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Land Tenure Reforms and Women's Land Rights: Recent Debates in Tanzania

Paper Prepared for the UNRISD Project on Agrarian Change,
Gender and Land Rights

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CONTENTS

LIST OF ABBREVIATIONS USED	4
1. INTRODUCTION	5
2. BACKGROUND TO THE RECENT LAND REFORM PROCESSES IN TANZANIA	6
3. THE RECENT LAND REFORM PROCESSES	9
3.1. Official Processes	9
3.2. Unofficial Processes	14
3.3 Gender Perspectives on the Official and NGO Processes	15
4. THE DEBATES AND THE PLAYERS	18
a. The Government versus Shivji and the National Land Forum	18
b. The Gender and Land Debates: the Gender and Land Taskforce, Shivji and the Government (The Ministry of Community Development, Women's Affairs and Children)	21
5. THE POST-MORTEM: REAL GAINS FOR WOMEN OR CO-OPTATION OF GENDER EQUALITY DISCOURSES?	24
6. IMPLICATIONS OF THE TANZANIA CASE FOR DEBATES ON GENDER AND LAND TENURE REFORMS IN AFRICA: DEBATES ON TITLING, CUSTOMARY LAW AND WOMEN'S RIGHTS	29
BIBLIOGRAPHY	31

LIST OF ABBREVIATIONS USED

BAWATA	Baraza la Wananake la Taifa
DANIDA	Danish Development Agency
DFID	Department for International Development (UK)
ESRF	Economic and Social Research Foundation
GLTF	Gender Land Task Force
HAKIARDHI/LARRI	Land Rights Research and Resources Institute
IFIs	International Financial Institutions e.g. World Bank and International Monetary Fund and Regional Institutions such as the African Development Bank
IIED	International Institute for Environment and Development (UK)
ITR	Individualisation, titling and registration
JET	Journalists Environmental Association of Tanzania
LHRC	Law and Human Rights Research Centre
LTG	Land Tenure Study Group
MCDWAC	Ministry of Community Development, Women's Affairs and Children.
MLHUD	Ministry of Lands, Human Settlements Development
MP	Member of Parliament
NLP	National Land Policy
NGOs	Non-governmental Organisations
NOCHU	National Organisation for Children, Welfare and Human Relief
NORAD	Norwegian Development Agency
PRA	Participatory Rural Assessment
SADC	Southern African Development Community
SAREC	Swedish International Aid Agency
TAHEA	Tanzania Home Economics Association
TAMWA	Tanzanian Media Women's Association
TAWLA	Tanzania Women Lawyers Association
TGNP	Tanzania Gender Networking Programme
UHAI	Ulingo wa Kutetea Haki za Ardhi or the National Land Forum
VA	Village Assembly
VLA	Village Land Act
WAT	Women Advancement Trust
WLAC	Women's Legal Aid Centre

1. INTRODUCTION

The recent processes of land tenure reform in Tanzania and their accompanying debates raised a broad range of questions. These include the focus and direction of national development, the most appropriate models of democracy and the role of different sections of the state in land tenure management, administration and adjudication. As well, they generated discussion about the most fruitful approaches to questions of social justice and equity in the distribution of resources. What is interesting about Tanzanian case is not its total difference from other cases of land tenure reform. Indeed, like elsewhere in Southern and Eastern Africa, Tanzania was experiencing problems its fair share of land tenure problems. Indeed, a number of academic writings on the issue suggest that there was a crisis situation (Ngware, 1997; Kapinga, 1998; Chachage, 1996). These conflicts had their roots in the history of land tenure reform as well as more recent processes of economic liberalisation, which had thrown up an array of interested parties and aggrieved local forces.

However, the contours of the debate are particular to Tanzania's history of agrarian change and land policies. Different elements of this history- which includes moments such as the colonial government's appropriation of the radical title in land, post-colonial policies of such as villagisation and more recently, economic liberalisation and multi-party rule- have provided some of the specificities and concerns which have shaped the land reform debates and processes. Also significant is the particular processes adopted by Tanzania for its land tenure reform and the array of forces called forth by these processes. For example, the establishment by the government of a Land Commission which conducted public hearings and was chaired by a radical legal expert, Shivji, who then became an articulate and influential pillar of NGO advocacy after the Commission's ideas were set aside came to influence the character of the debates. In addition, the presence in the debates of a network of women's rights activists who tried to steer a course between the State and a more radical civil society agenda and the fact that the state itself was in a well on course but uneasy process of transition to liberalisation- have meant that the debates about land titling and registration, customary law and the rights of women have had some striking particularities.

After more than two decades of the dominance of the "there is no alternative to liberalisation" discourse, which has homogenised policy discussions across Africa, it is almost anomalous to find fundamentally opposed views at the heart of the policy process on something as fundamental as land reform. The particular way in which gender and land discourses have slotted into these debates and the views of the various protagonists has confirmed some of the dominant concerns of gender and land debates in other African countries.

