning Ord*, Cap 378; the *Land Acquisition Act*, 1967; and the *Limitation Act*, 1971 all give primary emphasis to the Granted Right of Occupancy. Very little is provided for the Deemed Right of Occupancy, which is the tenure for the majority of the inhabitants of Tanzania. It is important to consider additional details in relation to these two forms of Rights of Occupancy.

1.2 Granted Rights of Occupancy

The uniqueness of the Granted Right of Occupancy vis-a-vis the Lease has been discussed and determined in case law. See *Premehand Nathu & Co Ltd v The Land Officer* (1962), BA 730 (PO); EA 941 (CA) and also the decision in *Director of Lands and Mines v Sohan Singh* (1952), 1 *Tanganyika Law Reports*, 631.

Under Section 6 of the *Land Ordinance* the President may grant land for terms not exceeding 99 years. There is at present a proposal to empower the President to grant land for 999 years as long-term rights for Village Councils.[5] However, the proviso to Section 6(1) provides more particularly that:

> "Provided that before any such grant is made of any public land in an area over which a native authority has been established, such native authority shall be consulted."

The Government has interpreted this section as being non-mandatory (see Government Circular No 12 of 1953). The Customary Lands of the Meru Tribe were taken by the British colonial administration without consultation with the established Native Authority.[6] Today, it could be argued that the Tanzania Government is doing the same thing with regard to pastoral land by ignoring the mandatory provisions of the law.[7]

The President is allowed under Section 12 to authorise subordinate officers to grant Rights of Occupancy for short terms of less than five years. This authority has been given to District Land Officers by Government Notice No 266 of 1959.

Once a Right of Occupancy has been granted the President may impose, under Section 7(5) terms of contract between himself and the grantee provided such terms are not inconsistent with the provisions of the Ordinance. The President issues a certificate of Title under the terms of Section 9 which includes all terms and conditions which go with the Grant.

The power of issuing Certificates of Titles for long-term Rights of Occupancy has been given under Section 9(2) to the Commissioner of Lands, sometimes referred to as the Director of Land Development Services (DLDS). Once the Certificate is executed by both parties the Right of Occupancy is effectively conferred on the Grantee.

The type of Right of Occupancy granted may be distinguished on the basis of its period or on the basis of use. In terms of time there is the granted short-term Right of Occupancy on one

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[5] United Republic of Tanzania, *Agricultural Policy of Tanzania 1983*, Government Printer, Dar es Salaam.

[6] Japhet, Kirilo and Seaton, E, *The Meru Land Case* (Nairobi: EAPH, 1967)

[7] See *NAFCO vs Mulbadaw Village Council and Others*, Court of Appeal, Civil Appeal No 3 of 1980; see further treatment in Shivji, I G and Tenga R W "Ujama in Court: Report on an Acid Test for Peasant's Rights in Tanzania", *Special Report in the 'African Events' Magazine* [December, 1985] pp 18-20.

hand and the long-term Right of Occupancy on the other. Under Section 27 of the *Land Registration Ordinance*, Cap 334, all Rights of Occupancy above 5 years are to be compulsorily registered. Short-term Rights can only be registered where the Certificate contains an option whereby the occupier may require the President to grant him a further term or terms which together with the original term exceed five years. However, a grantee may opt to register a short-term Right of Occupancy under the *Registration of Documents Ordinance*, Cap 117. Here it is the document that is registered not the Right of landholding itself. Often the so-called *Letters of Offer of Rights of Occupancy* are registered under the *Registration of Documents Ordinance*.

Thus the long-term Right of Occupancy is granted under the *Land Ordinance* with a Certificate of Title executed by the DLDS on behalf of the President, whilst the short-term Right of Occupancy is executed by District Land Officers on behalf of the President under Section 12 of the *Land Ordinance*, Cap 113.

In terms of land use there are several types of Granted Rights of Occupancy. These include Agricultural, Pastoral, Mixed Agricultural and Pastoral, and that granted for Building Purposes (Residential, Commercial, Industrial, Service, Recreational, etc).

The first three types are distinguished under the *Land Regulations of 1948*. These Regulations provide general use conditions for Agricultural, Pastoral and Mixed Agricultural and Pastoral Rights of Occupancy. They replaced antiquated Regulations, namely, the *Land Regulations*, of 1926 which were mainly for Agricultural Rights of Occupancy and the *Land (Pastoral Purposes) Regulations* of 1927. The major problem with these was that they required the occupier to spend a specific sum of money on scheduled developments within a certain period of time. The occupier could choose any type of the scheduled improvement and may be over-invest in some triviality to meet scheduled requirement. The *Land Regulations* 1948 were enacted to avoid this problem, and tie down development to specific development conditions and not solely to the value of developments. By a Special Act the *Land Regulations* 1948 were made to apply to all Rights of Occupancy, even for those granted before 1948. See *Rights of Occupancy (Development Conditions) Act*, 1963.[8]

Under Section 10 of the *Land Ordinance* the President is empowered to revoke a Right of Occupancy either for "good cause" or for public interest. Good cause is defined to include:

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[8] For a detailed discussion of these Regulations see James, R W and Fimbo, M G, "*Customary Land Law of Tanzania: A Sourcebook*", Nairobi, EALB, 1973 Chapter XXIX, pp 635-668, entitled "Statutory Controls of Land Use".

