

# **Formalization of Customary Land Rights and Development Issues in Africa: The Case of Tanzania's Village Land Act, 1999.\***

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## **Aim of this paper**

I would like to examine the formalization of customary land rights based on an interpretation of the 'Village land Act, 1999' and a field survey. I aim to clarify how it such formalization facilitates and, at the same time, it influences economic development.

## **1. General economic conditions and the concept of land in Tanzania**

**(1)** Tanzania is one of the East-African countries that shifted from socialism to market economy after attaining independence<sup>17</sup> in 1967. More than 80% of the population lives under the poverty line, we could call Tanzania is one of the poorest countries in Africa (UNDP 2006:294) . Agriculture is a major industry in Tanzania. It contributes 45% of the GDP and 69% of land in the countries is demarcated as 'village land' which is used primarily for farming (Sijaona 2002: 34) .

**(2)** In countries that follow the modern concept of property, land is recognized a physical commodity that is traded on the market. However, the

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<sup>17</sup> Tanzania has experienced German colonial rule (1890~1914) and British colonial order (1918~61). After independence socialism policy was announced by the Arusha declaration made by the first president Nyerere (Nyerere 1968: 231-250).

concept of land is different in Tanzania and can be summarized by the views of Karl Polanyi, who defined land not as a commodity but as a means of 'providing substance to for human life' (Polanyi 1975:243) .

## **2. Transition of World Bank(W.B.) land policy and land property in Africa** (World Bank 1975,1990,2002,2003 and others) (Amemiya 2007)

Tanzanian's effort to establish a new land law are probably influenced by land policy of the World Bank. Therefore, a better understanding of the transitional rights provided in the Village Land Act (1999 )is needed. In particular, it is necessary to identify the changes in land policy and analyse the theoretical aspects of the World Bank's land policy.

Based on an overview of the World Bank's land policy, we can see a shift in the Approach to land policy, in the moved from the neo-classical theory of new development economics to recognition of informal systems.

Moreover, we found that the Village Land Act, 1999 in Tanzania is largely consistent with the newly established World Bank land policy.

This dramatic change in the World Bank's Policy is due to the ideas of Hernando de Soto who proposed grant of ownership based on fact.

Upon reviewing of De Soto's theory, one can see observe analytical validity for the Tanzanian situation; however, one may question the adequacy of rules derived from customs. In the case of Tanzanian, the customary land rules excluding people who are not part of the customary system (De Soto 2006).

## **3. Important features of the Village Land Act, 1999** (Amemiya 2003, 2004a. b., 2005)

Property rights provided in the Village Land Act, 1999 have been considered different from modern property rights provided by Western law. These are characterized in 'customary right of occupancy' and limited rights —the so called 'commons' for members of villages community.

### **(1) Process of implementing the Village land Act, 1999 and its significance**

The Village Land Act, 1999 was established as a compromise<sup>18</sup> between the

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<sup>18</sup> In 1991 Professor Issa Shibji, Faculty of Law chaired Land Committee to conduct first research on land issue after independence. Contents of published Land Committee Report( Government of Tanzania 1994)-so called Shibji report-is too critical and suggested drastic decentralization land administrative structure to village authority. Therefore Government of Tanzania ignored this report and clarified new land policy

World Bank's pressure to open access to land and present conditions dominated by customary tenure in rural Tanzania. As mentioned above, more than 80 % of the national population is living in regions categorized as 'villages', and more than 69% of the country is demarcated as of 'village land' which is used for farming. In this context, the Village Land Act, 1999 is an important law that recognizes the land right of the villagers based on customary land rights. Villagers' land rights are authorized by the village council<sup>19</sup> which functions as the apex authority of the village community.

## **(2) Provisions under the act**

### **① Customary right of occupancy**

Customary right of occupancy can be granted to a village member only by the village council. This right is recognized by customary usage and is granted for an unlimited duration but the customary right holder is obligated to register to registry. Basically right holder must be person living in the village; however, individuals who seek to relocate to the village can also apply for this right. Moreover, it is now possible to issue the certificate of customary right of occupancy, and transfer rights through disposition and causa mortis .

The Act involves no obligation with respect the provision of modern land property rights, such as that in Japanese law, however, Village Land Act, 1999 provides the following obligations. A right holders is required to (1) clearly demarcate land borders, (2) appoint a caretaker for the land when the right holder is not in the village and (3) follow the customary law for land use in the village. Alienation to outsider is strictly prohibited and only alienation to individual living within the village is permitted. However, even in the latter case, applications need to be made more than two months in advance and are subject to clearance procedure. Sometimes even applications by family members are rejected in case the land is assigned to other person and the family member can not reside in the village.

