

Commission on Nomadic Peoples

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Nomadic Peoples, Number 34/35, 1994

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Pastures lost: alienation of Barabaig land in the context of land policy and legislation in Tanzania

Charles R. Lane

Introduction

Pastoralists in Tanzania, like those elsewhere in Africa, are losing access to their traditional lands and finding their movements increasingly restricted. More fertile areas are being taken up by government and private interests for nonpastoral commercial use (Lane & Swift 1989). Communal ranges are being enclosed and broken up into discrete and potentially exclusive titles that subdivide wider pastoral ecological land use units (World Bank 1992).

In spite of the fact that traditional livestock keepers in Tanzania make a substantial contribution to the national diet (Raikes 1981) and economy (Mustafa 1985), and produce meat at a lower cost than state ranches, many officials regard the pastoral sector as inefficient. As a consequence, state policies have tended to favour cultivation agriculture (Lane 1991) and the preservation of wildlife to the detriment of pastoralists (Parkipuny 1991). Privatisation of land is promoted as a panacea for increasing productivity, conservation of natural resources, encouragement for investment, and as the only viable collateral to obtain credit.

In Tanzania, land theoretically has no value and cannot be sold. It can only be acquired by following due process of law to attain a Granted Right

of Occupancy (leasehold tenure), which is subject to conditions of use. According to the World Bank, the lack of land tax and the fact that the cost of land acquired through allocation is well below its market value, has promoted speculation and land grabbing, and "as land is perceived as a free good its use is insulated from normal economic pressures", thus permitting its under-utilisation and misuse (World Bank 1992:18).

A growing body of research shows that the process of land alienation and restrictions on movement are destroying natural resources as well as pastoral livelihoods (see Lane & Moorehead 1993). In the process environmentally sound and economically efficient use of extensive dryland resources by pastoralists is being undermined (World Bank 1992). Recent analyses suggest that such processes persist because of the ascendancy of bureaucratic and commercial interests over local needs and wishes, and as a result of dogma from the development community which accepts flawed assumptions that pursue political, not ecological objectives.

Four major policy initiatives in Tanzania have converged over time to undermine pastoralist's security of tenure: (1) nationalisation of land; (2) 'villagi-

sation'; (3) village titling; and (4) land use planning. Through a review of the Barabaig case, it will be illustrated how these processes and the policies that underpin them have operated to alienate pastoral lands, threaten destruction of rangeland resources, and undermine the pastoral economy.

As so much has already been written about the plight of the Barabaig in relation to the alienation of their land (see for example Lane 1993, 1991a, 1990) the purpose of this paper is to provide an up-date on progress with the legal case and set this within the context of land-related policy and legal changes in Tanzania. However, a brief description of the background to the problem of land alienation will be given for those who are not familiar with the more detailed material.

The Barabaig of the Hanang plains

The Barabaig are a sub-tribe of the wider ethnic and language group called Tatoga (sometimes Datoga). Being Nilotes and cattle herders they share many of the characteristics of livestock-keeping cultures — for example, similarities with the neighbouring Maasai. Today, most Barabaig also grow maize through shifting cultivation as a dietary supplement and to preserve livestock from crisis sales.

Traditionally, the Barabaig occupy the plains surrounding Mount Hanang — the Basotu Plains in the north and Barabaig to the south — which are now encompassed by the boundary of Hanang district of Arusha region in north central Tanzania. The district is broadly divided by the Rift Valley escarpment into north-highland Basotu and south-lowland Barabaig plains. The area is semi-arid, with an average of around 600 mm rainfall per year with a

variation of 450 mm to 900 mm. Rainfall is bimodal, falling mainly in April/May, and November/December with slightly more rain falling on the highland Basotu plains (Lane 1991a).

