

Columbia University

Land, Governance and Legitimacy in Tanzania

The Effects of Legal Pluralism on Maasai Pastoralists

Jacqueline Brown
Kristine Garrucho
Joseph Lin
Vera Quina

5/8/2009

This research would not have been possible without Professor Jackie Klopp, whose patience and insight gave us both encouragement and guidance. We are also grateful to Dr.Séverine Bellina and Dr.Michel Sauquet of the Institute for Research and Debate on Governance, along with Jenny McGill and Melissa Giblock at Columbia University, who made this project happen. We are especially thankful to all the organizations in Tanzania that provided support for our fieldwork. Bernard Baha and Yefred Myenzi from Haki Ardhi have been excellent sources of guidance and advice, and have been a great help throughout the entirety of the process. We thank CORDS, which not only provided great insight, but also was instrumental in arranging much of our fieldwork with Maasai pastoralist communities. We are very thankful to Adam Ole Mwarbu for his insight and everlasting character. We thank everyone at PINGOs Forum, TAPHGO, MWEDO, MVIWATA, LHRC, OXFAM, TNRF, and ALAT in Tanzania, as well as Professors Mamdani and Ssekandi here in New York. We appreciate the help and advice of Professor Mellau, Professor Hodgson, Professor Stein, Professor Homewood, Professor Leander Schneider, Professor Mara Goldman, Andrew Williams, Alais Morindat, Michael Odhiambo, and African Mlay. Lastly, we would like to thank Noelle Lee Okoth and last year's IRG workshop team, Sera Shani, Innocent Bash, and all others who contributed to this research; without the amazing assistance we received throughout this endeavor, this research would not have been possible.

Table of Contents

I.	Introduction	5
A.	Methodology and Organization of the Paper.....	6
II.	Theoretical Framework	7
A.	Sources of Legitimacy.....	7
B.	Improving Legal Pluralism in Tanzania	8
C.	Considering Multiple Legitimacies in a Legal Pluralist Society	10
III.	Power Dynamics Reflected in Land Governance Institutions.....	11
A.	Consolidation of State Power during the Colonial Period	11
B.	Villagization during Post-Independence.....	12
C.	Neo-liberalism and the Shaping of Government Values	12
D.	The Shivji Commission and the Missed Opportunities for Reform	13
E.	Embedded Values in the 1999 Land Acts	14
IV.	Implications of Customary Law and Statutory Law Asymmetry: The Case of the Maasai Pastoralists	16
A.	Territorial Dimension: Displacement and Villagization	17
1.	Displacement.....	17
2.	Villagization	18
B.	Political Dimension: Lack of Representation and Inadequate Dispute Resolution Mechanisms	20
1.	Lack of Representation.....	20
2.	Failure of Dispute Mechanisms	25
C.	Socio-Economic Dimension: Livelihood Insecurity and Chronic Poverty	28
1.	Livelihood Insecurity	28
2.	Chronic Poverty.....	30
V.	Conclusion	31
VI.	Reference List.....	33
VII.	List of Contacts	36

LAND, GOVERNANCE AND LEGITIMACY IN TANZANIA

The Effects of Legal Pluralism on Maasai Pastoralists

I. Introduction

Land reform and governance are major themes in contemporary Africa. Each serves as an arena where power and different claims to legitimacy over land rights interact and shape existing institutions and land use. While these dynamics are a central part of the governance and state/institution-building process as well as a common source of conflict around land, they are often treated as given rather than in need of critical questioning. This is particularly true for questions around legitimacy, which is itself a complex concept. Neglecting these questions means that development priorities set by international and local stakeholders are typically silent on land issues and concerns, or they tend to promote over-simplified solutions like land titling, which do not deal with the deeper dynamics involving land tenure.

This paper suggests that the debates surrounding the institutions governing land should re-enter development discussions in a more central way, given that land remains a key yet contested resource in Africa. Evidence shows that challenges to how the state allocates land rights and the perceived illegitimacy of many of these allocations generates conflicts on the ground. Unfortunately, these manifestations are generally treated as threats to development instead of as symptoms of deeper legitimacy crises linked to problems in governance over land. However, in ignoring the significance of contestation over land, we often fail to ask whether land governance institutions are enabling local productive systems and human development or are, in fact, hindering them.

This paper analyzes the formation and implementation of institutions governing land and explores how legitimacy crises arise in Tanzania's land tenure system. Tanzania provides an instructive illustration of an institutional building process, which from the colonial period to the recent history of socialism and the subsequent economic liberalization, reflects ongoing attempts to reform and reconcile state/"modern" and local/"traditional" institutions around land.¹

In most contexts, the reform process concerns only "modern" state institutions; therefore, the "traditional" local institutions are often relegated to the margins. In Tanzania, there is an underlying premise to its laws that the rights to land are grounded on either "statutory" or "customary" rights—the former being formally adopted by the state to govern society as a whole, while the latter being formed out of shared beliefs among people within a particular community. In an effort to recognize both, the country legislated provisions that would, on its face, give equal weight to the two distinct sources of law. This can be seen as Tanzania's attempt to institutionally recognize the existence of different legal norms within a pluralistic society.

Despite this attempt, a closer look at present governance processes reveals an imbalance between these sources of law. Research shows that while statutory law typically has more weight in cases involving land disputes than customary law, the cases where customary law is upheld reveals that the definitions of what is "customary" tends to be biased and flawed. This paper posits that behind these asymmetries

¹ Dichotomies of "modern versus traditional", "statutory versus customary", "formal versus informal", are problematic and require nuanced analysis and characterizations of a more pluralist and complex reality. However, given that the Tanzanian institutions, particularly certain provisions of the land laws, have been constructed out of these dichotomies, the reference to these throughout the paper is inevitable although we understand these as problematic.

in the institutionalization and application of land laws are power dynamics that influence which values are embodied and favored by state institutions. These power dynamics are reflected in institutional biases that tend to privilege the “modern” state apparatus but render customary laws inferior in the process. We argue that these imbalances can be linked to the persistence of land conflicts in Tanzania, and that these conflicts are manifestations of legitimacy crises suffered by institutions that require reform.

Although land issues affect all communities in the country, for the purposes of this paper, we limit the scope of this study to Maasai communities around the Arusha and Morogoro areas. We explore the experiences of advocacy organizations working on land conflict and analyze how they view the legitimacy of the existing governance institutions. Maasai pastoralists and agro-pastoralists are a group whose way of life is traditionally deep-rooted in land and for this reason is directly affected by decisions regarding the land tenure system. Over the years, pastoral communities in Tanzania have seen their land repossessed by national parks, conservation areas, large-scale commercial agriculture, and small agriculturalists—the last of which are also displaced from neighboring areas. This loss of access to land has made the traditional practice of livestock keeping, which involves moving large herds from one grazing land to another, untenable and severely impacts the socioeconomic conditions of the local communities.

It is important to note that the Maasai dominate pastoralist activism and discourse, because they have gained the capacity to organize themselves and to access the mainstream institutions (*e.g.* the United Nations, the Tanzanian parliament, etc.) to voice their interests. We focus on the Maasai only to narrow the scope of our paper and not to privilege their struggles compared to other pastoralists and communities in Tanzania. However, we hope that our findings and recommendations will be useful to understand the context affecting a wide range of similarly positioned communities.

A. Methodology and Organization of the Paper

To analyze how legitimacy crises arise in Tanzania’s land tenure system, as well as the link to local conflicts, we employ a twofold approach. First, an institutional and stakeholder mapping has been done through an extensive literature review and the snowballing method of locating key informants on land issues in Tanzania. The second component of the methodology involved key informant interviews in Tanzania with national and local government officials, scholars, and representatives of non-government organizations that are either involved in land issues in general or specifically claim to represent pastoralists’ interests.² These interviews have informed much of the analyses on this paper.

This paper first defines legitimacy in the context of legal pluralism and, in the process, outlines the theoretical framework that supports the overall analysis. Second, it examines Tanzanian land law and its formation and institutionalization by specifically bringing attention to the power dynamics around the values concerning these institutions. Third, using interview materials and focusing on the case of Maasai pastoralists, this research attempts to understand how the land tenure system in legal pluralist societies can result in local conflict and legitimacy crises. We focus on institutional biases and perceptions of asymmetric implementation of the law in allocation of local land rights. Finally, we conclude with a discussion of potential avenues for improved land governance structures in Tanzania.

² A full list of contacts is available in the appendix.

This paper aims to support a conference on governance and legitimacy challenges in East Africa, which has been organized by the Institute for Research and Debate on Governance (IRG) and is scheduled to take place in Arusha, Tanzania in October 2009. We hope that these findings will supplement the colloquium's goals of stimulating public discussion and bringing together different stakeholders involved in land management. In the broader context, we hope that this paper can enhance the debate on ways to institutionalize more democratic governance of land and to enrich the debate, through this concrete case, on legitimate governance challenges and proposals in Africa.

II. Theoretical Framework

Legitimacy and legal pluralism are complex concepts that are subject to variable approaches. As a result, it is necessary to first clarify and contextualize these terms as well as explain how they are helpful to analyze Tanzania's situation. This theoretical framework first provides a definition of legitimacy, which serves as the basis for our study and assesses the factors necessary for legitimacy to exist within a legal pluralist context. Second, this section explains the history and rationale behind legal pluralism and will highlight that contemporary legal pluralist structures cannot be separated from a country's power dynamics. Third, we explore the implications of incorporating various sources of legitimacy under a legal pluralistic framework. Finally, we apply these notions of legitimacy and legal pluralism throughout the paper in order to highlight nuances and complications with Tanzanian's system.

A. Sources of Legitimacy

When it comes to governance, contemporary Western notions of legitimacy tend to focus on the state³, and assess the extent to which its institutions and political order conform to certain standards that are considered *legitimate*.⁴ However, legitimacy is derived not merely from state capacity, the effectiveness of its regulatory structures, and the exercise of public power, but also deals with the mechanisms through which power is exercised. In this way, dealing with legitimacy shifts from the normative state-centric view to adopt an empirical approach that focuses on state-society relations. Thus, the empirical approach is concerned with analyzing legitimacy in relation to people's material and symbolic expectations, i.e. whether, how and why people accept—or not—a particular actor or institution (Bellina et al. 2009). Emphasizing that legitimacy also has to do with people's beliefs, perception, and their daily experience of the state and power allows us to recognize that the state may draw upon various sources of legitimacy within its borders. Also, it implies that the sources of legitimacy are virtually infinite, depending on what the community believes. This is particularly true in the context of African societies, which are often plural and quite diverse. How, then, can the various sources of legitimacy be defined?

According to Scharpf, legitimacy is a two-dimensional concept. On one hand, *input legitimacy* is linked to citizen's participation through processes by which decisions are made or laws are created. Do citizens participate in the policy-making process? Are the processes accountable and transparent? Are elections used, and do they accurately aggregate and reflect citizens' values and will? The rules and procedures involved in *input legitimacy* are supposed to strengthen the relation between the state and citizens: the more the constituents participate in the public process through these mechanisms, the more legitimate the state is.

³ Legitimacy has been used in its legal definition, i.e. compatibility to the law. This made international cooperation, for instance, to equate legitimacy and election.

⁴ Standards like the "legal rational", equating legitimacy with legality, as well as international legitimacy, equating state legitimacy with elections.

Output legitimacy, on the other hand, assesses the end product of a certain process or institution and deals with its performance. Output legitimacy is solely concerned with results and is determined by whether an institution effectively and efficiently addresses the needs of the citizen. Are institutions effective means of resolving conflicts and reconciling differences? Do policies provide solutions to social issues, or do they just cause further complications? *Output legitimacy* depends on how satisfied citizens are with the content of government policy and the delivery of public services (Boedeltje 2004). Ultimately, although many factors of input and output legitimacy can be differentiated, the two dimensions are closely inter-linked (Boedeltje 2004).

Two other dimensions of legitimacy, shared beliefs and international legitimacy, adopt an empirical stance apart from the Westernized state-centered approach of legitimacy (Bellina et al. 2009).⁵ *Shared beliefs* are an essential feature of legitimacy, because they have the ability to transform the meaning of ordinary state input or output activities into a sense of belonging and acceptance. In fact, legitimacy depends not only on the public participation and inclusiveness of civil society into the state's governance mechanisms, but also on the state's consideration and respect of peoples' beliefs and perceptions. Beyond consideration and respect, we must question whether the state is able to develop mutually constructive relations with and between the diverse sources of legitimacy, in order to develop shared norms and regulations that are recognized and shared by both the state and the people.

