PASTORAL LAND TENURE SERIES Nº 5

A Legal Quagmire: Tanzania's Regulation of Land Tenure (Establishment of Villages) Act, 1992

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DRYLANDS PROGRAMME

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This series is funded by grants from the Swedish Agency for Research Cooperation with Developing Countries (SAREC) and the Norwegian Agency for Development Cooperation (NORAD) in support of the Drylands Pastoral Land Tenure in Africa Programme.

11 May 1994
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Abstract

The process of villagisation in Tanzania caused the displacement of customary land owners by new settlers. As a consequence some of the former land owners began filing suits in the courts claiming back their lands. The success of some of these claims causes alarm in official circles as it constitutes a reversal of the villagisation process. To avert social upheaval and restore its credibility the government has drawn up legislation extinguishing customary rights to village lands. Act 22 was passed by parliament just a few days after the Presidential Land Commission presented its report recommending the problem was best tackled by a reappraisal and eventual overhaul of the nation's land tenure system. A review of the legislation indicates that it is poorly drafted and will likely fail to resolve and might possibly exacerbate disputes over village lands. The Act has subsequently become the subject of litigation itself, and was ruled unconstitutional in the High Court pending Appeal. In this paper the author argues that the Act could be in contravention of the Constitution by offending the doctrine of separation of powers. In his view the government would have been better advised to adopt the recommendations of the Land Commission to devolve power to Village Assemblies and an independent National Lands Commission, and rooting land tenure in the custom and culture of the people.

Introduction

The aim of this paper is to provide a legal critique of the Regulation of Land Tenure (Established Villages) Act, No. 22 of 1992 (herein referred to as Act 22). In particular, the paper assesses whether the Act achieves its objective of resolving the problems of land tenure which arose from villagisation (referred to as Operation Vijiji).

Section I of the paper provides a synopsis of the Land Ordinance[1] which provides the basic legal framework of land tenure in the country. Section II discusses briefly the impact of villagisation on land tenure and the resulting problems which led to the enactment of Act 22. Section III investigates in some detail the impact of the Act on the pre- and post-villagisation land rights regime of rural landholders. In section IV it compares the approach and recommendations of the Presidential Commission of Inquiry into Land Matters (referred to as the 'Land Commission')[2] with provisions of the Act. Finally, section V discusses the constitutionality of the Act.

At the outset, it must be made clear that it is not the intention of this paper to analyse the merits or otherwise of the villagisation programme or the advantages and disadvantages to Tanzania of competing land tenure systems. That was done comprehensively by the Land Commission whose Report is currently under consideration by the Government. It is hoped a national debate on the Report will ensue that will hopefully provide a major input into the eventual formulation of a National Land Policy and an appropriate land tenure structure.

I. BACKGROUND

The Land Ordinance was enacted by the British colonial administration in 1923. It has since remained the basic legal framework defining and regulating land tenure in the country.

Section 3 of the Land Ordinance declares the whole of the lands of Tanganyika[3] to be 'public lands', and section 4 provides that 'all public lands and all rights over the same are hereby declared to be under the control and subject to the disposition of the President and shall be held and administered for the use and common benefit, direct or indirect, of the natives of Tanganyika, and no title

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[1] Cap. 113 of the Revised Laws of Tanzania.

[2] The Commission was appointed by the President in January, 1991 with wide-ranging terms of reference. It was chaired by the author with eight other members who were current or retired holders of Government and Party positions. The Commission presented the first volume of its Report on land policy and land tenure in November, 1992 and volume two on selected land disputes in January, 1993. The Government has not as yet taken a position on the recommendations of the Commission but it is expected that the Report will be published soon.

[3] Mainland Tanzania.

to the occupation and use of any such lands shall be valid without the consent of the President' (Cap 113). The whole of the lands of Tanganyika thus came to be vested in terms of the final or radical title in the executive arm of the state.

The proviso to section 3 stipulated that the vesting provision did not affect the validity of the existing granted rights of occupancy and also other rights and interests in land 'lawfully acquired'.[4] By virtue of this provision, it could be argued, existing customary titles continued to be legally valid with one major modification. The overarching radical title vested in the state (the political sovereign) thus divested existing clans, tribes, communities, as the case may have been, of their ultimate control over land. As to what this meant in terms of the content and security of customary titles in relation to, and as against, the state was left to be determined largely by administrative policy. Law did not explicitly guarantee, secure or entrench customary titles and rights. This, as the Land Commission was first to identify, constituted and continues to constitute, the source of insecurity, instability and fragility of customary land rights directly impacting upon the major means of livelihood of millions of peasants and pastoralists in rural and peri-urban Tanzania.

Under the Land Ordinance, the major estate that can be created on land is a 'right of occupancy'. Section 2 defines the right of occupancy to mean '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.' Section 6 empowers the President to grant rights of occupancy for a maximum period of 99 years. These are what are called granted rights of occupancy whose terms and conditions are broadly defined in the Ordinance and further elaborated in the certificate of occupancy. *Granted* rights of occupancy are therefore entrenched in the statute and the powers of the state over them are provided in, and circumscribed by, law.

That part of the definition of the right of occupancy - 'the title of a native or a native community lawfully using or occupying land' - has come to be described as *deemed* rights of occupancy. Except in the definition given, the deemed rights are not mentioned or provided for in the body of the Ordinance. The definition of the deemed right is at best a declaration of its existence. The definition by itself does not secure the customary title in law as a statutory

[4] Originally all rights lawfully acquired and subsisting at the time of the commencement of the Ordinance (i.e. 1923) were saved. Under the terms of the Land Laws (Miscellaneous Amendments) Act, 1970, no. 28, the 'effective date' was changed to 1970.

right. This is what makes the customary title fragile in the face of: (a) a competing statutory right owner, i.e. an owner of a granted right of occupancy; and (b) the owner of the radical title, the state.[5] It is in the case of its relation with the state that customary land "rights" have been most vulnerable.

The lack of legal commitment on the part of the state to secure and guarantee customary rights subjected them to the expediency of administrative policy and action. The Land Commission succinctly summed up the status of customary titles in the following words:

> "The distinction between legal relation and administrative relation grasps the underlying basis of the Land Ordinance and the subsequent practice of the state in respect of the land rights of indigenous people. It allowed the government to have full powers to deal with land according to whatever administrative policy was adopted from time to time. This suited the colonial political economy pretty well. So long as the state desired peasant production, the occupants would be considered to have deemed or permissive rights. But when land was needed for the purpose of alienation, the Governor would, so to speak, withdraw his 'consent' (or permission which itself was assumed) and alienate it on granted right to a settler, presumably in the "indirect interest" of the inhabitants. ...
>
> "In short, the colonial state did not want its hands bound by law in relation to the land rights of customary landholders. These would be treated administratively."[6]

Lack of a national land policy combined with arbitrary administrative actions in the post-independence period further reinforced the uncertainty and insecurity of customary landholders. The most dramatic expression of arbitrariness in

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[5] A dominant body of case law since colonial times has held that a granted right of occupancy is a better and superior title to a deemed right of occupancy. In *National Agricultural and Food Corporation (NAFCO) v. Mulbadaw*, Civil Appeal No. 3 of 1986 (unreported), the Court of Appeal, for the first time, seemed to acknowledge (*obiter*) that a granted right over the land under customary right could not be valid unless the customary right was first properly and lawfully acquired under the relevant law, for example, the Land Acquisition Act, 1967 (no.47). However, the same Court seemed to shy away from taking that remark to its logical conclusion in *Charles Nyirabu v. Nyagwaswa*, Civil Appeal No. 14 of 1985 (unreported) when it was starkly faced with competing titles - customary versus granted. Although both in *Nyagwaswa* and in a later decision, the Court of Appeal seems to have taken a firm view that in a peri-urban area declaration of planning area *per se* does not operate to extinguish existing customary rights (see *Kakubukubu v. Kasubi*, Civ. appeal no. 14 of 1991, unreported).