This report is an account of the politics and processes of the recent land tenure reforms in Tanzania. It examines the various stages and outcomes of the land tenure reform, the issues which formed the subject of debate, the protagonists in these debates and their positions and strategies. The gender and land debate is discussed in much more detail and situated within the broader questions of land tenure. This exercise provides some insights into the positions of women lawyers, social science researchers and other NGO activists not only on land, but also on broader issues of law reform and the place of legislation, how to address discrimination under customary law, the implications of the larger developmental paradigm for gender equity as well as what these positions imply for strategic alliances within civil society and the State. The Tanzania case is then discussed in the light of the general debates around land tenure reforms in Africa.

The report has five main sections: a background, which discusses land tenure, issues before the reforms and a second section on the reform processes. The debates and the protagonists are then discussed followed by a discussion of the post-mortems following the passage of the Land Acts. Finally, the implications of the discussion for debates on land tenure reforms in Africa are tackled. The reports main sources of information are interviews conducted with key NGOs engaged in the land tenure reform debates, academics as well as government officials. This is supplemented with numerous documents- statements and position papers of the NGO coalitions, OXFAM, papers

presented by academics at workshops, publications on the subject such as Shivji's prolific work as well as official documents such as the Land Commission Report, the National Land Policy as well as the Land Acts of 1999.

2. BACKGROUND TO THE RECENT LAND REFORM PROCESSES IN TANZANIA

Discussions of land tenure in Africa are usually justified in terms of its centrality in what are essentially agricultural economies and societies. Tanzania is no exception to this. In the recent land policy document, land is said to be one of the four pillars of Tanzania's development philosophy, the other three being people, good policies and good leadership (National Land Policy, 1997, p. 42). The Declaration of NGOs and interested persons on Land which was issued by the National Land Forum in 1997, is no less emphatic, when it notes of the then proposed Land Bill which was yet to put before the National Assembly:

This law, like any other law concerning land, will have great significance to each one of us because land is the basis of life for the large majority of people in our country. The large majority of Tanzanians lives in villages and depends on land for their survival. Land is our biggest resource because it is the major means of production of food and other necessities. Land is the source of our wealth and the basis of our existence. Land is also the hub around which revolve our custom, culture and traditions (NGO Declaration, 1997).

Before the recent reforms, which can be dated from 1992, land relations in Tanzania, as in many other African countries, had undergone many important changes as a result of colonial and post-colonial land policies and agrarian change. These changes had resulted in numerous problems, which had not been comprehensively addressed in more than three decades after independence. Before colonisation, landholding was based on the laws and culture of the different language groups and also corresponded to the dominant land use patterns. Colonial rule was to change much of that. The German administration passed legislation in 1895 declaring all land as crown land vested in the German Empire. The British Administration when it assumed control passed the Land Tenure Ordinance No. 3 of 1923 making all land in Tanzania, occupied and unoccupied, Public land under the control of the Governor. No occupation of land was therefore valid without his consent. The governor was given the powers to grant the right of occupancy (known as the granted right of occupancy and defined as the right to occupy and use land for a period of up to 99 years). In 1928, the right of occupancy was redefined to include "the right of a native community lawfully using or occupying land in accordance with customary law" (p. 7, of Land Policy document) thus introducing the deemed right of occupancy.¹ All these had the effect of vesting control over land in the Executive arm of government.

Within the colonial statutory land regime, a minority held granted rights of occupancy while the majority held their land under the deemed rights of occupancy.² There were differences in what these two interests offered their holders. While "customary" land rights holders could go to traditional courts for redress, these processes were subordinate to the colonial state executive. A significant development in this period was the creation and encouragement of individualised freeholds, which were, considered a good replacement for customary law rights.

After independence, freehold titles, which covered less than one percent of land, were converted to leaseholds and then changed to rights of occupancy under government leaseholds. Also, what is described as a semi-feudal system in the West Lake Region was abolished (National Land Policy,

¹ Shivji attributes the introduction of this interest in land to the colonial judiciary with the help of the privy council (Shivji, undated, p. 6). Such land could however still be acquired compulsorily by the colonial government for immigrants.

² It has been suggested that while the relationship between the state and the former was contractual, that between it and the owners of deemed rights was statutory and administrative (Shivji, undated).

1997; Shivji, undated). These policies were justified as an attempt to prevent the creation of a landless class and in keeping with the principle that land could be secured with use. For the next two decades, individualisation, titling and registration (ITR) as occurred in Kenya was not on the cards (Shivji, 1998; Kapinga, 1998). However, modernisation ideology continued to flourish and policies, including that on agriculture and land, reflected this. The Post-colonial State inherited the radical title³ in land and this was justified in terms of the development and nation building.