The final dimension of legitimacy is the international recognition of a state's external sovereignty. However, even if *international legitimacy* grants recognition to the state, it can be an ambiguous source of state legitimacy. In fact, international legitimacy may either converge with domestic legitimacy or be at odds with it. Almost any state is given international legitimacy regardless of its domestic actions (e.g. Somalia) and some are viewed legitimate by some states, but not by others (e.g. Zimbabwe is considered legitimate by the Chinese government, but as illegitimate by some European states). Also, international legitimacy must be dealt with carefully, because it can potentially disrupt state-society relations. When the international community is actively present in a country—through financial, political or military support—it has the capacity of shifting the accountability orientation of the state from its domestic population to the international donors community.

This multidimensional view of legitimacy will allow us to analyze how various sources of legitimacy and its articulations on the community, national and international level in Tanzania can both weaken and strengthen the state-society relationship (cf. Part IV). Viewing legitimacy as an empirical concept with multiple manifestations is fundamental to understand the implications of legal pluralism.

B. Improving Legal Pluralism in Tanzania

Legal pluralism refers to the coexistence and competition of multiple sources of legitimacy and normative systems within the same geographical or political context. Of course, each one of these systems of norms refers to different values and sources of authority that affect the manifestation of power in a given society, and shape existing practices and institutions.

The practice of employing different sets of laws, such as “customary laws,” within the same legal framework is not a new phenomenon but has deep historical roots, reflective of a country's unique history and dynamic power structures. In order to expedite colonial rule in Africa, British colonialists

⁵ The four sources of legitimacy here identified are the result of the analysis of Max Weber.

introduced the concept of “customary law,” which was what they recognized to be the “tradition”. They then integrated this “customary law” in state law, in a superficial attempt to recognize indigenous rights. However, what was deemed “traditional” was at the prerogative of the rulers, and not the ruled; custom was essentially “state ordained and state enforced” (Mamdani 2002, p.22). In this way, legitimacy of this kind of “customary law” can be questioned, because it does not necessarily reflect a real participation of the people (input legitimacy) nor is it automatically representative (shared beliefs). Moreover, the colonizers separated the so-called ‘customary law’ from the values and practices in which it was supposed to be rooted. Culture and customs are a dynamic process always transforming and adapting to reality; under colonialism, customary law was gradually disconnected from the traditions it was supposed to reflect. The colonizers thus established a monocentric-state-centered legal pluralism⁶ for ruling of land in Tanzania. This monocentric legal pluralistic situation entails a hierarchy of norms, privileging the state and provokes an asymmetry between the laws, which is still observed today⁷.

This research provides insight as to why and how institutions suffer legitimacy crises, particularly in societies with heterogeneous preferences and highly inequitable power relations. Considering legitimacy in the context of legal pluralism illustrates the concept’s dynamic and relative nature vis-à-vis a particular community. Recognizing legitimacy as contingent on many different normative orders call for a polycentric⁸ notion of legal pluralism, where authority exists in both traditional and state institutions.

In Tanzania, several normative orders coexist, many of which are incorporated into the country’s land governance structure. Despite the coexistence of both statutory and customary laws in Tanzania’s legal framework, the weight attributed to each of them is unavoidably imbalanced because of the shifting power dynamics occurring within the state. Laws are not created and implemented in vacuums and it is thus important to assess the many actors that are involved and the values by which they are motivated. Although customary law is incorporated into formal structures in Tanzania, it is debatable whether it holds *de facto* equal weight as statutory law. It is possible for statutory and customary laws to conflict with one another, because two different actors can legally claim rights to the same piece of land where one may hold statutory rights and the other hold customary rights. In this event, decisions are often made based on power dynamics, and the law that takes precedence is a reflection of the relative weight of the values and power structures behind them. History tends to favor the state in such situations, yet it is interesting to examine the scenarios under which customary forces could hold greater power, perhaps through coordinated mobilization or active struggle by parties on the ground. This research will seek to highlight the relationship between customary and statutory law and the powers behind them, and will assess the impacts on legitimacy of how legal pluralism typically plays out in Tanzania.

Although Tanzania abolished many of the artificial “traditional” structures created by colonialists after independence, the concept of “customary law” remains. In theory, customary law is an ensemble of legal practices traditionally observed and accepted by relevant actors in a particular social setting, whereas the state formally adopts statutory law to govern society as a whole. Thus, customary law

⁶ In monocentric legal pluralism, even if other normative orders are recognized, the reference law is still state law, and the other laws, e.g. indigenous, are only applied if made compatible and then encompassed by state law.

⁷ For greater detail of the colonial imposition of ‘traditional’ structures in Africa, see Sally Falk Moore’s “Social Facts and Fabrications: ‘Customary’ law on Kilimanjaro 1880-1980”(1986), which analyzes, in particular, how notions of “traditional” law have been reproduced and transformed among the Kichaaga-speaking people of Kilimanjaro (10).

⁸ Polycentric legal pluralism acknowledges that an individual mobilizes multiple normative orders to deal with a given situation; this calls for the recognition and application of different laws, culminating in a hybridization process, e.g. between state and local/traditional laws.

theoretically endeavors to account for the values and traditions of diverse communities, and statutory law represents the values that the government recognizes as vital to the country as a whole. Cognizant of the insufficiencies of its land governance structure, in the 1990s, Tanzania tried to reform customary law. This reform was an attempt to improve the degree of legal pluralism in its land governance structure, as the state widely consulted its constituents, supposed to take into account their beliefs and perceptions regarding land. However, customary law still remains widely state-defined and implemented and does not necessarily reflect the daily practices of the people it is supposed to refer to. Moreover, given the heterogeneity of Tanzania's society, it is questionable that this is the most appropriate framework to improve the legitimacy of the state when it comes to land management.

As this research shows, the current legal structure presents some problems in terms of protecting local land rights and incorporating potentially useful traditional institutions and values. The Tanzanian state, despite considering legal pluralism, still does not provide a legal pluralistic situation that considers all the sources of legitimacy mentioned above, thus deepening the legitimacy of the state.

C. Considering Multiple Legitimacies in a Legal Pluralist Society

In a legal pluralist framework, which recognizes the existence of heterogeneous communities integrating multiple sources of legitimacy, it is difficult to arrive at a common perception of legitimacy. When the geographical and political scope of a common multiple legal framework increases, determining its legitimacy becomes more complex as more power dynamics come into play. The presence of inconsistencies demands the reconciliation and prioritization of competing notions of legitimacy, yet it is undeniably difficult. However, if the state is seeking to enhance its own legitimacy, it could be helpful to revisit its state-society relationship and consider different notions of legitimacy in society, thus surpassing a state-centered legal pluralism.

Even if simultaneously taking into account the four dimensions of legitimacy raises more questions than answers, it is worth exploring these aspects of legitimacy in order to improve the nature of legal pluralism in a given country. In dealing with input legitimacy, it is interesting to analyze the state's real acceptance of the coexistence of multiple governance processes. Are citizens able to participate in decision-making processes and voice their demands? Do existing rules and participation mechanisms strengthen the relationship between the state and its citizens? When analyzing the output of state activities, do institutions effectively address the needs of the citizens? Are there effective means of settling disputes and reconciling differences?

However, more importantly, in order to go beyond a state-centric notion of legal pluralism, shared beliefs and international legitimacy need to be considered. Are social norms and shared beliefs recognized and taken into account? Does the legal pluralist framework take into account the different needs of a heterogeneous society? Also, taking into consideration the international dimension, it is necessary to explore the way external factors interact with domestic legitimacy. Do international forces reinforce or disrupt state-society relations?

In Tanzania, the same statutory laws, customary laws, and power structures apply to diverse constituencies with various norms, values, and livelihoods. However, it is natural to assume that uniformly applied laws will affect differing communities in differing ways. Thus, how far does the inclusion of customary law in land governance institutions go to make them legitimate? Is the inclusion of customary law the most appropriate way to improve legitimacy in land governance?

In brief, how can Tanzania improve its legal pluralistic framework regarding land laws in order to make it less monocentric and more legitimate?

In the succeeding sections, we analyze the dynamic and nuanced nature of legitimacy with respect to Tanzania's land governance institutions. Looking at the experience of the Maasai pastoralists, who are uniquely affected by Tanzania's current practice of legal pluralism, highlights the difficulties of creating and implementing legitimate land laws.

III. Power Dynamics Reflected in Land Governance Institutions

A. Consolidation of State Power during the Colonial Period

Tanzania's current land management system has its roots in German and British colonialism. In fact, remnants of asymmetrical colonial-style land tenure are reflected by the fact that the state holds all the land in trust. State-run land management was first introduced to Tanzania in 1895 when the Kaiser of Germany granted an ordinance that gave title to all land to the Crown, except for land already occupied or used by private parties or indigenous peoples (James 1971).⁹ Therefore, the Crown held the right to make all future land grants. Those who merely possessed land under customary principles enjoyed only a de facto right of occupancy, because the German administration would only recognize ownership claims of those who could prove them with documentary evidence (Olenasha 2005, p.2). Such documentary evidence was nearly impossible to provide in the oral cultures of East Africa, which nevertheless had very sophisticated indigenous notions of property and law.

The Treaty of Versailles dismantled the German Empire and Tanzania came under British administration. Under the mandate of the League of Nations, the British had to administer Tanzania under terms that required consideration of "native laws and customs". They were not to transfer native land or natural resources except between "natives", with the previous consent of the competent authority; and were not allowed to create property rights over native land in favor of non-natives, except with the same consent (Schoenherr 2004). Here, the state attempted to construct a legal pluralistic system.

However, in a move to increase state control in 1923, the British issued a land ordinance which, while acknowledging that native and customary rights should be preserved, declared that all lands in which title had not previously been acquired, whether occupied or unoccupied, were subject to the control of the Governor, who held them in trust for the native population (United Republic of Tanzania 1923). Some argue that these customary rights were recognized merely because the government did not want to spend resources to govern the entirety of Tanzania. Under this seemingly new rule, the customary right of occupancy was again merely permissive, and allowed the British administration to acquire local land to be used at its discretion.

In light of Tanzania's historical context, it is important to note that the legal pluralistic system, which is a top-down construct of an external colonial government, lacks input legitimacy. In terms of output legitimacy, on the other hand, the national government has struggled to meet the basic needs of its people. Though its actions might address the needs of some of its population, it still does not address problems with pastoralists. What is important to note about the dynamics of this period is that it laid

⁹ This was similar in approach to British colonial land tenure arrangements. See H.W.O. Okoth-Ogendo's "Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya".

the foundation for the consolidated, unchecked authority afforded to the state, which all the succeeding government administrations were able to take advantage of the political process.

B. Villagization during Post-Independence

After Tanzania gained independence in 1961, the post-independence government kept most of the legal framework from its colonial era (Olenasha 2005, p.5). The major change from the colonial era was that the President of Tanzania now held all Tanzanian land in trust for the people, whereas before the British Governor had formerly held it. The power transfer was met with very little resistance, partly due to the colonial mindset of the general population and the cultural sentiments of the Ujamaa.¹⁰ Therefore, the central government still held title and had total authority over land, and it used this power to further a variety of aggressive land tenure reforms that failed to strengthen customary rights, and caused great confusion regarding the legal status of much of Tanzania's land (Olenasha 2005, p.5).

The greatest reform to follow the colonial period happened in the years up through the Arusha Declaration in 1967. Specific policies encouraged people to move into villages and utilize farming. Nation-wide villagization not only aimed to facilitate the provision of public services, but also sought to prevent the emergence of inequalities in rural areas. Some viewed this policy as an act of redistribution of land between villagers. Nevertheless, the policies of the 1960s-1980's had mixed effects on Tanzanians. Some were not affected at all by the policies because they were already living in villages and had historical boundaries. Others, who were already living within villages, were also relocated because the government wanted to redistribute people throughout the country. The few Tanzanians who resisted the villagization movement were summarily penalized and forced to move. Without a legal framework, the forced relocation of citizens proved to be problematic and encroached on previously enjoyed customary rights (Coldham, p. 235).