The terrain is dominated by an extinct volcano, Mount Hanang, which rises 3,418 m from the lowland Barabaig plains. The plains themselves are undulating and punctuated with depressions. Permanent water sources are scarce and confined to a few perennial streams on the slopes of Mount Hanang and some volcanic lakes — mainly on the Basotu plains — many of which are surrounded by cultivation (Niamir-Fuller et. al. forthcoming).

The vegetation is dominated by acacia and commiphora woodlands interspersed with open grassland. Using the vegetation and soil classification of Stoddart et. al. (1975), Niamir-Fuller et. al. (forthcoming) describe 12 range sites with different vegetation patterns found in Hanang. In response to this diversity of grazing resources and the variability of climatic factors, particularly rainfall, the Barabaig practice transhumance — moving with their livestock around the range at different times depending on forage conditions and water availability.

Barabaig pasture classification is based on a mix of factors that take account of topography, soil type and vegetation. As I have described elsewhere, there are eight major forage regimes around which the Barabaig move their livestock, according to range conditions in a seasonal grazing rotation, or what Niamir-Fuller et. al. (forthcoming) call a 'seasonal deferment system' of grazing.

The most productive forage regime is called muhajega by the Barabaig. They are found mainly on the Basotu plains in mbuga (Kiswahili) depressions with fertile soils. Because of the inherent fertility of these soils and their water holding capacity muhajega offer the

greatest vegetation biomass and nutritional value to livestock. Consequently, they are grazed whenever conditions permit. However, as permanent water is scarce on the plains, this is largely confined to the months of rain when, surface water can be found.

The grazing system is dependent on free movement of herders to utilise pastures according to their assessment of productivity and the needs of their livestock. However, this is not 'free for all' access to land as described by Hardin as a 'Tragedy of the Commons' (1968). Barabaig customary land tenure arrangements are communal in as much as they are based on the community's joint user rights to rangeland including muhajega. Within communal land tenure arrangements they recognise a home territory and many tenure types from common to private property (Lane 1991b).

Customary rights are basically divided along tripartite lines with the community controlling overall territory, surface water, and certain features such as sacred trees and the forest on Mount Hanang itself, where rights to cut live timber on the mountain is forbidden. There was also a customary rule (now widely broken) denying habitation in the wet season of the darorajand forage regime on the Barabaig plains near Lake Balangda Lelu, as the grazing is needed in the dry season when wells at the lake offer the only source of water. Clans control wells, grave sites, abandoned homesteads and farmland. Individual household heads have private rights to the homestead and its surrounds, shade trees, and the private grazing reserve, or radaned, that is used for small stock and sick animals (Lane 1991b).

Land alienation

Today, the Barabaig are recoiling from

the effects of the alienation of over 40,000 hectares of prime muhajega grazing land. The land in question was acquired by the government for the Canadian International Development Agency (CIDA) – funded Tanzania Canada Wheat Program (TCWP), with scant regard for Barabaig customary rights to land (Lane 1991a). The loss of this land is compounded by the steady encroachment on pastures by neighbouring mainly Iraqw and Mbulu farmers and large scale commercial crop producers from outside the district.

In nearly all cases the best land (muhajega) is taken. Whilst the scheme only covers 12% of district land, it represents a far greater loss to the Barabaig, affecting a major proportion of muhajega land — perhaps as much as 50% of the available pasture land outside the Mount Hanang forest reserve, excluding salt pans and land affected by tsetse infestation (Lane & Pretty 1990). The withdrawal of so much of the productive pastureland from the Barabaig landuse system has led to a downturn in production and resulted in degradation of the environment (Lane & Scoones 1993). Indications are that this has also had an adverse impact on Barabaig infant mortality levels (Borgerhoff Mulder 1990; Lane 1991a; Brystad 1993).