The grant of customary right of occupancy, alienation, disposition and other actions, related land rights must be authorized through a contract with the

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( Government of Tanzania 1995) which is more centralized management system and looking toward to open land market to foreign investors . Newly established Village Land Act is middle of the road between drastic decentralization system and existing centralized system. See Amemiya 2005 detail.

<sup>19</sup> Village council is smallest administrative unit in Tanzania, hence it is in charge of village government. It consists of chairman and other 15-25 village committee members elected through Village Assembly. Their term of office is five years (Local Government Laws, revised, 2000) .

village council.

Villagers are not permitted alienate land freely.

Land that has not been used for more than five years is forcibly expropriated by the village. These characteristics are completely different from modern property rights, such as those in Japan.

## ② Communal village land

Communal village land, the so called 'commons', can be used by villagers. Villagers have right to use and earn profit from the land, but they are not permitted to dispose of it. Basically, they lose the right to use this land once they leave the village. Specific customary rules pertaining to communal village lands vary from one village to another. However, in general, pasture land for grazing and passage of livestock, forests are used for obtaining fuel wood, mountain forests are used for tree planting, according to the former agricultural land based on policy of *Ujamaa*<sup>20</sup>, depending on the situations in each village (Amemiya 2004a). Village council has to register their own communal village land to registry for the purpose of public announcement. It is assumed that villager have an obligation of the 'good usage' (*Matumizi Bora ya Ardhi Vijiji*) of the communal land by making some kind of based on contribution to the village. This obligation is implied in a guideline of Village Land Act, 1999 (Government of Tanzania.2002) which is written in *Kiswahili* even though there is no written rule to this effect. An observation of the actual situations in villages reveals that almost all villages have detailed penal rules pertaining to the use of communal land. Remote villages tend to have loose regulations in comparison with villages that are located close to urban areas. For example, *Msindo* village does not impose a restriction on the felling of fuel wood from forests that are part of the communal village land. The restriction of regulation on the usage of communal village land varies from one village to another depending on the economic utility of the land. I must also point out that communal village land is crucial to the villagers' livelihood, since it supports several activities including farming. It could be said that in order to effectively manage the communal village land in rural Tanzania, it is necessary for village communities to function properly.

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<sup>20</sup> Socialism policy was announced by the Arusha declaration made by the first president Nyerere (Nyerere 1968: 231-250). Tanzania's ideal socialist society was based on cooperative agricultural production in *Ujamaa* (family in *Kiswahili*) villages.

### ③ Mortgage and lease

It is possible to realize a 'small mortgage' against the land under customary right of occupancy without the approval of the village council. The maximum limit of the small mortgage is not stated in Village land act, 1999, however it is assumed to be 500,000 Tsh.<sup>21</sup> through an estimation based on a provision of the Land Act. In case where banking facilities are utilized for the sale of land at auctions, only villagers are permitted to buy such land. It is clear that this provision seeks to prohibit alienation of land to outsiders.

Further, such mortgages need to be registered with the village council.

Villagers can lease their customary right of occupancy to villagers and outsiders with the approval of the village council. Because of a lack of provisions, details regarding such leases are not clear, however, leases with longer duration and larger plots tend to be restricted, need the approval of the land commissioner<sup>22</sup> and the village assembly<sup>23</sup>.

Based on the above features of the provisions of the Village Land Act, we summarize that this law has several features that differ significantly from Western law. Since customary right of occupancy is based on villagers' customary occupation of the land, the Act permits rights held by a group such as a family. The Act is distinguished by provisions regarding the following three aspects:

- a. Customary right of occupancy can be granted to both groups and individuals.
- b. Villagers have a right to the communal village land, and
- c. All procedures concerning the land is managed and authorized by the village council.

A system based on the above provisions prevents land alienation to person living outside the village.

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<sup>21</sup> Tsh. is Tanzanian currency 'Tanzania shilling'. 1 US \$ = 1239.000 Tsh. (12 Nov. 2008)  
(from Bank of Tanzania HP

[http://www.bot-tz.org/FinancialMarkets/IFEMsummaries/ifem\\_summaries2008.htm](http://www.bot-tz.org/FinancialMarkets/IFEMsummaries/ifem_summaries2008.htm))

<sup>22</sup> Land commissioner of Ministry of Land is an executive officer of land administration practically.

<sup>23</sup> Village assembly is the supreme authority on all matters of general policy making in relation of the village. All villagers over 18 years old has obligation to participate it (Local Government Laws, revised, 2000) .