(a) non-payment of rent, taxes, or other dues imposed upon the land;

(b) breach of the provisions of Section 14 of the *Land Ordinance*, which are concerned with compensation for unexhausted improvements;

(c) breach of any term or condition contained or to be implied in the certificate of occupancy in any contract made in accordance with Section 7 of the Ordinance. This includes therefore terms imposed by the *Land Regulations*, 1948;

(d) attempted alienation by a native in favour of a non-native contrary to Section 11 of *Land (Law of Property and Conveyancing) Ordinance*, Cap 114, and Section 8 of the *Land Ordinance*, Cap 113;

(e) breach of any regulations under the *Land Ordinance* relating to the transfer of or other dealings with rights of Occupancy or interests therein. This largely refers to consent provisions in the event of dispositions. Generally no disposition can be made without the consent of the President (see Regulation 3(1) *Land Regulations 1948*; and S 41 of the *Land Registration Ordinance*, Cap 334).

The phrase "good cause" in relation to the revocation of a Right of Occupancy has received judicial interpretation in the case of *Patman Garments Industries Ltd v Tanzania Manufacturers Ltd* (1981), in the Court of Appeal, per Mwakasendo J A. Good cause must be objectively determined and it is not a matter of the objective whims of government officials.[9]

In addition the President may revoke the Right of Occupancy under S 10(2) of the *Land Ordinance* where it is in his opinion in the public's interest so to do. This provision is, unlike S 10(1) of the *Land Ordinance*, a subjective one and is not subject to the objective test required for determination of good cause.

Lastly, the devolution of the Granted Right of Occupancy upon death is regulated by Section 13 of the *Land Ordinance*, Cap 113. It provides:

> S.13 The devolution of the rights of an occupier upon death shall be regulated, in the case of a

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[9] See discussion of cases with regard to revocation of the Right of Occupancy on "good cause" in G M Fimbo, "Double Allocation of Urban Plots: A Legal Labyrinth, Citizen's Puzzlement and Nightmare", paper presented to a public seminar organised by the Law Association of Tanzania (LAT), 1988, mimeo, LAT, 1988.

native by the provisions of Section 19 of the *Administration (Small Estates) Ordinance*, Cap 30, or, in the case of a non-native, by the law governing the devolution of leaseholds forming part of his estate:

Provided that the aforesaid Ordinance shall not apply to the devolution of the rights of any native using or occupying land in accordance with native law or custom and without having otherwise obtained a right of occupancy under this ordinance. In such case the devolution of the rights of a native occupier upon death shall be regulated by the native law or custom existing in the locality in which the land is situated.

The general Law for matters of Succession is an applied statute namely the *Indian Succession Act* of 1865. This will apply to the title granted to the non-native in the event of death. For the native the provisions of Section 13, above, will apply.[10]

1.3 The Deemed Right Occupancy

The incidents of customary land rights have not been articulated authoritatively in any official document. The classic work on these rights remains James and Fimbo's *"Customary Land Law of Tanzania: A Sourcebook"* (1973). Statutory law defines what customary law is (see the *Interpretation and General Clauses Act*, 1972, Section 2) and it also provides for the applicability of Customary Law (see Section 9 of the *Judicature and Application of Laws Ordinance*, 1961).

The central idea which forms the core of landownership in Tanzania is that linked to corporate ownership of land. In the classic case of *Mtoro Bin Mwamba v The Attorney-General* (1953) 2 TLR 327 (CA) the East African Court of Appeal borrowed the then classic anthropological thinking by adopting a passage from R M Northcote's *A Memorandum on Native Land Tenure* (1945) which argued:

The Bantu had no idea of a right of the land in itself *in re*, land was just there for cultivation and was in no sense a chattel. The general right over the land might be termed an usufructuary, occupational, agricultural right, and heritable. A man had security of tenure as long as he behaved himself and obeyed the chief and, if the land was agricultural, kept it under cultivation ... Allocation of the lands was in the hands of the

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[10] James and Fimbo, *supra*, note 8, pp 165-243 on "Intestate Succession" and "Testate Succession" at Customary Law.

> handmen, elders, clan heads or chiefs ... The land was there for the community ... in other words the right of the community or the general good was overriding.
>
> Subject to the above the right was a perpetual one, or put another way, non-terminable, except by action or non-action on the part of the Occupier.

Thus the landed right for the African native was taken to be a permissive occupational right - a usufructuary title - which did not confer on the individual a title to land. This thinking had been followed in other cases by the same court and the Privy Council.[11] Yet more particular studies of African tribes, like that of Cory and Hartnoll on *Customary Law of the Haya*, recognise various forms of ownership in that tribe, viz public lands, individual lands, communal lands, family lands and land held by virtue of office, eg. Chieftaincy or Priestly Office. This has been the case with the Chagga who had the Kihamba system of individual land ownership. Particular studies of African communities do show a diversity of systems of landholding.

