CRITICAL REVIEW OF COMMON PROPERTY RIGHT REGIME IN THE MANAGEMENT OF NATURAL RESOURCES IN TANZANIA

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Abstract
This article provides discussion on common property rights in Tanzania. It surveys the laws that provide for regulation of property rights in Tanzania. The article notes that common property right exists in land and natural resource sectors namely; forest, water, wildlife, agriculture, fisheries, pastoral and mining. Laws and policies under these sectors provide for the realization of common rights by respective communities. The rights range from access, occupational, user to transfer. Property right, are important in the management of common natural resources. While individual property right vests property in the individual, common property right vests right in the collective entity of the community / group. Property rights are protected by either formal, informal or a cross-breeding of formal and informal institutions. Effective protection of common natural resources requires a property regime that involves all members of the community who benefits or are affected by the depletion of the resource. Such involvement requires deliberate identification of the resource, definition of property rights involved and grant of appropriate protection to such rights. While government authorities at their different levels, remain the regulators of the manner communities' exercise their common property rights; they must however, avoid too much control on community enjoyment of such rights.

Key words: Common Property, Property Rights, Natural Resources, Rights.

1.0 Common Property Natural Resources

The article reviews the management of common property natural resources in Tanzania. It explains the meaning of the concept of common property natural resources as described by different authors. It makes a detailed survey of the various common property regimes in the natural resources sectors such as forests, water, wildlife, land, mining, fishing, pasture in Tanzania, followed by a critical assessment of the same. The article concludes *inter alia* that effective of management of common natural resources hinges on effective involvement of all stakeholders. Such involvement requires deliberate identification of the resource, definition of property rights involved and grant of appropriate protection to such rights.

> Bollier when disambiguating the commons had this to say, that,
> Commons is '[w]hat unites [the] various groups of people in their sense of the commons against theft by large corporations or being imperiled by unchecked market activity. It is a generic term for describing all those things that we inherit from nature and civil society, which we are duty-bound

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> to pass along, undiminished, to future generations. [Thus] 'a commons' arises whenever a given community decides that it wishes to manage a resource in a collective manner, with a special regard for equitable access, use and sustainability. It is a social form that has long lived in the shadows of our market culture, but which is now on the rise.' From this quote, it is clear that commons entail collectivism grounded on common purpose for sustainable benefit of all.

Management of common natural resource properties requires clear property right.[119] A crucial feature of a property right is the ability to exclude others from using the resource. The right to use, but not to exclude others from use, is a highly imperfect property right. Failure to recognize this leads to weak, or useless model and may waste the resource. Different authors have defined common property resource regime to include a set of institutional arrangements that define the conditions of access to and control over a range of benefits arising from collectively used natural resources.[120] Garret Hardin in 1968 contextualized the regime in a scenario of common property management under the tragedy of the commons theory where he used the example of a pasture land open to all where each one will try to add more herds[121] due to the utility value in it resulting to suffering to all. Various academicians have faulted this theory as misjudged and based on the medieval environment.[122] Crowe for instance, remarks that tragedy of the commons to which Hardin was referring was a tragedy of overgrazing and lack of care and fertilization which resulted in erosion and underproduction so destructive that developed in the late 19th century an enclosure movement.[123] While his theory was more based on open access which was vulnerable to destruction by all, he nonetheless, managed to create an awareness on what could result in a common property regime should there no be proper regulatory mechanisms. The right to control property has continued to be the most valuable interest to an individual when its ownership is outright, and it is easily transferable in exchange for other goods and services. Property rights to land-based resources generally vary across the different types of land that make up the ecosystem. Insecure property rights reduce incentive to invest in land improvements and conservation structures. Arthur Young (1804)[124] while travelling in the British Isles observed the benefits of

119 See Centre for International Environmental Law (CIEL), *Whose Resources, Whose Common Good: Towards a New Paradigm of Environmental Justice and the National Interest in Indonesia* citing Bromley, Daniel W. "Property Regimes in Economic Development: Lessons and Policy Implications." In *Agriculture and the Environment: Perspectives on Rural Development*, edited by Ernst Lutz. Washington, DC: World Bank, 1998, Bromley, Daniel W., and Espen Sjaastad. "Prejudices of Property Rights: Of Individualism, Specificity and Security in Property Regimes" In *Development Policy Review, Vol. 18, no. 4*, 2000; McCay, Bonnie J., and James M. Acheson, eds. *The Question of the Commons: The Culture and Ecology of Communal Resources*. Tucson, AZ: University of Arizona Press, 1990. p 8.

120 See Swallow, B. M. and Bromley D.W., Institutions, governance and incentives in common property regimes for African rangelands. Environmental and Resource Economics. 1995. 6:99–118, Jodha, N. S. Studying common property resources: A biography of a project. Economic and Political Weekly. 1995. March 18., McKean, M. and Ostrom E., Common property regimes in the forest: Just a relic from the past? Unasylva. 1995. 46(180):3–15.

121 Garret Hardin, 'Tragedy of the Commons' *Science, New Series, Vol. 162, No. 3859* (Dec. 13, 1968), pp. 1243-1248. p. 1243 available at http://www.jstor.org.

122 Richard A. Falk, This Endangered Planet (New York: Random. 1971), p. 48., E. C. K. Conner, Common Land and Enclosure. 2nd ed. (London: Cass, 1966) and C. C. Taylor, "Archaeology and the Origins of Open-Field Agriculture," in Trever Rowley, ed., The Origins of Open-Field Agriculture (London: Groom Helm, 1981), p. 21.

123 Beryl Crowe, "The Tragedy of the Commons Revisited." in Hardin and Baden. Managing the Commons, 1969, pp. 54-55.

124 In Kula E., Economics of natural Resources and the Environment. Chapman and Hall. London. P. 29.

changing from communal to private farming where he concluded that the magic of private property turns sand into gold.[125] Therefore, property right is essential as it motivates one to invest labour and bring it to its highest valuable use for society. Common property right entails a significant measure of participation, transparency, decentralized control and accountability – factors that are not always present when the state is managing a resource.[126]

Sometimes people have tended to consider property rights in a narrow sense as ownership that means absolute and exclusive control of a resource. Property rights to land, water or other benefits need not be exclusive to be secure. Such rights can be held in common or overlap with different resource users. Property rights to common or public lands i.e. forests and wetlands are sometimes insecure and contested. In such regard, community management, public regulation or co-management by communities and local government agencies may be appropriate to enhance access and operation. While looking at the value and contribution that members of the community may give to common property resource, Wyk et al. argue that the meaning that a community gives to a natural resource has implication on the manner it will be managed. Thus, benefit will be perceived depending on the meaning constructed in association which correlates with a perceived benefit.[127] Insecurity or conflict over property rights may encourage extractive use of resources. It may also generate uncertainty about reaping gains on investment in conserving resources and instead provides incentives to free-riders or unsustainable use. Brouwer citing examples from Portugal on management of common property raise concerns on the management of common land that, in villages that are threatened by emigration, the temporary departure of younger residents, who leave the village to the elderly who [may fail to farm], and the concomitant temporary abandonment of common land may turn the commons into an easy prey for local community or municipal authorities.[128]

With property rights, one can determine who can do what with a particular resource. Property rights thus do specify the claims and related obligations of different actors to the benefits of the resource. According to this article, property rights can be grouped as use rights, control or decision-making rights and ownership rights. However, to be secure, rights should be of sufficient duration to allow one to reap the rewards of investment and should be backed by an effective, socially sanctioned enforcement institution. The institution necessary to support the rights may be a community or any other relevant institution. Because land-owning communities may have difficulties mobilizing financial resources and technical expertise, they may enter contractual arrangements for improving their resources. In such contracts, state institutions may be entrusted with the responsibility for improving and managing the resource.