[6] Land Commission Report, op.cit. vol.1, p.13.

relation to customary land tenure was the implementation of the villagisation policy leading to massive confusion in land tenure and abuse of power in allocation of rural lands.

As is known, between 1972-74, millions of rural land users in Tanzania were resettled and their villages re-located as a result of the policy of the ruling party to villagize the whole rural population of the country. The Land Commission in its analysis of the process pointed out that the central concern that informed the conception and implementation of Operation Vijiji was predicated on the nature of production and no thought was given to the ownership of land. Consideration was not given to the effect on existing land tenure systems of the massive relocation and no thought was given to the tenurial system that would govern the 'new' settlements in villages. No enabling legislation was passed to provide a legal framework for what in effect was a major reform of land tenure in the country.[7] Apparently, the dominant perception was that since all land belonged to the state, the state could allocate and re-allocate it as it wished without serious legal (not to speak of social) consequences, particularly on the 'land rights' of the occupiers. In the event, 'changes' in land tenure systems effected by villagisation proceeded without a legislative framework. The legal framework for the land tenure system therefore continued to be the Land Ordinance and its jurisprudence developed partly by colonial administrative practice and partly by the colonial judiciary.

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[7] As a matter of fact, the Parliament did pass the Rural Lands (Planning and Utilization) Act, 1973 (no. 14) under which the President was given virtually unlimited powers to extinguish existing (including customary) rights. This Act, however, was never invoked to implement villagisation. The Act was used in 1987 under which the then Prime Minister extinguished customary rights in 106 villages (G.N. No. 88 of 13/2/1987). This was aimed at undermining the legal challenge posed by customary rightsholders of the lands occupied by the parastatal NAFCO following the filing of a couple of suits deriving their strength on the observation of the Court of Appeal in *Mulbadaw* case referred to above. Act 22 in section 12 repeals G.N. No. 88, presumably on the ground that it has become redundant since the Act purports to do exactly what the G.N. did.

The Villages and Ujamaa Villages (Registration, Designation and Administration) Act, 1975 does not deal with land tenure at all as was observed in the *Mulbadaw* case. The Directives made under the Act stipulate that the village will be allocated land by the District Development Council (see GN No. 168 of 22/8/75). The tenurial implication of this Directive is unfathomable. In any case, the Directives have lapsed since the 1975 Act was revoked and its provisions incorporated in the Local Government (District Authorities) Act, 1982.

II. THE PROBLEM

Use of paramilitary force by the government and political discretion on the part of the people combined to make them go along with resettlement as a result of villagisation. In the relatively liberalised atmosphere of the 1980s some of the former customary owners who had been displaced by villagisation began filing suits in courts (primary courts) claiming back their lands. Some succeeded as a result of which the current occupiers were evicted by court orders. Indeed, in some cases, even village councils were ordered to demolish public facilities such as schools, stores and dispensaries to make way for the former customary owners. The success of the first few cases snowballed and more were filed, and many more peasants, particularly in Babati, Hanang, Mbulu (including the sub-district of Karatu) received notices from advocates threatening law suits. The result was apprehension and panic in the countryside and a potential threat to social stability.

Members of parliament from the areas brought strong pressure to bear on the government to do something lest the whole thing develop into civil unrest. Stalwarts in the party strongly felt that what was happening was nothing less than the reversal of the villagisation process. As the Land Commission found on its visits to the relevant districts, the fears expressed by the parliamentarians were real. In effect what seemed to be happening was that some of the former large landholders were attempting to recover their lands lost through villagisation while the new occupiers - some of them had never known any other lands except those allocated to them during villagisation - were being threatened with eviction and the prospect of becoming landless and destitute.[8]

In one sample of land cases pending before the Primary Court of Karatu, the Land Commission found that some 92 suits (arising from villagisation) were filed in the first seven months of 1992. These involved 89 people claiming to recover lands from 565 present occupiers. Of these 565, five were village governments, three churches, one mosque, one a plot occupied by the government women's organisation (UWT), and one occupied by the youth organisation (Vijana). The total land claimed was some 1693 acres.

The following table shows the distribution of claimants and respondents by land size.

[8] Land Commission Report, Vol. 1, p. 56.

Land size (acres)	% age of Claimants (n. 89)	% age of Respondents (565)
0-4	16	87
5-10	27	10
11-15	18	2
16-20	10	0.4
21-30	12	0.2
31-40	2	nil
41-50	7	"
51-70	6	"
71-100	1	"
Over 100	1	"

Source: Land Commission Report Volume 1, pp 54-55

As the Land Commission commented:

> "While at one end a small group (16%) seems to be trying to improve its allocations during villagisation by claiming a little more, at the other end there is a significant group of the former, relatively large, landholders desirous of re-claiming their former lands held under customary rights. ...
>
> "As would be expected, the family heads from whom land is claimed are very small landholders, allocated land during villagisation. Thus 97 per cent are below 10 acres. ...[T]he 0.6 per cent holding land over 15 acres are all either village governments or the church who were also allocated land during villagisation.
>
> "If these cases succeeded, it would displace some 565 family-heads or close to 3000 people. In the 11 cases that succeeded before the Primary Court of Mbulumbulu during 1992, for example, 6 claimants recovered 64 acres from 11 respondents. Of the 6, only two recovered 44 acres or almost 70 per cent of all lands in dispute. The same two claimants have another 7 cases pending before the same court in which all together they are claiming 56 acres against 9 respondents. If they succeed in all these

cases, all told, the two would have displaced 17 families recovering 120 acres in the process."[9]

It has been suggested that one of the motivations behind increased litigation to reclaim lands especially in Karatu must have been hunger for land as a result of increased opportunities for commercial farming. Prosperous farmers in pre-villagisation times had taken advantage of this by borrowing land, in many cases previously their own. For these farmers reclaiming lands through courts opened up the prospect of cutting out substantial rents they had to pay to their 'landlords'. On the other hand, for smaller landholders improvement in their landholding through litigation would place at their disposal more land for lending and thereby scope to earn rents.[10]

Be that as it may, the upsurge in court cases not only threatened social upheaval but challenged the very credibility of the government and the ruling party. This matter was brought to the attention of the Land Commission in the course of its investigation. While appreciating the problem to be serious, the Commission felt unable to recommend short-cut measures such as passing of *ad hoc* legislation or arbitrary administrative actions.[11] The problem was the outcome of chaos in land tenure wrought by Operation Vijiji, which, among other things, as we have seen, paid scant regard to land tenure or its legal framework. The problem was best tackled by reappraisal and the eventual overhaul of the land tenure system which was what the Commission was involved in doing.

Nonetheless, in view of the gravity of the situation, the Commission advised the government that the post-villagisation *status quo* be maintained pending the final recommendations of the Commission.[12] This could be done by the government taking up the legal defence of the respondents in courts and, if necessary, getting the final legal position from the highest court, the Court of Appeal. On its examination of case files, the Commissioners were convinced that the cases (the large majority being in Primary Courts) had not been argued fully and that the decisions could be challenged on numerous grounds. Furthermore, the panic itself was the result of a feeling of defencelessness on the part of small peasants who were being dragged to the courts through no fault of their own. After all

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[9] Ibid. p.55.

[10] See Land Tenure Study Group, 'The Implication of the "Regulation of Land Tenure (Established Villages) Act, 1992" for peasant land security and natural resource management and conservation in Tanzania', FTPP/IIED (draft).

[11] The then Regional Commissioner of Arusha attempted to have the advocates involved in serving these notices struck off the roll.