The incidents of land allocation, land holding and land transfers cannot be generalised for African communities. For these incidents to apply one has to be a member of a community. The communities in Tanzania have three major levels: the family, the clan and the tribe. Customary land rights will be those practices and usages applicable within the tribe and clan. Some of the land may be subject to family use, eg. land for building homesteads or land for cultivation. Some of the land may be subject to clan control and use, for example, land for grave sites, for ritual, for grazing, land surrounding water-sources, etc. Tribal land may encompass pasture land, ritual groves, commonage, etc. The incidence of tenure vary from tribe to tribe.

There are general requirements, however, that allocation of land must be made by the validly recognised allocating authorities. In pre-colonial times, especially for agricultural communities, each tribe, clan and family had its own land allocating authorities. With the coming of the British and indirect rule the *Native Authorities* Ord, 1926 (revised in 1947) created Native Authorities which, in many cases, usurped the land allocating functions of traditional land allocating authorities. The Native Authorities through a system of by-laws regulated land use and enforced minimum - acreage cultivation regulations. Failure to abide with these by-laws was subject to penal sanctions.

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[11] See *Amadu Tijani v Secretary, Southern Nigeria* (1921) 2 AC 399; *In re Southern Rhodesia* (1919) AC 211; *Muhena bin Said v The Registrar of Titles and Another* (1948) 16 EACA 79.

The Native Authorities were gradually replaced by the Local Government Authorities created under the *Local Government Ordinance*, Cap 333, enacted in 1953. The Local Authorities were different from the former Native Authorities in that the Government was elected and not appointed by traditional right, real or fictitious. The land allocating functions passed over to the local authorities as representing the native community. By 1963 the Native Authorities and African Chiefs were phased out completely.

From 1963 however the position of Local Government has had a chequered history. In 1972 the Local Government system was held at bay by the passing of the *Decentralisation of Government Administration (Interim Provisions) Act*, 1972. This Act created Development Councils which in effect superseded the Local Government Authorities. The Development Councils (in many instances) took over the functions of local authorities in land allocation and control of usage. This was happening without the formal repeal of the *Local Government Ordinance*, Cap 333. Matters became more complex with the passing of the *Villages and Ujamaa Villages (Registration, Designation and Administration) Act*, 1972, (No 21 of 1975). That Act was to apply to the whole of Tanzania in the village system. Villages could be registered under the Act, and once so registered the Village Councils assumed corporate personality, they could thus sue or be sued, own property, eg. land, etc. The Village Council was empowered to regulate economic activities in the village and oversee all land usage and transfers of land. It was provided in the Directions made under the Act (Direction 5(1)) that the District Development Council had to allocate land for village use to the Village Council. It is unclear where the District Development Council derived its mandate to allocate land or whether it had any land reserved to it for allocation to villages.

In 1982 the Village Act of 1975 was repealed and the *Local Government (District Authorities) Act*, 1982, No 7 or 1982 was enacted to replace it. This latter Act repealed also the *Local Government Ordinance*, Cap 333, and incorporated the system of villages under its structure.

Therefore it would appear today that the so-called "native community" under the *Land Ordinance*, Cap 113, may be the District Authority which at a lower level of administration is represented by the Village Council. It would appear therefore that the practices sanctioned by the Village Council in the allocation, usage and disposition of land are the ones relevant to any legal conception of customary land tenure. It is a fact that many villages are not as yet well-structured and the system followed is still that of customary tribal tenure. However, the Village Council does have legal power to supersede these practices. The future seems to be ambivalent until such times as proper land regulation can be enacted by the National Assembly.

It is important to note however that there have been recommendations that Villages should be granted a 999 years Right of Occupancy and presumably from it derivative tenures could be granted to members of the Village. This has not been legislated upon as yet. In the late 1960s there were recommendations for *Rules Concerning Land Held Under Customary Law*. These were proposed under Section 9A of the *Judicature and Application of Laws* Ord, Cap 453, James and Fimbo reproduce these in their book *"Customary Land Law in Tanzania"* (pp 671-674), but they have not been promulgated as yet. These may provide a basis for restructuring and enactment of uniform Regulations on Land Tenure for customary landed rights.

2 Pastoral Land Rights

The anthropologist Aud Talle (1988) writes about the Maasai pastoral land right as follows:

> "The pastoral Maasai acquire exploitation rights to land by virtue of territorial affiliations. Maasailand and its inhabitants are divided into some twenty territorial sections (**olosho**, pl. **iloshon**) within which people are more or less free to exploit pasture and water resources. The various sections differ greatly in size and number of inhabitants. The borders of the sections are founded on customary use, but were formally decided on in colonial times. The section boundary is not absolute, however; in times of drought and stress people negotiate access to pasture and water across sections".[12]

The ownership and use of land is radically different between pastoral and agricultural communities. Whilst individual incidents of ownership are manifest in an agricultural community it is communal tenure which is prevalent in a community of pastoralists. There is an inherent economic sense in this; and James and Fimbo (1973) note:

> "The economic and agricultural advantages of a communal system of land tenure in a community of pastoralists or mixed farmers are immediately obvious. Very few large stretches of pastoral country are completely uniform in their characteristics, particularly when seasonal variations are taken into account. Some parts are consistently better grazing grounds than the rest, others better than the average at certain seasons. Under a system of individual tenure some stock owners must get sub-standard grazing ground; under a

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[12] Talle, *"Women at a Loss: Changes in Maasai Pastoralism and their Effect on Gender Relations"*. Stockholm's Studies in Social Anthropology, 1988, p 31.

system of communal tenure all have equal access to the good grazing ground as well as the bad and this means, if the land is properly managed, that its stock feeding capacity will be maximized."[13]

For Tanzanian pastoralists communal land tenure is the central form of landholding. Individual tenure is however important and complementary, largely for domiciliary settlement, grazing reserves, specific resources such as certain trees and plots for agricultural activity.