125 See also James R.W., & Fimbo G.M., *Customary Land Law of Tanzania: A Source Book*. Dar es Salaam. East African Literature Bureau. 1973 on the magic of ownership.

126 Bollier D., 'A New Politics of the Commons' in *Renewal magazine*, December 17, 2007. P 4.

127 Wyk E.V., Breen C., Freymund W., Meanings and robustness: Propositions for enhancing benefit sharing in social-ecological systems in *International Journal of the Commons Vol. 8, no 2 August 2014*, pp. 576–59.4 p. 580.

128 Browler, R. Baldios and common property resource management in Portugal, http://www.fao.org/docrep/v3960e/v3960e07.htm.

The type and strength of property rights arrangements affect communities' time, horizon and investment choices. Stronger land use and management rights for communities can increase their ability to conserve the particular resources. Formal property rights often co-exist with and differ from locally exercised property rights. The existence of overlapping arrangements and regulatory frameworks need be taken into account in order to assess their effects on resource management. Common property rights provide communities with access and foster local conservation of unique natural resources. When access to communal areas is restricted not only are livelihoods affected but also species lose their value as the traditions associated with them disappear. State imposition of new property rights regimes that fail to account for traditional rights can also affect the maintenance of local knowledge of specific varieties. Both formal and informal networks can work to increase access to diversity and availability of genetic variation, or they can work in conflicting ways thus reducing diversity. Common property resources entitle beneficiaries, whether individual or community specific common rights to common areas. The community controls the use of the property and can exclude non-members from using it. Individual members of the management group, have both rights and duties with respect to use rates and maintenance of the property owned. Common property can exist in sectors such as; forest, water, wildlife, agriculture, fisheries, pastoral and mining. Communal rights under this property regime range from access, occupational, user to transfer. Both central and local government authorities are crucial in ensuring that rights of enjoyment are protected.

The major factor in common property regime is power relations that emanate from those legal systems. In essence, power relationships do determine the distribution of rights and the extent people can claim their rights. If not carefully considered, the legal framework can create rights but such rights may be limited in scope. The same can also articulate rights but limit the avenue or possibilities to pursue them. Due to this possibility, actual rights to natural resources involve social relations and power sharing in a particular society.

Effective resource management entails balancing benefit entitlements and responsibilities of property rights. Rights may be conditioned by *inter alia* amount, timing, etc of a resource use and management. Different scholars have favourably argued that property rights function better in managing natural resources if coupled with participatory approach.[129] Within such intersection, the two can help in sharing information, marketing and minimizing risks particularly to common property resources. Most marginalized people get difficult making their voices heard. Interventions to strengthen their property rights or to help them participate in participatory activities improve their bargaining positions. Also, security of rights and the capacity to manage local common resources allow people to make decisions while promoting environmentally sustainable management practices and a healthier resource base for future generations.

129 Flintan F., Rangelands Village Land Use Planning in Rangelands in Tanzania: Good Practice and Lessons Learned. International Land Coalition. 2013 p. 17.

2.1 Common Property Rights' Issues and Scope

This section explores common property rights regimes in different natural resource sectors in Tanzania. The analysis endeavours to identify the legal and policy issues involved in the management of common property resources. Given the fact that land necessitates various rights to be enjoyed which makes it not only important to individuals but communities in their collectivism.

2.1.1 Collective Land Rights

One of the mundane resources where common property rights exist is land itself. It is well established that multiple rights exist on land. Such rights include: cultivation, grazing, hunting and gathering. Section 4(3) of the Land Act confers property right to such rights and interests in land. The section provides that [e]very person lawfully occupying land, whether under a right of occupancy, wherever that right of occupancy was granted, or deemed to have been granted, or under customary tenure, occupies and has always occupied that land, the occupation of such land shall be deemed to be property and include the use of land from time to time for de-pasturing stock under customary tenure.

To concretize the above right, the Village Land Act, Cap. 114 [R.E. 2002] allows not only individual rights but collective ownership of rights whereby a group or community can enjoy common rights or access even if the community may or may not have legally recognized ownership over the land. The Act permits joint land management arrangements between (a) two or more villages; or (b) between one or more village and the District Council having jurisdiction in the area where the village or villages which are to be part of an arrangement of joint management are situate. One or more village may also enter into an agreement with an urban authority within whose boundaries that village or those villages are situated, and that arrangement may provide for the Commissioner to be involved in that joint management of village land.[130] Also, section 11 (5) of the Act recognizes agreement(s) reached by villagers of two or more villages about the use, by those villagers jointly of village land which falls within the jurisdiction of two or more villages or an agreement reached between the traditional leaders of a group of persons using village land which falls within the jurisdiction of two or more villages. The village councils of those villages may decide to adopt and approve them as a joint village land use agreement by the village assembly of the village of those villagers or, of that village council.

The Act also provides room for village councils to enter into agreement, known as a joint village land use agreement with other village councils concerning the use by any one or more groups of persons of land traditionally used by those groups.[131] The land in question must fall partly within the jurisdiction of one village and partly within the jurisdiction of another village.[132] In order for such agreement to take effect it has to be approved by the village assembly of each

130 Village Land Act, section 11(1).
131 *Ibid*, section 11(2).
132 *Ibid*, section 11(3).

village.[133] The agreement may include matters concerning the use of the land or part of it by different groups of persons, and the periods when the group may use such the land or part of it.[134] It may also cover nature and scope of any rights to or interests in the land recognized by the rules of customary law applicable to the land.[135] Where more than one set of rules of customary law are applicable it must state the manner of resolving any conflict between the sets of rules.[136] Where an agreement was reached by the traditional leaders of a group of persons using village land which falls within the jurisdiction of two or more villages, the village councils of those villages may be adopted and approved it as a joint village land use agreement by the village assembly or village council of the village of those villagers.[137]

The village council is also empowered to recommend to the village assembly portions of village land that can be set aside as communal village land and the purposes thereto.[138] Communal land can be for community or public occupation and use. It may include land habitually used or regarded as available for use as community or public land before the Village Land Act.[139] For the use to be valid it must have been, approved by the village assembly registered by the village council as communal village land.[140]

While the authority to register a village lies with the Registrar of Villages in the Ministry of Local Government; the Ministry of Lands demarcates (maps) the village boundaries, after getting agreements from the stakeholders. After the village has been demarcated, the Commissioner issues to the village, a certificate of village land. The certificate confers upon the Village Council the authority to manage the land. There is neither mandatory provision that requires that the village formally verify the boundaries stipulated in the certificate nor the Ministry of Local Government to consult with the Ministry Lands before registration of villages. This causes problems to match existing villages against physical land. Once the certificate of village land is issued, it confers management functions of land to the village council and affirms the occupation and use of the village land by the villagers; or affirms the use of land, for purposes of pasturing cattle.[141] As of 2015, about 7,169 villages had certificates. In March 2013 the Surveys and Mapping Division reported that they had surveyed 10,500 villages and had 1,317 villages to survey[142] implying that some of the villages do not yet know the boundaries of their village land. Lack of village surveys exacerbate village boundary conflicts. Uncertainty on the status of the village means uncertainty on the status of village land as well as the risk of investing on the land.