Given that the villagization process was another top-down construct, it can be said that this lacked input legitimacy. In terms of output legitimacy, the fact that the policy had mixed results and had been deemed ineffective for the country signifies deficiencies. However, despite the legitimacy questions that surrounded it, it is important to note that the dynamics of this period left a lasting institutional legacy as this established the notion of a "village" as the framework for securing land tenure in Tanzania.¹¹

C. Neo-liberalism and the Shaping of Government Values

During the 1980s, the government began to encourage privatization and foreign investment by structuring policies toward economic growth (United Republic of Tanzania 1994). For the sake of this neo-liberal model of economic development, thousands of rural and village lands were ceded to local and foreign individuals and companies without regard to the impact that such actions would have on local villages or customary land rights. Perhaps as a response to lands being taken by foreigners, the government initiated a program to give village councils land titles to all the land in their villages in order for them to adequately protect their land. But because the government did not specify the legal status of previously granted customary land rights, rights of occupancy, and derivative interests, it was unclear who held ultimate legal claim to these lands (United Republic of Tanzania 1994).

¹⁰ Ujamaa in swahili means "familyhood" and was a term adopted that describes that a person becomes a person through the people or the community.

¹¹ This is evident in the Village Land Act of 1999 and its reference to earlier legislations, particularly the Land Tenure (Village Settlements) Act of 1965 for the definition of a "village" (United Republic of Tanzania 1999b, 1982, 1965).

The full effects of these ambiguous policies in the marginalization of local land rights have only been experienced recently. However, it should be recognized that the historically instituted governance framework over land in Tanzania facilitated these policies. Both the consolidated, unchecked authority afforded to the state and the “village” in this framework for securing tenure raises serious problems of legitimacy at the local level.

D. The Shivji Commission and the Missed Opportunities for Reform

The early 1990s saw an opportunity to correct the “failed” institutions. As an effort to hear the grievances against existing land tenure policy and prepare for reform, in 1991 the Government of Tanzania appointed the Presidential Commission (“Commission”) of Inquiry into Land Matters (United Republic of Tanzania 1994). The Commission recommended the following principles, pertinent to this paper, on land policy:

- 1) Land tenure systems should facilitate the generation, accumulation and investment of capital within the rural agrarian and pastoral sector;
- 2) Whereas national lands may be excised and merged in village lands, village lands subject to exceptions expressly provided in law, should not be excised and integrated in national lands;
- 3) The land tenure system is based on multiple land regimes all existing side by side and none of which should be considered superior to the other and interests under all of them should enjoy equal security of tenure under the law;
- 4) In all forms of land tenure regimes, security of tenure is dependent on use and occupation (ibid).

The Commission, led by Professor Issa Shivji, also made recommendations about institutional reform. First, the Commission suggested that land tenure law should be a constitutional category, which would give it legitimacy and protection against political meddling. Also, in a move contrary to current policy, the Commission recommended that land be held in trust by an actor other than the executive branch. Ceding control to the executive branch was dangerous and was not in line with democratic principles. The Commission argued that a village assembly should control village land and decisions would be made through public dialogue with a majority vote.

Input legitimacy was ensured in the reforms suggested by the Commission as extensive consultations were facilitated all over the country for citizens to voice their opinions about having a just land management framework (i.e. output legitimacy). *Vis-à-vis* the consolidated, unchecked authority afforded to the state, the Commission’s recommendations on institutional reforms was an opportunity to decentralize power and have a system that better suited the needs of the people. The issue of having the “village” as the framework for securing tenure in Tanzania, on the other hand, was not deemed significant. In fact, the four principles outlined above are in favor of strengthening the “village” rather than questioning it (given the legitimacy deficiencies outlined in the previous section).

Ultimately, the government did not heed to many of the recommendations of the Commission, particularly the institutional reform that would reduce the power of the state. This, plus the fact that the notion of a “village” as the framework to secure tenure was left unchallenged, meant that the government’s National Land policy passed in 1995 still contained many of the provisions (including the existing problems) with current land tenure management.

On the surface, it appeared as if the government had truly reformed and incorporated citizen input to bolster input legitimacy. However, the policies that were revised only dealt with insubstantial issues,

and nothing changed concerning power configurations over land tenure. A key problem with the land policy continued to be the lack of participation of citizens in the decision making process, which denigrated input legitimacy. Also, land tenure reform fell short of satisfying output legitimacy standards by not representing the will of the people. Critics speculate that the reason for not taking into consideration the Commission's recommendations was that the executive branch did not want to relinquish power or control.

E. Embedded Values in the 1999 Land Acts

In line with the National Land Policy plan, the Land Act of 1999 and the Village Land Act of 1999, (together with the Land (Amendment) Act of 2004), brought a basic system of land law for Tanzania. The Land Acts were supposed to recognize and clarify existing land rights, facilitate the equitable distribution of Tanzanian land, enable the creation of a land market, and ensure that the entire system is administered transparently and efficiently (Olenasha 2005, p.15). Yet, serious problems persist based on conflicting interests between key state actors and business enterprises and local economic actors and citizens. Power structures privilege the state and those who have access to the state, and these power structures are reflected in the predominance of statutory law in land disputes. Additionally, these structures reflect the competing values of the central government.

In Tanzania land is currently divided into three categories: general land, reserve land, and village land. General land is governed by the Land Act IV and is directly under the Land Commissioner; reserve land is ruled by statutory law (*e.g.* Forest Reserves are governed by the Forest Act of 2002); and village land is governed by the Village Land Act V, and is placed under the administration of the village council (Shivji 1999b).

In the Land Act IV of 1999, General Land is all land that is neither village land nor reserve land, and also includes "unused land". Paradoxically, Act V, relative to Village Land, also states that the village council is fit to decide on the allocation of "unused land". There is clearly, if not a contradiction regarding what legislative framework to employ, at least a grey area of law that creates confusion between these two pieces of legislation. Ultimately, the Land Act IV, superior in the hierarchy of jurisdictions, supersedes the Village Land Act V, and consequently has power to rule over this non-cultivated land. However, customary law, pertinent to pastoral livelihoods, is only used to determine village land. If the Commission of Land decides to utilize the Land Act IV, which only considers statutory law, it severely restricts pastoralists' traditional and customary land rights.

These land laws reflect both power dynamics and influence in the political process. They reveal competing values inherent in various groups all vying for greater control within the country. Some of these groups have sought out ways to expand or solidify their power; however, others have lost positioning due to strong opposition forces or societal shifts beyond their control. The following section will describe the various groups and their struggle for power.

Government and Foreign/Local Investors

Because of the government's pursuit for economic development, investors have a sizable amount of power concerning national policy. By leasing out large tracts of property to investors, the government is able to raise substantial amounts of capital. Also, the government is also able to lure businesses and create some jobs by providing property incentives to foreign business. Researcher Robert Palmer notes that "access to land by the poor in many parts of Africa is currently seriously threatened by a combination of privatization and unrestricted market forces; by governments desperately seeking

foreign investments... and by greed and corruption by the rich and powerful” (Larsson 2006, p.37). Though the law does not explicitly allow land ownership for foreigners, it does have sufficient loopholes. Foreigners can gain ownership by registering an institution whose majority shareholders are citizens (Olenasha 2005, p.21). The government has made their policies attractive to investors, privileging them over local economic interests and livelihoods. Tanzania’s system has shifted into a market-oriented system that has been abrasive to traditional uses of land. Also, the government has adopted a lease system, which awards leases to foreign entities for time periods of 33-, 66-, and 99-years.

Government and Settled Population

Though the settled population in Tanzania does not have much monetary leverage over the government as the international investors, they nevertheless possess power due to the type of land they occupy. Settled populations do have an advantage over other groups such as the pastoralist, due to its perception that its economic activities readily contribute to the national economy. Governmental favoritism to this group has also been shown in history. In the 1960s villagization acts, the government tried to modernize the pastoralists and to have them settle in villages and enter other professions such as farming. This is often premised on the problematic notion that farming is better than pastoralism or livestock production in utilizing the land.¹² Such policies have severely harmed pastoralists. Tanzanian law does not specifically state that such lands have greater worth, but evidence shows that lands with titles are more readily recognized than lands without.

In pursuing these values, the government has expanded the rights of settled villagers and has pushed for privatization of land along with formal titling. Groups like MKURABITA, an executive project from the Office of the President, works to formally title all the land. In the spirit of Hernando De Soto, MKURABITA aims to give formalize land rights which, in theory, creates fungible equity for the poor.¹³

According to standard neo-liberal economic theory, private ownership of land encourages better management and an incentive to utilize capital assets. In theory, by privatizing land, landowners may be able to take out loans from banks by using their land as collateral. Also, land ownership has always been a way for private citizens to store wealth or create more of it. However, a careful review of this theory reveals that this can be detrimental to land usage. For instance, at times titled land is not utilized, even in times of scarcity because the landowner’s main goal is to purchase land to storing wealth.

BOX 1: Conflicts among Laws: *Land Act IV and the Village Land Act V*

The Village Land Act codifies the use of “customary law.” If the Commission of Land decides to utilize the Land Act IV, which only considers statutory law, it severely limits pastoralists’ traditional and customary land rights. Moreover, we have to question the meaning of land utilization in the context of pastoral livelihoods. Pastoralists, as nomadic cattle herders practice transhumance, and consequently leave their lands for extended periods of time without any explicit use. Does this mean their lands are “unused” and thus can be changed of category and eventually sold off?

¹² For further information, refer to : Xavier Peron’s «L’occidentalisation du Maasai du Kenya: Privatisation fonciere et destructuration sociale ches les Maasi du Kenya» Harmattan vol 1 2 (1995).

¹³ See: Stein and Askew (2008) for a critique of this project.

Government and Conservationists

Conservationists have proved to be a particularly powerful group that has been especially active with national politics. Their interests are mainly in preserving lands for natural flora and fauna. Since 10% of Tanzania's GDP comes from tourism, with most of the contribution from its wildlife parks, the government of Tanzania has a keen interest in land conservation. Conservation lands apply fortress conservation theory where exclusion of all people is enforced to protect the land and animals. By lobbying and with support from international donors, conservation groups have been able to establish national parks and game reserves, carved mostly out of areas that pastoralists lived in, putting displaced villagers at odds with Maasai organizations (Homewood and Brockington 1999).

Government and international donors

In Tanzania, international donors wield tremendous amounts of power in the central government. In an interview, an NGO worker commented that the government pays more attention to a foreign donor than to his own constituency. Since colonization, foreigners have always maintained a direct power connection to national policy. Some postulate that the government's astuteness toward foreign donors has been inherited from historical memory.

Also, in African societies, wealthy elites are often foreign educated, and form enclaves that comprise the national body. Historically, the way African elites have developed power that has been inextricably linked to their readiness to adopt "strategies of extraversion." As Jean-François Bayart notes, these strategies are much more than mere external networking, common to the political activity, but are the expression of an extraverted political system, historically dependent on external resources (1993). African elites tend to derive their authority and power from their access to external institutions and well-connected outsiders, and build on patronage structures, thus answering more to international donors and former colonizers, than to their own people (Shivji 1998). Though there are no formal laws that recognize the importance of foreign donors, their influence can be observed through the political process. Typically, the stronger foreign-backed policy is the policy that the government utilizes. This pattern perpetuates itself in the management of land, and creates a disconnection between the government and the governed, thus entailing a vacuum in the governance process that is addressed throughout this paper.

IV. Implications of Customary Law and Statutory Law Asymmetry: The Case of the Maasai Pastoralists

As demonstrated in the previous section, power dynamics tend to influence institutional biases, which undermine Tanzania's attempt, on paper, to afford equal weight between customary and statutory law. In reality, customary law is regularly perceived as inferior to statutory law, and the implementation of land laws only serve to reinforce and emphasize its unequal status. Also, even if customary law is generally well applied in some regions, this does not mean that all residents benefit from these laws, or that these customary laws reflect the values and traditions of all groups in the area. Legal pluralism in Tanzania is quite monocentric, and the implementation and validation of customary law necessarily passes through the state. The experiences of the Maasai can illustrate some of the problematic consequences associated with legal pluralism in the context of an unequal and undemocratic power relationship between a bureaucratic state and local communities. For the Maasai, this asymmetry between customary and statutory law manifests itself in three interconnected dimensions: territorial, political, and socio-economic. Asymmetries have led to crises of legitimacy linked to the creation and implementation of land laws (input and output), which in turn disconnects the community's identity

from the state (i.e. lack of shared beliefs). These issues are further complicated by the role that international actors play, especially when they lend legitimacy to processes that are deemed unjust at the domestic level. These dynamics are detailed in the section below.