2.1 The Elements of Communal Land Tenure

A Corporate Personality

Communal property, including land, can only be held through a corporate unit. This unit must have identity or personality that is distinct from its members. It may be a family, a clan, a tribe or a territorial unit.

In Africa, amongst the Ibo in Nigeria, the family has common property in land though the title vests in the head of the family.[14] In India the Hindu joint family property is well known in anthropological and legal literature as a form of corporate ownership.[15]

The corporate unit is legally defined as one that has first, a distinct name and identity from that of its members. Property by members of the unit may only be held in the name of the corporate unit. Secondly, the unit must have a clearly defined membership, and procedures for acquiring and terminating membership must be known. For kinship groups once a person is born into the group he acquires membership automatically. For territorial corporate units the procedures may be different. One may be required to seek permission from the territorial assembly or council which represents the corporate unit or seek adoption into the group. Thirdly, the corporate unit must have a defined structure for purposes of landholding. It must be clear who may represent the group in cases of allocation, transfers or other matters regarding disposition of land. Fourth, the corporate unit must not be transient it must have physical perpetuity. In case of a territorial unit domiciliary settlement over a period of time might be adequate proof of continuity. Fifth, the law or a body of identifiable norms must attribute rights and duties to the given corporate entity. This means with regard to the given form of corporate property the corporate unit must be legally responsible for the use and misuse of the said

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[13] James and Fimbo, *Supra*, note 8, p 94.

[14] *Ibid*, pp 262-292, especially from p 278.

[15] *Ibid*, pp 262-278.

property.[16] The *Land Ordinance*, Cap 113, recognises that a deemed Right of Occupancy may be held by a "Native Community". It is submitted that this is a recognition of corporate land holding.

B Communal Land

Land is under the control of the corporate unit and has not been allocated for use to a unit lesser than the corporate unit itself, eg family or individual, may be regarded as communal land. James and Fimbo (1973), list forest lands, grazing lands, hunting lands, unalloted arable lands and abandoned lands within the control of a land allocating authority.[17]

The problem has been largely the identification of the corporate unit that has the rights over communal land and the determination of the land allocating authority within it. As discussed above the history of native land allocating authorities has been chequered. James and Fimbo (1973) note a total confusion in relation to land allocation authorities:

> "The whole structure of traditional hierarchy in relation to land administration has crumbled and the method by which the vacuum is filled is veiled in obscurity. In some places, eg. Bugufi division, Ngara district, and North Mara, we find the Village Development Committee exercising the function of land allocation. In the Arusha and Meru districts, allocation is carried out by the Natural Resources Committees which were, until 1960, called the Land Committees. The NRCs are committees of the Arusha Meru District Council, each is composed of 11 Councillors and the District Agricultural Officer as an ex-officio member. Yet in other areas District Executive Officers have assumed the powers and ,in some districts, the District Councils."[18]

As narrated above, however, today this role has been increasingly taken by the Village Councils under the *Local Government (District Authorities) Act*, 1982. But even under the present Act there is still a problem of absence of uniformity of land allocating bodies and the lack of central control as noted by James and Fimbo. The Case of *NAFCO v. Mulbadaw Village Council & Ors*, Civ App No 3 of 1980 is illustrative of this confusion.

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[16] *Ibid*, pp 283-292.

[17] *Ibid*, p 68; also see Oldaker "Tribal Customary Land Tenure in Tanganyika" *Tanganyika Notes and Records* 117 (1957)

[18] *Ibid*, James & Fimbo, p 69.

In that case land was granted to NAFCO in total disregard of the existence of the Village Council. Section 5 of the *Land Ordinance*, Cap 113, requires the President to have regard to native laws and customs in exercising his powers under the Ordinance. And, moreover, under Section 6 of that Ordinance the President is obliged to consult the native authority in control of the land, which, in that case, would have been Village Council through the District Development Council. The Barabaig Iraqw community resident in area used the said land for pastoral purposes and this customary usage was completely ignored. Moreover, the native authority was not consulted. Even if it were consulted subsisting rights, including communal rights, could not be extinguished without following the mandatory procedures of the *Land Acquisition Act*, 1967. These procedures require consultation and compensation before an entrenched right may be extinguished.

The negative consequences that flow from the aforementioned confusion were amply summarised by James and Fimbo (1973).