[12] This advice is reiterated at p.199 of volume 1 of the Report.

they were not 'voluntary trespassers' as their opponents presumably accused them of being, but people who had been forced onto those lands by no less an authority than the state itself as a result of a country-wide Party and Government policy. The government had an obligation therefore to defend them. The least it could do was to stand by them, so to speak, in court by hiring private counsel. This would have been legally sound and politically correct.

The Commission in its Report warned of the dangers of attempting to resolve the issue through panicky measures.

> "At this stage, the Commissioners would like to underline the dangers of attempting to resolve the land tenure problems arising from villagisation through *ad hoc* legal measures, such as passing retrospective legislation to validate villagisation or *en masse* and indiscriminate extinction of customary titles, ... We believe that the tenurial problems arising from villagisation can only be resolved within, and as an integral part of, a new dispensation on village land tenure."[13]

Regrettably, the government did not heed the Commission's advice. It attempted to 'resolve' the problem by pushing through parliament an obviously ill-considered piece of legislation. The Bill for Act 22 was published on 9th November, 1992, just two days before the Land Commission presented its Report. The original Bill was full of elementary deficiencies.[14] Some of these were corrected (albeit unsuccessfully) in the Act which was rushed through the National Assembly without serious questioning and assented to by the President on 28th December 1992.[15]

In the event, the warning of the Commission proved to be prophetic. The Act was almost immediately challenged in the High Court at Arusha and promptly

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[13] Land Commission Report, vol.1, p.58.

[14] For instance, all customary rights were extinguished and no attempt was made to save the allocations done during villagisation.

[15] Many members of parliament went along with the Bill partly because they lacked full appreciation of its far-reaching implications (the Land Commission's Report was not available to the MPs at the time), and perhaps partly out of deference to their colleagues from Arusha, some of whom command great respect in the House for being outspoken on other issues. A critical memorandum from the Faculty of Law was circulated to MPs and drew the Prime Minister's wrath. A government radio commentary (*mazungumzo baada ya habari*) suggested that the Bill emanated from the Commission's Report. The Commission subsequently issued a public statement dissociating itself from the Bill.

declared unconstitutional.[16] The state took the matter before the Court of Appeal, and its judgement is pending. Regardless of the constitutional validity or otherwise of the Act - and that is not as clear as it may appear on first sight (see below) - the fact remains that Act 22 is a highly deficient piece of legislation pregnant with flaws and generally wreaking havoc with the land tenure system, and in particular, further endangering the land rights of customary landholders who constitute the large majority of the rural population.

III. Act 22

The long title of the Act stipulates that it is an Act 'to regulate land tenure in villages established pursuant to Operation Vijiji ...'. As will become clear in the course of this paper, that is not what the Act really does. The real objective of the Act is found in the 'Objects and Reasons' of the original Bill, which was 'to resolve conflicting interests existing in land occupied by Villages which were established pursuant to the Government policy on villagisation.' Whatever the case may be, there are two issues that require investigation: (a) the impact of the Act on pre- and post-villagisation tenurial rights; and (b) whether the Act succeeds in making good its claim of setting up an acceptable and workable machinery for resolving existing conflicting interests.

Section 3 is the most substantive provision of the Act which states:

> (1) Notwithstanding any other law to the contrary, all rights to occupy or to use land in accordance with any custom or rule of customary law existing or held or claimed to be held by any person in any village land prior to Operation Vijiji, are hereby extinguished.
>
> (2) For the avoidance of doubt the extinction of rights under sub-section 1 of this section shall not effect:
>
> > (a) any right to occupy or to use any village land which was acquired by any person during or subsequent to Operation Vijiji, in any village established as the result of Operation Vijiji; or

[16] See *Akonaay v. Attorney General*, High Court Civil Cause No. 1 of 1993 (unreported), although this judgment, with respect, seems extremely weak in its legal argument and lacks finesse.

(b) any right to use any village land in accordance with any custom or rule of customary law existing in any village which was not established as the result of Operation Vijiji.

On the surface, the broad intention implicit in this section seems to be fourfold:

(1) to extinguish all customary rights (including such lesser rights as easements etc.) which were in existence prior to villagisation and which, to whatever extent, were tampered with during villagisation;

(2) to save all customary rights which were not tampered with during the operation;

(3) to validate allocations of land made by and during the process of villagisation; and

(4) not to affect in any manner whatsoever any form of granted rights on village lands.[17]

The actual provisions of the Act, both because of its loose and ambiguous drafting, as well as the bureaucracy's administrative bias against customary landholders, go beyond what is at first apparent

Extinction of Pre-villagisation Customary Rights

The intention of extinguishing pre-villagisation customary rights was to remove the legal basis of the former customary owners dispossessed by villagisation and who are currently reclaiming their lands in courts. The technique used is to extinguish customary rights or 'deemed rights of occupancy' under the Land Ordinance. The legal problem, of course, is how to do this without casting the net too wide or upsetting the existing land tenure system.

The draftsman of the Act uses the concept of 'village land'[18]. 'Village land' is defined in section 2 as 'all land within the boundaries of any village established as the result of Operation Vijiji, whether or not such area has been registered as a village in accordance with section 22 of the Local Government (District

[17] This includes lands held under offers of right of occupancy which do not have certificates of occupancy because the land is unsurveyed.

[18] The concept of 'village land' in the Act has nothing in common with the concept of 'village lands' (as opposed to 'national lands') developed by the Land Commission.

Authorities) Act, 1982'. The central issue in this definition is to determine exactly the 'village established as a result of Operation Vijiji'. To answer that we have to look at the definition of 'Operation Vijiji.' 'Operation Vijiji' is defined to mean 'the settlement or re-settlement of people in villages during and at any time between the years 1970 and 1977, for the purpose of implementing the policy of villagisation'.

Several scenarios can be identified. Some clearly covered by the definition, other grey and ambiguous areas subject to several mutually exclusive and contradictory interpretations and constructions.

First is the case of traditional villages where people were not moved at all as in Kilimanjaro region where customary rights continue untouched. This is a clear and unambiguous situation, but a situation which probably is not widespread in the country, perhaps not even in Kilimanjaro which is supposed to have been least disturbed by villagisation.

The second concerns villages where people were not settled or resettled, but boundaries were redrawn by virtue of the merger of smaller villages or excision of larger ones. This too happened in some regions, including Kilimanjaro. It could be argued that this situation is not covered by section 3 because people were not 'settled or resettled', although a new village or villages were established as a result of the operation. Here clearly the accent is on 'settlement or resettlement' of the people rather than on the establishment of a (new) village for the 'purpose of implementing the policy'. If accent is placed on the latter two elements, it could be argued with equal force that the situation described in this paragraph falls within the ambit of section 3. Opposite conclusions can be arrived at depending on which elements of the definition are given weight. In practice, such ambiguity is a perfect recipe for arbitrary and inconsistent decision-making on land rights by administrators, administrative and quasi-judicial bodies.

A third scenario is common in the most affected areas like Karatu. In Karatu no new villages were established nor old village boundaries redrawn. The accent was on *redistribution* of land, contrary to what was then considered to be the main objective of the policy to settle people in villages. This was admitted by some of the implementors, including members of parliament in their evidence to the Land Commission.[19] Does such a village, where land was simply redistributed, fall within the definition of 'village land' wherein

[19] Land Commission Report, vol.1, p.53 et.seq.

customary rights are extinguished? Clearly, there may not be substantial shifting around of people (therefore no settlement or resettlement) and no new village has been established. Thus none of the elements stipulated in the definition of 'village land' and 'Operation Vijiji' are satisfied. If this argument is accepted, then customary rights within such villages would not be considered to have been extinguished, in which case one of the major problems (proliferation of law suits) which originally motivated the Act would remain unresolved. At the least, more enterprising well-paid lawyers representing prosperous clients could stall the whole machinery under the Act by filing suits and obtaining interim injunction and prohibition orders pending their finalisation. Given the notoriety of the Act in other respects, such a move would not only reproduce on a larger scale even more litigation and accompanying apprehension, uncertainty and fear, but could even garner, rightly or wrongly, public support and sympathy.