133 *Ibid*, section 11(3).
134 *Ibid*, section 11(4).
135 Section 11(4).
136 *Ibid*.
137 *Ibid*, section 11(5).
138 *Ibid*, section 13(1).
139 *Ibid*, section 13(4).
140 *bid*, section 113(7).
141 *Village Land Act,* section 7(7).
142 See URT, SPILL Review, 2013.

It also needs to be pointed out that since villages are growing spontaneously or as a result of official subdivision of existing villages, the process of village demarcation and registration should be harmonized given the growing number of new villages. Essentially, the Registrar is empowered whenever he is satisfied that a prescribed number of households have settled and made their household within any area of Mainland Tanzania, and that the boundaries of that area can be particularly defined, to register that area as a village.[143]

Although the law provides for an adjudication process between neighbouring land owners and between villages and villages and other land use authorities[144] clarification, confirmation and or documentation of rural land rights can only become when villages are surveyed and have a village land use plan. So far, 1,317 villages still need to be surveyed. Majority of rural land owners (indeed, all land owners in the country) do not have Certificates to authenticate their rights. Only few individuals have certificates of customary rights of occupancy (some 169,362 CCROs in the country, out of a potential of 8 million parcels) as rural land still carries customary / traditional conception towards land ownership. There is need to speed up villages land surveys and land use plans. This would eventually result into more villagers getting CCROs for their holdings.

MKURABITA Report outline stages for Titling and Registration of Land in Rural Areas

1	2	3	4	5	6	7
Village Boundaries (Survey and demarcation with general boundaries e.g. hills, rivers, roads, rocks, etc.)	Village Land Certificate approved by Commissioner for lands)	Approval of Land Use Plan	Adjudication and registration of parcel	Application To the Village Council	Letter of Offer	Certificate of Customary Right of Occupancy.

SOURCE: (MLHHHSD 2005)

2.1.2. Multiple Land Rights

Due to multiple land use scenarios, land use disputes are not uncommon. The Land Act, Village Land Act and the Land (Disputes) Act have provide mechanisms for dealing with land related disputes but the framework appears to jam due to increase in number of unresolved cases. Fights between pastoral communities such as the Maasai, and Sukuma, fishing communities such as rival fishing communities in Lake Victoria, and between pastoral and farming communities in Kilosa are rampant in parts of Tanzania partly due to inefficiency

143 See section 22 of the Local Government (District Authorities) Act 1982 and section 7 of the Village Land Act 1999.

144 Sections 48-55 provides for village land adjudication where the boundaries are not surveyed. See also Village Land Forms No. 44-49 on adjudication.

of the dispute settlement framework and shortage of land to meet the demands of the competing land uses.

The Village Land Act provides that village land can be occupied by villagers and non-villagers, the procedure for non-villagers is not simple as it must obtain necessary approvals. Non-villagers according to the law include non-village organizations. The majority shareholders or members of the organization may be citizens registered or licensed to operate under any law for the time being in force in Tanzania.[145]In case the majority of the members are not of the village it will have to apply to the village council. Ins such case, the village council will have to forward the application together with its recommendation to the Commissioner for the grant or refusal of such a grant.[146] As for non-citizens, they cannot obtain an allocation or an acquisition of village land through purchase except with the approval of the TIC where they will get a derivative interest upon transfer of the land to general land as further discussed below. There is however, possibility for non-citizens to obtain a license, a lease or enter into joint venture with villagers upon obtaining necessary clearance with the TIC.

2.1.3 Land Rights for Investors

As per the Land Act allocation of land to non-citizens is already restricted to investors whose investments have to be approved by the Tanzania investment Centre. (TIC). Under section 20(1) […] a non-citizen cannot be allocated or granted land unless it is for investment purposes under the Tanzania Investment Act (1997). The land to be designated for investment purposes has to be identified, gazetted and allocated to the Tanzania Investment Centre which shall create derivative rights to investors. There is also little scope for non-citizens to enjoy limited grants of rights of occupancy under section 19(2). Where the land is in rural area therefore the same limitations apply and the land will have to be identified, gazette and allocated to the TIC. Because most land is in rural areas [about 70%, leaving general lands with 2% and reserved lands 28%,] village lands have been constantly transferred to general land before the same is allocated to the TIC and subsequently the investor under a derivative title.

Procedures to transfer village land to general land are detailed as a safeguard to protect village lands against unscrupulous dealers.[147] In economic terms it does not make good sense but a necessary safeguard for the welfare of the rural majority, in limiting the avenues for acquiring village land that may render rural landholders landless or even homeless.[148] There are also restrictions on use set out in section 29 of the Village Land Act or as may be prescribed by the village council having jurisdiction over that land such as; the user to keep and maintain the land in good state; farming to be in accordance with the practice of good husbandry customarily used in the area, land to be used in a sustainable manner in accordance with the highest and best customary practices, compliance with

145 *Ibid,* section 17(1).
146 *Ibid,* section 17(5).
147 See section 4 of the Village Land Act.
148 Kironde L.S. &Tenga W.R., *Study of Policy, Legal and Institutional issues Related to land in the SAGGCOT Area.* World Bank report 2012

planning permission where needed, paying any rent, fees, charges, taxes and other required payments due in respect of his occupation of the land etc. So, essentially there is a whole list of restrictions on use of rural lands but the main problem lies with the enforcement of the same due to weak capacity of village councils. Regulations on restriction for rural land use do serve public purpose but the main challenge as noted is weak enforcement. There is need therefore to promote enforcement of the regulations by *inter alia* improving the capacity of the institutions in terms of skill and working tools.