Following the Arusha Declaration in 1967 and the policy of Ujamaa, rural development was organised in two main ways- large scale ranching and agriculture under parastatals and small-scale agriculture under villagisation. Villagisation involved the resettlement of over nine million peasants in villages. It has been noted that this resettlement, which was often without the consultation and consent of the resettled and without regard to the land tenure system, was implicitly justified in terms of the state's ownership of land. A whole host of problems have been identified as a result of these policies and the attendant processes of agrarian change (Ngware et al, 1997). Economic liberalisation policies of the 80s resulted in the reversal of Ujamaa. The development of land markets, growing land scarcity and disputes led to demands for land reforms across Tanzania. For the majority of Tanzanians who lived in villages, the rules that governed land relations under customary land tenure and under villagisation policies clearly did not quite deliver security of tenure. While customary law rules governed the everyday transactions and inheritance, the overarching influence of state structures and practices led to complaints of abuses of the rights of rural and peri-urban land users particularly groups such as pastoralists and socially disadvantaged groups within many communities such as women and the youth (Shivji, undated; Ngware, 1997).

While there is general agreement that customary land tenure rules discriminate against women in relation to men in different ways, the ways in which such discrimination occurs and therefore the most effective solutions are disputed in Tanzania. Three broad strands of debate can be isolated. The most prolific are the anthropological studies of both patrilineal and matrilineal groups. They have sought among other things to demonstrate that women did have some significant rights under customary land tenure, which were eroded by processes of agrarian change and the codification of customary law. Also, they have suggested that women have contested and resisted this erosion of their land rights in various ways and this needs to be understood in any discussion of land tenure reform⁴ (interviews with MM, BK, 2001; Mbilinyi, 1988; 1991; Odgaard, 1997; 1999).

Odgaard's research in Iringa and Mbarali Districts among the Hehe and Sangu is an example of this tradition. It demonstrates that historically both male and female children were entitled to a share of their father's property. Inheritance rights were tied to the responsibility for children, the old and the sick. Sons and brothers inherited larger portions of a deceased person's land because they were expected to shoulder the bulk of such responsibilities. Odgaard however reports that women's inheritance rights are in dispute these days with brothers arguing that sisters cannot inherit land and sisters with the support of their fathers arguing the opposite. Marital residence, which was patrilocal, did not favour women because their share of property was often left in the care of brothers to be accessed by them in case of divorce or widowhood. The growing incidence of divorce, single

³ The radical title is the highest interest in land and is equated with ownership of the land. Section 4 (1) of the Land Act of 1999 declares that all land in Tanzania "shall continue to be public land and remain vested in the President as trustee for and on behalf of all citizens in Tanzania". This makes the President of Tanzania the holder of the radical title.

⁴ This tradition has also tended to justify its interest in women's land rights in economic terms, usually on grounds of their predominant role in agricultural production, but also less usually in terms of the importance of land for other economic activities. For example, Ngware argues, citing Mbilinyi, Odgaard and Suda, that women contribute much more to agricultural work than men as both the main growers of food and export crops and also as providers of labour both paid and unpaid. Women's contributions are even more critical, because many of them are heads of households who have responsibility not only for agriculture but also family welfare (Ngware, 1997, p. 23). Koda for her part has argued that culture in the form of discriminatory inheritance rules has had a negative impact on women's success as entrepreneurs since more many successful entrepreneurs, inheriting some wealth has been a key factor (1997).

parenthood as well as the growing incidence of male labour migration, formal education etc. has meant that more women have to take responsibility for family members in the countryside. As a result many fathers are supporting daughter's claims, thus underlining the argument that inheritance goes with responsibility for the welfare of the living (Odgaard, undated).

Koda's research among the patrilineal Pare of the Kilimanjaro Region found that although men mostly control land, women had both use and control rights over small plots around the homesteads. A father gave such land to his daughter on her marriage. While she could allocate such land to another person when she was not using it, she could pass it on only to her own daughters. Because these plots were around homesteads and it was precisely the places where coffee came to be grown, this affected women's rights to the small plots because it was men who mostly grew the coffee. The increased pressure on such land created by population changes and the advent of cash crops meant that this customary practice begun to lapse (Koda, personal interview, 2001; Omari and Shaidi, 1992; Lusugga and Hidaya, 1996). Odgaard's research among the Nyakyusa in Rungwe District in the Mbeya Region suggests that the growing individualisation of land rights and land shortages have resulted in a process of concentration of land in male hands. This has reversed a situation where women did have rights in land but which were different from the more established and abiding rights that men had as members of one community were. As she notes, women's rights were determined at any point in time by their status- as girls, as married women and as widows and therefore, their rights and obligations were to different communities (natal and marital) at various stages in their lives. These principles notwithstanding, fundamental changes in the situation of the Nyakyusa have resulted in a situation where daughters are no longer able to inherit land and women's access to land is now largely through marriage (Odgaard, 1997).

