

## Managing from below: opportunities for, and constraints to, legal and institutional innovations for community forestry in Tanzania

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### SUMMARY

Reform of land tenure and natural resource management in Tanzania seems to be a result of a host of factors, some of which conflict with one another. Two opposing factors in particular stand out. Reform is in part a response to the needs of modern Tanzania, where the economy is being liberalized, resources are being privatized and there is an emerging land market.<sup>1</sup> But reform is also a result of a search for a new land tenure and resource management structure that will shape the course of Tanzania's development in a way that is relevant and responsive to the needs of the majority of its citizens – its small farmers, pastoralists and resource-dependent people.<sup>2</sup> The reform has been criticized in certain circles as inadequate to facilitate “bottom-up” or grassroots development in line with popular aspirations.<sup>3</sup> This paper attempts to examine the opportunities and constraints that exist for legal and institutional innovations for community forestry in Tanzania. This will be done in the light of the new forest policy,<sup>4</sup> the new land bills, existing legal frameworks and village organizational structures. The paper looks at these policy and legal reforms and focuses on the extent to which, through them, powers have been devolved to communities to become legal owners and managers of their forest resources. The underlying argument is that security of tenure for communities over their land and forest resources is a precondition for effective community forestry.

1. First schedule to the Land Bill (No. 5 of 1998), in its statement of objects and reasons. The bill has been approved by parliament and currently awaits presidential assent to become law.

2. This seems to the author to be the underlying philosophy of the report of the Presidential Commission of Inquiry into land matters.

3. Since most of the reforms remain at policy level, it is perhaps premature to speculate on the issue. However, on reform of land tenure see Shivji (1998) and Shivji and Kapinga (1997).

4. The National Forest Policy of Tanzania (Ministry of Natural Resources and Tourism, 1998a).

## Introduction: the reform of land tenure and natural resource management in Tanzania

As part of the country's colonial legacy,<sup>5</sup> land tenure and natural resource management have been characterized by a centralized tradition of management, with enormous powers vested in the State.<sup>6</sup> Almost three decades of independence had seen minor attempts at land reform and devolution of power to communities. From the late 1980s to the present, Tanzania has been implementing a series of reforms<sup>7</sup> encompassing land tenure and the ongoing reform of natural resource management. The land tenure reform process culminated in parliament's recent approval of the long-debated land bills.<sup>8</sup>

### Land tenure

The new land bills stipulate that all land is to remain vested in the President as a trustee for, and on behalf of, all the citizens of Tanzania.<sup>9</sup> For the purposes of management, land is classified into three different categories: general, village and reserved land. The latter is land reserved under various pieces of legislation, which include the Forests Ordinance, Cap 389, the Wildlife Conservation Act 1974 and the National Parks

Ordinance, Cap 412. Land is to be freely transferable from one category to another at the request of the President through his delegates, the Minister responsible for lands and the Commissioner for Lands.

The recognized system of tenure continues to be the right of occupancy,<sup>10</sup> which is further categorized as a granted right, a customary right or a derivative right.<sup>11</sup>

### Rural land tenure

As a result of a programme implemented in the 1970s and known as "operation *vijiji*", rural Tanzania is organized into village communities.<sup>12</sup> The meaning of rural land tenure has now been spelled out in the Village Land Bill, which in turn takes the village as its point of departure. The bill defines village land to include, inter alia, land other than reserved land that the villagers have regularly occupied and used as village land during the 12 years preceding the act.<sup>13</sup> Certificates of village land will be issued to villages affirming the occupation and use of village lands by villagers.<sup>14</sup>

The management of village lands will be entrusted to village councils, which will have power to grant customary rights of occupancy on village land to villagers and non-resident citizens. Grants to non-village organizations over village lands are to be made and governed or administered by the Commissioner for Lands.<sup>15</sup> The bill