A. Territorial Dimension: Displacement and Villagization

Competing interests around land as well as the asymmetric implementation of the land laws has two major impacts on the Maasai and the territorial dimension of their way of life: displacement and forced villagization.

1. Displacement

Land, livestock, and mobility are indistinguishably intertwined as the lifeblood of the Maasai and underpin all aspects of their culture. Based on interviews with Maasai leaders, the linkages among these elements characterize their way of life. Livestock, which determines livelihood and social status, requires land to graze. In order to adequately sustain livestock and to avoid diseases, the Maasai require mobility to access resources (e.g. water, pasture, salt licks) on varied tracts of land.

While the Maasai have traditionally grazed freely over much of East Africa, their access to land and their capacity to make productive use of it (with their traditional way of life) have become more and more constrained because of recent land law dynamics. The vesting of the radical title in the President, for instance, has allowed the government to unilaterally change the categorization of a parcel of land in the name of “public interest.” This term, which (based on government actions) has become associated with capital investments, fortress conservation, and a particular vision of modernization (Porokwa, PINGOs Forum, Personal interview: Arusha, 14 January 2009).

BOX 2: Displacement Leading to Conflict in the Kilosa District, Tanzania

Since last January, in Kilosa, clashes between pastoralists and peasants have left six people dead, a large amount of properties and houses destroyed and led to the displacement of more than 2,000 pastoralists.

Around 50 pastoralist families were accused of having entered the district illegally. They were then consequently ousted, fined, and their cattle were confiscated and kept in camps. The pastoralist families were forced to move out of the district without any proper assistance and given no alternative land possibilities.

A Maasai interviewee (Mwarabu et al., PAICODEO, Personal interview: Morogoro, March 2009) highlighted the harsh mechanism of these evictions: As pastoralists generally do not possess funds to pay their fines right away (30,000* Tanzanian Shillings (TSH) per cow and 10,000 TSH per sheep/goat), they have to mobilize their networks to find money. In the meantime, they are being charged 5,000 TSH per day for each animal that stays in the holding camp. Moreover, the Maasai insisted that during these periods of reimbursement, pastoral families are deprived of their source of income, which further deteriorates their situation. Maasai advocates explained that poor pastoral families tend to abandon their cattle in those camps, because they lacked the means to recover them. Consequently, the Government may take advantage of the situation and sell the remaining cattle to traders and keeping the earnings.

*10,000 Tanzanian Shillings is approximately equivalent to 8 Dollars and 5,75 Euros

Today, much of traditional Maasai land is subject to conflicting land uses such as tourism, a growing industry that ranks third in attracting foreign direct investments in Tanzania (United Republic of Tanzania 2005c). With respect to Maasai land, tourism is interlinked with fortress conservation (or the setting up of enclosed reserves) because it facilitates proximity and dependable access to wildlife. A example is the country's much promoted northern tourism circuit covering Mount Kilimanjaro, the Serengeti and Arusha National Parks, and the Ngorongoro Crater, which is close to land and resources traditionally depended on by the Maasai.

Wildlife legislation includes explicit provisions for securing areas for wildlife conservation and restricts human access and activities. This results in the territorial displacement of pastoralists. In previous cases, the "public interest" language has served as grounds for what Maasai groups refer to as "land grabbing", or the illegitimate appropriation of land by elites (Klopp 2000). Tanzanian land laws have legalized "land grabbing" in a de facto manner by allowing the state to unilaterally change the categorization of land, especially from "village" land to either "general" or "reserve" land. As a result, all those with customary rights (like the Maasai) would lose ownership if the state utilized the latter of the two categories (Lengare et. al., CORDS, Personal interview: Arusha, 15 January 2009). Thus, it is common to note the growing distrust and cynicism among the Maasai about externally introduced developments, even though there is general acknowledgement among the interviewed that development also come with some benefits, as discussed in this paper's political and socio-economic sections.

Due to territorial displacements mentioned above, concerns around input and output legitimacy arise regarding the implications of the Tanzanian land laws. In terms of the input process, legitimacy questions ensue because the government can unilaterally categorize portions of Maasai land to be "reserve land" for conservation, or "general land" for other investments without public input or approval. Additionally, a political space is absent to challenge its authority. This problem will be elaborated further in the political representation section of this paper.

In terms of output legitimacy, concerns also arise because the Maasai are physically pushed out of the land they traditionally use and also not given due compensation, which includes alternative areas where they can have the option to maintain their traditional way of life (Mwarabu et al., PAICODEO, Personal interview: Morogoro, 9 January 2009). For this reason, the Maasai pastoralists' survival is subverted to either forced settlement (as discussed in the succeeding section) or a struggle to find alternative land to access. Because of the latter reason, pastoralists have been involved in clashes with other land users, such as farmers. A prominent case is the Kilosa conflict, wherein the two groups competed (and are still competing) for limited land and diminishing resources (see: Box 2).

The overall context of competing interests around land is exacerbated by the negative notion (rooted in the colonial conception) of the Maasai as a "wandering tribe," whose pastoral way of life is unsustainable and needs modernization. This sets the pretext of forced villagization. Thus, as voiced by one key Maasai interviewee, the dynamics behind the land laws ultimately take away from them their prerogative to freely choose and decide on their future.

2. Villagization

In interviews with representatives of the state, the permanent settlement of the Maasai is identified as part of the "ideal solution" to address conflicts linked with land (Shewiyo, Ministry of Lands and Human

BOX 3: Land Security and Titling

One strategy to avoid conflicts between different categories of land is for Tanzania to complete its land demarcation process, as each village would have a title for its allocated land. However, the process still has a long way to go. It is estimated that only 13,000 out of 90,000 villages have seen their lands demarcated, let alone titled (Porokwa, PINGOs Forum, Personal interview: Arusha, 14 January 2009). Moreover, there is a lack of awareness at the grassroots level about the process.

According to the law, it is relatively straightforward and economical to apply for a title. However, several obstacles arise in the implementation of the law (cf. Strategic Plan of the Implementation of the Land Law, SPILL). First, villagers are knowledgeable neither about the process for land acquisition nor about the need to demarcate land for tenure security (e.g. in Kiserian village, Longido District, only the Chairperson spoke fluent Swahili among the adults). Second, the government argues that they do not have enough funds for surveying the land, which is necessary for demarcating and titling land. Third, due to a lack of awareness and capacity, bureaucratic obstacles exist which make the process lengthy and costly.

Most villages in Tanzania only possess a land certificate that supposedly identifies its boundaries; but in the majority of cases, the village authorities do not have a title for their land. As a consequence, they do not possess legal land prerogatives, and the responsibilities and rights for that land remain with the Ministry of Natural Resources, which severely undermines the security of village land tenure. This inability of properly identifying boundaries between different categories of land leads to the occurrence of various conflicts, like the ongoing dispute in Kilosa (see: Box 4).

Settlements Development, Personal interview: Dar es Salaam, 8 January 2009). Given the framework of the land laws, which recognizes customary rights to land only in the context of a village, it would seem understandable that government officials advocate for the Maasai to settle in order to secure their tenure. For this reason, government land law advocates, especially at the district level, believe that they are working with Maasai's interests in the context of distinguishing boundaries. Even though they recognize that boundaries are problematic for pastoralists, they also believe that in the absence of alternatives, this is a necessary compromise for the Maasai to secure any access to land (Mkumbo, District of Monduli, Personal interview: Monduli, 13 January 2009).

However, because of their need for mobility and flexibility, pastoralists understandably deem this advocacy illegitimate because their way of life is not compatible with the government notion of a "village", i.e. a territorially-fixed, nucleated settlement with defined boundaries. Thus, it can be noted that the Maasai organizations' common rhetoric has an underlying anti-government sentiment, and this can be deemed as reflective of the lack of shared beliefs between the state and its Maasai citizens.

As mentioned in the earlier sections, the notion of a "village" as a settlement pattern lacks input and output legitimacy. Aside from this, more legitimacy questions can be raised because the institutionalization of the village as the framework for securing tenure in Tanzania does not provide an alternative for those with claims based on customary rights (like the Maasai) other than in the context of a "village". This is due to two reasons highlighted by all Tanzanian interviewees. First, as alluded in the earlier section, pastoralists typically do not hold statutory rights to land, and the land laws only recognize their customary rights to "village land", and not to "general" and "reserve" lands. Second, the pastoral use of land is not formally

acknowledged; therefore, seasonally used areas are deemed to be “unused” land. This land then falls under the “general” land category, which pastoralists lack the necessary statutory rights.

Despite legitimacy deficiencies and the fact that this has not been officially challenged (not even in the Shivji Commission report), the imperfect notion of a “village” remains the sole definition used to secure tenure in Tanzania. However, while government officials automatically interpret this as advocacy for settlement, it is interesting to note that Maasai organizations, such as the PINGOs Forum, TAPHGO, and CORDS, see room for an incremental process to secure tenure in a way that still allows them to uphold aspects of their pastoralist livelihoods.

For these groups, securing Maasai land through a “village” title has become a primary step, because it enables them to make claims based on customary rights. A second priority is building local Maasai capacities and awareness of their rights so that they can better negotiate terms of concessions. In terms of the negotiating process, some Maasai strategies offered include: the coordination of the shared use of land (and its resources) among different Maasai “villages” so as to secure their mobility; as well as lobbying for “pastoralist policies” so as to create a new venue to in which to articulate their interests (Personal interviews: PINGOs Forum, Arusha, 14 January 2009; TAPHGO, Arusha, 15 January 2009; CORDS, Arusha, 15 January 2009).

However, there remains a need to mitigate the centrality of the “village” structure because of the limitations it imposes. First, this could not be applied in conflict cases such as Kilosa, where securing a Maasai “village” title could not be possible because the existing farmer settlements already had titles to the land. Second, obtaining a “village” title does not automatically imply security of tenure for the Maasai. In fact, at worst, this may even facilitate the ease of displacement because individuals (or even village assemblies), for lack of education and/or awareness, can be easy fall prey to those using legal recourse to grab their land. In such a case, the lobby for “pastoralist policies” and the need to challenge the legitimacy of the “village” as the framework to secure tenure in Tanzania becomes even more justified from the Maasai perspective.

B. Political Dimension: Lack of Representation and Inadequate Dispute Resolution Mechanisms

The asymmetry of Tanzania’s land laws are manifested not only in the territorial dimension, but also in the political arena as well. Political imbalances arise due to a lack of representation for the Maasai in the political process, dispute-resolution mechanisms, which fail to incorporate Maasai values, and national power structures.

1. Lack of Representation

Pastoralists are consistently underrepresented in land governance dialogues, and as a result, the processes by which land tenure is determined are often perceived by Maasai pastoralists to lack legitimacy. Given overall low Maasai participation in formal governance structures, Maasai values have not been adequately incorporated into current land laws, both statutory and customary, and are thus treated as inferior to those of the government. In part because of their nomadic lifestyle and traditional values, the Maasai are indirectly, yet significantly, disadvantaged when it comes to representation in formal state structures. There are two main explanations for the Maasai’s weak representation in formal structures: their nomadic culture and subsequent lack of capacity, and the negative perceptions of the government.

A key feature of new land laws is decentralization, which aims to give more democratic representation and participation to those at local levels. This is manifested in various provisions, including their grounding principles, one of which is to “enable all citizens to participate in decision-making on matters connected with their occupation or use of land” (United Republic of Tanzania 1999a). However, decentralization has not necessarily benefited the Maasai. Not only has it been inadequately implemented, but decentralization, together with current land laws, does not encourage the participation of nomadic groups.

The Maasai’s nomadic lifestyle significantly hinders the ability for their concerns to be adequately heard and represented. Strong governance institutions are difficult to establish when the communities that they are mandated to serve are constantly moving. The Maasai have a difficult time electing officials or supporting a specific base, because they are constantly moving from one designated ‘village’ to another. According to the new land laws which aim to decentralize land governance, land is allocated primarily at the village level, and the village assembly has the mandate to give land away or not. Because Maasai do not reside permanently in one area, it is difficult for them to establish their case and be included in the determination of land. In an interview with the Parakuiyo Pastoralists Indigenous Community Development (PAICODEO), Adam Ole Mwarabu emphasized the difficulty for the Maasai to maintain unity and organize concerted collective action (Morogoro, 9 January 2009). It is difficult for the Maasai to mobilize politically locally, let alone nationally, given their nomadic lifestyles.