Where the President is mindful to transfer any area of village land to general or reserve for public interest, he may direct the Minister to proceed.[149] Public interest in this case includes investments of national interest.[150] Consequently, there have been conversions of land from customary right of occupancy in rural areas to granted right of occupancy in favour of non-village foreign investors.[151] Powers of the President to convert village land is required to be used in a transparent manner with villages full involved and their opinions taken into consideration. About 3,079 transfers have taken place in the year 2013-2014 which could also imply some change of use. So far, changes that have been taking place include those for declaring unreserved lands to be reserved or game-controlled areas or converting land from village land to general or reserved land and *vice versa*.[152] This trend has caused resentment among local communities regarding the fate of their land as once the land is transferred the chance for it to be returned is slim. In the case of Lindi the land was transferred to Bioshape a foreign company but the investor could not carry out the investment as planned. Besides it is alleged that the company acquired more land than allowed under the Tanzania national Guidelines for Sustainable Liquid Biofuels Development which limits land to 20,000ha.[153] The Sunbiofuels in Kisarawe also had acquired 8,200ha of land. The company failed to operate as planned and sold its interest to 30 Degrees East Co. Ltd. This is a trend that points to lack of focus to use the land in the destined use. This has resulted into public complaints and turning such lands into bushes or to unintended uses.[154]

Experience has shown that there have been many conversions of village land from customary right of occupancy in rural areas to granted right of occupancy in favour of non-village foreign investors.[155] While the process of village land transfer under section 4 of the Land Act is supposed to be long and detailed;[156] required consultations and property inventory for compensations have either

149 *Ibid* section 4(1).

150 *Ibid*, section 4(2).

151 Consider cases of land transfers in Kigoma, Kisarawe, Lindi, Njombe, Loliondo fueling resentments from local communities. See studies by LEAT and HAKIARDHI on land acquisitions.

152 See section 4 of the Village Land Act and section 5 of the Land Act.

153 See Report by MVIWATA, *Assessing Impact of Biofuel Investments on Local Livelihoods in Tanzania: A Case of Kisarawe, Bagamoyo and Kilwa Districts*, 2014, see further Kironde L.S. and Tenga W.R. *Study of Policy, Legal and Institutional issues Related to land in the SAGGCOT Area*. World Bank report 2012.

154 Ref. cases like Bioshape in KilwaLindi and SUNBiofuel Companies that failed to utilize the land effectively. LEAT, Prospects and Challenges for Agribusiness in Tanzania. (2010).

155 Consider cases of land transfers in Kigoma, Kisarawe, Lindi, Njombe, Loliondo fueling resentments from local communities. See studies by LEAT and HAKIARDHI on land acquisitions.

156 See Village Land Regulations of 2001 GN # 66 of 2001 on procedure for compensation and Village Land Forms No. 8, 9, 11, 12, 13, 14, & 15.

been ignored or not done meticulously. Even in the cases of transfer or compulsory acquisition, the compensation is required to be fairly determined and the process be transparent. In such a case, villagers will be assured that the land that is converted to general land or is compulsorily acquired for investment purposes was not done in secret but also the land would revert to them at some future date, or in the case of the investor being in default.

Despite the current compensation criteria as mandated under Article 24 of the URT Constitution (1977) as amended, compensation has to be prompt and commensurate with the prevailing land value in the market. There is also need for a comprehensive Resettlement Policy to deal with issues of relocation evictions, and resettlement in the country. There is also need to ensure more transparency and involvement of local communities in land transfers. In case land is to be transferred then the focus should be on resettlement not compensation which has often proved to be inadequate and recipe for court disputes. So far, the process of transfer has led to a lot of complaints from affected villages.[157] This is definitely a result of inadequate consultative process or compensation rates. Also, compensation for village land occupiers is somehow complicated compared to compensation for occupiers of general land, namely holders of granted rights of occupancy. This is due to the fact that most of the holdings are not surveyed; the land might be used rotationally or under shifting cultivation, or is reserved village land or communal land. The process requires notices, hearings, and identification of the rightful occupiers, valuation and ascertainment of the rightful people to be compensated.[158] The procedure for ascertaining rightful people for compensation is provided in the Land Regulations.[159] However, sometimes compensation is disputed for want of adequacy or payment to wrongful people.[160] In addition, although theoretically there is abundant land in villages, large scale investors may need to acquire land from more than one village to avoid the danger of threatening available village land reserve. This process may require joint village land use plans and effective operation of Local Government Authorities.

The need for land use plans to safeguard the common property rights is eminent. It is upon such plans that communal land rights can be freely enjoyed and investment can be more sustainable. The National Land Use Planning Commission has prepared a set of guidelines requiring a transparent, fair, inclusive and consultative process in the planning of village land use. With the Land Use Planning Act 2007, land use plans are pre-requisites for issuing CCROs. Nevertheless, most villages do not have village land use plans. In over 105 villages 84 have been surveyed, 52 have certificate of village land and 32 have village land use plans. More than 2,000 certificates of customary right of occupancy have been issued. In Mbeya, out of 148 villages, 16 have land-use plans. In Ifakara, out of the 81 villages in the District 12 have VLUP. The Mbozi experience was scaled up and

157 Example in Kisarawe.
158 See Village Land Regulations 2001, GN 86/2001.
159 GN # 86 of 2001.
160 See for instance the findings of the URT, Report of the Presidential Commission of Inquiry into Land Matters 1992, p 88.

a systematic process to issue CCROs was developed in Babati and Bariadi. SPILL 2014 notes that the National Land Use Framework Plan was prepared and agreed by Cabinet. 35 District Land Use Framework plans were in place.[161]

Various reasons could justify the lack of village land use plans for most villages. These include lack of base maps to work upon; lack of technology to demarcate areas for various uses within the village; lack of adequate staff at District level to give assistance to villages; and the complex village land use planning requirements. There is also limited know how of villagers about land use planning. There is therefore need for developing base maps to help in preparing the land use plans; providing necessary skill on demarcation of areas for various uses within the village and hiring more staff to carry out the exercise of planning in the rural areas.

The Land Use Planning Act 2007 provides different levels of land use plans from the national level to the district and village level. So, in terms of the law there are valid provisions for promoting land-use planning[162] with a view to safeguard the land rights of the relevant communities. However, due to the slowness of the process of land use planning, it has not resulted into widespread impact on protection of rural land rights. It is high time the exercise should move from pilot case to full scale land use planning across the country. Preparation of a Village Land Use Plan is a pre-condition to systematic adjudication. The satellite imagery or aerial photography acquired for systematic adjudication provides a base for developing the Village Land Use Plan. According to the Village Land Use and Management Guidelines, the process for preparation of Village Land Use Plans are as follows:

a. District prepare and formulates District PLUM team,
b. Mobilization of village institution, conduct PRA and formulate Community Action Plan (CAP),
c. Establish existing situation reports and maps,
d. Determine future needs and draft proposed land use plan and by-laws,
e. Approval of land use plan and village by-laws by Village Assembly,
f. Present to the District Authority, Village Land Use Plan for advice,
g. Present to the District Authority by-laws for approval,
h. Implementation of Village Land Use Plan and by-laws.[163]

The Guidelines for Participatory Village land Use Planning, Administration and Management (2013) outlines the criteria for allocating land for livestock keeping and grazing, forest reserves, water sources, wildlife conservation areas and other uses. The Guideline provides that about 30% of the whole land is reserved land. To keep pace with these villages and district authorities have been reserving 20-30% of their land for forests. For water resources 60 metres buffer zone is left for ensuring protection of the water source. WMAs on village land takes about 20-30% of village land which may include village forest reserve where there is scarcity of land.