### **(3) Status of the Village land Act, 1999 in the policies of the World Bank and Tanzanian government**

In the current debates in the Tanzanian parliament and the international community, the Village Land Act is categorized as a transitional law on the route to a completely modern law system that will provide personalized rights in the future (Deininger 2004:5) ( Government of Tanzania 1999).

## **4. Provision for dispute settlement in the Village Land Act, 1999**

A provision of the Village Land Act, 1999, has established a mediation organization for dispute settlement in villages. This organization was established in an effort to formalize the existing customary dispute settlement organization mentioned in ②.

### **① Village Land Council (§60)**

The Village Land Council is a mediation system that comprises 7 members including at least 3 women (§60(1)). The Village Land Council is the closest dispute settlement system in villages; however it does not have binding force. In order to be nominated by Village Council or the Village Assembly as the member of village Land Council, an individual is required to have reputation, integrity, and knowledge of customary land law (§61(4)). Nonresidents of the village, members of the National Assembly, the magistrate of the district in which the Village Land Council is to function, and persons under the apparent age of 18 years are not eligible to be nominated (§61(5)).

Village Land Council shall exercise its function of mediation in accordance with any customary principle of mediations, natural justice, and any principles and practices of mediation in which the members may have received any training (§61(4)(a)-(c)).

### **② Referral of disputes from the council to court**

The Village Land Council does not have binding force; however, if any of the parties involved is not satisfied with the judgments of any mediation for dispute settlement or if they do not wish to make use of the services of the Village Land Council, they could refer the dispute to a court having jurisdiction (§62(1)). The parties could take the dispute to district adjudication within 30 days of the publication of the provisional adjudication or the provisional adjudication record (§64(4)).

.The following courts are vested with exclusive jurisdiction over land disputes

in villages.

- Ward Tribunal
- District Land and Housing Tribunal
- The Land division of the High Court
- The Court of Appeal

**③ Other system for settling land disputes in villages: Village Adjudication Committee**

There is an adjudication committee that specializes in settling disputes pertaining to the boundaries of a residential plot.

Applicants for the customary right of occupancy can apply to this committee through the Village Council to determine the boundary in advance of the application for the customary right of occupancy (§49). The Village Adjudication Committee shall adjudicate upon and decide in accordance with customary law and provide advice to safeguard the interest of women, absent persons, minors, and persons with disabilities (§53(3)).

The Village Adjudication Committee is one of the internal committees in Village Council.

**(2) Actual situation in villages( *Msindo* village and *Mantanji* village)(Amemiya 2004a)**

In *Msindo* village, the Council of Elders (*Baraza la wazee*) has functioned as a traditional mediation system. This council is not a part of the administrative setup but rather is an informal system; however; villagers regard it as a quasi-judicial body and its judgment is highly respected. This council consists of 16 elders.

Similarly, in *Mantanji* village, a different type of Council of Elders (*Baraza la wazee*) has functioned as a traditional mediation system. This Council consists of 5 to 7 oracles, who try to settle disputes in collaboration with the Village Land Council. The Village Land Council functions as the main dispute settlement body and the Elders act as advisers. There are no provisions regarding the Council of Elders and its collaboration with the Village Land Council in the text of the Village Land Act in either of the abovementioned villages. We can observe that both villages have their own traditional disputes settlement system, which has recently been formalized by the Village Land Council.

## **5. Formalization of land right and economic development**

In this section, I indicate both the positive and negative aspects of the formalization of customary land rights from the viewpoint on economic development.

### **(1) Encouragement of economic development by formalization of customary land rights and dispute settlement system**

The formal mortgage system prescribed in the Village land act, 1999 is considered to be better than the current informal mortgage by deposit of land to villager. I came to across some cases in which villagers ended up losing their land without receiving fair compensation because they were not aware of actual market price of their land.

The Village Land Act, 1999 makes it possible, at least in theory, for villagers who do not own property to access bank credit. However, there are few actual cases of villagers acquiring bank credit since the new act was enforced. There are four reasons why villagers tend not to access bank credit.

- a. The Village Land Act, 1999 has not spread across the country.
- b. Village land does not have high market price; hence banks do not consider it as an attractive property for mortgage.
- c. The ceiling amount of loan on village land mortgage is too small for the banks.
- d. Mortgaged land can be sold through auction to only to villagers.

### **(2) Possibility of increasing poverty**

Individual land rights increase the possibility of the villagers losing their village land, rather than providing them with the opportunity to access credit through land mortgage.