Maasai feel as though they lack forums in which they can voice their grievances (Mwarabu et al., PAICODEO, Personal interview: Morogoro, 9 January 2009). Jackson Muro, a program officer in the Tanzania Pastoralist, Hunter-Gatherers Organization (TAPHGO), stressed in an interview that although many Maasai attend traditional community meetings, very few attend government meetings and village forums, causing their priorities to be unknown and their issues to be undiscussed (Personal interview: Arusha, 15 January 2009). This lack of participation in government venues leads the Maasai to question the legitimacy of the processes (input legitimacy) by which laws are determined.

In an interview, Paul S. Kadege, a lawyer and Program Officer for the Kiteto Civil Society Forum, emphasized that although local governments are consulted and involved in the implementation of land laws, local Maasai leaders are usually not (Personal interview: Morogoro, 9 January 2009). Although it is possible, traditional Maasai leaders are rarely the same individuals as local government officials. Additionally, in the cases where traditional leaders have assumed local government positions, increased

BOX 4: Technology and Participation

Increased technology, including the growing use of cell phones and Internet among the Maasai, introduces a new and interesting dynamic to Maasai nomadism. New technology may lessen the representation challenges (highlighted in this section) that Maasai encounter due their nomadic lifestyles. It remains to be seen how exactly this will impact Maasai’s capacity for political participation, but increased use of communication technology could allow them to overcome many of the constraints they have historically encountered for adequate representation and political participation. For the very fact that we were able to arrange interviews with these pastoralist organizations to gain their insights and perspectives on the land laws is proof of the potential of new technologies to increase the voice of the Maasai.

Maasai representation is not necessarily guaranteed. Kadege noted that the state often tries to co-opt traditional authorities and bring them in line with government values and ambitions, or denies them the opportunity to exert significant influence on contentious policies. Again, here both input legitimacy and legitimacy derived from “shared beliefs” comes into question.

In regions that are homogeneous Maasai, it is possible for Maasai to have better representation in government. However, many Maasai live in mixed regions where adequate representation is difficult where elected government officials are forced to serve competing interests while remaining in line with government policy. For example, leadership in Monduli is friendlier to the Maasai than in Morogoro because elected officials are dependent on the Maasai vote. In an interview with the Pastoralists Indigenous NGOs (PINGOs) Forum, Edward Porokwa suggested that in heterogeneous areas such as Morogoro, politicians can actually increase their popularity from farmers by assuming a negative stance towards the Maasai (Personal interview: Arusha, 14 January 2009). In homogeneous Maasai communities, input legitimacy and “shared beliefs” between the people and state officials is more likely than in mixed communities, where it is more difficult for Maasai to be adequately represented in the implementation of land laws. In mixed communities, these “legitimacy crises” often manifest themselves in conflict, marginalization, or both.

In order for Maasai to receive representation and be able to voice their concerns through government structures, they must be aware of them (Muro and Larsen, TAPHGO, Personal interview: Arusha, 15 January 2009). However, Maasai lack the capacity to be engaged in the formal structures, which have such significant impacts on their lives. For example, most Maasai speak neither Swahili nor English, because they are only taught the native language. Also, few Maasai have access to formal education systems and literacy remains below national levels (Kimesera, MWEDO, Personal interview: Arusha, 26 March 2009). As a result, Maasai have a weak understanding of land laws, and had little knowledge of land laws prior to their passing. Also, to compound the problem of representation, customary leaders often “lack formal education and the qualifications for national political positions” (Ruotsalainen 2007, p.3).

In addition to limited education, the Maasai also suffer from limited infrastructure. Because Maasai land tends to be marginal, there is little infrastructure development (Muro and Larsen, TAPHGO, Personal interview: Arusha, 15 January 2009). Lack of facilities limit development, and create a vicious cycle in which the Maasai remain poor, uneducated, and overlooked due to their inability to adequately represent themselves. Lack of capacity leads to reduced participation in state institutions, which in turn has an effect on the input legitimacy of Tanzania’s land laws.

Inadequate local Maasai representation in deciding policies that critically affect them is justified by the modernist values and negative perceptions that many government actors hold on the Maasai. These perceptions work against the inclusion of Maasai villages and organizations into a democratic decision-making process. Even though pastoralists have in fact adapted to new conditions throughout their history, they are portrayed as stubbornly resistant to modernity. In this way, the government tends to hold a negative view of Maasai because of their commitment to maintaining aspects of traditional livelihoods and cultures. The government typically raises three major rationales as a justification for excluding or overruling Maasai voice and claims: the Maasai’s alleged inefficient use of land, environmental degradation, and resistance to modernity. In interviews held with state officials within the Ministry of Land, it was clear that the government considered pastoralism not to be in the public interest of Tanzanians, and that it was in fact in the interest of the Maasai themselves to adopt more efficient livelihoods and livestock-rearing methods (Shewiyo, Ministry of Lands and Human Settlements

Development, Personal interview: Dar es Salaam, 8 January 2009). It is here apparent that “shared beliefs” between Maasai pastoralists and government officials is, at best, limited.

It is important to note that the state tends to consider pastoralism to be less efficient than agriculture. In interviews with pastoralist organizations, such as CORDS, TAPHGO, and PINGOs Forum, they often voice the negative stance that the government takes towards pastoralists. Little importance is attached to traditional livestock raising methods. However, most of the beef sold, traded, and consumed in Tanzania is the direct product of Maasai pastoralism. The Maasai contribution to national GDP is not properly recognized or appreciated, and its positive role in society goes unacknowledged (Mellau, Sokoine University, Personal interview: Morogoro, 18 March 2009).

Claims of environmental degradation are just as contentious. Although the government states that pastoralism harms the environment, there is little evidence to support this. On the other side, The Maasai claim that agriculture in arid and semi-arid areas also degrades the environment, and that restricting cattle to a small area will further destroy the environment. Finally, the government views Maasai practices as contrary to their value of modernization, and considers pastoralism a constraint on national development. The Maasai have had to continually adapt and create new forms of organization and livelihood with the state investing little infrastructure or capital to “modernize” or empower themselves. The state thus tends to replicate colonial discourses,¹⁴ which now, as then, work to justify the economic interest the central state actors have in taking control of local land use and generating revenue from it.

Since the end of 1992, pastoralists have started to voice their discontent over the current land management system. A handful of organizations (such as CORDS, TAPHGO and PINGOs Forum) as well as other actors (including gender groups and donors), advocate for the rights and interests of pastoralists, and increase pastoralists’ representation and consideration in land governance processes. The Maasai pastoralists have been particularly active in this endeavor, building effective external networks to gain international support for the local land struggles that affect their communities, mostly through NGOs. This is interesting as they, like the government, have also adopted a strategy of extraversion (Igoe 2006). While the government is responsive to foreign investors and international conservation NGOs, the Maasai endeavor to access funds and recognition from international donors and development NGOs. This highlights the complex and sometimes-conflicting effects that the international community has on domestic politics and Tanzania’s land laws. Although some international actors, such as investors and conservationists, serve to legitimize Tanzania’s land laws, other international actors contest their legitimacy.

Unfortunately, within Tanzania, groups advocating for pastoralists’ rights usually work independently from one another, limiting their effectiveness and ability to powerfully voice collective concerns. Additionally, the lack of coordination between these groups on the ground can mean that projects aimed at improving Maasai capacities may overlap while some regions and issues go unaddressed altogether. As Mattee notes, “Divisions within the pastoralist lobby have fragmented the voice of pastoralists, and have reduced their ‘political weight’” (2006, p.4).

¹⁴ For further information on the recurrence of colonial era norms and discourses into modern day institutions, see Leander Schneider’s “Colonial Legacies and Postcolonial Authoritarianism in Tanzania: Connects and Disconnects” [African Studies Review vol. 49, no. 1, April 2006, pp. 93-118].

All of the above factors contribute to a lack of representation that leads to the lack of Maasai participation in formal decision-making process. As a result, state laws and institutions are inherently unfavorable to the Maasai and lack legitimacy due to the democratic deficiencies apparent in their creation as well as the actual effects-displacement, forced villagization and disempowerment of their implementation.

BOX 5: The Lack of Input Mechanisms for the Kiserian Maasai

In the Arusha Region, a Maasai town called Kiserian (Longido District) faces various challenges due to globalization and pressure from foreign influences. A foreign hunting company, without the consent of the village, has received hunting licenses from the central government to use village land. This company does not contribute to the conservation of the land or the local village but instead hunts wildlife, builds hunting tracks on pastoral property, and disturbs villages with loud gunfire. Because hunting licenses can cost over \$10,000USD or more for a single animal, the interests of hunting companies are important to the Director of Wildlife and can fuel investment and economic development in Tanzania.

Initially, the hunting company promised villagers some form of monetary compensation, potable water infrastructure, and a school building in exchange for access to the land. Company representatives even met with community leaders to discuss the possibility of a formal relationship. However, talks soured when villagers were asked to sign a written agreement that would bind them to contractual provisions with the company. The Maasai village leaders, who lacked formal legal training, had never dealt with contracts to use land and were unsure about agreeing to anything formal. Nevertheless, they verbally agreed and received some money and a school building. In the meantime, they proceeded to ask other villages about the types of compensation they received and discovered that the amount that the hunting company offered was insufficient.

When they told the hunting company of their dissatisfaction, they received the surprising news that the company was apparently also negotiating terms with officials from the Ministry of Tourism, and that the Director of Wildlife has already granted them hunting licenses or “blocs” even without the consent of the affected villages, including Kiserian. As it turned out, the Director has the authority to issue these licenses; moreover, it can exercise this authority without the necessity to provide compensation for affected residents.

Without a legal claim to their property, the villagers have resorted to accepting anything that they receive from the hunting company. They have sought the help of local NGOs to seek formal titling of their land in order to have the ability to protect their interests. Some also expect that with titling, they will be able to receive loans from banks. Ultimately, the villagers desire to be educated of their rights so that they are better able to protect their livelihood.

2. Failure of Dispute Mechanisms

When looking at dispute resolution mechanisms and their effectiveness from the perspectives of the Maasai, it is necessary to consider Tanzania's customary power structures in comparison to statutory structures, as well as the effectiveness of the land laws to resolve both intra- and inter-group conflict. Because the formal dispute resolution mechanisms do not adequately reflect Maasai customary structures, input legitimacy and legitimacy derived from shared beliefs are compromised. In addition, output-based legitimacy is lacking because land laws and the asymmetric nature of statutory and customary law are not effective mechanisms for dispute resolution.

Traditional Maasai power structures and decision-making procedures are insufficiently incorporated into modern legal conflict resolution mechanisms, which results in the reduced legitimacy of formal institutions in the eyes of Maasai pastoralists. The following section will illustrate that the legal pluralist system in Tanzania is not polycentric in nature with multiple sources of authority but instead has strong roots in the state.

BOX 6: Traditional Maasai Political Structure

The most influential people for the Maasai are the Oloiboni; an Oloiboni is the head political and spiritual leader for each group of Maasai. Following the Oloiboni, the Ilaigwenak occupy the 2nd highest position in Maasai culture, and tend to have a greater presence in most Maasai communities, as there can be numerous Ilaigwenak in one group, with one Olaigwenani heading each broad Maasai community. These power structures are largely reflective of the "men's age-set system" that dominates Maasai culture (Ruotsalainen 2007, p.10). Maasai leaders are the elder men of a community who have earned their position after close scrutiny of the community and demonstrated merit. At the most local level, the community as a whole, led by its elders, has significant authority. Despite the emphasis on communal decisions, women continue to occupy inferior statuses in Maasai communities, and are unable to fully participate in decision-making procedures (Ruotsalainen 2007, p.10).

Maasai decision-making structures and sources of authority diverge from state power structures. Decision-making structures are loosely hierarchical, yet lack a single all-authoritative leader. In an interview with Haki Ardhi, a prominent Tanzanian NGO advocating for improved land rights, program officer and researcher Bernard Baha explained that in Maasai communities, traditional decision-making structures are conciliatory in nature and are predicated on coming to mutual agreement rather than pursuing conflict-resolution through formal avenues (Personal interview: Dar es Salaam, 6 January 2009). When allegations or conflicts arise, the issue is first brought before the village elders, who resolve most disputes.