It is clear from a succession of reports and public protests by the Barabaig that the land was acquired with little respect for Barabaig rights (see, for example, Africa Watch 1990; Survival International 1990; Lane 1993). On some occasions, the first the Barabaig knew about the loss of their land was the sound of tractors ploughing round the homestead. Although some Barabaig were given some compensation, they claim too little was given to too few, too late (Lane 1991a). Despite assurances from officials, no assistance was given to relocate them

elsewhere. Considered legal opinion suggests that due process of law was not followed, or at worst was corrupted by the Tanzanian National Agricultural Finance Corporation (NAFCO) to help the parastatal acquire the land.

The vulnerability of pastoralists to alienation of their lands has its roots in their particular communal form of land tenure, and the ignorance and negative attitude of many government and donor organisations, who consistently misinterpret or disregard the basis for pastoral land tenure security. In the following analysis of development policy and action in Tanzania five themes consistently re-occur: (1) disregard of customary land rights, particularly common property or collective rights; (2) ignorance of extensive herding systems as practised by the Barabaig (almost no Barabaig hold senior posts in central government and few even at the local level); (3) ignorance of the adverse ecological impacts arising from alienation of pastoral lands; (4) the prevalence of policies for privatisation of property; and (5) the ascendancy of state interests over the needs of local communities as exemplified by the imposition of 'top down' approaches.

Nationalisation

All land in Tanzania was brought into the 'public domain', ie. nationalised, by way of the 1923 Land Ordinance. Later in 1928 an amendment gave customary rights statutory recognition, as a Deemed Right of Occupancy to be interpreted "in accordance with native law and custom". However, administration of land, in the hands of first colonial and later independent governments, has confirmed the inferior status of customary compared with statutory tenure or Granted Right of Occupancy (Tenga 1992). Providing precedent for

contemporary actions of the Tanzanian Government, the Colonial Government sought to acquire lands then held under customary tenure for the use of settlers, for expediency using arguments which undermined customary rights (see below for elaboration of the famous Meru Land Case).

The creation of public land tenure has created a problem for pastoralists, who leave little evidence of occupation, and whose migratory pattern of land use can mean that land is apparently idle for long periods and has often been assumed to be vacant (Lane & Swift 1989). As such pastures have been subject to encroachment, alienation and uncontrolled use as an open access resource. In some pastoral areas this has led to over-grazing and land degradation, as customary controls no longer confine rights of access to the customary user group nor regulate levels of use — a true tragedy of the commons.

Villagisation

It has long been thought by administrators and livestock specialists that pastoralism is a primitive form of production that requires transformation. Nomadism is also regarded as evidence of disorganisation and an obstruction to development. Settlement of pastoralists is therefore regarded as a prerequisite to efficient production and the integration of pastoral populations into the mainstream of society.

Although villagisation in Tanzania was not specifically designed to settle pastoralists, it has incorporated them to a large degree, and its impacts pose particular problems for pastoralists. The demarcation of communal rangelands into villages has the potential for disrupting customary land use patterns. Village boundaries not only divide up the commons, they also provide the

potential for exclusion of customary land users from traditional access to resources. This is because village titles do not cover the whole range that makes up a pastoralist ecological land use unit.

Villagisation was implemented with little consideration for the diversity of customary land tenure arrangements, particularly forms of communal tenure that do not fit easily within the new village structure. According to Shivji, Chairman of the Presidential Commission of Enquiry into Land Matters, the movement of people into villages was achieved with "little regard to existing land tenure systems and the culture and custom in which they are rooted" (URT 1992:61).

In the process it transformed the distribution of land among groups and individuals, had a negative effect on agricultural production, mixed equity, and generally negative effects on the environment (World Bank 1992). Villagisation was achieved with the use of government directives without adequate legal endorsement. The legislative instruments that facilitated villagisation — Rural Lands (Planning & Utilisation) Act 1973, and the 1975 Villages & Ujamaa Villages (Registration, Designation & Administration) Act — maintained centralised authority yet gave directions for the administration of village lands through the appointment of new local village authorities who were entirely independent of traditional institutions. These directives were

... so vague and their implications for land interests (ownership) are so far-reaching that, even without a bill of rights entrenching the right to private property and principle of natural justice, they could have been declared *ultra vires* [beyond legal authority] by the courts on several grounds, including on the grounds of unreasonableness (URT 1992:47).