5. The Germans through their Imperial Decree of 1895; the British through their Land Ordinance, Cap 113, and numerous other pieces of legislation.
6. When independence was attained in 1961, colonial legislation remained intact with minor cosmetic modifications. Powers vested in the State pertaining to land included compulsory acquisition of land, the revocation of rights and the extinction of customary rights.
7. Structural adjustment programmes, market reforms and privatization were undertaken under pressure from international financial institutions; there has been a move away from State control towards a market-oriented economy.
8. The debate, however, has tended to be confined to a small élite of intellectuals and non-governmental organizations (NGOs). Neither the National Land Policy (1995) nor the bills were made accessible to the majority.
9. Section 2 of the Land Act. The legal implications of this are far-reaching: in trust arrangements, beneficiaries can sue for breach of trust. However, technical difficulties in suing the President in his official capacity under the existing constitution may in practice render the section a non-starter.
10. The right of occupancy is similar to the English lease: it is a right to the use and occupation of land for a specific term, ownership remaining with the State upon expiry.
11. A lesser interest created from a granted/customary right of occupancy, e.g. a lease.
12. There are currently more than 8 000 registered villages in Tanzania (United Republic of Tanzania, 1994).
13. Section 57 (1) (e) of the Village Land Act Bill.
14. Section 8 (1).
15. Section 7 (13), *ibid*.

confirms the validity of existing allocations concerning village lands.<sup>16</sup> Furthermore the village council will have the power to recommend to the village assembly what portion of land may be set aside as communal village land<sup>17</sup> and to enter into joint village land use agreements with any other village council.<sup>18</sup>

## **The legal framework for forestry management and the status of non-reserved forest lands on public land**

Apart from land legislation, the basic law affecting forestry management is the Forests Ordinance, Cap 389, and the subsidiary legislation made thereunder. Although this law has been amended in various ways, it has not been subjected to a major overhaul and its main provisions have been left more or less intact.<sup>19</sup> Under the ordinance the minister responsible for forestry is empowered to declare any area of unreserved land (i.e. land not held under a granted right of occupancy, customary right or previously reserved under other laws) a forest reserve, once procedures spelled out in the act have been followed.<sup>20</sup>

Legally speaking, there are two recognized categories of forest reserves: territorial forest reserves, which are under the authority of central government, and local authority forest reserves, which are under the authority

of local governments.<sup>21</sup> Tanzania's forest and woodland resources amount to 33.5 million ha. Out of that total some 14.5 million ha are gazetted as forest and game reserves.<sup>22</sup> The remaining 19 million ha are non-reserved forests on public lands.

### **The status of non-reserved forest land within the land tenure structure**

Non-reserved forest lands have hitherto been legally and officially recognized as public lands and are unused in the eyes of the law. In practice they provide a major source of fuel, building materials, wild foods and browse for rural communities. The pitfalls of the above categorization have been that: (i) such lands have been (and still may be) subject to encroachment by the State<sup>23</sup>; (ii) these lands have been subject to uncontrolled use since communities lack the means to restrict access for outsiders; and (iii) the immediate users of these forestry resources, whose livelihoods depend on them, lack security of tenure. This in turn acts as a disincentive to communities to manage these resources sustainably. A major concern has been whether to place such lands under village jurisdiction, set them aside as reserves or leave them as they are (World Bank, 1992). This concern has been partially answered by the Village Land Bill.

Pursuant to the bill, such non-reserved public land may be classified as general land or village land depending on whether or not it is occupied and used by a village.<sup>24</sup>

16. Allocations, for example, made by operation vijiji from January 1978 to the commencement of the act, allocations made by the village council and allocations made to non-village organizations under granted rights of occupancy extinguishing prior existing customary rights save where the customary rights have not been transformed by operation vijiji.

17. Section 13, *op. cit.*

18. Section 11(1), *op. cit.*

19. In the course of writing this paper, it came to the author's attention that a draft bill for forestry is currently being prepared. However, this could not be verified independently.

20. These include the demarcation of boundaries and giving 90 days' notice in writing of the proposed declaration.

21. Section 5 (1).

22. There are 12.5 million ha of forest reserves and 2 million ha of forest woodlands within national parks.

23. They may, for instance, be declared reserves, licensed to investors, or acquired in the public interest.

24. To be classified as village land if the villagers can establish use and occupation of it for a period of 12 years prior to the commencement of the act. However, if such land falls within villages but is unoccupied and unused it will be classified as general land.

## Arguments in favour of community forestry

Several factors make categorizing public unreserved forests and woodlands as village lands (and hence placing them under the jurisdiction of their respective village governments) a viable alternative for effective management:

- there is a link between the forests and woodlands and the socio-economic and spiritual life of the communities who live in their proximity;
- placing resources under village jurisdiction, i.e. under the control of their immediate users, is socially legitimate (Ndonde, 1996); and
- the Tanzanian State has not always proved to be a good manager of resources.