A fourth scenario is where people who had been moved in the initial phases of the operation returned to their original settlements and lands or, as they are called, *mahame*. This happened on a considerable scale (no one knows its extent) in Sukumaland. Under Act 22, the customary rights of *mahame* returnees have probably been extinguished and it could hardly be argued that they have acquired any new rights (since long undisturbed or adverse possession or prescription cannot be set up against the government.[20]) In short, in law, they would be considered squatters on public lands without any rights contrary to the perceptions of the occupiers who believe they have repossessed their ancestral lands or *mahame*.

Fifth, the Act adds salt to the wound in potentially dangerous situations like Tarime where villagers have never accepted the new village boundaries set during villagisation. If anything, it removes the floor from underneath the grievances of the villagers by declaring their customary rights (and boundaries) to have no validity. Needless to say, the simmering conflict in Tarime is likely to arouse bitter resentment, if not social upheaval, should the state attempt to implement Act 22 in the area.[21]

Finally, as we have seen, the Act leaves granted rights - prior to, during or subsequent to villagisation - on village lands totally untouched. In a number of situations this has the effect of actually undermining the policy of villagisation. Three situations presented to the Land Commission illustrate this well.

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[20] See the case of *Mtoro bin Mwamba v. The Attorney General* 20 E.A.C.A. 108, p.121.
[21] Land Commission Report, vol.1, p.60 and Evidence.

First, by giving blanket protection to granted rights on village lands on the one hand, and extinguishing in a similar blanket fashion customary rights to village lands on the other, the Act gives legal validity to numerous alienations of village lands to outsiders - parastatals (NAFCO lands in Hanang, for example) companies (as in Lindi), individuals, (land grabbing in Loliondo)[22] - hotly contested by villagers. In some cases, as in the case of Mulbadaw village in Hanang district, registered villages established as a result of villagisation have lost their lands to invaders who in turn have taken out titles to the same. In other cases, village leaders in cahoots with district authorities have alienated village lands held under customary titles to outsiders or richer villagers who in turn have taken out titles. In all such cases, the villagers are likely to react with utter disbelief (and ultimate resistance) if told that the very basis of their claims - customary rights - has been extinguished by an act of Parliament while those who acquired paper titles over their lands are fully protected by the same Parliament.

Secondly, many villages during villagisation were established on formerly alienated lands abandoned by the previous holders of granted rights. These villages are facing eviction *en masse* by former owners, or their successors in title, returning to reclaim their occupancy.[23] Whereas, under the Act, the villagers (as will be shown below) would have no legal basis to establish the validity of their land allocations and occupation, the grantees would fall back on their granted rights made virtually unchallengeable by the Act.

Third is the situation where the villages threatened by alienation of lands to outsiders have on their own initiative obtained granted rights of occupancy, and in the process given rise to boundary problems with adjacent villages who claim that their customary lands have been invaded. The classical, and potentially explosive, situation is that between Sonjo and Maasai villages in Sale division of Ngorongoro district.[24]

The Maasai are pastoralists while Sonjo are agriculturalists with a very developed irrigation system for intense cultivation of land. Traditionally, during the dry season Maasai would be let in to graze in Sonjo areas where greener pastures were to be found. After the season, the Maasai would return to Waso, a Maasai area. What has happened in the recent past is that Maasai areas,

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[22] See the evidence presented to the Land Commission and Volume 2 of the Report (case studies). The transcripts of the evidence (over 20 volumes) have been deposited with the University of Dar es Salaam library and the Tanzania National Archives.

[23] Land Commission Report, vol.1, chapter 5.

[24] See Land Commission Report, vol.2, p.38.

including Waso, have been invaded by outsider cultivators thus putting pressure on Maasai lands. The Maasai in turn have moved and taken over Sonjo areas giving rise to bitter conflicts and armed clashes.

The Maasai, with concern for the security of their lands, had some of their villages demarcated, surveyed and titled through the initiative of NGOs like KIPOC (Koronkoro Integrated People's Organisation for Conservation) and with financial assistance from ADDO (Arusha Diocesan Development Organisation). The Sonjo feel bitter about this and they allege that they were not consulted during the titling process and some of their traditional lands have been taken over by Maasai villages.

Curiously, in a recent statement, the Minister of Lands threatened to revoke the titles of Maasai villages and have the boundaries reconsidered to resolve the conflict.[25] Yet the solution proposed goes against the Act. The apparent security of the granted title would have no meaning to villages if the revocation was effected through executive action. On the other hand, the attempted extinction of customary rights in the Act directly undermines the legal foundation of Sonjo claims. In this circumstance, which could be repeated in diverse situations, the Act satisfies neither the Sonjo nor Maasai and fundamentally destroys the legitimacy and credibility of villagisation as well as doing untold damage to the social and customary fabric of rural communities.

Many more hypothetical cases could demonstrate flaws in Act 22. However, this is not necessary. The few discussed above arise from actual situations and amply demonstrate the depth of the legal quagmire that arises from the strategy of blanket extinction of customary rights adopted by the Act.

POST-VILLAGISATION LAND RIGHTS

Villagisation was effected, as we have seen, without a clear legal framework as to land tenure. It was an administrative/executive action based on a policy which almost exclusively concentrated on only one dimension in the process of resettlement and relocation - mode of production - to the exclusion of the other equally important dimension - mode of ownership of the means of production.

Relocation and resettlement was effected through the use of force. Allocations of land to the villagers was done by executive bodies - party officials, *ad hoc* district and regional committees, new organs of the decentralised bureaucracy

[25] Reported recently in newspapers, date misplaced.

such as District and Regional Development Directorates, etc. No one knew nor cared to know the legal status of these land allocations and what legal regime would govern land tenure in the post-villagisation era. By default therefore the erstwhile Land Ordinance with its dichotomy of deemed and granted rights of occupancy continued to rule the roost - or rather destabilise the rooster.

In the event, the central question facing the draftsman of Act 22 was how to validate in law the exercise of land allocations made during, and as a result of, Operation Vijiji. This has been done by the legal device of saving what the Act calls 'right to occupy or use any village land which was acquired by any person during or subsequent to Operation Vijiji, in any village established as the result of Operation Vijiji'(section 3(2)(a)). This monumental task of 'validating, saving and securing' land allocations during villagisation has been done within three small sub-sections of the Act.

Section 3(2)(a) essentially provides that the extinction of customary rights on village lands does not affect 'any right to occupy and use any village land' acquired during or subsequent to Operation Vijiji. The other two sub-sections relate to the amendment of the definition of 'occupier' and 'right of occupancy' in section 2. The words in italics have been added to these definitions respectively by Act 22.

> '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 *or in accordance with any rights acquired during or subsequent to Operation Vijiji as defined in section 2 of the Regulation of Land Tenure (Established Villages) Act, 1992, in any village established as the result of Operation Vijiji'.*

And,

> 'Right of occupancy' means a title to the use and occupation of land and includes the title of a native or of a native community lawfully using or occupying land in accordance with native law and custom *or in accordance with any rights acquired during or subsequent to Operation Vijiji as defined in section 2 of the Regulation of Land Tenure (Established Villages) Act, 1992, in any village established as the result of Operation Vijiji'.*

It will be immediately apparent that all the problems associated with identifying 'village land' discussed above in relation to the extinction of customary rights reappear in identifying 'village land' for the purposes of determining land allocations which have been validated. The problematic phraseology in the definition of 'village land' and 'Operation Vijiji' such as 'village established as a result of Operation Vijiji' or 'settlement and resettlement of people in villages ... for the purpose of implementing the policy of villagisation' (s.2) is resurrected and could result in the same or similar problems already discussed.