In the process, perhaps as many as a million pastoralists were settled (mainly Maa & Tatoga speakers like the Barabaig). A study by Kjaerby (1979) of villages in Hanang district found that those Barabaig who settled in villages were forced to compromise their herding strategies by limiting the extent of their migration to the distance their herds could travel to and from a permanent homestead in one day. The concentration of livestock within the village has had an adverse ecological impact and encouraged a trend towards agro-pastoralism, which has resulted in a decline in levels of pastoral production and welfare.

In spite of official policies which aim to undermine their customary way of life, communal land tenure and migratory land use by pastoralists persists. However, a long-term future for pastoralists is dependant on resolution of the conundrum of how village-based common resource management can be coordinated with a pastoral tenure system. How long can *de facto* communal tenure be maintained within a village structure? How can livestock belonging to residents of one village share the resources of another, when the land use authority has passed from traditional institutions to new village councils? How can migration to track forage resources outside the village be facilitated, when those resources are the exclusive property of another village? These crucial questions need to be answered before villages start to accept the paramountcy of village titles in contradiction to customary land tenure arrangements.

Village titling

It has long been thought in government circles that only registered title can provide secure tenure, and thus at-

tain higher levels of production and the protection of resources from destruction. Tenure reform is based on the premise that indigenous land tenure systems act as an obstruction to development and that more formal registered title will encourage rural land users to make land-improving investments and induce lenders to finance such investments through the provision of credit. This strategy has been pursued by government and donor agencies alike, despite its description as a fallacy by such eminent social scientists as Bromley and Cernea (1989), and substantial challenge to it from empirical research (Place & Hazell 1993).

Village titling is thought to provide greater security of tenure for villagers to control encroachment. However, as the Barabaig case attests, it has singularly failed to protect village land from alienation by outsiders, and has created problems in its own right. The continued encroachment of pastoral areas has dislodged pastoralists from much of the best of their traditional lands, and prompted extensive out-migration to otherwise under-populated areas in the south of the country. Recent press reports, for example, suggest there is currently a "scramble for Maasailand" as commercial farmers use all means possible (some dubious) to take up pasture land for crop cultivation. Niamir-Fuller et. al. (forthcoming) have identified the push factor of land encroachment as a stimulus for out-migration by Barabaig pastoralists to the Usangu plains in Mbeya region. These migrations have gone as far as northern Zambia (Galaty 1989).

Under the new administrative structure each village is granted statutory title to land. This has resulted in the double allocation of rights where registered title is superimposed on the plethora of existing customary tenure arrange-

ments that are still recognised by way of the 1923 Land Ordinance. This raises a fundamental legal question: which title to land will prevail? As we shall see further on, an attempt to answer this question in a manner which favours the government's agenda has been provided by government, through the passing of an extraordinary piece of legislation.

Village land use planning

Formal land use planning has also been proposed as an adjunct to the village titling programme. This has been implemented through procedures developed for urban planning that are inappropriate for the diversity of settings found in rural environments in Tanzania. As a consequence, maps of 'planning areas', designating fixed 'land use zones', take little account of the complexities and flexibility inherent in customary land tenure arrangements. This has been made apparent by a study of a village in Hanang district with a sizeable pastoral population (Barabaig).

The shortcomings of land use planning as it is currently being implemented for cattle herders using extensive land use systems are well illustrated by the plan for Dirma village in Hanang district. A 'Lands Rapid Rural Assessment' in Dirma conducted in 1991 by the World Bank exposed the flaws of the land use planning process. Traditionally, Barabaig herders migrate eastward out of the village in the dry season to gain access to permanent water on the shores of Lake Balangda Lelu. In return, residents of Dirma allow herders from other areas to come into the village in the wet season to make use of the rich pasture resources found there. Once it was known that village land would be subject to land use planning, some of those who relied on access to village land in the wet sea-

son set about ensuring — by any means — that they were regarded as villagers, and were allocated land in the new village plan.