161 URT, MLHHSD, SPILL 2014.
162 See Part V of the Land Use Planning Act (2007).
163 See the Village Land Use and Management Guidelines, the process for preparation of Village Land Use Plans.

The natural resources laws and land-use planning laws provide for areas for specific uses. Percentage of areas for various uses and resources such as agriculture, grazing land, social facilities, forestry, water bodies and residential are based on GIS and recorded and the uses are monitored by the Village land use management coordinator and the district land use management coordinator. There is need to ensure that protected rural land use correspond to actual use. There is need for effective monitoring of compliance by various actors to ensure that protected areas are not compromised for unplanned for uses.

2.1.4 Pastoral Rights

Pastoral rights have long been ignored or rather given inadequate regulatory consideration. This however, does not negate the truth that pastoralists need conducive environment to operate efficiently and sustainably such as; designated land for pasture and reliable source of water. It is generally accepted that communal use of land for pastoralism has been a common phenomenon in many African countries. Pastoralism as stated by Flintan, is made up of three components – livestock, people, and the rangeland (resources and land).[164] The three requires clear protection in the law to ensure sustainability of pastoral livelihood. The Land Act (1999) [Cap. 113 R.E. 2002] provides room for development of strategy for range management and recognition of associations and organizations of livestock keepers to ensure protection of livestock keepers and their traditional grazing rights. Communal land within village boundaries to some extent provides grazing land for pastoralists. The Village Land Act does also provide for recognition of common property for pastoralists, such as land sharing arrangements are possible, including the issuance of a Certificate of Customary Right of Occupancy (CCRO) over land held under traditional pastoral tenure. In practice official processes do not appear to recognize a customary pastoral title to land but rather recognize only usufruct rights – merely a license to use someone else's property.

The rights to pastoralists have furthermore been acknowledged in the Land Act where it confers protection to occupation of land for pasturing stock under customary or statutory tenure. Every person who lawfully occupies land, under a right of occupancy, as grant, deemed right, or customary tenure, the occupation of such land is deemed to be property and include the use of land from time to time for de-pasturing stock under customary tenure.[165] While section 4(3) of the Land Act is unequivocal in its terms, the realities on the ground are still puzzling as pastoralists feel that their security is always compromised with no enough safeguards.

The Grazing Land and Animal Feed Resources Act also promotes pastoral rights[166] by empowering village councils to grant right of way for stock-driving for purposes of providing access to water, dipping, marketing facilities and other services which are not within the grazing-land.[167] Once such right of way is granted it continues to be used for the common benefit of the surrounding communities

164 *Ibid.*
165 Land Act, section 4(3).
166 Grazing Land and Animal Feed Resources Act, Act No 13 of 2010.
167 *Ibid*, section 16(2).

and therefore requires protection. The Grazing Land and Animal Feed Resources Act also requires Village Councils to set aside part of the communal village land to be strategic grazing land in accordance with the provisions of the Land Use Planning Act.[168] Village Councils are empowered under the Act to prohibit, restrict, limit or control entry into grazing land for purposes of cultivation, mining, establishment of wildlife protected areas or any other use other than livestock keeping.[169]

Once designated, the grazing lands may be owned communally or privately by livestock keepers.[170]The Act gives the steps to follow when pastoralists wish to secure their grazing land, including the formation of a pastoralist association. The solution that appears tolerable is one of registration of grazing commons to a group of defined users (a pastoralist association).[171] Any development on the grazing land has to be undertaken in a manner that is consistent with sustainable land use planning and management practices. Any land set for livestock keeping may only be developed in the manner prescribed by the Minister but in consultation with the Village Assembly.[172]

Problems faced by pastoralists include:-

a) Shrinking grazing lands due to population growth and protected area expansion,
b) Increasing sedentarisation and its adverse effects on range access and condition,
c) Inadequate animal & range husbandry services, veterinary care & access to markets,
d) Loss of grazing due to migration of farmers into traditional rangeland areas,
e) The deterioration of important customary institutions governing rangeland management,
f) Conflicts with crop farmers and within different groups of herders over natural resources such as water.[173]

Among the advocates of pastoralists argue on the need for secure tenure over their lands and natural resources.[174] This has not been achieved despite the provisions in the Village Land Act of 1999 enabling the recognition of communal tenure. It would appear that pastoralists have migrated into areas where they did not exist traditionally and this has brought about numerous clashes, between pastoralists and farmers in many areas in the country, especially those that have abundant pasture. This trend mirrors the Biblical Cain and Abel rivalry which resulted into bloodshed. Antagonism between the two is aggravated by diminishing land for pastoralism as a result of reservation, encroachment by agricultural and

168 *Ibid*, section 17(1)
169 Section 17(3) of the Grazing Land and Animal Feed Resources Act.
170 *Ibid*, section 17(2).
171 Sustainable Rangeland Management Project (SRMP) for the International Land Coalition, *Village land use planning in rangelands in Tanzania: good practice and lessons learned*, 2013. p.24.
172 *Ibid*, section 18(3).
173 *Ibid*.
174 See for instance Flintan F. *op cit*.

other noon-pastoral activities, drought and climate change, the increase in the population of in both people and animals and so on. Addressing the pastoral question needs addressing issues of protection of pastoral land and resources that includes water and rights to passage.

It is still deemed however, that village councils cannot enforce the law as stipulated. Most villages are managed by farmers who are on perpetual conflict with pastoralists. This makes is difficult for village authorities to enforce the protection of pastoral lands. Also, in reality, pastoralists do not reside within the confines of one village as they keep moving from place to place in search of pasture and water. As a result, they have found themselves at loggerheads with farmers in many parts where the two communities converge resulting in conflicts which are sometimes violent. Also pastoralists have been occupying land earmarked for conservation thus engaging into conflict with authorities. The Ihefu wetland is a case at hand where pastoralists had to be moved forcibly from the wetland. The next section looks at regulation of common properties in the mining sector.

2.1.5 Mining Rights

The mining sector is by and large the most volatile sector in the country. The Court in the case of *Hosea Katampa vs. The Ministry of Energy and Minerals, the AG and Geita Gold Mine*[175] emphasized that the entire property and control over minerals is vested in the United Republic as per section 5, read together with section 6, which illustrates the extent access to mineral rights in Tanzania is controlled and regulated. It does not matter, that the mineral concerned is on, in or under the land under right of occupancy, or village land or forestry, national park or even in a game reserve. While local and foreign actors have been operating in this sector, the threshold of their exact contribution to national GDP has always been on the spotlight. Effective regulatory regime coupled with appropriate property regime that acknowledges common property in minerals is essential. Common property rights in the mining sector exist under joint or collective arrangements.