> "The unsatisfactory aspects of land control under customary system are an absence of uniformity of land allocating bodies and the lack of central control. Because of the fact that different bodies are concerned with allocating land, there is an indication of diverse policies, and cases are not uncommon where the same piece of land is allocated to different grantees by different bodies. The lack of central control means that overriding governmental policies are not taken into consideration in the system of land administration. Moreover the absence of rules laying down norms for the guidance of the allocating authorities makes it easy for these bodies to misuse their powers."[19]

Suffice it to note that much as the law today gives customary land allocation powers to District Authorities it is not clear at all how these powers are to be exercised by these bodies or those subordinate to them.

These problems are compounded in reference to communal lands. These lands depend on the customary land use practices of given communities. For agricultural communities, it would appear, communal lands are the equivalent of "Public Lands" at the clan or tribal level. Such lands form a reserve of land for future cultivation or supplement to agricultural practices. This is not the case with pastoral societies. Communal lands, in the form of pasture lands, are the basis for pastoral production. These lands are not a reserve for use but the very lands that are used for the major productive activity, ie. grazing of livestock. A description of practices of two communities which are the major pastoral groups in Tanzania is instructive.

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[19] *Ibid.*

C Pastoral Communities

The land tenure system of the Maasai has not received comprehensive treatment by legal scholars and what is known is derived from the work of anthropologists.[20] The first essential factor is membership in the grazing/pastoral community. There are socio-political factors which may determine ones membership in a pastoral society. These factors, which are the constitutional elements of such societies, are so far, the subject of sociological not legal studies. They combine a complex of principles related to three main factors: Kinship, Residence and Age-Sets.[21] One might own livestock due to his membership in a kinship group (clan, lineage, family, etc).

Also one may graze his herd in a certain area due to his membership in a territorial community of section. Yet one may have certain obligations with regard to say the security of the livestock based on membership in the age-set.[22] These different levels determine rights and duties in a unique way not found in agricultural communities.

Writing about the Maasai Barbara Grandin comments:

> "Land tenure in East African pastoral areas was traditionally communal and to a large extent it so remains. Rights to grazing are obtained by virtue of membership in a social unit. Due to ecological variability and erratic rainfall patterns, traditional access areas and their concomitant social units are large. The social unit sharing an

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[20] See Gulliver, P H, *"Social Control in an African Society"*, London: Routledge & Kegan Paul, 1963 - for the Agro-Pastoral Kinsmen of the Maasai - the Waarusha; Rigby, *"Cattle and Kinship Among the Gogo"*, Ithaca: Cornell UP, 1969, and also Wilson, G, "The Tatoga of Tanganyika" 33 & 34 *Tanganyika Notes and Records* 34-47 & 35-56 (1952/53); Klima, G J "Jural relations between the sexes among the Barabaig" 34(1) *Africa* 9-20 (1964); Kjaerby, F, "The Development of Agro-Pastoralism among the Barabaig in Hanang District", *Bralup Paper*, No 56, UDSM (1979); etc.

[21] See Tenga, R W "Custom and Law with Reference to the Tanganyika Legal System" unpublished doctorate thesis, Cornell University, Ithaca, New York (1985) Chapter 3 Part 2 "The Nature of Social Regulation in the Pre-Colonial Societies".

[22] See Levine, R A and Sangree, W H "The Diffusion of Age-Group Organization in East Africa" 32(2), *AFRICA* 97-110 (1962) and *also* Monica Wilson, *"Good Company: A Study of Nyakyusa Age-Villages"* (London: OUP, 1951; Boston: Beacon Press, 1963) pp 19-43.

area (the access group) may be a clan, as among the Samburu, a section/sub-tribe as among the Maasai, or some other locational grouping. Below the access group there are smaller groups controlling local resources."[23]

Then she proceeds to present a schematic of socio-spatial organisation in East African pastoral areas which outlines the segmentary structure and primary functions at each level:

Grandin's Schematic of Socio-Spatial Organization in E A Pastoral Areas[24]

SMALLEST

A Household production unit

- locus of cattle ownership
- autonomous decision-making
- highly mobile
- flexible; may split seasonally
- viability problem (labour/animal balance)

B Joint residential unit (compound/homestead)

- joint for herding/watering
- strong prescription for food sharing
- domestic self-help unit

C Local unit (eg neighbourhood)

- broader cooperation/information exchange, sociability
- share/control local grazing and water resources
- often core nucleus population with regular influx/outflow of others

D Primary resources sharing units (access group)

- large to allow for resource fluctuations
- theoretically free access to all members
- largest unit of traditional administration

LARGEST

E Political society/ethnic group

- ideological unit
- shared language and culture

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[23] Grandin, "East African Pastoral Land Tenure: Some Reflections from Maasailand" in "Land, Trees & Tenure" (proceedings of an international workshop on Tenure Issues in Agro-forestry, ICRAF, Nairobi, 1989) pp 201-209.

[24] *Ibid.*

- limited access throughout areas in time of severe stress
- occasional hostilities

It is rather obvious that in the first two levels the kinship principle will form the basis of legal postulates. However, for the remaining levels the residence/territorial principle dominates. It is here that the age-set groups play an important role in dispute resolution and the security of the herds. It is possible using Grandin's schematic to find the juridical basis of the "access group" by an analysis of the relative importance of kinship residence or the age-sets factors at each level and clearly set rights and duties with regard to land tenure. Grandin differentiates these as *spatial ties* (compound, neighbourhood, community) on one hand and *cross-cutting social ties* (affinity, clanship, age-set) on the other. Whatever, any particular study of the juridical basis of land tenure in any ethnic group ought to determine how rights and duties are allocated under the above mentioned principles which are at once certain, ie fixed and fluid.