In the Maasai court, men are able to voice their ideas. At this level, punishment comes in traditional forms; such as if the individual is found guilty, he gives tobacco and a blanket to the elders for their blessing. They may also be fined a certain amount of livestock, usually not more than one or two cattle as a maximum penalty. If agreements are not reached at the local levels, the dispute will ascend the decision-making ladder. Conflicts may be referred to the Ilaigwenak, with the final say held by the spiritual leader or Oloiboni, who have the ability to impart severe punishment. Such customary laws and conciliatory

approach have helped build unity among the Maasai (Mwarabu et al., PAICODEO, Personal interview: Morogoro, 9 January 2009).

In addition to land, mobility and community, respect for elders is an important value of the Maasai. Maasai elders occupy a powerful position and exercise significant influence on members of Maasai communities. Nevertheless, perceptions of legitimacy and sources of authority are changing, illustrating the dynamic nature of legitimacy, and new forms of authority are challenging traditional Maasai power-structures. Some Maasai are even circumventing traditional age-set hierarchies. For example, it is now becoming more common for younger men to take elders to court. In addition, some take advantage of new laws to serve personal interests. As the researcher Ruotsalainen derived from Ndagala (1992):

“those who would not be suitable for customary leadership can due to their education get access to leadership positions through the ‘modern’ political system... This means that those who contest for political positions might not have full support and respect from people in the community while those who have respect might lack education and competence to deal with national political institutions” (2007, p.4).

Statutory law constrains the power of Maasai elders, who are no longer viewed by all parties as the highest authority. A legitimacy crisis thus occurs when the relative status of traditional and legal authorities is unclear, and when the decisions of differing authority sources are incompatible. The lack of “shared beliefs” is here evident, and Maasai pastoralists do not consider the state to be the only source of authority, nor is it clear that the interests of the state and the Maasai are the same.

The formal dispute resolution mechanisms that exist under the new land laws often fail to produce agreeable outcomes. The ineffectiveness of these measures compromises the output-legitimacy associated with them. Traditional Maasai conflict resolution methods occur within a legal pluralist context, and thus coexist with modern statutory dispute mechanisms. In the course of implementing the land laws, disputes arise. For this reason, there are provisions within the land laws that mandate the creation of a dispute settlement mechanism, which begins at the village level and culminates with the national-level judicial system. This is especially evident when a resolution cannot be reached at the lower levels (United Republic of Tanzania 1999a). Despite the legal provision for the existence of these mechanisms, there is consensus among different land experts that the land laws are generally weak if the intent is to resolve disputes in a speedy and fair manner (Palmer 1999, p.4). Professor Shivji, for instance, identifies key weaknesses like the lack of a clearly defined mechanism for participation in various levels, as well as the reliance on those that have been prescribed in the past but have actually failed in practice, *e.g.* ward tribunals (1999a, p.2).

For the Maasai, land disputes may occur within three different contexts: disputes may arise in either heterogeneous or homogeneous communities, or may arise between the Maasai and the Tanzanian government. The outcomes and the legitimacy associated with each scenario may differ greatly, even though all occur within the same legal structure. In homogeneous Maasai communities, decision-making structures, both customary and statutory, may be viewed as both legitimate and effective by affected parties, given that most residents of a homogeneous region share similar values with one another, as well as with the village officials they elect. In heterogeneous communities, however, dispute resolution mechanisms are often prone to failure. Although democratic processes allow some opportunities for participation and representation, the majority often overrides the interests of the minority. The differences between farmers and pastoralists are often irreconcilable because of the differing notions of land use and rights. Tensions between the two groups, the sense of desperation and

frustration on behalf of the pastoralists, as well as the perceived lack of legitimate recourse can result in violent conflict (See Box 2).

When disputes over land exist between the Maasai and the government, there is little chance the Maasai will succeed due to the fact that the government holds the final say in all matters, as institutionalized in current land laws. The lack of democratic accountability of the Ministry of Lands

BOX 7: Wildlife Bill 2008

Under the review of its Wildlife policy, the Tanzanian government tried to establish a new Wildlife Bill in October 2008. The main issue with the draft bill was the concept of “Game Controlled Areas”, i.e. lands that are immediately outside National Parks and Game Reserved Areas, which legally belong to villages, but are formally ruled by the government under Reserve Land. The government wanted to prohibit pastoralist activities, such as grazing and cattle herding, in these “Game Controlled Areas”, which in fact consist of lands in the outskirts of the protected areas. These lands constitute a significant part of land in northern Tanzania, including approximately 98% of the land in Longido and 70% of the land in Monduli district and are liable to both safaris and hunting. The “Game Controlled Areas” were supposed to then be subdivided into hunting blocs, which the Wildlife Department would issue hunting permits. Consequently, the authority who holds this permit also has the legal right to exclude other people, such as the pastoral groups traditionally present in those areas, from further activity. If these Reserve lands were changed to the category of “Game Controlled Areas”, it would have further undermined the mobility of pastoralists, their livestock number, and eventually would have left millions displaced.

As a response, pastoral NGOs such as PINGOs forum, CORDS and Haki Ardhi mobilized pastoralists around the Arusha region to contested the bill. This was a success story in the mobilization of pastoralists in the defense of their land rights. With the mobilization of pastoral civil society and support from pastoralist sympathizers in parliament, the draft bill was revised, and the concept of “Game Controlled Areas”, so detrimental to their livelihoods, was abolished. However, even with this amendment, if a herd crosses “boundaries” into a “Game Reserve Area” - another classification of Reserve Land where no settlement is allowed- it is considered as illegal, and all heads of cattle are confiscated and the owner fined (PINGOs, 24 March 2009).

reduces the perceived legitimacy of institutionalized dispute resolution mechanisms. The power the Ministry wields does not commensurate with social engagement in a democratic process. As discussed in earlier sections, the Ministry has oversight over general and reserve lands; therefore, the dispute settlement mechanisms discussed in this section are applicable solely to village land. This becomes problematic in issues like boundary disputes because the Ministry becomes the de facto mediator to facilitate resolution, yet it is also party to the conflict. In such a case, issues of legitimacy arise as the people ultimately get denied the benefit of separation of power principle in dispute settlement (Shivji 1999a, p.2). Also, the lack of “shared beliefs” is inherent when the government itself is one of the parties involved in the dispute.

C. Socio-Economic Dimension: Livelihood Insecurity and Chronic Poverty

The territorial displacement of the Maasai and the pressure to settle has led to increasing livelihood insecurity and worsening poverty. Moreover, the limitations of the political space for contestation, as well as of the group's weak capacity to voice their interests, allow these changing dynamics to test the survival of their traditional way of life. In this context, looking at the socio-economic dimension of the Maasai way of life can bring together the territorial and political dimensions discussed in this paper, and in the process, raise further questions around the legitimacy of the land laws.

1. Livelihood Insecurity

Livestock, as alluded to in the earlier sections, is central to the Maasai way of life because their livelihood and social status hinge on this. Interviewees identified cattle to be the primary unit through which wealth is stored—much more than money or land as is typical in other societies (Personal interviews: PAICODEO, Morogoro, 9 January 2009; CORDS, Arusha, 15 January 2009). This is why livestock, particularly cattle, is the central commodity in their internal economic transactions, including their dowry system (Galaty 1982b).

Because the land laws are not conducive to traditional livestock-keeping, it is understandable that the Maasai raise questions about the legitimacy of these laws as they threaten the fundamental foundation of their community. In the absence of clear options to keep their traditional economic structures intact, there is growing pressure for the group to be incorporated into the country's broader economic framework but often under the terms of the government. The merits of integration can be debated; nevertheless, this "mainstreaming" has undeniably affected the Maasai in some problematic ways. For instance, their growing reliance on the urban economy for income as suppliers of meat and as low-skilled workers makes their general welfare more vulnerable to the volatility of the market (Lengare et. al., CORDS, Personal interview: Arusha, 15 January 2009). Another issue that can be deemed problematic is the commoditization of Maasai culture for tourism. Without proper mechanisms, they are not guaranteed adequate compensation for their economic contribution and actual protection for their unique cultural heritage.

Among the interviewed Maasai representatives, it is interesting to note the diverse views concerning integration into Tanzania's state and economic system. There are some that see it as a threat to their group's very existence, while there are also others that see it as breathing life into their traditional structures. An anecdote on the latter was shared in one of the interviews, where it was pointed out that Maasai men, who are trained as moran (warriors), would find employment in urban areas as askari (guards). In doing so, they retain their links to their communities by remitting a portion of their income to their families who can then acquire more cattle (Lengare et. al., CORDS, Personal interview: Arusha, 15 January 2009).

Despite the differing views on state and economic integration, there is general consensus that the dynamics behind the land laws have been altering the Maasai's livelihood. With the "village" as the framework by which land tenure is secured in Tanzania, the land laws imply a bias towards settlement and agriculture, which can be deemed as lacking output legitimacy; and the absence of a process to explore and provide alternatives reflect deficiencies in input legitimacy.

These legitimacy concerns are echoed by Maasai organizations who question the feasibility of settled farming practices given the variability of Tanzania's environmental patterns. In their opinion, the fact

that traditional nomadic practices of livestock-keeping have survived for centuries is proof of their adaptability and suitability to seasonal changes (Lengare et. al., CORDS, Personal interview: Arusha, 15 January 2009). In separate interviews, interviewees raise the irony of the laws allowing for “wildlife corridors” for animals to migrate as seasons change, but failing to extend this to pastoralists, who are the citizens whose interests the law is supposed to be upholding. In terms of the dimensions of legitimacy, this is an evidence of the lack of shared beliefs as the state fails to embody the interest and the identity of the Maasai.

Another issue that the Maasai organizations raise is that the push towards settled agriculture does not come with the corresponding support structures, particularly in terms of technology and financing. Moreover, instead of employing a cooperative approach, the government’s call for change is done negatively through the rhetoric around “need for modernization”. These calls are typically grounded on claims that the Maasai’s vast ownership of livestock exceeds the “carrying capacity” of the land they occupy, as well as that the Maasai contribute to global warming because of the methane produced by their cattle’s manure.¹⁵ However, Maasai groups contest the legitimacy of this environmental rhetoric, claiming that their practices are more environmentally sound than the game hunting, for example, and other consumptive tourism activities, which the government endorses (Lengare et. al., CORDS, Personal interview: Arusha, 15 January 2009; see Box 8).

BOX 8: Consumptive versus Non-Consumptive Tourism

Tourism is not necessarily incompatible with pastoralism. There is a stark (and constructive) distinction between consumptive tourism, like hunting activities, and non-consumptive tourist activities, such as safaris and hiking, in terms of their impact on the pastoralist way of life. Most pastoralists view non-consumptive tourism as positive for their development, if they are included in the decision making-process. First, it brings them direct income, benefiting the whole community; second, this kind of tourism protects the animals, as opposed to hunting activities, and ensures a lasting source of sustainable development. Moreover, In terms of governance, hunting activities are under the supervision of the centralized government through the Director of Wildlife, whereas activities such as safari and photo taking are under the supervision of the Ministry of Tourism, which generally issues permits only after seeking agreements with Village authorities.

For the Maasai, non-consumptive tourism also presents more opportunities for participation since components of their culture, particularly their centuries-old living in harmony with nature, can be incorporated in tourism packages that feature the Tanzanian environment. With pastoralists making up 10% of Tanzania’s population, they represent a significant but untapped human resource, particularly if their unique cultural heritage is not preserved. In this respect, the challenge is to bridge the divide between indigenous populations and the government, through the recognition of pastoral groups’ contribution to the economy. Their direct contribution to the GDP tends to be underestimated, and it could in fact increase significantly should government support them to manage land and develop their capacity.

¹⁵ An article published in the Arusha Times (7 February 2009) entitled “Maasai Cattle Cause Global Warming” is an example of this rhetoric portraying the Maasai as detrimental to the environment; therefore, the encouragement to help them adopt modern technologies like biogas to offset their negative impact [Available at: <http://allafrica.com/stories/200902090821.html>].