The Mining Act, which was enacted in 2010 provides *inter alia* that a mineral right can be held by more than one person namely; a group.[176] In local community context, this manifests in the artisan and small-scale miners (ASM) sector. ASM miners and their dependents constitute a unique segment of local communities engaged in mining activities. Hentschel et al notes that artisanal or small-scale mining (ASM) activities are at least as important as large-scale mining due to their role in poverty alleviation and rural development. The sector engages mostly the poor who mining is the only income opportunity available to them.[177] The ASM groups engaged operate on their own or along-side large scale operators such as Africa Barrick Gold Mine (now Acacia) has a program to assist the artisanal and small-scale miners near the North Mara mine among others. In a report sponsored by the World Bank it was estimated that there are over 680,000 artisanal miners

175 Civil Appeal No. 221 of 2017, Court of Appeal of Tanzania at Mwanza (Unreported), p. 15.
176 Section 9. of the Mining Act.
177 Hentschel T., Hruschka F., and Priester M., *Artisanal and Small-Scale Mining Challenges and Opportunities*, IIED. London. 2003. p 1.

in Tanzania.[178] The collective groupings under ASM are: Primary Mining License (PML) owners, pit holders, diggers, processors and buyers, and dealers.[179] Formal small-scale mining takes place legally with miners in possession of a primary mining license, which thus give them a legal right to mine. In addition, the mining officers are able to exercise control as provided in the Mining Act. Informal small-scale miners or artisanal miners, hardly get legal protection. Mostly they are found in rush areas either of gold, diamonds or colored gemstones. Unlike the formal small-scale mining, artisanal mining is uncontrolled so it is often unsafe, unhealthy and environmentally unsound, and can give rise to social problems. In recent years, a number of governments have formally recognized the sector and attempted to provide facilitating environments.[180]

The Mining Act recognizes formal grant of primary mining license to individual citizens of Tanzania, a partnership composed exclusively of citizens of Tanzania or a body corporate, whose members are exclusively citizens of Tanzania and the directors are all citizens of Tanzania; and the control over the company, both direct and indirect, is exercised, from within Tanzania by persons all of whom are citizens of Tanzania.[181] Artisan and small scale miners however, can team up and apply for a primary mining license to be secure from the perils of large-scale miners.

Despite their long neglect, the government has made efforts to uphold the superiority of the commons over private right. In 2017 the Parliament enacted the Natural Wealth and Resources (Permanent Sovereignty) Act, No. 5 of 2017 which among other things vest permanent sovereignty over all-natural wealth and resources to the people of Tanzania under the trusteeship of the government.[182] Section 5(1) provides for the inalienability of rights over natural wealth and resources.[183] The above sections builds on Art 9 and 27 of the URT Constitution 1977 as amended which vests duty and beneficial interests over natural resources to the citizens.[184] These legal developments are crucial as they create precedence of commons rights over private rights. Moreover, in 2016 Hon. President Magufuli issued an order to cancel a prospecting mining licence that had been issued to a mining giant Pangea Minerals Ltd, a subsidiary of Acacia Mining Plc in favour of 5,000 small scale miners.[185] The Premier, Kassim Majaliwa also issued a directive that called upon banks to accept mineral [supposedly to the benefit of small scale and artisan miners] as collateral for bank loans.[186] While these executive steps are aimed at helping local communities to assert more control and benefit from the mining resources, the actions need to be backed-up by corresponding regulatory

178 Bryceson F. D. & Bosse Jønsson J. Tanzanian *Artisanal Gold Mining: Present & Future,* Geographical & Earth Sciences, University of Glasgow Presentation Britain-Tanzania Society Seminar, SOAS, London, 15 March, 2012 at http://www.btsociety.org/ on 24th Feb 2015.

179 *Ibid*.

180 Hentschel T., *op cit* p. 13.

181 Section 8(1) of the Mining Act.

182 Sections 4(1)&(2), 5(2).

183 *Ibid*, section 5(1) of the Act.

184 See further General Assembly Resolution 1803 (XVII) of 14 December 1962, Permanent sovereignty over natural resources.

185 See Guardians Reporter, Guardian Newspaper, 7th Dec 2016.

186 See Citizen Newspaper, Oct 3, 2018.

framework to guarantee legal security. With the above snapshot on common mining rights, suffice it to consider the regulation of common property rights in the forest sector.

2.1.6 Forest Rights

In the forest sector the legal framework is liberal, providing for existence of common property rights. Under the Forest Act No 12 of 2002,[187] forest management falls under different management authorities according to their types. It can be a central government (National Forest Reserves-NFRs) reserve or District Councils (Local Authority Forest Reserves-LAFRs) reserve. Some of the forests can be created on village land hence the management is common by the respective village(s). A common village land forest reserve can either be (a) declared village land forest reserve; or (b) *gazette* village land forest reserve. All village forest reserves which were in existence at the commencement of the Forest Act were declared to be declared village land forest reserves. Village land forest reserves may be owned and managed by one village or more villages as long as they are within one local authority or more local authorities.[188] The Act allows a village council to (a) declare an area of village land to be a village land forest reserve; by submitting an application to the Director of Forests through a local government authority for a declared village land forest reserve to be gazette as a village land forest reserve. The Act provides for the rights of villages to enter into joint agreement for the management of forests forest on village land. Thus, where there has been a joint management of village land forest reserve by two or more villages as per section 36(1) any of the villages can inspect a copy of such a joint agreement management and this will be managed in common under the joint arrangement. The Act also provides room for categories of Community based Forest management (CBFM) and Joint Forest Management (JFM).[189]

Community Based Forest Management include; village land forest reserves, community forest reserves created out of village forests, unreserved forests on village land managed by Village Council, private forests by individuals on village land held under customary right of occupancy. It also encompasses forest on general or village land where the right of occupancy or lease has been granted to a person. Under Joint Forest Management, communities living around forests may enter into Joint Management Agreements. Villages may also enter into Joint Management Agreements for National or Local Authority Forest Reserves.

The Act envisages formation of joint management agreement between:- the Director of Forests and any person, organization in the public or private sector, community groups or group of persons living adjacent and deriving their livelihood from a national forest reserve; a district council and a village council,

187 [Cap. 323R.E. 2002].

188 Forest Act, sections 4.

189 PFM is a collective term of community collaborative approaches to forest resources management, including Joint Forest management (JFM) and Community Based Forest Management (CBFM). The two regimes differ in their levels of power and jurisdiction given to the local authority (village government or community) over the forest resources. JFM is a co-management between community and government applied in State forest reserves while CBFM is applied in forests on village land which formerly were open access resources and thus characterized by heavily degraded forests.

a community group or any person or an organization in the public or private sector providing for management within a local authority forest reserve; a village council and a community group providing management within a village land forest reserve; the manager of a private forest and community groups or other groups of persons living adjacent to and deriving their livelihood from or adjacent to the private forest.[190]In that case, there may be a community corporate entity *vis-a-vis* an individual or another corporate entity. The management under such a relationship is regulated by the Act *vide* the management agreement and the adopted management plan. The Act provides concessions of forest land to be submitted to the Minister. Apart from forest management a sister economic activity that has mainly been undertaken in forests reserves is apiculture.