A study of the Barabaig land tenure gives a similar outlay to that in Grandin's scheme. Charles Lane (1991) finds common property tenure to be the principal form of land-ownership among the Barabaig.[25] A traditional political structure has authority over access to resources and rights which apply to different levels based on particular circumstances. There are three kinds of property: private, clan and community property.

Private property, according to Lane, includes the homestead, the midden, grazing reserve, calf and small stock holding pen, rest and occasional milking area, shade area and homestead plot. This property is controlled by the head of the household. Any dispute in relation to it is settled by the neighbourhood council (girgwaged gisjeud).

Clan property amongst the Barabaig includes the well, empty homesteads, farm plots, graves and grave grass reserves. Juridical authority for matters related to this property is vested in the Clan Council (hulanda dosht).

Community property is made up of the earth itself, Mt Hanang (a holy mountain amongst the Barabaig), sacred trees, meeting trees, etc. The juridical authority here is the Barabaig General Assembly (getabaraku).

Once again a complex interrelationship between kinship and territoriality intermingles with nomadism and other factors to

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[25] "Alienation of Barbaig Pastureland: Policy Implications for Pastoral Development in Tanzania", D. Phil thesis, University of Sussex, London, IIED.

express juridical relations. Further definitive studies of how these relations are determined are to date lacking.

2.2 Re-Construction of Pastoral Land Tenure: Statutory Attempts

There have been attempts to legislate for pastoral land tenure beginning with the Regulations under *Land Ordinance*, Cap 113, then the *Range Development Act*, 1985 and finally the model land use rule.

A Regulation of Granted Rights of Occupancy

The Granted Rights of Occupancy are subject to development conditions. Under Section 21 of the *Land Ordinance*, standard Regulations were issued to cover three categories of Rights of Occupancy, agricultural, pastoral and mixed agricultural and pastoral.

In 1926 the British made the first Land Regulations under the *Land Ordinance*. These covered land for agricultural purposes and mixed agricultural/pastoral purposes. In 1927 the *Land (Pastoral Purposes) Regulations*, 1927 were enacted. These imposed the following conditions on every occupier of a Right of Occupancy for pastoral purposes:

> " (a) that he will within the first five years of the term effect or place on the land occupied improvements to the value of five shillings per acre. Such improvements may consist of any of the permanent improvements or non-permanent improvements specified in the schedule of the Land Regulations 1926, but at least 50 per cent of the value of said improvements must be in livestock the property of the Occupier.
>
> (b) that he will at all times after the expiration of the fifth year of the term have and maintain on the land occupied improvements of the nature and to the value required under the last preceding covenant; that he will use the land only for pastoral purposes or for purposes ancillary thereto. Should he desire to use any portion thereof for purposes which are not ancillary to stock raising he shall give notice of his intention so to do, when permission may be granted on his undertaking to pay rent for such portion at such rate as may be determined."[26]

The problem with these Regulations was they equated development to monetary investment. Often Occupiers would

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[26] James and Fimbo, *supra*, note 8, p 647.

invest a financial outlay equal to the required, say in buildings, and thereby comply with the condition. The *Land Regulations*, 1948 sought to overcome this difficulty by making specific requirements, say, in the number of livestock to be maintained on the property Regulations 6(3) implies the following terms and conditions into the Certificate of Occupancy.

> "(a) that the occupier will during the first year of the term of the right of occupancy fully stock with his own cattle one-seventh of the total area of the land subject to the right of occupancy to the satisfaction of the President, and during each of the next four years of such term fully stock a further one-seventh of the total area of such land with his own cattle in like manner as aforesaid;
>
> (b) that the occupier will at all times during the terms of the right of occupancy have and maintain fully stocked with his own cattle to the satisfaction of the President all areas which he is required to stock under conditions (a) set out in this sub-regulation amounting in the fifth year of such term and thereafter to five sevenths of the total area of such land."[27]

By 1962 about 1,500 Rights of Occupancy were in existence and about 700 were subject to the 1926 and 1927 Regulations. It was therefore found necessary to subject all Rights of Occupancy to the Land Regulations of 1948.[28] This was done under the *Rights of Occupancy (Development Conditions) Act*, 1963 (Cap 518).[29]

B Regulations of the Deemed Rights of Occupancy (Customary Land Tenures)

Specific regulation of customary tenures has only been done through use and conservation by-laws enacted under Local Government legislation. However, in the early 1960s there was a unique attempt to regulate customary landed interests by statute. This was done under the modernisation programmes of

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[27] *Ibid*, p 642-643.

[28] See *Land Tenure Proposals of 1962*, Government Notice No 2 of 1962, paras, 36-39; also James and Fimbo, pp 643-645.