It is argued that for effective community management of forests and woodlands, two things are necessary:

- 1 forests and woodlands on public land need to be vested in the village, thereby securing tenure of the forest resources for the village; and
- 2 the villages should be legally empowered to control the use of forest resources and restrict the access of non-local people to those resources.

What follows is an examination of the opportunities for, and constraints to, innovations for community forestry management in Tanzania.



## Opportunities and constraints for legal and institutional innovations

### Opportunities offered by the land bills

The Village Land Bill of 1998 is a step towards enabling villages to manage their forest resources. The following provisions are relevant to community forestry:

- villages will receive a certificate of village land describing its boundaries;<sup>25</sup>
- authority to administer all village land will be granted to the respective village councils;<sup>26</sup>
- village councils will recommend to village assemblies what portions of village land should be set aside as communal land and for what purposes;<sup>27</sup> and
- land habitually used, whether as a matter of practice or under customary law, or regarded by village residents as available for use as community land before the commencement of the act, will be deemed to be communal village land and will be registered.<sup>28</sup>

What this last provision does is to provide legal recognition for villagers' communal customary rights. Hitherto such rights were largely ignored or unrecognized.<sup>29</sup>

The bill is not explicit about the exact legal status of the certificate of village land. However, it is argued that since the certificate affirms the occupancy and use of the village land by villagers, it is intended to be of equal status to a granted right of occupancy and therefore excludes the possibility of other grants on the same land.

25. Section 7 (6).

26. Section 7 (7) (b).

27. Section 13.

28. Section 13 (7).

29. Often under previous land legislation, individual customary rights have been subject to discussion. There have been a few cases where communities have tried to assert communal customary rights over village lands in courts of law and have lost, e.g. NAFCO vs. Mulbadaw Village Council, Court of Appeal of Tanzania at Arusha, Civil Appeal No. 3 of 1985.

The bill also makes provision for local dispute settlement machinery in the form of elders' councils,<sup>30</sup> with right of appeal to the main judicial system, and provides the mandate of the councils. These provisions, given an innovative reading and interpretation in courts of law, strengthen arguments in favour of community management<sup>31</sup> by recognizing communal customary rights. Lands habitually used as commons may also be considered "communal", thereby doing away with the requirement on communities to establish use according to custom.

### **Opportunities offered by the National Forest Policy**

A new forest policy was finally approved by the government in March 1998. Its overall objective was to enhance the contribution of the forest sector to the sustainable development of Tanzania and the conservation and management of its natural resources for the benefit of present and future generations. The policy identifies the core problem in the management of forest reserves – the poor capability of government institutions to manage these resources. As a consequence forest cover is destroyed and degraded and forest lands are converted to other land uses.

Joint management agreements will be established to enable participation of all stakeholders in forest management. Such agreements will involve the central government, the private sector and organized local communities or organizations set up by people living adjacent to forests.



The following statements apply specifically to non-reserved forest lands on public lands.

- Village forest reserves will be established and will be managed by village governments or other entities designated by the village governments for this purpose.<sup>32</sup>
- The legal framework for the promotion of private and community-based ownership of trees and forests will be established.
- Allocation of forests and responsibility for their management to villages, private individuals or to the government will be promoted.
- Central, local and village governments may demarcate and establish new forest reserves under the policy.

### **Opportunities offered by existing legal frameworks**

#### ***The Constitution of the United Republic of Tanzania***

Article 9 of the constitution<sup>33</sup> requires the government to ensure that natural resources and the natural heritage are harnessed, preserved and used for the common good. Article 27 further requires all citizens of Tanzania to safeguard and protect the country's natural resources. Given an innovative interpretation, these provisions strengthen community management. Since constitutional reforms are under way, there is an opportunity to establish constitutional guarantees for community rights regarding village lands.

30. Such councils are to be nominated by the village council and approved by the village assembly.
31. However, courts can only make bold judicial statements in favour of community management if they are subject to litigation not on their own motion.
32. For instance, NGOs, user groups and religious associations.
33. The 1977 Constitution (as amended). Tanzania is currently undergoing constitutional reforms. A commission has been appointed to collect people's views on the need for a new constitution.