Significantly, the studies also suggest, that in spite of these processes of erosion, there is evidence of some practices which have tried to address questions of insecurity in rights to land which have benefited women, as well as efforts by women themselves to safeguard their rights by recourse to favourable traditional practices, and less commonly to legal processes. One such traditional practice is the institution of female husband, by which widows safeguard their interests in their husband's land by marrying a woman who then provides labour and also children, who are born in the name of the deceased husband. In some communities, there is a trend of parents distributing land to daughters and sons in their lifetime as a social security device. Also, village authorities were reported to be supportive of claims of daughters when they were challenged by male relations and in laws. Once these cases got to the courts, however, customary law rules were asserted to the detriment of women (Mbilinyi, 1999). And yet, there have also been a number of court cases which have affirmed women's interests under customary law, the most famous of these being *Epharahim v. Holaria Pastory*.⁵

Therefore it has been argued that the National Land Policy (1995)'s disregard for the fact that in many communities, women did have some land tenure rights is problematic. For example, the National Land Policy's rendition of landholding rules before German and British Colonisation is revealing in how it writes out women:

"The individual as a member of a family, clan or tribe acquired rights of use in the arable land he and his family could clear, cultivate and manage", states the policy (p. 6). Again, it is noted that "when land was held under family tenure, each member of or and heir of that family had a definite share in that property. Each member of the family could not dispose of his share without either getting the consent of other family members and a right of pre-emption to other heirs. Similarly, where land was held in a clan, the owner could not dispose of it to a non-clan member without first getting the permission of the clan elders" (p. 6).

Thus it has been argued, that simply making the recommendation that traditions or customary law and practice be observed with regard to family land ignores the fact that some important traditions of women's access to and control of land are not widely known. Traditions of male control have become

⁵ *Epharahim v. Holaria Pastory and Another*, Unreported Primary Court (Civil Appeal) No. 70 of 1989.

the dominant discourse on land rights in spite of the more complex character of realities on the ground (BK, interview, 2001).

The second strand, represented by the feminist lawyers is less historical in approach, basing its positions on the situation as is currently stated under the law. Studies and writings of this group have tended to demonstrate, through a discussion of the rules, how customary law discriminates against women in terms of access, control and inheritance of land (GLTF; Rwebangira, undated). Writers such as Shivji represent the third strand. Shivji suggests that women's land issues are less about access and more about control and ownership because the evidence shows clearly that women are the "real producers/labourers on land in Tanzania" (Shivji, p. 84), thus implying that women have access.⁶ On the question of ownership, he argues that neither men nor women nor communities own land because it is vested in the State. The rights available to them are of occupancy, in other words, control, which on the face of it can be owned by both men and women. These rights are mostly in the hands of men because of poverty and patriarchal practices existing within families, communities and the society at large (p. 86). Also, men as clan and family elders and village leaders are in sole charge of decisions about allocating and disposing of land, and rules of inheritance and divorce practices discriminate against women.

These differences in position and approach are important because different attitudes flow from them about how to address the gender and land tenure issues. For example, there are clear differences in attitudes to customary law. Thus while the legal feminists seek to replace customary law rules with statutory rules granting women equal rights of access to and control of land, the Shivji position does not consider customary law as the main problem of land tenure, and in recognition of its discriminatory provisions, would want it reformed tangentially and administratively. The anthropological feminist position is more ambiguous about customary law rules (Mbilinyi, 1999; see also interview with BK, 2001). These differences as they are played out in the land reforms processes and debates, will be addressed in later sections of the paper.

3. THE RECENT LAND REFORM PROCESSES

3.1. Official Processes

In January 1991, Issa Shivji, a professor of law was appointed by the President of Tanzania to chair a Commission of Inquiry into land affairs. For 18 months, the Lands Commission visited most of the districts of mainland Tanzania interviewing communities and their members about problems of land tenure. Around the same time, the Ministry of Lands, Housing and Urban Development (MLHUD) also established a committee to review land tenure. This Committee used workshops, seminars and desk research to collect its information. It has been suggested that in addition to differences in methodology, the two processes had different briefs. While the Commission was established because of complaints from the public about land conflicts, the Ministry's brief was to address "inconsistencies in existing outdated land law, which made it difficult to plan and administer land matters" (Chachage, 1996, p. 4). Thus the committee was concerned to clarify the inconsistencies and deal with the issue of how the government could advance development within the liberalisation paradigm in the face of the problems of the existing legal system. The difference between the Commission and the Ministry's committee, in Chachage's words, was that the Ministry "was not interested in the restructuring of the system, but in its streamlining so that responsibilities could be clearly defined and delegated. Its stated main concern was how to protect small holders' rights to land from land grabbers, while at the same time responding to interests of the investors" (1996, p. 5).

⁶ But see Koda's argument that access to land is not a problem mainly in parts of Tanzania where basic infrastructure is not in place and there is low population density. In other parts of Tanzania, there is evidence that women and youth have difficulty with access to land (Interview with BK, 2001).

In November 1992, the report of the Shivji Commission was submitted to the Government of Tanzania. A number of the Commission's detailed recommendations became the subject of a national debate involving the government, academics and NGOs.