In line with the Forest Act, section 18(1) of the Beekeeping Act No 15 of 2002 recognizes creation of joint management agreement of a gazette bee reserve between the Director of beekeeping and a local authority or a village council or a group or any person or organization in the public or private sector. Such agreement provides for the management by that organ or person for the whole or a part of, or some specific matter within the bee reserve. The joint management agreement must provide among other things for rules governing and regulating the use, access and resources of the bee reserve, including, where relevant, rules concerning the powers, and duties of persons from a local community appointed to act as bee reserve keeper of the reserve.[191] The section further provides for rules for managing a declared local authority bee reserve. The rules may include customary rules and practices applicable to the management of bees and apiary products within the area recognized as such by the local authority.[192] The Act also provide for right of village councils to:-

(a) declare an area of village land under its jurisdiction to be a village bee reserve;
(b) negotiate a joint management agreement or other agreement or arrangement with the Director, a Group or some other person or body in respect to the Management of a village bee reserve;
(c) establish a committee to manage a village bee reserve or allocate the duties of managing such a bee reserve to an existing Committee of the village council.[193] Once the village bee reserve is declared, it shall be managed for the collective benefit of the villagers. The rules for the formation of the village land bee reserve committee are to-

    (i) be formed from the membership of the village assembly;
    (ii) be formed with due regard to gender balance;
    (iii) elect a chairman annually from amongst its membership;
    (iv) be the principal village body concerned with the management of a village bee reserve;
    (v) report on a regular basis and take account of the views of the

190 *Ibid*, section 33(1).
191 Section 18(f).
192 Section 18(2)d.
193 Section 20(1).

village assembly on the management of the village bee reserve. Hence, in the context of common property rights in forests community bee reserves should also be taken into account as recognized in the law.

According to Makatta, et al., in 2018, PFM in Tanzania is estimated to have covered about 13% of all the forests[194] from a total of 2,328 villages in 63 different districts that had engaged in PFM in 2008. In the same year, 550 had declared / gazetted village forest or signed Joint Management Agreements.[195]

There is however need to streamline the management responsibility of various actors in the forest sector. Forests on general land have been prone to over-exploitation. There is need to consider vesting more property rights on those forests to communities and private persons under the framework of Participatory Forest management (PFM). More villages should be encouraged to gazette and or sign management agreements as PFM has proved to be efficient forest management tool. This hitherto discussion takes us to the next discussion on the common water rights.

2.1.7 Water Rights

The Water Resources Management Act (2009), empowers the Minister for water resources to designate areas to be water catchment areas or sub-catchment areas.[196] The Water Resources Management (Registration of Water Users Associations) GN No. 22 published on 22/01/2010[197] provides modality for the formation of local water user's associations. The association can be created in form of; irrigators, water consumers, cooperative societies, NGOs, companies etc. The objectives of the association are operation, and conservation of the water catchment area of a given river and its tributaries. The management of the catchment or sub-catchment is done by a committee of the catchment or sub-catchment appointed by the association. The functions of the committee include: (i) coordinating and harmonizing catchment and sub-catchment integrated water resources management plans and (ii) resolving water resources conflicts in the catchment or sub-catchment.[198] In that sense, the water resources legal framework acknowledges the presence of common properties in the water sector. The local communities in catchment areas have been given mandate by law to manage such common property for the benefit of the members of the community. Under the Water Supply and Sanitation Act, Act No 12 of 2009 it is provided that there can be community ownership of water supply organization established by agreement of the majority of the members of a community.[199] The Act recognizes communal water supply schemes providing incentives to facilitate communally owned water supply organizations to register their organizations and to acquire

194 Makatta A., Lupala F.J., Maganga F., and Majule A., 'Forest Governance at Village Level with Potential for REDD+ in Participatory Forest Management, Tanzania', *International Journal of Environmental Sciences & Natural Resources*. Jan 20, 2018. p. 2.

195 URT, VPO (February 2013), National Strategy for Reduced Emissions from Deforestation and Forest Degradation (REDD+), Government Printer – Dar es Salaam – Tanzania.

196 Water Resources Management Act, section 29(1).

197 Made under section 81(1) of the Water Resources Management Act, No 11 of 2009.

198 *Ibid*, section 29(2).

199 Section 31 of the Water Supply and Sanitation Act.

certificate of title. Village councils are required to promote the establishment of community organizations, coordinate their budgets and resolve any conflicts.[200] Since water a resource is vital for varied purposes, the next section consider one crucial benefit of water in the context of fishing rights.

2.1.8 Fishing Rights

Tanzania has great potential of fishery resources in marine, lakes, rivers and dams. The Fisheries Act 2002, (Act No. 7 of 2002) and its strategic policy provides for establishment of beach management units.[201] Section 11(1) requires the Director of Fisheries to ensure inter alia that; the livelihood, culture and traditions of local communities and their access to fishing ground are not affected by aquaculture development; local community has access to fishing grounds and that no person or group of persons may deprive a local community the access to fishing grounds without good cause. This section essentially protects common fishing grounds for local communities. The Director of Fisheries has been allowed to enter into a management agreement with beach management units (*group(s) of devoted stakeholders in a fishing community*) of the whole or part of or some specific fishery matter or activity within any water body or with any one or more local authorities having jurisdiction within the vicinity of any water body and deriving the whole or a part of their livelihood from that water body.[202]The management agreement must contain;- (a) statement of objectives of the agreement; (b) description of the area covered by the agreement; (c) description of the management activities to be undertaken; (d) rules governing the use of and access to other fishers; (e) duration of the agreement; (f) provision for revision of the agreement; and (g) provision for settlement of disagreement.[203] On that basis, there have been various beach management units for the management of fishing grounds for the benefit of the respective communities. The other legislation that is specifically relevant to fisheries is the Marine Parks and Reserves Act [R.E. Cap 146] which is specific for coastal and marine habitat management.

The Act establishes the Marine Parks and Reserves Unit.[204] The purposes of designation of a marine park or reserve are *inter alia* to ensure that villages and other local resident users in the vicinity of or dependent on, a marine park or marine reserve are involved in all phases of the planning, development and management of that marine park or marine reserve, share in the benefits of the operation of the protected area, and have priority in the resource use and economic opportunity afforded by the establishment of the marine park or reserve.[205] The National Integrated Coastal Environment Management Strategy (ICMS) (2003) provides for various aspects of conservation. On community participation, the Plan aims to facilitate mechanisms that assure significant benefits to communities. It also aims to strengthen the capacity of Village Liaison

200 *Ibid*, section 8.

201 Means, a group of devoted stakeholders in a fishing community whose main function is management conservation and protection of fish in their locality in collaboration with the Government-see section 2 of the Fisheries Act 2003;

202 Section 18(1) of the Fisheries Act.

203 Section 18(2) of the Act.

204 Marine Parks and Reserves Act, Section 3(1).

205 *Ibid*, section 10.

Committee (VLC) to participate in management of the Park, and encourage and facilitate local residents' involvement in sustainable tourism enterprises and other emerging economic opportunities. The above discussion takes us to a more broader property right on wildlife resource rights.