Interestingly, despite legitimacy questions, there is a sense of openness among the Maasai around diversifying their means of livelihood, particularly given the context of increased insecurity introduced by the land laws. The interviewed Maasai acknowledge that a growing number of pastoralists have abandoned (either completely or partially) their traditional, nomadic livestock-keeping in favor of farming, ranching, or feedlotting. This is especially true around the Arusha area where organizations like the Mtandao wa Vikundi vya Wakulima Tanzania (MVIWATA) in the Monduli district are able to provide the support structure for agro-pastoralist practices to emerge. This livelihood diversification requires securing a “village” title; however, we have seen the difficulty of obtaining one, particularly in farmer-pastoralist areas like Kilosa. For this reason, the lobby for “pastoralist policies”, which would equate the practice’s status to that of mainstream agriculture, and challenge the primacy of the “village” as the framework to secure tenure in Tanzania, seems to remain a relevant course of action. Through these, mechanisms to facilitate a better understanding of Maasai values can be explored to address the lack of shared beliefs between the state and its Maasai citizens.

2. Chronic Poverty

Pastoralists, in general, are often seen to be in chronic poverty.¹⁶ Development discourse often attributes this to their persistence to thrive in marginal areas where they do not have access to basic services like health and education. While prevalent, this outlook can be questioned from the perspective of the Maasai, who have different conceptions of what constituted deprivations until they began to be integrated into the country’s mainstream economy. Given their traditional conception of wealth as measured and stored in cattle, it involves a shift to re-conceptualize the value of cattle to be only relative to its market price (Lengare et. al., CORDS, Personal interview: Arusha, 15 January 2009).

This mindset shift associated with the rise of neo-liberalism and the pervasiveness of market capitalism has repercussions on the group’s social fabric as a whole, especially since this change also accompanied other shifts in their relationship with their land and with their community. While land is traditionally seen as a social resource, which supports their wealth creation through cattle accumulation, the new dynamics around the mainstream economy commodifies land and makes it an economic resource. As discussed in earlier sections, the experimentations in Tanzania around formalizing the property and business of the poor have international roots in Hernando de Soto’s “revolutionary” concept of formalizing property rights, and thus, have been endorsed by a number of international donors and academics. While theoretically sound, grounding this to existing institutions in Tanzania suggests that it would in fact increase the vulnerability of the poor instead of alleviating it (Stein and Askew 2008). Certainly, we have shown the limitations of such an approach when confronted with pastoralist communities. From the point of view of pastoralists, formalizing property rights is contrary to their way of life, and clearly outlines the lack of shared beliefs between pastoralists and the government.

For pastoralists, the commodification of land also compromises the social structure and stability that are embedded in their communities. With the increased push towards individualization and the increased consciousness to define territories, the social networks that have sustained the group are weakened. Evidence of this includes the traditional Maasai governance structures’ increased susceptibility to corruption (through the council of elders), which is recognized by both Maasai interviewees as well as government representatives. Another is the Maasai’s increased employment in urban centers—especially because this not only decreases the number of productive members within their traditional

¹⁶ Little et.al. discuss poverty among East African pastoralists in “Challenging Orthodoxies: Understanding Poverty in Pastoral Areas of East Africa” [Available at SSRN: <http://ssrn.com/abstract=999623>].

community, but also because this introduces new issues like HIV/AIDS, which is transmitted through urban workers (Lengare et. al., CORDS, Personal interview: Arusha, 15 January 2009).

Given their desire to preserve their traditions, it seems logical to say that actively pushing groups like the Maasai into the mainstream economy lacks output legitimacy. To a certain extent, this is true, as many pastoralists view formalization as neither fair nor productive. However, it is interesting to note that even the Maasai organizations themselves recognize that as much as there are costs to the process, there are also benefits. It was previously demonstrated that the Maasai are using technology to increase their voice and participation in the political process. All of the groups also recognize the role of education in improving the circumstances of the Maasai, which is why they have programs to ensure that young people in their community can be sent to school (Mwarabu et al., PAICODEO, Personal interview: Morogoro, 9 January 2009). Another benefit is their increased knowledge and access to medicine to improve their livestock-keeping (Mellau: Sokoine University, Personal interview: Morogoro, 18 March 2009). For Maasai women in particular, the changing dynamics also opened opportunities for them to organize themselves and pursue new occupations (Kimesera, MWEDO, Personal interview: Arusha, 26 March 2009).

V. Conclusion

The adverse effects of Tanzania's land laws on Maasai pastoralists bring the legitimacy of these laws into question, as has been illustrated throughout this paper. In our analysis, we find that these questions of legitimacy are rooted in the flawed attempt to institutionalize legal pluralism through the legalization of "customary law".

In the discussion of the historical context behind the land laws and the customary rights to land, we note that the emerging notion of "customary law" is inherently deficient in incorporating and protecting the interests of many citizens, including the Maasai. Historical power dynamics, particularly since colonial rule, have institutionalized a monocentric land governance system, as reflected in the persistence of the unchecked and centralized authority afforded to today's Tanzanian state. Because of this, the implementation of land laws (even those recognizing customary rights) has been characterized by power asymmetries favoring the values of the state. These values are not necessarily reflective of the citizens' shared beliefs because the elite, investors, donors, and international community tend to shape the articulation of the interests that the state represents. As can be seen in practice, this institutional bias in favor of the Tanzanian state allows it to limit how "customary law" is both defined and applied.

Given the above context, the land laws designate that "customary law" is to be defined and afforded equal status to statutory rights only in the context of a "village". However, throughout this paper, we also discuss evidences that the notion of a "village" excludes certain citizens, particularly pastoralists, because this notion of fixed settlements with territorial boundaries is not consistent with their traditional way of life. In cases where these pastoralists chose to maintain their traditional practices, they risk having their interests marginalized because they cannot participate in the state-defined venues to define what is "customary".

However, for those who feel the need to settle in a "village" to secure their tenure, it also does not necessarily follow that they can effectively participate in governance processes because of limited capacity. As presented in this paper, citizens like Maasai pastoralists face constraints in their ability to effectively participate because of issues like language, literacy, and poverty. At worst, their weak

capacity also tends to make them vulnerable to the exploitation of powerful actors, including the government. This is especially true where there is a lack of “checks and balances” on state power. As the final adjudicator to land conflicts, the government has little incentive to rule against its interests, even when the government itself is party to the disputes. In this context of legal pluralism, this concentration of power poses a very significant challenge.

Given these findings, we are highlighting the need for institutional reforms, particularly around checking the centralized power of the Tanzanian government. This can be done either from the top, by revisiting the recommendations of the Shivji Commission, or from the bottom, through better mobilization among organizations involved in pastoralist and land issues. Another area in need of reform is the physical and conceptual restrictions posed by the notion of a “village”. This would imply acknowledging the value of traditional mechanisms, like the Maasai’s elder rule system, and incorporating these into the political mechanisms of the state, especially since for some citizens, these serve as more legitimate venues for interest articulation than the “village”. Particularly in the interest of pastoralists, the passage of pastoral policies and laws could also be explored. Giving pastoralists’ practices legal recognition could ensure that before the court of law, their use of the land is just as legitimate as other forms of land use more consistent with the notion of a “village” like farming, ranching, etc.

Beyond the need for institutional reforms, the findings in this paper also suggest the necessity for more dialogue and debate on the notion of “customary law” and what this exactly means in the Tanzanian context. This suggestion implies rethinking the notion of the “village” and the underlying values of pastoralism and the Maasai culture. This recommendation to facilitate a culture of local to local dialogue, stems from our observations that there are potential benefits towards building a constructive relationship between the state and its citizens. This is particularly true when Maasai organizations are open to a compromise in terms of what they would consider a fair outcome for their group. In this context, the challenge would be to facilitate an increased understanding of local traditions, so that where possible, these can be integrated. Among the innovative ideas that were brought to our attention and are worth exploring include the mapping and recognition of “pastoral corridors” in land use planning, as well as the integration of Maasai culture for sustainable tourism.

Lastly, stepping out of Tanzania onto the broader international development context, our findings reinforce the need to acknowledge that the international community can significantly affect domestic dynamics; and that development practice, even if it is intended to be technical, is really inherently political. For this reason, it is important that development practitioners do not take the legitimacy of state institutions as given. Instead, they should analyze the mechanisms for the inclusion of the citizens in governance, examine its outcome for its responsiveness to the needs of the people they are supposed to serve, and in the process, evaluate whether these truly reflect the public interest. In the absence of these, international actors should be cautious in lending recognition and support to programs and projects, which in the bigger picture may be causing more harm than good to the society that these are supposed to aid.

VI. Reference List

- Aligaesha, Baraka. Mtandao wa Vikundi vya Wakulima wa Wilaya ya Monduli (MVIWAMO). 2009. Personal interview. Monduli. 13 January 2009.
- Århem, Kaj. 1985. *The Maasai and the state: the impact of rural development policies on a pastoral people in Tanzania*. Copenhagen: International Work Group for Indigenous Affairs.
- Augustinus, Clarissa, and Marjolein Benschop. 2003. *Security of tenure: best practices*. Nairobi: UN Habitat.
- Baha, Bernard, and Yefred Myenzi. Haki Ardhi. 2009. Personal interview. Dar es Salaam. 6 January 2009.
- Bayart, Jean-François. 1993. *The state in Africa: the politics of the belly*. New York: Longman.
- Bellina, Séverine, Dominique Darbon, Stein Sundstøl Eriksen, and Ole Jacon Sending. 2009. The legitimacy of the state in fragile situations. In *Report for the OECD DAC International Network on Conflict and Fragility*.
- Berger, Dhyani J. 1993. *Wildlife extension: participatory conservation by the Maasai of Kenya, ACTS environmental policy series*. Nairobi, Kenya: ACTS Press, African Centre for Technology Studies.
- Berry, Sara. 1976. *Inequality and underdevelopment in Africa: a suggested approach*. Brookline [Mass.]: African Studies Center, Boston University.
- . 1987. *Property rights and rural resource management: the case of tree crops in West Africa*. Boston, MA (270 Bay State Rd., Boston 02215): African Studies Center, Boston University.
- . 1993. *No condition is permanent: the social dynamics of agrarian change in sub-Saharan Africa*. Madison, Wis.: University of Wisconsin Press.
- Boedeltje, Mijke, and Juul Cornips. 2004. Input and output legitimacy in interactive governance. <http://publishing.eur.nl/ir/repub/asset/1750/NIG2-01.pdf>.
- Bruner, Edward M. 2001. The Maasai and the lion king: authenticity, nationalism, and globalization in African tourism. *American Ethnologist* 28 (4):881-908.
- Coldham, Simon. 1995. Land tenure reform in Tanzania: legal problems and perspectives. *The Journal of Modern African Studies* 33 (2):227-242.
- Cronk, Lee. 2004. *From Mukogodo to Maasai: ethnicity and cultural change in Kenya, Westview Case Studies in Anthropology*. Boulder, Colo.: Westview Press.
- Fosbrooke, Henry. 1948. An administrative survey of the Maasai social system. *Tanganyika Notes and Records* 26.
- Fratkin, Elliot. 1994. *Problems of pastoral land tenure in Kenya: demographic, economic and political processes among Maasai, Samburu, Boran, and Rendille 1950-1990*. Boston, Mass.: African Studies Center, Boston University.
- . 2004. *Ariial pastoralists of Kenya: studying pastoralism, drought, and development in Africa's arid lands*. 2nd ed, *Cultural Survival studies in ethnicity and change*. Boston: Pearson Education, Inc.
- Fratkin, Elliot, and Robin Mearns. 2003. Sustainability and pastoral livelihoods: lessons from East African Maasai and Mongolia. *Human Organization* 62 (2):112-122.
- Galaty, John G. 1982a. Maasai pastoral ideology and change. In *Studies in Third World Societies*, edited by P. C. Salzman.
- . 1982b. Being "Maasai"; Being "People-of-Cattle": ethnic shifters in East Africa. *American Ethnologist* 9 (1):1-20.
- Gilbert, Elizabeth L. 2003. *Broken spears: a Maasai journey*. 1st ed. New York, London: Atlantic Monthly Press, Atlantic Books.
- Hodgson, Dorothy Louise. 2000a. *Rethinking pastoralism in Africa: gender, culture and the myth of the patriarchal pastoralist*. Athens, Oxford: Ohio University Press, James Currey.