The bias of planners to regard all that they find as primitive, unsuitable and in need of reform is revealed by the language used in the planning process. The basic assumption on which the Dirma plan was based regarded the traditional grazing pattern as haphazard ("kiholela") and inconsistent with development objectives.

[The] planners have arbitrarily assumed that current land use is inadequate and destructive to the environment and the plan prescribes replacement of existing agricultural and pastoral practices with 'modern' and 'scientific' methods (*ya kisasa* and *ya kitaalamu*), without elaborating on what these concepts mean (World Bank 1991:1).

In the report, the World Bank revealed how the plan failed to account for the diversity of natural resources, provide for the complexity of the traditional land use pattern, or accommodate the inter-relationship between resources in and beyond the village boundary. Further, the plan erroneously treated all villagers as an homogenous group, and gave no recognition to the different land user and various interest groups found in the village. Some villagers and some of the leadership saw the plan as a means to protect village land from encroachment. Others wanted to take up fertile land for themselves or sub-lease it to commercial farmers. Only a few realised that the process could also restrict the traditional migratory pattern and ultimately deny them access to water in the dry season in neighbouring villages (Johansson 1991). According to Johansson (1991) the planning process was not "transparent and intelligible" to the villages, and as little account was taken

of their perspectives, and no detailed environmental knowledge attained beforehand, the plan was likely to damage the local pastoral economy, degrade resources and prompt emigration from the area.

From all this, it is clear that at the local level there are serious consequences for pastoralists if land use planning continues along these lines. Only a very small percentage of village land use plans have been drawn up as yet, and even fewer implemented, and few villagers have any idea what is being planned for them, or what the potential adverse effects such insensitive and inflexible planning can have on the local ecology. It is, however, becoming increasingly clear that the planning process ends up providing the means by which some groups are deprived of their land by others who do not depend on the land for their livelihood, but have the means and authority to direct the process.

In the end everyone will lose. In pastoral areas, fertile lands are being withdrawn from pastoral production and customary land use controls are being undermined, to the point where 'free for all' access ends up causing destruction of natural resources, which in turn results in a reduction of people's contribution to the national economy, to the detriment of their welfare. Pastoralists who are displaced in this process have few options but to migrate elsewhere. However, this is becoming increasingly difficult; they are not often welcome at new destinations, and villages now have the means to exclude them as intruders. Increasingly, they drift to the towns and fill the peri-urban shanties, to eke out a living as best they can in the informal economy or to become burdens on the state, as the industrial and commercial sectors have almost no capacity to absorb more work-

ers. It would be better for pastoralists to remain where they are and enjoy security of tenure, without the pressures of land alienation and the imposition of external legal and administrative frameworks that take no account of the needs of livestock-rearing economies based on mobile resource use patterns.

The Barabaig land cases

According to Tenga and Kakoti (1993) the British colonial administration structured land tenure in Tanganyika in such a way as to allow the state, through a series of expediencies, to take over land from 'natives'. This policy was based on the premise that 'natives' had only revokable occupational rights and not ownership per se of land. They further argue that this tradition has persisted in independent Tanzania, where the government has resorted to extraordinary measures to facilitate what they call "state-organised land-grabbing" (1993:1). As we shall see there is ample evidence of government using its authority to impose its interests over customary land rights holders.

Until recently the most infamous example of this has been the Meru case. In this case, the Colonial Government used expeditious methods to displace local communities in favor of settlers. The latter were given title to land against the customary claim of the Meru people, who were forcibly evicted from their homes on tribal land they had occupied "since time immemorial" (Japhet & Seaton 1967:11).