[29] James and Fimbo, *supra*, note 8, pp 647-653.

village settlements, for agricultural communities, and range development for pastoral communities.[30]

The modernisation of agriculture was regulated under the *Rural Settlement Commission Act*, 1963, later superseded by the *Land Tenure (Village Settlements) Act*, No 27 of 1965; as amended by the *Rural Settlement Commission (Dissolution) Act*, 1965, No 17 of 1966. Through the mechanism of these statues programmes were to be implemented whereby traditional agriculture would be transformed by organising peasants in modern government-supervised settlement schemes. The "leap into modern life" never occurred as the schemes resulted in a fiasco.[31]

The modernisation of traditional pastoralism was to be achieved through a machinery set up under the *Range Development and Management Act*, No 15 of 1964. The Act was aimed at achieving "a more effective use of grazing land by total communalisation of the land and supervision of the scheme by ranching associations."[32] The USAID had in 1963 sponsored a report called the *Fallon Report*, entitled "Development of the Range Resources, Republic of Tanganyika" (1963).[33] The report argued that:

First: maximum economic advantage can only be enjoyed by a community of pastoralists if they are organised in such a way that ranch lands are owned and managed communally.

Second, with a planned system of control of grazing lands and with good management, grazing grounds would be kept at their best and re-seeded with suitable kinds of grass when necessary.

Third, the total number of herds could be limited to the carrying capacity of the land, and eroded areas could be rehabilitated periodically, also adequate water supply could be established and maintained.

R W James sums up the *raison d'etre* of the programme in the following words:

> "The economic superiority of a planned system of communal tenure of pastoral lands over other systems is dependent on the group which enjoys the rights being able to organise its affairs in such a way

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30 IBRD, "The Economic Development of Tanganyika" (Baltimore: John Hopkins Press, 1961); also Coulson, A, *"Tanzania: A Political Economy"* (London: OUP, 1982) p 147.

31 James, R W, *"Land Tenure and Policy in Tanzania"* (Nairobi: EALB, 1971) pp 23-26; 232-235.

32 *Ibid*, p 24.

33 Published by USAID Mission in Tanganyika, 1963.

that it can take, in its corporate capacity, those steps which a prudent and progressive owner would take if the land were his private property."[34]

The *Range Development Act*, 1964 was passed in order to achieve the above-mentioned objectives.

The Act was applied immediately under its first schedule to the Maasai District except the Ngorongoro Conservation Area. And then under GON No 2543 of 1969 it was applied to Dodoma, Kahama, Maswa, Nzega, Mpwapwa and Shinyanga.

There were to be two stages in the implementation of the Act, but at no stage was ownership of stock intended to be communal.

The first stage was the declaration of an area as a *Range Development Area* (S 3) and then the establishment of a *Range Development Commission* (S 4) which was usually composed of the Area Commissioner as Chairman, the Area Secretary, Area Party Chairman, Regional Director, Members of Parliament and a few cattle owners from the area.[35] The Commission was given the following instructions:

(i) The Minister in consultation with the commission would make rules prohibiting, restricting and controlling entry into and residence within the Range Development Area (S 6).

(ii) The Commission would make wide-ranging Orders including:

- Control of grazing and cultivation and the protection of natural resources including afforestation of the area (S 9).
- May declare the number of authorised stock units any ranch land could take.
- Take measures to control conserve and utilise water (dams, furrows, waterholes, etc).
- Soil conservation measures etc (S 11).[36]

The second stage is the formation of *Ranching Associations*. Under the Act the *Formation of Ranching Association and Establishment of Ranch Lands, Regulations*, 1968,[37] provided

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[34] James, *supra*, note 32, p 229.

[35] *Ibid*, p 235, note 37.

[36] *Ibid*.

[37] Government Notice, No 88, of 1968.

mechanisms under which these Associations could be established.

Once a group of pastoralists apply to the Commission to form an Association and they are accepted and registered; they become a body corporate and then the Association is entitled to a land grant of a Right of Occupancy.

Once land is allocated to a Ranching Association customary rights (over land, water and pastoral land) are extinguished (S 26). This extinction of rights was not to effect granted Rights of Occupancy (S 24).

The Association was to pass its own by-laws. They could prescribe the quota of stock units; land use; rehabilitation; stock improvements; dipping, injection, quarantine, branching, etc, of stock. Contravention of the By-laws was punishable (S 40). Persistent contravention could lead to expulsion (S 49).

Members of the Association had derivative interest in ranchland vested in the Association. The member could:

> "(a) reside on the ranchlands or the Association together with the members of his household, other than any such member who is the subject of a prohibition order made by the Commission in relation to such ranchlands;
>
> (b) keep and graze on the ranchlands of the Association the stock of himself and the members of his household not exceeding the aggregate stock units of his quota;
>
> (c) be entitled to such other rights of pasturage, water, cultivation and enjoyment of the natural resources of the ranchlands as may be provided for in the rules or by-laws of the Association."[38]

The scheme was legally over-elaborate and had very little to do with reality. The Ranching Associations were founded on principles and ideas of western corporate societies and never took into account the forms of indigenous organisation which could instil respect and endow legitimacy to the Associations. A well researched critique of these Associations, and the Act, is given by Alan H Jacobs in a paper written in 1980 entitled "Pastoral Development in Tanzania Maasailand."[39] According to Jacobs by the end of the 1970s it was clear that the Ranching Associations were a clear failure. It is obvious the kinship considerations, residence and age-set principles that have proved workable in traditional society were not adequately, if at all, considered by the draftsmen.