In addition, the draftsman has compounded the confusion by making a very basic assumption.

Each of the provisions which purports to validate land allocations during and subsequent to Operation Vijiji is in the nature of a declaratory stipulation. This means that Act 22 has not *created* any new right and given it a legal status; rather it simply declares and recognises a pre-existing right. *The Act assumes that rights to use or occupy land were acquired during and subsequent to Operation Vijiji.* The question is: were any rights acquired during and subsequent to the operation? In other words, did the land allocations made in the course of the operation amount to the accrual of land rights?

'Right' in this context can only mean legal rights and legal rights have to be established in law. This means that the alleged 'accrual' of rights could only have been by the operation of the then applicable law. The law in force on land tenure at the time of the operation, as we have seen, was the Land Ordinance. Under the Ordinance there could only be two categories of rights - granted and deemed rights of occupancy. It could therefore be argued that land allocations during villagisation amounted to granted rights of occupancy or, in the alternative, deemed rights of occupancy.

Section 6 empowers the President to grant rights of occupancy. Clearly this must mean the granting of rights over public lands. Can he also override customary rights and grant a right of occupancy over the land occupied by customary owners? The legal position on this question was ambiguous. But since the observation by the Court of Appeal in the *Mulbadaw* case, it could be argued that the President would have first to acquire land held under customary right in accordance with the procedure laid down in the Land Acquisition Act, 1967 before he could grant that same land on a granted right of occupancy. No such acquisition was effected in the case of villagisation. Therefore the argument that village allocations amounted to granted rights could fail.

However, a more imaginative lawyer could argue that by virtue of Act 22, customary rights have been extinguished retrospectively. Therefore in law there did not exist any customary rights to be acquired. This argument based on abstract logic with little relation to life would have to make a fundamental assumption - the retrospective operation of the Act - in the process opening up a pandora's box of legal problems. It is very unlikely that a judicial authority would be prepared to accept the stretching of the *operation* of the Act back that far in history for the consequences of doing so cannot be predicted.

But even if that hurdle was overcome, there are even stronger reasons for the position that villagisation land allocations did not amount to granted rights.

First, one would have to be persuaded that the diverse authorities which implemented villagisation and allocated land did so in their capacity as delegatees of the President. In which case delegation is being implied. While delegation under the Land Ordinance for the purposes of land allocations (for example, to the Minister of Lands, land officers) is judicially recognised, it seems to me, delegation has to be more defined and specific and cannot be to an unspecified organ.[26]

Secondly, the procedures and practice of giving granted (or statutory) rights of occupancy have been established and judicially recognised over the last fifty or so years. This, among other things, involves Letters of Offer with specified conditions, Certificates of Occupancy and so on. None of these were followed during villagisation. No court can be asked to assume away the lack of this specific procedure.

Finally, what would be the period of such a right of occupancy? Presumably it would be a grant of a right of occupancy at will under section 6(2)(a) of the Land Ordinance, a very precarious right indeed.

For all these reasons, it is submitted, village land allocations cannot be assimilated within 'granted' rights of occupancy, however imaginative a construction that may be placed on the statutory language.

The more plausible position would be to argue that villagisation allocations amounted to deemed rights of occupancy. In this case, one would have to argue that the diverse state and party authorities which made these allocations did so

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[26] *Ad hoc* committees which implemented villagisation cannot be said to have been within the contemplation of the Land Ordinance or the President.

not as 'delegatees' of the President in his capacity as the owner of the radical title under the Land Ordinance, but in their capacity as 'local authorities' under 'native law and custom'. There is some precedence to accept local governmental organs as land allocating authorities within the regime of customary allocations.

If this carries the day - and admittedly there is force in the argument - the full force of 'native law and custom' would have to be logically applied. This means that while allocations made on vacant lands could be sustained, allocations over lands already occupied by customary owners - a very large proportion in the villagisation exercise - cannot. The reason for this is that there are: (a) recognised circumstances under which a customary owner loses his right; and (b) legally recognised and valid ways and methods of customary land allocations by a customary authority. None of these conditions can be satisfied in this case. It would be very far-fetched to argue that previous customary owners lost their rights (through abandonment, misconduct) over land which then fell vacant for re-allocation during villagisation. The truth is that the former customary owners were 'forcefully' evicted. It is virtually impossible to establish that any customary regime recognises expropriation *per se* as a valid ground for depriving an existing occupier of his or her land.

It is submitted that the assumption made by Act 22, that either granted or deemed rights were acquired during Operation Vijiji, cannot be easily sustained. If this is so, then Act 22 does not save or validate, let alone secure, the rights of post-villagisation occupiers of lands.

What is more, Act 22 itself further undermines the argument that the rights acquired amounted either to granted or deemed rights. A careful reading of the amended definitions of 'occupier' and 'right of occupancy' purports to create a new category of a right of occupancy. This right, to quote the relevant parts of amended section 2 in the definition of the 'right of occupancy', is:

> "the title of a native or a native community lawfully using or occupying land ... in accordance with any rights acquired during or subsequent to Operation Vijiji ...."

So breaking up the definition yields us three species of right of occupancy:
(a) 'a title to the use and occupation of land', or granted right of occupancy;
(b) 'the title of a native or a native community lawfully using or occupying land in accordance with native law and custom', or deemed right of occupancy; and
(c) 'the title of a native or a native community lawfully using or occupying land ... in accordance with any rights acquired during or subsequent to Operation Vijiji'.

On the face of it, (c) is a new species of pre-existing 'right'. Since Act 22 does not create it, it is assumed that it existed by virtue of the then existing law. However, there is no legal basis for such a new form of right. The result is that there neither exists a new right, nor can the apparent 'new' right be assimilated with the existing land rights under the Land Ordinance.

In short, it is very doubtful if Act 22 has succeeded in 'saving or validating' Operation Vijiji. It has totally failed to provide security, certainty and stability to landholders in villages. As far as land tenure in rural Tanzania is concerned, it is probably more confused after Act 22 than it was before. The Act creates a legal quagmire. Every step to use it or implement its provisions could lead to the sinking into a mire of legal challenges and more land conflicts that could ultimately result in social instability.

THE MACHINERY TO RESOLVE DISPUTES

Under the far-reaching provisions of section 5 of the Act, legal proceedings touching on the extinction of customary rights or in relation to customary rights on village land have been removed from the courts and placed under the jurisdiction of customary tribunals. Such proceedings already begun in courts or partly heard are terminated by law. Judgments and orders by courts in any such proceedings which have not been executed shall not be executed.

This is Act 22's response to the problem of court cases arising from villagisation - to kill them off by edict or pronounce them stillborn or dead by law. Experience shows that attempts to oust the jurisdiction of courts are always resisted, not least by the judiciary itself. This is going to be even more so given the ambiguity and sloppy draftsmanship of the Act. Enterprising lawyers will continue filing suits in courts in spite of the ouster clause on grounds, *inter alia*, that such clauses do not cover their situations. One is likely therefore to see courts inundated with litigation of such a nature that it could further alienate the already estranged public from the machinery of justice. Whatever be the case, probably the greatest impact of the blanket ouster clauses is likely to be the undermining of the legitimacy, integrity and the already battered image of the judicial system of the country.[27]

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[27] See the observations of the Land Commission (vol.1, pp.204-5) on the adverse impact of the proliferation of administrative tribunals on the judiciary; 'The effect of administrative tribunals is really to sideline the judiciary and undermine the principle of separation of powers. It further enhances the concentration and centralisation of power in the hands of the Executive.' (*ibid.* p.205)

The Act does not create any new machinery for resolving disputes. It falls back on the machinery created by the Customary Leaseholds (Enfranchisement) Act of 1968. Under that Act a system of Customary Tribunals, Appeals Tribunal with the Minister as the final appellate body was instituted. The 1968 Act, it will be recalled, enfranchised customary tenants. Its original aim was to abolish a semi-feudal system of land tenure, *nyarubanja*, which existed in West Lake (now Kagera) region.