Resistance to the displacement of the Meru led to an unsuccessful application to the United Nations. Despite an amendment to the Land Ordinance (No.5 of 1950) requiring that a Native Authority must be consulted before a Granted Right of Occupancy could be given, the British government

interpreted the law to mean that consultation did not mean having to obtain consent of the Native Authority (Tenga & Kakoti 1993).

In independent Tanzania, the same policy has been applied to acquire land for the state. In 1968, NAFCO, a parastatal concerned with agricultural finance, proceeded with the acquisition of land for a large wheat complex in Hanang district (Lane 1991a). At the time the land was described as 'idle', but the Barabaig pastoralists, who have customary rights to the land, complained that it was acquired without due process of law. Since then, NAFCO has expanded operations and acquired title to over 100,000 acres, which the Barabaig claim is 30,000 acres more than was ever applied for (Lane & Pretty 1989).

The first Barabaig challenge to the government on this issue resulted in a court case brought by the residents of Mulbadaw village (Mulbadaw Village Council and 67 Others versus NAFCO — Civil Case No. 10 of 1981) against NAFCO, which claimed that neither they nor their Village Council were consulted before NAFCO acquired land for the Mulbadaw wheat farm of the Tanzania Canada Wheat Program (TCWP). NAFCO did not deny the acquisition of the land, but claimed that, as a parastatal body acting for the government, it had the authority to do so. The issue to be settled was whether the land in question was acquired for a 'public purpose', within the meaning of the Land Acquisition Act 1967. The High Court ruled in favour of the Barabaig, declaring that their customary claims were valid and that proper legal procedures had not been followed by NAFCO. However, the decision was overruled on appeal, on technical grounds relating to whether plaintiffs in the court were able to attest to the customary claims of those

not in court, and whether those in court were 'natives', within the definition of the Land Ordinance (Civil Appeal No. 3 of 1986).

In response to this expansion of the TCWP, particularly at Gidagowmod and Waret farms, the residents of communities adjacent to the farms returned to the Court with counsel from the Legal Aid Committee of the Faculty of Law at the University of Dar es Salaam, pursuing two cases (Yoke Gwako & 5 Others versus NAFCO & Gawal Farm — Civil Case No. 52 of 1988; and Ako Gembul & 10 Others versus NAFCO & Waret & Gidagamod Wheat Farms — Civil Case No. 12 of 1989).

In this case the plaintiffs sought leave from the judge for a representative suit to include the whole affected community without distinguishing who was a native or not, to avoid the problems encountered in the Mulbadaw case. The plaint specified that NAFCO:

... did without licence, lawful justification or permission of the Plaintiffs, forcefully enter upon the suit land, set on fire and or otherwise destroy the homesteads of the Plaintiffs, caused destruction of crops, livestock and household chattels, and evicted the Plaintiffs from the suit land ... without following the mandatory procedures under the law.

Quite apart from the loss of land, the Barabaig are incensed by the denial of traditional rights-of-way that permit easy access to water, grazing and salt resources, and by the destruction and desecration of ancestral graves (bung'eding) on all the farms and the continual harassment and violation of human rights inflicted on the plaintiffs by NAFCO employees. They are seeking a judgement that declares them to be lawful owners of the suit land by way of customary tenure, and the titles issued to NAFCO to be null and void. They

want an eviction order and perpetual injunction brought against NAFCO denying them entry to the suit land. They want restoration of grave sites, action to arrest the erosion occurring at sacred locations (such as the siltation of Lake Batosutu caused by cultivation), restoration of traditional rights-of-way across the farms, the payment of damages to aggrieved families, and general damages and mesne profits to the amount of Tsh. 100,000,000 (currently US \$ 213,000, but nearer a million dollars at the time of the plaint before devaluation).

The cases are currently being heard in the High Court of Arusha. Despite considerable delay, inconvenience and cost to counsel, plaintiff and witnesses, it is expected that they will receive a fair hearing and benefit from a sound judgement, despite attempts by government, through executive authority and legislative provision, to undermine Barabaig customary claim to the disputed land.