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[38] James, *supra*, note 32, pp 140; 142-156.

[39] See 7 *Rural Africana*, 1-17 (1980).

Ever sine the failure of the Range Development programme no other comprehensive attempt has been made to regulate pastoral land under customary law. Several factors militate against the effort to regulate this land. Two are foremost.

First, the official thinking in Tanzania has been, since colonial times, centred around agriculture. Pastoralism has been taken to be a marginal activity, if not outrightly counter-productive. Even legislation which refers to pastoral rights is still addressed to farmers. A classic example are the *Rules Concerning Land Held Under Customary Law* proposed under S 9A of the *Judicature and Application of Laws* Ord, Cap 453.[40] Section 8 of the Rules provides:

> 8(a) Where a person has no grazing land or his land is insufficient for grazing purposes he may use land which has not been allocated to anyone.
>
> (b) Such use of public land shall not be a bar to another person being allocated the land if that person can put the land to better use. On such allocation the first person will vacate or be removed from the land.

The rules here assume individual ownership of grazing land just as a farmer owns farmland. Furthermore land used for pastoral purposes may be allocated to any other person who may put it to "better use". The pastoralist "will vacate" and if necessary "be removed from the land". Thus the precariousness of pastoral land rights is inbuilt within the law and even condones the use of force for expropriation of the pastoralist.

Second, the lack of information on the judicial arrangements of pastoral communities renders the legislator ineffective. Studies abound on the socio-political organisation of the Maasai, yet there is little attention paid to their legal system. The paucity of such information on the Barabaig make the task of a would be legal reformer much more formidable. Such studies are essential and should be high on the agenda for the social research community.

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[40] James and Fimbo, *supra*, note 8, pp 671-674.

3 Conclusion

Pastoral land rights exist in Tanzania as a peripheral system of land tenure. General land law applies to pastoral rights just as it applies to agricultural rights. It is important to note that varieties which exist with regard to functional/ purpose and time classifications for the Right of Occupancy apply too in the same manner to the granted pastoral right.[41]

The allocation and disposition processes for the granted right of occupancy are the same for both agricultural and pastoral rights.[42]

The land rights which are in jeopardy are those held under customary tenure. Recently, the Prime Minister has used his extensive powers under the terms of the *Rural Lands (Planning and Utilization) Act*, 1973 to extinguish customary rights in pastoral areas. In November 1986 he issued the *Land Development (Specified Areas) Regulations*, 1986. He issued these under the authority of Section 4 of the 1973 Act. Section 4 provides:

> "Where the President is of the Opinion it is in the Public interest to regulate land development in any area of Tanganyika, he may by order in the Gazette, declare such area to be a specified area for the purpose of this Act."

It is after the President has declared an area a specified area that the Minister responsible for regional administration - ie. the Prime Minister - may under Section 5 (not Section 4) of the Act make Regulations. It means that the Prime Minister's Regulations of 1986, made post-haste, were made under a wrong section, and as such, according to principles guiding the making of subsidiary legislation, are null and of no effect.

Nevertheless, the Prime Minister went ahead and conferred powers on himself to extinguish subsisting rights (see Regulations 3 and 4). Then in February 1987 under Government Notice 88 of 1987, the Prime Minister issued the *Extinction of Customary Land Rights Order*, 1987, which extinguished customary land rights in Arumeru, Babati, Hanang and Mbulu Districts. In July 1989, the Prime Minister issued another Order, Government Notice 260 of 1989 which covers areas in Hanang District which Barabaig pastoralists of Hanang claim in

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[41] James, *supra*, note 32, pp 116-138.

[42] Gondwe, Z S, "Land Transfers: Policy, Law and Practice", Unpublished LLM Dissertation, UDSM, 1982.

Court as theirs through customary right. The Order, as the one before it, raises very serious constitutional issues.

Customary rights as aboriginal rights are entrenched rights which are protected by the Constitution's Bill of Rights. Article 14 of the Constitution guarantees the Right to a decent living in society. Pastoralists cannot live a decent life, as they have known it, if their pastoral lands are grabbed away from them by the State in this manner. Article 24 guarantees the Right to Property and Act 24(2) makes it unconstitutional to expropriate or nationalise property without due process of the law and fair compensation. It is doubtful whether the 1973 Act adheres to these constitutional requirements at all. These are matters that are currently the subject of litigation in the Courts. As matters stand customary pastoral rights to land are in a very precarious position indeed.

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The programme's goals are:

- **To influence the formulation of land use policy through the generation of research findings that support and inform the debate on common property resource management.**

- **Contribute to the resolution of conflicts over land.**

- **Clarify the policy options available to national planners and donor agency personnel.**

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INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT

3 Endsleigh Street, London WC1H 0DD, UK
Telephone: 44.71.388 2117
Fax: 44.71.388 2826 Telex: 261681 EASCAN G