Of the four underlying principles guiding the Land's Commission's work and recommendations, the most significant for gender relations and land is "the modernisation of tradition as opposed to the imposing of modernisation on tradition" (Kapinga, 1998).⁷ This issue is tackled in the section on the debates around land tenure. The recommendations of the Lands Commission are discussed under three broad headings: policy and questions of law; administration and adjudication of disputes; and gender equity. On questions of policy and law, the Commission recommended that the shape of a new land tenure system be stated in Tanzania's constitution to give it the profile and legitimacy for effectiveness and protect it from the vagaries of political and administrative practice. Secondly, it was recommended that the radical title over all lands no longer be vested in the President of the Republic as head of the executive. In what was billed as the diversification and democratisation of the radical title, it was recommended that National lands should be vested in the Board of Land Commissioners within a National Lands Commission, while village land would be vested in their Village Assemblies,⁸ to be held and for the use and benefit of village members. These holders of the radical title would also be constitutional bodies (Shivji, 1998; p. 49; Kapinga, 1998)⁹. As was later argued by Shivji, this was the chosen alternative to individualisation of land tenure and the vesting of the radical title in individuals (Interview with IS, 2001).

In relation to village lands, the most important recommendations were about making village inalienable to outsiders such as state and para-statal institutions and companies not exclusively owned by villagers. Other Commission recommendations include small-scale allocations (of a maximum of three acres and a customary lease not exceeding ten years, but renewable) to persons from outside who are interested in small scale investment which is of mutual benefit.¹⁰ Other issues tackled by the Commission were the simplification of the registration process for village land, as well as the mandatory inclusion of the name of a spouse or spouses on the Certificate of Title to Village Land-what Shivji was later to call a village based titling system (interview with IS, 2001).

The establishment of new institutions, the inclusion or exclusion of land matters in the brief of already existing institutions was a central part of the recommended changes in governance and the adjudication of land disputes. The Commission recommended the establishment of the National Land Commission to be headed by a Board of Land Commissioners whose members will be nominated by the President and confirmed through public hearings. At least two of these were to be members of Village Assemblies.

In relation to Village Assemblies (VAs), the Commission also recommended that a quorum and a mandatory minimum percentage of women in their deliberations were needed. Other

⁷ The other three are the democratisation of land tenure control and administration; the idea that rules of tenure should facilitate "accumulation from below and the underlying principle of "security and safety of land rights first" (Kapinga, 1998, quoting from the land Commission Report Vol., 1, p. 131).

⁸ A Village Assembly is composed of all adult (18 years and above) members of a village while the Village Council is composed of 25 elected representatives of the village.

⁹ During the protracted disputes about the land tenure reforms, Shivji was to argue that its recommendations about the radical title and related issues were in response to the demands from the countryside to democratise the land tenure system. In his view, this translated to a demand that ordinary persons participate either directly or through their representatives in decision making with regard to land. Thus both the existing land tenure system which he describes as statist and the market model of individualisation, titling and registration being advocated by the IFI, foreign donors and consultants would not fit the bill (Shivji, undated).

¹⁰ The Commission also recommended a ceiling of 200 acres on land ownership in the Village. This amount was considered sufficient for medium size ranching and mechanised agriculture. The village commons e.g. water catchment areas, sacred sites, pasturelands, were also to be declared inalienable and under the direct supervision of the Village Assemblies.

recommendations are that the VAs elects five (5) elders to constitute the council of Elders with a term of three years, renewable for two terms. This Council, which will have civil and criminal jurisdiction, is the dispute settlement forum for Village land. The Circuit Land Court is to hear appeals from the Council of Elders and supervise its work. This court will hold its hearings where the land dispute is located. The Circuit court will sit with an advisory panel of three elders whose views the judge is not bound to take, although he or she has to explain any agreement or disagreement with their views. This recommendation is to ensure that judges and magistrates, who have to deal with village land cases, come to understand the values and notions about justice and equity, which inform land relations within communities.

Gender equity and land issues also received some attention. According to the Commission, it received both “direct and indirect” information about gender inequalities in access to and control over land. However, it concludes that inheritance is the most serious of the issues facing the females with regard to land (Presidential Commission Report, vol. 1 p. 249). The three major bodies of law governing inheritance and succession in mainland Tanzania are identified as statutory law, Islamic law and customary law. The most egalitarian of this is statutory law in the sense that it does not discriminate between male and female heirs. However, it is rarely applied in mainland Tanzania. Customary law rules, which are the most used, have some commonalities. Among a wide range of patrilineal communities, an important principle is the protection of clan land alienation to outsiders. This has formed the basis for discrimination against women as daughters, wives, divorcees and widows (Commission, p. 251).