Using a sledge hammer to crack a nut

With greater political liberalisation in the 1980s, the prospect of multi-party national elections in 1995, and a burgeoning free press, it is not surprising that land holders, whose customary rights were infringed in the process of villagisation, have begun to challenge the government in the courts. Indications from early cases are that the courts will rule in favour of customary title holders (URT 1992). In response to this prospect, the state has taken some extraordinary measures that far and away exceed the need for maintaining village structures.

Rather than face the prospect of losing cases to customary land rights holders, and having to return 'village lands' to original occupants, the government has exercised its executive authority

in this matter. At first, in 1987, the Prime Minister issued Government Notice (GN) 659, the Extinction of Customary Land Rights Order, extinguishing customary rights to land in 105 villages of Arusha region, where litigation on this point was pending. However, this did not include those villages involved in the Barabaig land cases. So, in 1989, the GN was extended by the Extinction of Customary Land Rights (Amendment) Order that included those villages affected by the litigation, and its application to the Barabaig cases was ensured by making it retrospective to the date of the original GN (1987), thus pre-dating the Barabaig complaint and denying them legal remedy.

The GNs were issued under the Rural Lands (Planning & Utilisation) Act of 1973, that empowers the President to declare a 'specified area' that may be subject to the "extinction, cancellation or modification" of 'Deemed Rights of Occupancy' (customary title) by the Minister for Lands. However, as there is no evidence that the areas concerned were ever 'specified', and as there is doubt whether the Prime Minister can be regarded as the Minister responsible for lands within the meaning of the Act, it is again unlikely to be upheld in the courts. According to Shivji (1994) and Tenga (1993), the Act itself could be challenged on grounds of breaching the Bill of Rights, which is now part of the constitution. They have further opined that the GNs are contrary both to the provisions of the 1973 Act and to provisions of the 1923 Land Ordinance recognising customary rights to land (URT 1992).

The prospect of the courts ruling against the validity of the GNs, forcing the government to undo the fabric of the new village land structure, has prompted the government to take an even more radical step. In an at-

tempt to save face and ensure victory in the courts, a quite extraordinary legislative instrument has been devised to extinguish all customary rights to land within the boundaries of all villages incorporated between 1970 and 1978. Section 3 of the Regulation of Land Tenure (Established Villages) Act 22 of 1992, stipulates that:

... all rights to use or occupy land in accordance with any custom or rule of customary law in any village or vacated settlement held or claimed to be held by any person prior to this Act is hereby extinguished.

This legislation so blatantly seeks to further the state's interests over the majority of its citizenry that it is likely to go down in the annals of Africa's legal history as one of the most remarkable pieces of legislation on land tenure yet devised. The provision would appear to exceed the limits of natural justice. For example, the Act provides that no compensation be paid to those dispossessed from their lands, it ignores previous judgements by the courts, and is to have retroactive effect. It revokes and replaces the GNs by declaring, in Section 5, that:

1 (a) "no compensation will be payable ... or remitted to any court ... in relation to the extinction of any right ..."

1 (b) "any suit or other proceeding ... which shall have been instituted ... shall forthwith be terminated."

1 (c) "no judgement, order or decree passed, made or given either before or after the commencement of the Act ... shall be executed."

2 "No order as to costs shall be made in relation to a suit or other proceeding which is terminated in accordance with this section."

The timing of the Act provides evidence of the government's dismissive attitude to informed opinion. It was presented

to the Bunge (parliament) only days before the Report of the Presidential Commission of Inquiry into Land Matters was submitted to the President. It cannot be coincidence that legislation making fundamental changes to land law would be tabled in advance of a Commission whose task it was to consider such matters and make recommendations to the highest seat of government. Logic would suggest that under normal circumstances the findings of the Commission should provide the basis for any new legislation. The answer to this inconsistency could lie in the disparity of perspective that underpins the two documents. It could be, for example, that the Commission's recommendations for recognition of customary rights to land, the involvement of traditional leaders in the registration of titles, and the abolition of existing legal and administrative provisions that treat customary rights as inferior to statutory rights of occupancy, were unacceptable to those who wish to continue capitalising on the chaos already created by the villagisation, titling and land use planning processes — for the continued private acquisition of customary lands for commercial purposes.