### **(3) Annual land exchange in villages**

It is very difficult to understanding this phenomenon from the point of economic efficiency. Under this practice, different plots of land allocated to different members in the village. The term of the land lease between individual and village council/individual set to a period less than one year.

### **(4) Lessons from the Kenyan experience**

Neighboring country Kenya's experiences are relevant to Tanzania. In early 1970', Kenya enacted the land act and institutionalized land registration. However, social and cultural factors have impeded the implementation of actual

mortgage enforcement. The World Bank's latest land policy refers to Kenya's experience is treated as case of a 'non-working system even after incurring large costs for the formalization of land rights' (World Bank.2003:49).

Tanzania has observed Kenyan experiences and has reached the present system as a compromise.

## **6. Minority issue: Hadza<sup>24</sup> hunter-gatherers** (Amemiya 2008)

The Hadzabe are hunter-gatherer people in northern Tanzania. They are one of the smallest minority ethnic groups in the world. The population is estimated around 1,000 to 1,500<sup>25</sup>, and they live mainly in Arusha region. They speak a click language, which is an isolated with no proven linkage with other languages. Their lifestyle is completely different from that of most agricultural people. The Hadza traditional area covers approximately 1,500 sq km within which the Hadza pursue a semi-nomadic lifestyle characterized by hunting and gathering. Although in recent years, some Hadza have chosen to diversify their income through trade with neighbours, the majority of the Hadza continue to depend primarily on hunting and gathering.

Hadza pursue a semi-nomadic lifestyle and they obtain their food requirements from wild roots, fruits, the honey of wild bees, and the flesh of game animals, which is currently supplemented by the produce from their small plots of maize and sweet potato. After independence, the government urged them to settle down and engaged in agriculture; however, the Hadza have continued to refuse these request. Their camp moves from one place to another every two or three weeks for a variety of reasons including access to food, water, material needs, abandoning areas where persons had fallen ill or died, gambling, disputes, and so on. The camp composition is flexible; individuals and families constantly moved in and out.

Every Hadza can live, hunt, and gather wherever he/she chooses within the Hadza land.

They do not engage in agriculture and or participate in pastoralism; however, it does not imply that they do not need to occupy any land. Instead, they require larger space within a short period of time.

Agriculture and pastoralism are important issues for protecting their land

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<sup>24</sup> Hadza is singular, and Hadzabe is plural.

<sup>25</sup> It is difficult to precisely determine this figure owing to the flexible ethnicity of persons living in peripheral areas.

right through land policy(Government of Tanzania.1995) and provisions of the Village Land Act. However, hunter-gathers are not regarded as part of either of these. Villagers may apply for customary right of occupancy based on their traditional occupation of a certain parcel of land in the village. Applicants must be registered as villagers throughout the period of their occupation. The Hadza traditionally led a nomadic lifestyle and dislike mingling with other tribes, therefore, they usually do not register themselves with any villages.

The Village Land Act—the formalized from the customary land law—is ideal for farmers and pastoralists and we have illustrated its function as a safety net in villages. However; this law does not take hunter-gatherer people into consideration.

In recent times, the encroachment of Hadza land by farmers and pastoralists has become serious problem which has given rise to several conflicts between the Hadza and other tribes. The Village Land Act does not provide any land security to the Hadza other than the option to compromise and settle down in some other village, abandoning their own tradition.

### **Conclusion: minimum safety net function (except hunter-gatherers) and active community**

It is clear from process of enacting Land Act that Tanzania does not treat land as a commodity to be exchanged on the market. Land is a basic necessity of life, production and labor for villagers, and every necessity is obtained from village land.

Their commons —Communal village land—plays a crucial role in villagers' life in proportion to poverty level. Marginal poor villages tend to reap the maximum benefit from the communal village land.

There is no social net work system in Tanzania; therefore, the land itself functions as the minimum safety net in villages.

In addition, village community is still alive and functioning well in Tanzania; hence, it is able to maintain and manage its communal village land for sustainable use for all village members.

The Village land act, 1999 is a characteristic law that has some provisions that benefit villagers including approval of co-ownership by family member, prevention of land assignment to outsiders and making commons open to all villagers. These provisions are very different from the so called modern property rights; however they are realistic options for the current state of Tanzania.

The World Bank recognizes that the Village Land Act is an adoption of informal system, and that absolute ownership is the ultimate goal. Moreover Tanzania may not avoid the transformation of customary right of occupancy to the ultimate goal of absolute ownership because of the constraints imposed by globalization.

Tanzania will have to transform gradually; otherwise, the villagers may face difficulties

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*Italic=Kiswahili*