The attempt to codify customary law, especially in matters of succession saw the passage of the Local Customary Law (Declaration) (No. 4) Order, 1963 which deals with intestate succession in patrilineal communities. Apart from distinguishing between self-acquired land, family land and clan land, a partial principle of primogeniture is applied to self-acquired land where the eldest sons receive a third of property and daughters inherit between one tenth and one twentieth. In terms of family land, which appears to be lineage land, daughters cannot inherit unless there are no males, and even then, they have only a life interest and cannot sell or bequeath such property. Similar rules also apply to clan land. Under Islamic law, although some share is provided for females, they tend to be unprovided for in practice.

The Commission cautions that, because rules of succession and inheritance are connected to religious practices, they have to be reformed with care. At the same time, it suggests that that customary laws are responsive to social change and this is an asset. In terms of options to address problems of succession, the Commission notes four possible options-

- Hard law- i.e. uniform law on succession for everyone and the abolition of personal laws.
- Soft law- continues the application of personal law but subject to certain principles embodied in statute.
- Evolutionary option- let personal law continue to apply, but address gender inequalities in other laws in other spheres of life in the hope that changes in other areas of law will eventually affect succession e.g. TAWLA lobbied to have the Constitution amended to include sex as one of the outlawed bases of discrimination. This was achieved in 2000 and TAWLA believes that this strengthens the basis to struggle against discriminatory provisions in other laws (TAWLA, 2000).
- Customary law option- let customary law continue and hope that it will evolve through the struggles of people themselves rather than through legislative intervention.

With regard to the options, the commission argues that the hard law option is not on the table because a) it would not satisfy all communities and therefore leave many unhappy people; b) it would be difficult to enforce and more likely to be breached than observed; c) it raises questions of the rights to cultural diversity and expression. On the other hand, the Commission does not favour the customary law option because of the belief that evolutionary processes need to be nudged in a positive direction

and unless such interventions take place, change could be extremely slow. For these reasons, the Commission favours the evolutionary and customary law approaches as the most feasible. This is because the both the hard and soft law options raise similar questions (Presidential Commission, p. 256).¹¹ The Shivji Commission recommended close study of the successes and failures of Succession laws, implying a discomfort with this approach by his statement that imposing legislative change in personal laws has never been easy. And yet, elsewhere, the Commission suggests that legislation, while it may not have immediate effect encourages certain trajectories. (p. 254)

The government organised a National Workshop on land policy at Arusha in January 1995.¹² It has been suggested that because the government found the Shivji Commission's recommendations for a multiple tenure system and the divestiture of the radical title from the executive unacceptable, it hired a consultant firm Tropical Research and Development, Inc, with the financial support of the World Bank,¹³ to write a technical report which formed the basis of the Arusha workshop and the national land policy (Chachage, p. 6). It was confirmed in the interviews that after the Shivji Commission, more studies involving local and foreign experts were conducted to investigate issues such as ITR and the organisation of land records (Interview with FKM, 2001). The outcome of all these processes was the National Land Policy.

In that document, the government of Tanzania laid out the justification for and objectives of the policy, identified the problems it wanted to address and made policy statements about them. It also stated that the government's response to the Shivji Commission was incorporated into the Policy.¹⁴ From early on, it is affirmed that the policy retained four central land tenure tenets in a modified form- land is publicly owned and vested in the President of the Republic, the rights of occupancy under both statutory and customary law would be the only recognised interests in land, land speculation would be controlled and land rights based mainly on use and occupation. According to the land policy document, the objectives of the policy are the promotion of a secure land tenure system, the optimal use of land and broad based environmentally sound social and economic development. Clear efficiency and equity objectives can be found in the eight specific objectives stated.¹⁵

Commentators have argued that while the land tenure reforms were said to be because of local land conflicts, they were mainly to facilitate the entry of foreign investors and well heeled Tanzanians and

¹¹ Interestingly, the Law Reform Commission of Tanzania has recommended a unified Law on Succession in its recommendations to government on succession. That law is yet to be tabled before parliament. In doing this, the Law Reform Commission is following practice in Zambia, Kenya, Uganda and Ghana. It has been suggested that the reason for the delay in tabling the new Law is because of fears of disturbing the sensitivities of a particular religious grouping (Interview with JW, 2001).

¹² Mrs Siwale, founder of the Women Advancement Trust (WAT), then a member of Parliament and ex-government Minister reports that she was one of the few women invited to this meeting. Together with others, they worked to convince the gathering of the need to have stronger policies to promote gender quality in access to and control over land.

¹³ The World Bank also supported the Ministry for Women's Affairs' efforts to intervene in the land tenure debates through a PRA study.

¹⁴ Among the list of justifications for a new land policy were changes in land use, increased population and urbanisation leading to increased demand and competition for land in particular locations. Others were the growth in the livestock population, reduction in land available for pastoralists, environmental problems, land use conflicts and the upsurge of prospective investors in need of large pieces of land. Also mentioned were the impacts of villagisation, the development of land markets, the evolution of customary land tenure towards individualised ownership, the adoption of political pluralism and recent court of appeal decisions affirming customary tenure rights in villages.