2.1.9 Rights to Wildlife

Out of Tanzania's total land surface area, 25% is set aside for wildlife conservation. About 43.7% of the total land area is somehow protected (or conserved) whereby wildlife protected areas (including Game Controlled Areas) cover at least 28%.[206] The 4th National Report on Implementation of Convention on Biological Diversity (CBD) Report 2009 notes that most of the wildlife is found outside existing protected areas thus making its survival to be in a race against development. As a result, Tanzania has been practicing community-based natural resource management by encouraging participatory forestry and wildlife management through Wildlife Management Areas and Community Based Forest Management Associations.[207]

The Wildlife Conservation Act, No. 5 of 2009, provides for creation and protection of communal property rights in the wildlife sector. The Act creates opportunity for the citizens of Tanzania to become involved in the wildlife industry by promoting integration of wildlife conservation with rural development through the transfer of the management responsibility of Wildlife Management Areas to local communities and by ensuring that local communities obtain substantial tangible benefits from wildlife conservation. It further establishes Wildlife Management Areas for the purposes of effecting community-based conservation.[208] Consequently, the Wildlife Conservation (WMA) Regulations of 2012 which by virtue of section 122(3) of the Wildlife Conservation Act are enforceable, provides for the creation of WMAs on village lands and implementation of the Wildlife Policy's objectives. The Regulations allow communities to become corporate entities and participate and benefit from wildlife utilization, in WMAs. However, in order to use any other natural resource products like fish, forest or bees, one needs to consult sectoral policies, laws and regulations regulating that particular resource. The Regulations spell out the process that the communities must follow in order to qualify for being granted wildlife user rights.

Forming a WMA requires communities, through their village assemblies, to elect a 'community-based organization' (CBO), which can manage the WMA belonging to several villages and be granted 'authorized association' status by the Director of Wildlife. This 'authorized' status simply means that the CBO is given user rights to the wildlife in the WMA, including limited rights to sell those user rights to third party investors (e.g. safari hunting companies). Prior to becoming 'authorized', the CBO must be registered with the Ministry of Home Affairs. The Village Councils have a relatively limited role in directly managing the WMA, except to receive revenues earned from the CBO and then, through normal village

206 URT, 4th National Report on Implementation of Convention on Biological Diversity (CBD) Report 2009, Division of Environment, Vice President's Office, 2009, p 17.

207 *Ibid*.

208 Section 5(1) of the Wildlife Conservation Act, (2009).

government procedures, budget and use those earnings. A major challenge for communities in forming WMAs is creating this new CBO institution, which will have considerable power over village lands and resources as the manager of the WMA. Agreeing on a constitution, membership, and leadership can be time-consuming and requires a great deal of grassroots engagement if the CBO is to be an accountable and effective organization.[209]

As WMAs are generally governed by among other laws, the Village Land Act 1999, and the Local Government Act (District Authorities) 1982it is clear that the use of the land in the WMAs has to be in conformity with the restrictions imposed by the Wildlife Conservation laws which do not take away the rights of the villagers and the Village Councils to utilize lands and resources found on it except the permitted wildlife resources.[210]

3.0 Critical Review of the Common Property Regime

As pointed out in the specific discussions above, the Wildlife Conservation Act, Forest Act, Beekeeping Act, Village Land Act, Land Act Cap 114 [R.E. 2002], Water Resources Management the Act (2009), Fisheries Act, National Irrigation Master Plan, Wildlife Conservation Act (2009), Marine Parks and Reserves Act [R.E. Cap 146] and the Grazing Land and Animal Feed Resources Act have provisions addressing issues of common property rights in these resources. Users' rights to natural resources such as water, wildlife, fisheries, forest resources, etc. are well provided for and protected by law. Individuals have been given the right of access and use of the relevant resources subject to compliance with the law. Upon securing permits, resources such as forest, minerals, fisheries, gas etc can be extracted, harvested or disposed of by the right holders. Sometimes, individuals' default by not obtaining the required permits either because of the strictness of procedures, fees involved or associated bureaucracy to secure one.

In practice however, property rights in rural commons are opaque partly due to lack of village land use plans. Clearly defined land use plans provide specific areas for various uses including lands under commons. Lack of land use plans fuel conflicts among different land users. For instance, pastoralists, who are transhumant, find it difficult to enforce their property rights over common land due to lack of clearly defined land use plans and secure property rights. Commons which may be considered marginal land such as pasture lands, catchments, and marshy lands are particularly vulnerable. There is likelihood that village authorities can allocate village communal or reserves lands to potential investors, thus privatizing part of the commons. While individual land owners could be issued with a CCRO, the same is not issued with regard to communal land which puts communal land rights at a disadvantage. One evidence that communal land rights are poorly recognized is the non-compensation of pastoralists and other communal land users, whenever their land is expropriated.

209 See Blomley T. and Iddi S. Participatory Forest Management in Tanzania: 1993 – 2009.p. 14.

210 See that section 8 of the VLA gives the Village Council authority and responsibility for the management of village land.

The Land Acts recognize occupancy rights held by a majority of landholders in the rural areas, especially those in predominantly agricultural areas. If one takes account of the unspecified status of women in the customary law regime and the precariousness of pastoral tenure and those of hunters and gatherers the legal framework may be said to recognize rights held by 70%- 90% of the rural population. The Land Acts also recognize forms of group tenure but the incidences of such tenure remain either problematic or unregulated as they are not recognized strictly under customary models of land or range management.[211]

Thus, the Land Acts define rural land rights as being individual or clan realized through the operation of customary tenure. Village land also includes communal land as well as land reserved for future expansion. A certificate of village land issued by the Commissioner for Lands to a registered village confers to the Village council powers to manage village land. Rights could be vague where a village is not registered, or where village boundaries are not agreed upon with neighbouring villages or other land managers such as urban, reserved land or general land authorities. The Village Land Act establishes and defines village land to include;

a) Land within the boundaries of the village registered under section 22 of the Local Government Act No. 7 of 1982;
b) Land designated under the Land Tenure Village Settlements Act, 1965;
c) Land, the boundaries of which have been demarcated as village land under any law or administrative procedure in force before the coming into operation of the Villager Land Act whether that administrative procedure based on or conducted in accordance with any statute law or general principles of either received or customary law applying in Tanzania and whether that demarcation has been formally approved or gazetted or not;
d) The land the boundaries of which have been agreed upon between the Village Council claiming jurisdiction over that land and neighboring entities; and
e) Land other than the reserved land that the villagers have been using for the last 12 years before the enactment of the VLA as village land in whatever manner.

On the basis of this definition, Individual land owners could be issued with a CCRO. Communal land rights holders including villager-farmers as well as pastoralists, hunters and gatherers should have secured rights. There is need to promote security of the commons by having clearly defined property rights. Such property rights should be vested to entities that have legal recognition. One of the ways could be forming associations, or forming a corporate body with consequential rights. Having clearly defined land use plans and subsequently issuance of CCROs to both individuals and collective occupiers is necessary to secure land rights on the commons. There is also need to enhance the internal capacity of groups by developing guiding rules and regulations and formally registering their associations. Although as the law provides communal lands can be held collectively by pastoralists, hunters and gatherers but regulation or

211 See CORDS Reports, MKURABITA, Tenga et al Study on Options for Pastoralists [2008], etc.