Evidence received by the Land Commission showed without doubt that customary tribunals have fallen into disuse or lost their legitimacy with the people. They were inefficient, incompetent and accused of taking bribes and practising nepotism. The Commission recommended that they be abolished and that their jurisdiction be exercised by Circuit Land Courts.[28] Yet the Tribunals are the bodies which are being resurrected under Act 22 and given even wider and far reaching powers.

The Land Commission had already drawn attention to the widespread problem of overlapping jurisdiction between Customary Tribunals and Primary Courts. The Commission also condemned the two-tier tenure system with registered and unregistered land (customary tenure) which forms the basis of the jurisdiction of courts. The genesis of this division lay in the racial division of the court system under colonialism. In terms of the Magistrates Court Act of 1984 it is the primary courts which have original jurisdiction over customary lands while disputes relating to registered land (granted rights) go to higher courts.

Act 22 has added a third structure. Disputes relating to granted rights go to the higher judiciary; those relating to customary rights in villages not established by Operation Vijiji would go to primary courts (thence to higher courts on appeal); and those relating to village lands in villages established by the operation would go to customary tribunals and eventually to the Minister on appeal. In this last case, courts of law are totally excluded from the process (see below).

Overlapping jurisdiction and the heavy involvement of executive organs in dispute settlement (with little success, it must be added) was identified by the Land Commission as one of the major sources of dissatisfaction, complaints, delays and inefficiency in the existing machinery for settling land disputes.[29] In the face of this evidence, it is inexplicable, to say the least, for Act 22 to place

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[28] Vol. I, pp. 210 & 222.
[29] Vol. I, chapter 10.

a major area of rural land disputes under the jurisdiction of the discredited officialdom of the Ministry of Lands.

One of the most important ingredients of any dispute-settlement machinery is whether people consider it to be fair, just and reasonable, in short whether it commands legitimacy with the general public. Framers of Act 22 have paid little regard to this principle. Their approach is typically bureaucratic - to have a quick decision-making machinery backed up by coercion regardless of whether those decisions are perceived by the public as fair, just and reasonable. Dispute-settlement machinery of this kind does not solve disputes because it leads aggrieved persons to act themselves to resolve conflicts and engenders more conflicts in the process - the very process the Act sets out to reverse.

IV. Land Commission's Approach and Act 22

A number of legal and tenurial problems discussed above were taken into account in the formulation of the Commission's recommendation on resolving the problems arising from Operation Vijiji. Probably the most important difference between Act 22 and the Commission's recommendations lies in their diametrically opposed approaches.

Act 22 approaches the problem in a piecemeal, *ad hoc* manner. The Commission locates the problem within the overall tenure structure as it has evolved historically and in its contemporary operation. Act 22 approaches the solution to problems in a bureaucratic, top-down ('managerial'[30]) fashion by imposing rules backed up by state coercion. For the Commission, the basic premise was the democratisation of the land tenure system which is sensitive to the land rights of rural small landholders.

In devising a land tenure regime, the Commission pays due regard to the customs and culture of communities without being overwhelmed by undemocratic practices (such as gender discrimination). By a blanket extinction

[30] This is the phraseology of the LTSG which sees the problem of land tenure in managerial terms. 'To us the greatest crisis facing land tenure in Tanzania is managerial rather than structural or legal. We therefore tend to agree with the Commissioners who choose to differ on the proposed radical restructuring of land administration on the argument that there is no ample justification for it in the report...'. The study does not seem to live up to its own premise because it fails to offer a "managerial" solution to the tenurial problems raised by villagisation or Act 22.

of customary rights, Act 22 blatantly undermines the customary regime while at the same time almost totally fails to put in its place a legitimate and workable alternative.

In its dispute-settlement machinery Act 22 is oblivious to the question of legitimacy on the one hand, and the need to maintain the integrity of the existing constitutionally established judicial machinery, on the other. It reproduces the discredited customary tribunals based firmly within an even more discredited organ of the state, the Ministry of Lands. The Commission distances its recommended dispute-settlement machinery from the executive, enhances the role of a re-formed judiciary in which there is a noticeable participation of the community through the system of Council of Elders (*Baraza la Wazee*) and seeks sanctions and deterrence against abuse in an open and transparent process.

Other more specific differences also illustrate how the Commission's approach translates itself into practical legal devices and mechanisms.

Firstly, unlike Act 22, the Commission's major recommendations on validating villagisation are to be part of a constitutional dispensation and therefore much less likely to be challenged on constitutional grounds.

Secondly, in its attempt to extinguish customary rights of the pre-villagisation owners, Act 22 casts a wide net by the use of spatial and policy concepts such as 'village land', 'villages established by Operation Vijiji', etc. This makes it very difficult for the draftsperson of the Act to capture all the practical situations of the operation which was very diverse and contradictory in the way it was implemented. The Commission, on the other hand, uses a relational concept, of 'rights affected or disturbed by villagisation' (Vol. I p. 197). This means that the Commission's approach is case-specific.

The other point, which is important in terms of legitimacy, is that the concept of extinction is essentially negative and it generates the popular perception of an imposed rupture with the past as well as expropriation of legitimate rights.[31] The Commission does not use the term 'extinction'. It uses the more positive concept of 'saving' certain rights by way of provisos. For example, several provisos qualify the vesting of village land in Village Assemblies. One of these would 'save' customary land rights which existed on the 25th day of January,

[31] Evidence given to the Commission showed that even those who were settled on lands of former customary owners did not approve of extinction of the latter's customary rights.

1973 (the date on which the ruling Party made its decision on villagisation), and were not disturbed during villagisation or by subsequent adjustments (*marekebisho*) made thereafter but before 31st December, 1977, on orders of the Party and Government in respect of land. This is to take account of the policy decision which was made later to avert some of the more blatantly irrational settlements done during the initial phases of the operation. Such rights would be deemed to be held of the Village Assemblies.

The effect of this proviso is that those customary rights which existed prior to 1973 and which were affected or disturbed in any way by the operation are not saved, hence have no validity in law. In effect, therefore, these rights are extinguished by virtue of *all village lands being vested in the Village Assembly*. The link between 'extinction' and vesting of land in the Village Assemblies is unmistakeable. Therefore 'extinction' takes place within the larger democratic dispensation on land tenure. This is far more likely to be perceived as socially just and legally fair (which is what it is meant to be), rather than the negative (and let it be said, perhaps, currently popular) perception of unjust and unfair 'confiscation' in Act 22.

At the same time, while the pre-villagisation affected customary owners would not have a legal leg to stand on in any judicial proceedings (and thereby threaten reversal of villagisation through courts, a prospect which is not dented by Act 22), they would still be provided with redress and a remedy under a separate act passed by parliament. Any such owner who is aggrieved could take his complaint to a Bench of Independent Arbitrators. He/she would have to establish not so much a legal right which would not exist, but that the deprivation of his/her customary right was unfair and unjust in terms of the then prevailing (villagisation) policy, procedures and practices even if such were not provided in law. A successful complainant would be entitled to an allocation of *alternative* land if available in the village and agreeable to the Village Assembly, or priority in land allocation over national lands or monetary compensation in lieu of land and compensation for unexhausted improvements. Appeals from the Bench of Arbitrators would be taken to the Circuit Land Courts on points of law only.