¹⁵ The first three relate to equitable distribution of and access to land by citizens, the reaffirmation of customary rights of both peasants and herdsmen and the prevention of land grabbing. The second three relate to the most productive use of land, the streamlining of land management, land administration and dispute settlement systems to make them more efficient, transparent and to promote rapid social and economic development. The last two also relate to sound information management and the protection of resources from degradation.

were being carried out under pressure and guidance from donors and the IFIs.¹⁶ This view of the National Land Policy is also supported by the observation that the Land Policy prohibits shifting agriculture and nomadism (Kapinga, 1998).

The National Land Policy recognised a dual system of land tenure made up of customary and statutory rights of occupancy, both of which were to be equal in law. It also made provision for the registration of such titles, both the customary and the statutory. There was a provision to restrict the access of foreigners to customary land as well as policy statements about the protection of land from speculation. In addition, there were recommendations regarding registration of land titles in general as well as specific provisions regarding village land and the protection of village land holdings. Regarding conflicts between statutory and customary law, the policy states that customary law is not automatically extinguished in planning areas and that due process must be followed to extinguish such rights.¹⁷ The institutional framework for land tenure governance was also the subject of policy statements with the view to reducing conflicts and malpractices, clarifying the powers of the minister for lands and the rationalisation and consolidation of all existing laws dealing with land tenure.

Most important for our purposes were those provisions regarding women's land rights. They include a statement that women have inferior land rights relative to men and that their access is indirect and insecure. It was also stated that the traditional provisions which protected women's land use rights had been eroded and that for land allocation, village councils have used customs which discriminate against women by allocating land to heads of households who are usually men (Land policy, section 4.2.5, p. 12). It was therefore provided that women would be entitled to acquire land in their own right through purchase and through allocations. However, it was stipulated that the inheritance of clan land would continue to be governed by custom and tradition provided it is not contrary to the constitution and principles of natural justice. Another provision was that ownership of land between husband and wife would not be the subject of legislation.

After the National Land Policy was adopted, the Government of Tanzania hired a British land expert described as a legal consultant of the Overseas development Agency, now known as Department of International Development (DFID), Professor Patrick McAuslan to draw up new legislation on land in 1999. This Draft Legislation was debated and passed in Parliament into law in 1999. The Lands Acts, 1999 were made up of two pieces of Legislation, the Village Land Act, which governs lands within villages and the Land Act, which covers all other land in mainland Tanzania. In keeping with the land policy document, all lands were to continue as public land vested in the President of the Republic as trustee for and on behalf of all citizens. Use and occupation of land would continue to be through granted and customary rights of occupancy, the two types of occupancy to be at the same level at law. Land under the Acts is classified into three- general, reserved and village land, all three categories under the ultimate administration of the Commissioner for Lands at the Ministry of Lands via the Village Council for village land, some statutory bodies for reserved land with general land directly under the Commissioner. The Commissioner also has the power to allocate both general land and reserved lands, with the advice of a land allocations committee. Thus the administration, management and allocation of land are under the central government.

In the case of village land, certificates will be issued to village councils to confirm their management powers over village land. Members of the community will be issued certificates of customary right of occupancy, not automatically, but through a process of adjudication and titling. Three types of

¹⁶ Shivji, undated, The Declaration of the National Land Forum, 1998; Manji 1998; Kapinga, 1998; Mbilinyi, 1999. To support this point, Kapinga quotes President Mkapa's statement that some of the aims of the land policy would be to make land rights more permanent, recognisable and legal so land becomes an asset capable of being deployed to satisfy borrowing conditionalities and for investment and share-holding (interview with President Mkapa quoted in Kapinga, 1998, pp. 4- 8).

¹⁷ Other provisions of the Policy related to urban areas and urban agriculture, areas of population pressure and resettlement, land use management covering agricultural land, range-lands and livestock keeping, large-scale farms as well as wetlands, the coastline, fisheries and hazard lands.

adjudication are envisaged- spot, village and central. The Acts have special provisions dealing with women's participation on Village Land Councils and the National Advisory Board.

3.2. Unofficial Processes

The National Land Forum (Ulingo wa Kutetea Haki za Ardhi (UHAI) in Swahili), a coalition of NGOs and concerned individuals was the outcome of a two-day meeting held in Dar es Salaam in May 1997 to debate the proposed Land Bill. Organised by Hakiardhi (also known as the Land Rights Research and Resources Institute or LARRI), the meeting which was attended by NGOs, media institutions and concerned individuals heard papers on various aspects of the Bill and debated these issues. The Forum then elected a co-ordinating committee, the National Land Committee, made up of a number of NGO representatives, to steer its affairs. It also issued a Declaration on the Land Bill. The Declaration will be discussed in more detail in the section on debates and players. The Forum organised a number of workshops throughout the period leading to the passage of the Land Acts.