- . 2000b. Pastoralism, patriarchy and history among Maasai in Tanganyika 1890-1940. In *Rethinking Pastoralism in Africa*, edited by D. L. Hodgson.
- . 2001. *Once intrepid warriors: gender, ethnicity, and the cultural politics of Maasai development*. Bloomington: Indiana University Press.
- . 2002. Precarious alliances: the cultural politics and structural predicaments of the indigenous rights movement in Tanzania. *American Anthropologist* 104 (4):1086-1097.
- Homewood, Katherine, and Daniel Brockington. 1999. Biodiversity, conservation and development in Mkomazi game reserve, Tanzania. *Global Ecology and Biogeography* 8 (3/4, Tropical Open Woodlands Special Issue):301-313.
- Hughes, Lotte. 2006. *Moving the Maasai: a colonial misadventure, St. Antony's series*. Basingstoke [England], New York, Oxford: Palgrave Macmillan, in association with St. Antony's College.
- Igoe, Jim. 2006. Becoming indigenous peoples: difference, inequality, and globalization of East African identity politics. *African Affairs* 105 (420):399-420.
- Iliffe, John. 1979. *A modern history of Tanganyika*. Cambridge; New York: Cambridge University Press.
- James, R. W. 1971. *Land tenure and policy in Tanzania*. Nairobi: East African Literature Bureau.
- James, R. W., and G. M. Fimbo. 1973. *Customary land law of Tanzania: a source book*. Nairobi: East African Literature Bureau.
- Kadege, Paul. Kiteto Civil Society (KCS) Forum. 2009. Personal interview. Morogoro. 9 January 2009.
- Kimesera, Ndinini. Maasai Women Development Organization (MWEDO). 2009. Personal interview. Arusha. 26 March 2009.
- Kjekshus, Helge. 1977. The Tanzanian villagization policy: implementational lessons and ecological dimensions. *Canadian Journal of African Studies / Revue Canadienne des Études Africaines* 11 (2):269-282.
- Klopp, Jacqueline. 2000. Pilfering the public: the problem of land grabbing in contemporary Kenya. *Africa Today* 47 (1):7-26.
- Kupaza, Ramadhani. 2009. Tanzania: Maasai cattle cause global warming. *The Arusha Times* (7 February 2009), <http://allafrica.com/stories/200902090821.html>.
- Larsson, Per. 2006. The challenging Tanzanian land law reform: a study of the implementation of the Village Land Act. *KTH - The Royal Institute of Technology Examensarbete* EX-06 (160):1-72.
- Lengare, Raphael et al. Community Research and Development Services (CORDS). 2009. Personal interview. Arusha. 15 January 2009.
- Little, Peter D., John G. McPeak, Christopher B. Barrett, and Patti Kristjanson. 2008. Challenging orthodoxies: understanding poverty in pastoral areas of East Africa. <http://ssrn.com/abstract=999623>.
- Mamdani, Mahmood. 2002. African states, citizenship and war: a case-study. *International Affairs* 78 (3):493-506.
- Mattee, A.Z and M. Shem. 2006. Ambivalence and contradiction. a review of the policy environment in Tanzania in relation to pastoralism. *IIED Issue Paper* (140).
- McAuslan, Patrick. 2005. Legal pluralism as a policy option: Is it desirable, is it doable? In *International Land Coalition Workshop: Land Rights for African Development: From Knowledge to Action*: UNDP. Nairobi, 31 October-3 November 2005.
- Mellau, Lesakit SB. Sokoine University. 2009. Personal interview. Morogoro. 18 March 2009.
- Mkumbo, M. District of Monduli. 2009. Personal interview. Monduli. 13 January 2009.
- Moore, Sally Falk. 1986. *Social facts and fabrications: "customary" law on Kilimanjaro, 1880-1980*. Cambridge [Cambridgeshire], New York: Cambridge University Press.
- Muro, Jackson and Rakel Larsen. Tanzania Pastoralist, Hunter-Gatherers Organization (TAPHGO). 2009. Personal interview. Arusha. 15 January 2009.

- Mwarabu, Adam et al. Parakuiyo Pastoralists Indigenous Community Development (PAICODEO). 2009. Personal interview. Morogoro. 9 January 2009.
- National Land Forum. 1997. Azimio La Uhai: Declaration of NGOs and Interested Persons on Land Dar es Salaam. 15 May 1997.
- Nelson, Fred. 2005. Wildlife management and village land tenure in Northern Tanzania. Arusha: Tanzania Natural Resource Forum.
- Odgaard, Rie. November 2006. Land rights and land conflicts in Africa: the Tanzania case. In *Country policy study*. Copenhagen: Danish Institute for International Studies.
- Okoth-Ogendo, H.W.O. 1991. *Tenants of the crown: evolution of agrarian law and institutions in Kenya*. Nairobi: Acts Press, African Centre for Technology Studies.
- Olenasha, William. 2005. Reforming land tenure in Tanzania: for whose benefit? Dar es Salaam: Haki Ardhi Report.
- Palmer, Robin. 1999. The Tanzanian Land Acts, 1999: an analysis of the analyses. Oxfam GB.
- Péron, Xavier. 1995. *Privatisation foncière et appropriation publique des terres chez les Maasai du Kenya: état des lieux d'une double privation = Land privatization and public appropriation of land among the Maasai in Kenya: a status of double deprivation*. Nairobi, Kenya: French Institute for Research in Africa.
- Porokwa, Edward. Pastoralists Indigenous NGOs (PINGOs) Forum. 2009. Personal interview. Arusha. 14 January 2009.
- Rigby, Peter. 1992. *Cattle, capitalism, and class: Iparakuyo Maasai transformations*. Philadelphia, PA: Temple University Press.
- Ruotsalainen, Petri J. 2007. Dual leadership structure among the Maasai pastoralists in Tanzania. In *AEGIS European Conference on African Studies*. Leiden, the Netherlands School of Global Studies, Goteborg University. 11-14 July 2007.
- Scharpf, Fritz W. 1998. Interdependence and democratic legitimation. *Max-Planck-Institut für Gesellschaftsforschung Working Paper 98/2*, <http://www.mpifg.de/pu/workpap/wp98-2/wp98-2.html>.
- Schneider, Leander. 2006. The Maasai's new clothes: a developmentalist modernity and its exclusions. *Africa Today* 53 (1):101-131.
- Schoenherr, Steven E. 2004. The Versailles Treaty of June 28, 1919. <http://history.sandiego.edu/gen/text/versaillestreaty/vercontents.html> (accessed 2 May 2009).
- Shewiyo, J.I. Ministry of Lands and Human Settlements Development. 2009. Personal interview. Dar es Salaam. 8 January 2009.
- Shivji, Issa. 1986. *The State and the working people in Tanzania, Codesria book series*. Dakar, Senegal: CODESRIA.
- . 1990. *The legal foundations of the union in Tanzania's union and Zanzibar constitutions*. Dar es Salaam: Dar es Salaam University Press.
- . 1994. A legal quagmire: Tanzania's regulation of land tenure (Establishment of Village Act, 1992). *Pastoral Land Tenure Series No.5* (IIED).
- . 1998. *Not yet democracy: reforming land tenure in Tanzania*. London: IIED/ Hakiardhi/Faculty of Law, University of Dar es Salaam.
- . 1999a. Lift the whip. Palaver: The Land Bills. In *The African*. Tanzania.
- . 1999b. The Land Acts 1999: a cause for celebration or celebration of a cause? Keynote Address to the Workshop on Land. Morogoro. 19-20 February
- Skinner, Elliot P. 1968. The "paradox" of rural leadership: a comment. *The Journal of Modern African Studies* 6:199-201.

- Spear, Thomas and Richard Waller. 1993. *Being Maasai: ethnicity & identity in East Africa*. London, Athens Ohio University Press; Dar Es Salaam, Nairobi: James Currey; Mkuki na Nyota; East African Educational Publishers.
- Spencer, Paul. 2003. *Time, space, and the unknown: Maasai configurations of power and providence*. London ; New York: Routledge.
- Stein, Howard, and Kelly Askew. 2008. Embedded institutions and rural transformation in Tanzania: privatizing rural property and markets. In *2008 ASA Annual Meeting: The University of Michigan*. United Republic of Tanzania. 1923. The Land Ordinance No. 3 of 1923.
- . 1965. The Land Tenure (Village Settlements) Act of 1965.
- . 1982. The Local Government (District Authorities) Act of 1982.
- . 1994. Report of the Presidential Commission of Inquiry into Land Matters, Vol. I: Land Policy and Land Tenure Structures. Uppsala.
- . 1995. National Land Policy.
- . 1999a. The Land Act of 1999.
- . 1999b. The Village Land Act of 1999.
- . 2005a. Poverty and Human Development Report 2005. edited by R. a. A. W. G. R. AWG). Dar es Salaam: Mkuki na Nyota Publishers.
- . 2005b. The Strategic Plan for Implementation of New Land Laws (SPILL). edited by M. o. L. a. H. S. Development. Dar es Salaam
- . 2005c. Tanzania Tourism Sector Survey Report. edited by B. o. Tanzania. Dar es Salaam
- Vanderlinden, Jacques. 2000. Les droits africains entre positivisme et pluralisme. *Bulletin des séances de l'Académie royale des sciences d'outre-mer* (46):279-292.
- . 2001. Production pluraliste du droit et reconstruction de l'État Africain? *Afrique contemporaine*.
- Western, D. 1969. *Land use in Maasai Amboseli Game Reserve : a case study for interdisciplinary discussions*. Nairobi: Institute for Development Studies, University College.

VII. List of Contacts

Tanzanian and International NGOs:

Community Research and Development Services (CORDS)
 Mr. Elifuraha Laltaika, Program Officer
 Kwa iddi, Sakina, Arusha
 olesanago@yahoo.com

HAKI ARDHI – Land Rights Research and Resources Institute
 Mr. Baha, Program Officer
 Plot 236, Block 47, Kijitonyama Area, Sinza Mori Street, Box 75885, Dar es Salaam
 baha@hakiardhi.org

Legal and Human Rights Center (LHRC)
 Mr. Daudi Mkilya, Lawyer
 Justice Lugakingira House, Kijitonyama Area, Box 75254, Dar es Salaam, Tanzania
 lhrc@humanrights.or.tz

Maasai Women Education and Development Organization (MWEDO)
 Mrs. Ndinini Kimesera, Executive Director

Simeon Road Corridor Area, Box 15240, Arusha, Tanzania
mwedo@habari.co.tz

MVIWATA – National Network of Smallholders Farmers
Mr. Richard Masandika, Executive Director
ricmasandika@yahoo.com

OXFAM Ireland
Silas Olan'g, Program Officer
Old Bagamoyo Road, Kiko Street, Plot 270, PO Box 10962, Dar es Salaam
solan'g@oxfam.org.uk

PINGOs Forum
Mr. Edward Porokwa, Coordinator
Kaloneni-Mviringo Street, Plot No.25, Box 14437, Arusha, Tanzania
eporokwa@yahoo.com

Parakuiyo Pastoralists Indigenous Community Development Organization (PAICODEO)
Mr. Adam Ole Mwarabu, Coordinator
Box 63, Kimamba, Kilosa district, Morogoro region, Tanzania
olpurkani@yahoo.co.uk

Tanzania Pastoralist, Hunter-Gatherers Organization (TAPHGO)
Mr. Jackson Muro, Program Officer
taphgo2000@habari.co.tz

Tanzania Natural Resources Forum (TNRF)
Mr. Andrew Williams
Box 15605, Plot No.10, Corridor, Arusha
a.williams@tnrf.org

Tanzanian Authorities:

Association of Local Authorities of Tanzania (ALAT)
Mr. Celestine T.Kimaro, Secretary General
Magogoni Street, S.L.P. 7912, Dar es Salaam
ctkimaro@yahoo.co.uk

District Council – Monduli
Mr. Mkumbo, District Land Officer

Ministry of Land
Mr. Shewiyo J.I, Assistant Commissioner for Lands, Eastern Zone
Ardhi House, Kivukoni Front, Box 9132 Dar es Salaam
shewiyoj@ardhi.go.tz

Scholars:

Prof. Katherine Homewood
Biological Anthropology, University College London (UCL)
k.homewood@ucl.ac.uk

Prof. Dorothy Hodgson
Department of Anthropology, Rutgers
dhodgson@rci.rutgers.edu

Prof. Mara Goldman
Assistant Professor, Department of Geography, University of Colorado-Boulder
marajgoldman@gmail.com

Prof. Lesakit S.B Mellau
Professor, Sokoine University
Box 3201 Morogoro
mellau@suanet.ac.tz or lesakit@yahoo.com

Prof. Ebenezer S.Mshana
Professor of Land Law, Univeristy of Dar es Salaam
ebenmshana@yahoo.com

Prof. Issa Shivji
Professor and Land Law Expert, University of Dar es Salaam
issashivji@cats-net.com