Thirdly, Act 22 obviously discriminates in favour of those occupying alienated village lands with paper titles - granted rights - regardless of how these were acquired. The Commission's recommendations make no distinction between titles. In the larger framework of: (a) granting equal security and a firm legal foundation to customary land tenure regime; and (b) returning alienated village lands to the villages, granted rights would be converted to customary rights if

they belong to villagers, and would have to be relinquished if they belong to the outsiders. This would help to redress, to a significant extent, grabbing of village lands which is one of the major sources of fear and apprehension in the countryside.

Fourthly, the problem of village boundaries is addressed by the Commission by rooting its demarcation machinery in: (a) the process of consultation between relevant village assemblies through its respective assemblies; and (b) impartial and independent adjudication by the Circuit Land Courts in case the village assemblies fail to reach an agreement. In leaving the decisions on village boundaries indirectly[32] to the discretion of the executive-dominated organs, Act 22's machinery is politically authoritarian and short on due procedure.

Fifthly, the Commission's proposals validate and secure the land allocations during villagisation by: (a) entrenching village assemblies and the vesting provision in the constitution; and (b) saving such allocations as a proviso to the vesting provision even if such allocations were not lawful in terms of the then applicable law so long as they were in accordance with the policy, practices and procedures of villagisation. The validated allocations are then assimilated in the customary law regime by stipulating that 'Such allocations and interests will be deemed to be held of the Village Assembly and such rights shall be construed to mean customary rights governed by customary law' (Vol. I, p.197). The point about this is to mobilise the legitimacy of customary law while embedding ultimate control and governance of land squarely in a modern (grassroots) organ - the Village Assembly.

V. THE CONSTITUTIONALITY OF ACT 22

Given the far-reaching implications of Act 22 and the arbitrary nature of its provisions, it is not surprising that the Act should attract an immediate attack on its constitutionality. However, more than a cursory look is necessary to determine whether, and in what respect, the Act could be said to breach the Constitution of the country.

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[32] Customary land tribunals (and ultimately the Minister as the final appellate organ) would inevitably, if indirectly, be involved in 'demarcating' village boundaries in the course of exercising their jurisdiction 'to determine whether any land is village land or is within village land' (s.7(a)).

Four major grounds can be advanced to challenge the constitutionality of the Act. These are:

(1) that the extinction of customary rights under section 3 violates the right to property stipulated in article 24 (1) of the Constitution;

(2) that in its consequences and effect the Act is discriminatory contrary to article 13 (1) & (5);

(3) that it denies an aggrieved party access to an impartial body for the adjudication of his rights and interests contrary to article 13(6)(a); and

(4) that some of the provisions of the Act fundamentally violate the basis of the constitutional structure of the State in that they are contrary to the underlying doctrine of separation of powers, independence of the judiciary and integrity of the judicial process.

RIGHT TO PROPERTY

Article 24(1) of the constitution stipulates the right of every person to own or hold any property lawfully acquired. Sub-section 2 makes it unconstitutional 'for the state' to acquire property for any purpose except under the authority of law which provides procedures and conditions for the payment of fair and adequate compensation.

Before sections 3 and 4 of the Act can be brought within the right to property, it must be assessed whether a deemed right of occupancy (i.e. customary land right) is *property* within the meaning of law.

There is now well-established colonial land jurisprudence and a body of case law from the highest courts, including the Privy Council, that land rights within 'native law and custom' cannot be considered rights of 'ownership'. They are essentially usufructuary rights of use and occupation, but do not amount to ownership interest in land comparable to a legal estate in English law. Thus, unlike a legal estate in land which can be alienated (i.e. sold as a chattel), customary rights cannot. The famous paragraph from the Privy Council in the Nigerian case of *Amodutijani v. Secretary, Southern Nigeria* (1921) 2 A.C. 399 on pages 402-404, is often cited. In that case, the Council said:

> "Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency,

operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principles. Even where an estate in fee is definitely recognized as the most comprehensive estate in land which the law recognizes, it does not follow that outside England it admits of being broken up.... In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of an individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment *inter vivos* or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned *a priori* are of but little assistance, and are as often as not misleading."

This observation and holding of the Privy Council was followed in later cases from other African jurisdictions including Tanganyika. The most celebrated judgement in this regard is *Mtoro bin Mwamba v. The Attorney General* (1953) 20 E.A.C.A. 108. Whatever one's view of the accuracy or otherwise of the cultural biases of colonial courts, the truth is that the land tenure system in Tanganyika was fashioned after that conception and virtually set in stone in the form of the Land Ordinance. To give one illustration: under the Ordinance compensation on acquisition, revocation and regrant is payable for 'unexhausted improvements' only, i.e. for improvements or developments made on the land,

but not for bare land or the right of occupancy whether granted or deemed.[33] In practice, it is true, that bare land does get sold - albeit disguised as a sale of tangible development such as trees, half-built foundations and so on - but the law has yet to recognise this reality and provide for it. In absence of an explicit change in the law, the case law cited stands.[34] Hence, the courts are likely to be more than persuaded that a deemed right of occupancy *per se* is not property and therefore does not fall within the ambit of a right of property in the Bill of Rights.[35]

The argument that section 4 of the Act which expressly bars payment of compensation 'only on account of the loss of any right or interest in or over land which has been extinguished' (section 4) is unconstitutional also falls. This provision, it is submitted, is saying nothing more than what is already the law. Compensation is not payable for a bare right of occupancy. On the other hand, compensation is payable for 'unexhausted improvements', but this is clearly not forbidden by the section and therefore section 4 is not caught by article 24(2) of the Constitution. This brings us to the second possible ground of challenge.

Discriminatory Treatment

Article 13(1) stipulates the usual equality clause while sub-article (2) states:

> "Subject to the Constitution, no legislative authority in the United Republic shall make any provision in any law that is discriminatory either of itself or in its effect."

'Discrimination' is further defined in clause (5) as 'affording different treatment to different persons attributable only or mainly to their respective descriptions by national origin, race, place of origin, political opinions, colour, creed or station in life whereby persons of one description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.'[36] This ground can only hold if it can be shown that

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[33] The post-independence statute, the Land Acquisition Act, 1967 also provides compensation only for unexhausted improvements and not for bare land.

[34] See the case of *Manyara Estate v. National Development Agency*, Civil appeal No. 27 of 1969. The East African Court of Appeal was clearly of the view that even a mortgagee of a right of occupancy was entitled to compensation for unexhausted improvements only.

[35] The Bill of Rights is incorporated into the Constitution.

[36] The printed version of the English translation is not particularly accurate or elegant. However, it is adopted here with minor change.

differential treatment is accorded to comparable persons and that the basis of such differential treatment is a person's national origin, race, place of origin, political opinions, colour, occupation or creed.

On the face of it, section 3 of the Act cannot be said to be discriminatory. However, the issue in the instant case is whether the provision is discriminatory in its *effect* or consequences. The fact that the provision only covers villages and not towns and therefore discriminates between urban and rural dwellers is a very weak argument. The two are not comparable and not within the contemplation of the phrase 'place of origin'. 'Place of origin' is a literal and misleading translation of the original Kiswahili phrase *pahala walipotokea* which is a nuanced rendering of 'social origin' and usually means "tribal" origin.