### ***The Local Government (District Authorities) Act 1982***

In 1982 local government legislation was enacted to create urban, district, division, ward and village authorities.<sup>34</sup> The Local Government (District Authorities) Act of 1982 empowers village authorities to take action and do whatever they judge necessary to promote the economic and social development of the village,<sup>35</sup> and to plan and coordinate horticultural, forestry, agricultural and any other activities.<sup>36</sup> Registered villages are empowered by the act to make by-laws concerning matters for which village authorities are responsible.

### ***The Cooperative Societies Act***

Under the Cooperative Societies Act, a village or community can form a cooperative, receive title-deed to land and manage it as a group. The cooperative society can make by-laws and enter into contracts.

### **Opportunities within village organizational structures in rural Tanzania**

Rural Tanzania is organized into village communities and the village as an organizational unit is widely accepted by the villagers.<sup>37</sup> The village organs are: (i) village assemblies, which consist of those apparently aged 18 or over who are normally resident in the village<sup>38</sup>; and (ii) village councils, which are made up of members elected by the village assembly.<sup>39</sup> The village council is the executive organ and is vested with administrative powers. The village council of a registered village is a corporate body that can sue, be sued, enter into contracts and hold property; it also has perpetual succession.

Various village committees are responsible for different matters, such as finance, natural resources and land.

Apparently, therefore, the institutional framework for community forestry management is already in existence and need not be created, as may be the case in some other sub-Saharan countries.

Recently, community-based organizations have been formed that have largely co-opted the village structures.<sup>40</sup> This shows that possibilities for institutional synergy exist, such as traditional representation through a State-registered body corporate.

### ***Agreements and joint ventures***

Pursuant to the Local Government (District Authorities) Act, registered villages are bodies corporate and may enter into contracts and law suits. Registered villages, community-based organizations and cooperatives could enter into contracts with other stakeholders to manage forest resources within their jurisdiction, excluding those that are reserved. Communities could be assisted in negotiating equitable contracts by having contract guidelines prepared for them.

### **Constraints**

#### ***Security of tenure for village lands and the new land bills***

The new bills retain the notion of public land, meaning that the ultimate owner of all land is the State, not the people. Thus in reality the State maintains executive control and ultimate decision-making authority. Land can be freely transferred from one to another of the three categories at the instance of the President and it is possible, given the increased pressure for land for, among other things, "investment", to envisage further alienation of village land. This could happen through its reclassification as general land and its allocation or sale without the villagers' consent. Likewise village land may be transferred

34. These were charged with various responsibilities, such as those relating to planning, finance, and land use.

35. Section 142 (2) (a).

36. Section 142 (2) (c).

37. Presidential Commission op. cit.

38. Section 55, Local Government (Districts Authorities) Act 1982.

39. Section 57 (1) *ibid.*

40. Especially pastoralist groups in Masai regions of Arusha, northern Tanzania.

to the reserved land category and then allocated to private persons using the pretext that better or sounder management is needed.

Existing alienations of village land have been in effect validated by the new bills as outlined in this paper.<sup>41</sup> The bills further facilitate land grabbing by, inter alia, enabling companies to get rights of occupancy and customary certificates of ownership over village lands, in which case it is the Commissioner for Land who has ultimate power of supervision. In summary, a centralized tradition of holding land cannot provide security of tenure for communities to manage forests that form part of village lands.

#### ***Village structures, democracy and local capacity building***

Although villages represent viable units for community forestry, questions of democracy necessarily arise and must be addressed. Village assemblies in practice have been disempowered. Village councils have felt more accountable to district, regional and national authorities than villagers. It is not unrealistic to envisage more economically powerful sections of the village community wielding political power. Since women have a direct interest in the conservation of forest resources, there is a need to integrate gender issues with conservation and development. Local capacity building has remained minimal in terms of the legal, managerial, financial and other resources committed.

#### ***Limited research into indigenous or local knowledge systems***

Linked to the above is the limited research into, and documentation of, indigenous knowledge systems and natural resource management techniques. After almost three decades of existence, the University of Dar-es-Salaam lacks a Department of Anthropology. If development practitioners are to make progress concerning community conservation and resource management, they must

build on the wealth of knowledge already possessed by communities.

#### ***The legal culture and the dissemination of legal information***

Legal innovations imply two things: (i) that there is knowledge of that law; and (ii) that all stakeholders are willing to abide by the law. Unfortunately Tanzania's evolution from a colonial State to a one-party socialist State has been characterized by minimal legal culture in the day-to-day business of governance and administration. Laws that have been adhered to have tended to be coercive in nature.<sup>42</sup>

Related to this is the low number of legal practitioners and lawyers.<sup>43</sup> These have an urban bias (for obvious reasons) and naturally little effort has been made to disseminate legal information to the bulk of Tanzanians, particularly in rural areas.