Future prospects for pastoralists

Only time will tell whether customary rights will be recognised as law, whether the interests of the state or of customary land rights holders will prevail, and whether this legislation will ultimately stand. NAFCO cannot seek protection from the Barabaig case through the ACT, as the communities concerned were incorporated after 1977 and therefore do not fall within the scope of the new legislation. Because of this limitation, it is likely that many, although not all, pastoral villages will be unaffected by the Act, as they are often

found in the land areas that were only recently villagised. However, the Act will present problems for those who live in older villages undergoing land use planning, particularly where they share land with non-pastoral villagers.

It is expected that the Act itself will be challenged in the courts as inconsistent with provisions of the constitution (Lane 1993). Here, attention will be given to reconciling its provisions with Section 24 of the Tanzanian Constitution;

(1) "Subject to the relevant laws of the land, every person has the rights to own or hold any property [land?] lawfully acquired."

Whereas the law might have been changed in this case, the courts will be asked to decide whether this is consistent with the entrenched right of people to own land and not be arbitrarily dispossessed.

If customary rights still fail to stand under this section, a second provision providing for the right of compensation may provide remedy for customary rights holders.

(2) "Subject to the provisions of subsection (1), a person shall not be arbitrarily deprived of his property for the purpose of acquisition or any other purpose without the authority of law which shall set out conditions for fair and adequate compensation."

It remains to be seen how the new legislation — with express denial of compensation or the right to recourse to the courts — can be read alongside this provision. If the legislation is allowed to stand, implications for millions of hitherto customary rights holders are most grave. In that case we can expect to see land grabbing persist to the ultimate dispossession of more vulnerable groups, including pastoralists, to the advantage of a growing élite of bureaucratic and commercial interests. If

this is to happen, the opportunity will have been missed to make use of indigenous expertise that enables pastoralists to sustain themselves, provide livestock production and cope in arid and semi-arid environments, make a substantial contribution to the national economy, and protect the productive capacity of land for future generations.

If the new legislation is found by the courts to be unconstitutional, this will cause understandable anxiety in government circles. Villagisation, a central plank of the country's development strategy, will have been effectively withdrawn. The fear will be that the subsequent breakdown in the village structure will result in a new kind of chaos. But this need not be so. What is needed is for government not only to recognise peoples' right to participate in the management of their lands, but also to realise that they bring skills, and a considerable institutional capacity to manage natural resources, at a far higher level of sophistication than could ever be the case through formal centrally controlled land tenure arrangements. Rather than attempting to bring uniformity to diversity, simplicity to complexity, and rigidity to flexibility, government should be learning more about the myriad of ways local people manage their resources, and take the opportunity to build on that capacity to achieve greater production and more equitable distribution of benefits from increasingly efficient land use systems.

With political liberalisation underway in Tanzania, as elsewhere in Africa, it seems inevitable that local people are going to want to exercise new freedoms and assert their rights more effectively than they have done in the past. It will, therefore, be increasingly difficult for government to resist popular pressure and simply try and legislate problems away. Donors too will want to ac-

commodate peoples participation in development and support their objectives. What is needed is a dialogue to commence between communities, government and donors, as is being attempted with Niger's Code Rurale (Lund forthcoming), where there will be an increasing role for indigenous NGOs to act as bridges between government, donors and the communities they represent. The challenge will be to design an institutional framework that will make this possible. This will only be achieved if local communities are empowered and government assumes a new role as facilitator and mediator rather than director of development.

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