There are slightly stronger grounds to argue that the law discriminates between villagers, in that villagers in 'villages established by Operation Vijiji' would have their customary rights extinguished while those in other villages are not subjected to the same disability or restriction. The argument can be strengthened if it can be shown that the effect of the law is discriminatory in terms of 'ethnic origin'. It is generally believed that villagisation did not affect some areas (for example, Kilimanjaro) to the same extent as others (for example, Tarime). This means that the villagers of certain 'ethnic origin' are allowed to enjoy their land rights emanating from their custom and culture while others have been deprived of the same. In other words, the issue here is not only in terms of rights but also in relation to the freedom to exercise customary rights which the general law recognises as one of the sources of law.[37]

This argument, however, is likely to face two hurdles; one empirical and another legal. Firstly, the effect of villagisation on different regions will have to be empirically established. This becomes onerous because of the extreme ambiguity of the concept of 'villages established by Operation Vijiji', as already discussed above. Secondly, it could be argued that the law is two-pronged: it extinguishes certain rights but re-establishes others (the rights acquired during and subsequent to villagisation). This means that in practice one could find that the same set of people whose customary rights are extinguished with respect to their traditional land find that they have acquired 'new' rights on other lands (or even some of the same lands) through allocation or re-allocation during villagisation. So 'disability and restrictions' imposed by the law go hand in hand

[37] See the Judicature and Application of Laws Ordinance, 1961.

with accrual of 'privileges and advantages', to use the language of sub-article (5). This means that there is in effect no group of people of distinct 'origin' which can be identified as having been subjected to disability or restriction or net disadvantage by virtue of being a member of a particular 'ethnic origin'.

It seems then that the 'discrimination' ground also runs into problems and is not as straightforward as it would seem at first sight. Given the problem of establishing discrimination *prima facie* (since it is not clear on the face of the law), the presumption of constitutionality would be difficult to overcome.

In conclusion, it would seem there are plausible and quite persuasive arguments to uphold the constitutionality of sections 3 and 4. However, the same cannot be said of other provisions of the Act which purport to oust the jurisdiction of the courts and give the same to customary tribunals.

RIGHT OF ACCESSIBILITY TO FAIR ADJUDICATION

It has now been well-established that the Tanzanian Constitution is structured around the doctrine of a separation of powers, and, in particular, *separation and independence of the judiciary*.[38] The judicial system, including the High Court as the highest court of record with unlimited jurisdiction, is established by the Constitution (article 108). The courts therefore have a very strong constitutional basis to strike down any provision or action which appears to interfere with the judiciary or the judicial process.

Article 13(6) which entrenches accessibility of an aggrieved person to a tribunal for the adjudication of his or her rights and obligations is fairly strongly worded. It is submitted that at the minimum, sub-article (6) entrenches the right to a fair trial before an impartial tribunal (which would draw in all secondary rights such as right to legal representation) and the right to appeal and/or review.[39]

The relevant sections of Act 22 (i.e. 5, 6, 7, 8 and 9) together provide for the following:

(a) ousting of the jurisdiction of courts including the High Court's powers of judicial review (see section 9(2));

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[38] See *Kazembe v. R*, High Court at Dar es Salaam, Misc. Criminal Cause No. 41 of 1989, unreported.

[39] Ibid.

(b) giving original and virtually unlimited jurisdiction over any land dispute 'within or touching on any village land' (section 7) to customary tribunals, and appellate jurisdiction to appellate tribunals established by the Minister who is also the final appellate body;

(c) terminating all proceedings already instituted in courts to do with extinction of customary rights or occupation of village lands in accordance with 'custom or rule of customary law' and barring execution of orders, judgements or decrees already passed in any similar proceedings.

Members of the customary tribunals are appointed by the executive, the appellate tribunal is appointed by the Minister, and the Minister himself is the final appellate body. His decision is final and conclusive and cannot be 'reviewed in any court'. No legal representation is allowed before any of these bodies.

In sum, it could be argued that taken together this hierarchy of tribunals and the procedure before them are in breach of article 13(6) of the Constitution relating to the right to a fair trial before an impartial tribunal. The executive organs, from the tribunals to the Minister, cannot, by any stretch of imagination, be described as impartial when the Ministry is the executive organ directly involved in matters to do with land. Barring of legal representation and lack of clearly stipulated procedures regulating the tribunals could also be attacked as violation of the right to a fair trial.

In addition, it is submitted that the power of the Minister to appoint customary and appellate tribunals is an infringement of the powers of the judicature.[40]

Ousting of the court's jurisdiction of judicial review offends article 13(6) and article 108 which establishes the High Court as the court of record with unlimited original jurisdiction.

Termination of proceedings (partly heard cases included) before the courts and prohibiting execution of orders, judgments and decrees passed by the courts amounting to usurptio by the legislature of judicial powers of the State which are vested by the Constitution in the judicature. It offends the doctrine of separation of powers and is therefore *ultra vires* the Constitution.

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[40] See the celebrated Privy Council decision in *Liyanage v. R* [1966] 1 All E.R. 650 which was cited with approval in *Kazembe*.

All in all, it would seem these arguments against Act 22 stand a great chance of success. In which case, sections 5, 6 , 7, 8 and 9 can be declared unconstitutional and struck off. The result would be to leave the Act with only threadbare provisions which are valid - sections 1 and 2 which are preliminary and definitional; sections 3 and 4 which extinguish the rights, and section 11 which amends the Land Ordinance.

If the position advanced in this paper was upheld, it would have the salutary effect of preventing immediate evictions of thousands of current occupiers of land through court orders. On the other hand, striking down of the sections mentioned would leave the Act without any machinery for settling disputes except in the courts. It is most unlikely the Act would be left on the statute book with more than half its body severed.

Persisting with depleted legislation may provide some breathing space to the Government. But at the same time the acute embarrassment and unworkability of the Act caused by the judicial knocking off of the five substantive sections of an 11-section Act, one hopes, would force the Government and the legislature to look at the problem afresh and approach it in a more rational and democratic fashion.

Legally, the substantive provisions of the Act would have been saved. But practically the application of these provisions is fraught with problems already discussed. Again, the problem of courts being inundated with cases would not have been resolved. Aggrieved parties would undoubtedly resort to courts for determination of such issues, among others, as whether their 'land' falls within the definition of village lands. Consequently, there is no way the Government would be able to escape the need to approach the problem from a different angle.

VI. CONCLUSION

The preceding legal arguments demonstrate the utter hopelessness of trying to accommodate new land relations wrought by villagisation within the pre-existing framework of the Land Ordinance. In an attempt to resolve the immediate tenurial problems created by villagisation, Act 22 has deepened a legal quagmire by compounding the already confused land tenure scene. If anything, this analysis demonstrates the unviability of piling up *ad hoc* legislation on the

substratum of the Land Ordinance, which puts enormous power over land in the hands of the executive by vesting the radical title in the President (State).

The authoritarian state-controlled and centralised model which guided the colonial and post-independence land tenure system has become bogged down. Act 22 attempted to winch the state free. This has clearly failed.

As the Land Commission argues in its Report, the way out of the impasse is thoroughly to democratise and legitimise the land tenure system by devolving power to the Village Assemblies and an independent National Lands Commission, on the one hand, and rooting land tenure in the custom and culture (albeit modified by democratic and accountable institutions and procedures) of the people, on the other.

People are crying out for nothing less than a democratic constitutional dispensation on land to resolve their problems. Act 22 attempts to smother that cry, and in doing so persists with past injustices.

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The main fields of activity are:

- **Networking between researchers, local organisations, development agents and policy makers. Networks help exchange ideas, information and techniques for longer term solutions for Africa's arid lands.**

- **Support to local organisations and researchers to encourage sharing of experience and ideas, capacity building and establishing collaborative links.**

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

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

- **Provide the basis for more efficient land use in pastoral areas of dryland Africa.**

A series of papers arising from this work will be published with a view to making relevant information available to policy-makers and development practitioners.

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