Implementing laws resulting from a process that excludes the vast majority (or its views) is bound to be problematic, leaving aside the question of the legitimacy of the process. It would therefore appear that the wide-ranging legal reforms currently under way may remain elitist, middle class and donor-driven.

#### ***Political will***

The third-phase government in Tanzania has shown its willingness to provide stakeholders with political space to negotiate the future of the country, which would have been inconceivable under past administrations. However, there is strong pressure to create an "investor-friendly environment", privatize resources and liberalize the economy. In the circumstances it would be naïve to assume that the political will exists to bring about the critical reforms necessary for community control not only over forests but over the destiny of those communities without popular agitation for change (Ndonde, unpublished).

41. Despite the grievances of villagers, as documented in the Presidential Commission report.

42. United Republic of Tanzania (1991) Commission of Inquiry into one party/multiparty State, Dar-es-Salaam. Forty laws have been declared unconstitutional and an infringement upon fundamental human rights. Many of those laws are a part of the colonial legacy.

43. For a population of 30 million, there are fewer than 500 registered advocates.

## Conclusion

This paper has attempted to show the legal status of unreserved forest lands in Tanzania's new system of land tenure. In light of the new land tenure system, forest policy and village organizational structures, it has tried, albeit haphazardly, to examine some of the opportunities and constraints that exist for legal and institutional innovations for community forestry in Tanzania. The main issues are now summarized.

Tanzania's new land tenure structure has to an extent tried to cure the anomalies in the legal status of public unreserved lands, including forest lands, by categorizing them as village lands, subject only to the requirement that they have been used and/or occupied. A vast amount of forest land in Tanzania falls within village lands and has hitherto been legally and officially classified as public lands with no defined ownership and use rights. In practice such areas provide the basic livelihoods of communities, but communities have been unable to protect these forest lands from both private and State encroachment and manage them effectively.

What is needed first and foremost for effective community forestry is to provide villages with security of tenure over forest land and village lands generally. The extent to which the new land bills provide security of tenure for communities over their village lands and forest resources is debatable.

The new forest policy and the new land bills have to an extent provided a framework for management of forest land by villages. In Tanzania, the registered village as an institutional unit presents opportunities for management of forest resources, provided that village governments are democratized, local capacities built and efforts made to research local systems of knowledge.

Existing legal frameworks provide opportunities for village management of forest resources. However, for communities to manage such resources effectively, they must not only be aware of their rights and obligations under existing and new legislation, but there must also be a willingness on the part of all stakeholders to abide by the law and a law-making process that is informed by those rights and obligations. There must therefore be popular agitation to bring about critical reform to enable communities not only to manage their forest resources but also to chart their own destinies.

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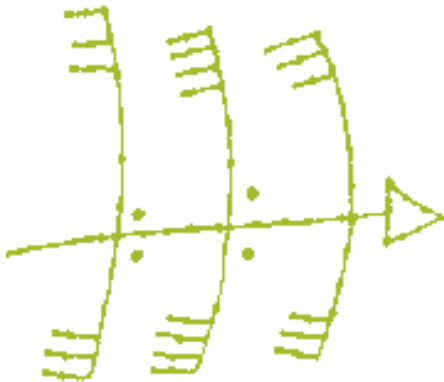
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## Relevant legislation

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The Constitution of the United Republic of Tanzania 1977 (as amended)

The Forests Ordinance, Cap 389 of the law of Tanganyika

The Land Act Bills 1998 (No. 5 of 1998)

The Land Ordinance, Cap 113 of the law of Tanganyika

The Local Government (District Authorities) Act 1982 (No. 7 of 1982)

The Local Government (Urban Authorities) Act 1982 (No. 8 of 1982)

The National Parks Ordinance, Cap 412 of the law of Tanganyika

The Natural Resource Ordinance, Cap 259 of the law of Tanganyika

The Ngorongoro Conservation Area Ordinance, Cap 413 of the law of Tanganyika

The Village Land Act Bills 1998 (No. 8 of 1998)

The Wildlife Conservation Act 1974 (No. 12 of 1974)

The Cooperative Societies Act 1991 (No. 15 of 1991)

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