Once the draft Land Bill became public knowledge, gender equality activists began to mobilise to ensure that the Bill reflected their concerns. A useful account of the process by the Tanzania Gender Networking Programme (TGNP) records that a now suspended organisation, Baraza la Wananake la Taifa (BAWATA)¹⁸ had initiated civil society advocacy around gender and land issues by organising a workshop for women to discuss the draft Bill. After BAWATA's suspension, the Tanzania Women Lawyers Association (TAWLA) became the convenor of a coalition to promote gender equity in the land tenure reforms. A consultative workshop organised in March 1997 attended by a broad range of civil society actors and government representatives decided the issues on which gender equality activists would focus. One of the outcomes of the workshop was a coalition to be co-ordinated by TAWLA. The coalition established a seven member committee, the Gender Land Task Force (GLTF) to champion the interests of disadvantaged groups, women and youth in particular. The task force members were TAWLA, the Tanzanian Media Women's Association (TAMWA), the National Organisation for Children, Welfare and Human Relief (NOCHU), Tanzania Home Economics Association (TAHEA), the Women Advancement Trust (WAT), the Women's Legal Aid Centre (WLAC) and the Tanzania Gender Networking Programme (TGNP). Some of the above mentioned organisations- TGNP, TAWLA, TAMWA- were already members of the National Land Forum and its steering committee the National Land Committee whose other members were groups such as HAKIARDHI, the Law and Human Rights Research Centre (LHRC), Journalists Environmental Association of Tanzania (JET) and the Kigamboni Women's Group). However, for a while, these two processes run in parallel streams.

The GLTF's goal was to secure a gender sensitive land law, which addresses the issues of marginalised groups of women, men and youth. Each member of the task force was assigned responsibility for different aspects of the campaign- TAWLA was to co-ordinate meetings and also take the lead in interpreting the Bill from a women's rights perspective, TAMWA was to deal with media advocacy, TGNP to lobby MPs while the others were to sensitise the public through community mobilisation, outreach activities and workshops. The coalition undertook a wide range of activities (See TGNP 2000 for the details).

By 1998, as a result of a sense that the National Land Forum and the Gender Coalition processes were best served by stronger co-operation between them- there were fears about the dissipation of energies and the possible exploitation of differences by the government- TGNP organised a meeting of the

¹⁸ See Meena, R. (2000) for an account of BAWATA's history and how it came to be de-registered by the government after it had been registered as an independent NGO by women's groups and individuals, including members of the Tanzania's ruling party's women's wing. Meena feels BAWATA, which was conceived as an autonomous women's organisation to unite all women in Tanzania during the transition to multi-party constitutional rule in Tanzania was banned because it would have been a competitor of the women's wing of the ruling party.

Feminist Coalition¹⁹ to discuss this issue. The outcome was a decision by the Gender Land Task Force to enter into coalition with the National Land Forum in order that to focus on both gender and “progressive”²⁰ issues within the Land Bills. The merger became the Land Coalition. Although it had been assumed that the Land Coalition would be a sum of the two coalitions, it soon became clear that there were differences within the new coalition. As the discussion will show, the issues that were to prove divisive were the radical title, attitudes to customary law and village level organisations. The TGNP has observed that in addition to these differences, the Land Coalition also began to divide around questions of allocation of donor funding. As well, individual organisations within the coalition began to engage in activities under their own steam (TGNP, 2000). In an elaboration during interviews, it seemed to have been the feeling that the women’s rights activists had abandoned any participation in the Land Coalition and the work around its demands. There is speculation that this may have been because TAWLA did not want to be associated with Shivji’s radicalism (Interviews with AM and MJ, 2001). It is therefore not surprising that there was such strong dissent within the Land Coalition about the achievements and failures represented by the Land Acts.

3.3 Gender Perspectives on the Official and NGO Processes.

While the Land Commission began its work in 1992, the gender and land debates have been dated from 1995 when the conference was called in Arusha by the Ministry of Lands to discuss the National Land Policy. Groups such the Tanzanian Gender Network Programme (TGNP), which became very active in gender and land reform advocacy, had barely been established at the time Shivji Commission begun its work. The TGNP, established in 1993, dates its involvement in the land issue from when it was invited to participate in the Arusha meeting called by the government to discuss the National Land Policy, not because of its record on land and gender issues, but because it was known as an active NGO through its activities during the 1995 election (Interview with AM and MJ, 2001). Also, none of the already existing women’s groups were focusing on land issues in a systematic manner. The Women’s Advancement Trust (WAT), an environment and shelter NGO, did episodically raise questions of women’s access to land. Again, community-based women’s groups tended to focus on women’s general welfare but not on land per se. Thus the observation that women’s groups and women’s rights advocates did not focus either on rural or urban land issues in the period before Arusha 1995 is correct (Manji, 1998).

In 1995, the Land Commission’s Report begun to receive criticism from women’s rights advocates. It was generally felt by women’s rights advocates that the Commission had not seriously focused on gender inequalities in land rights. This was expressed with various degrees of vehemence during interviews with groups and individuals (BK, S, 2001). As one respondent said, “the Land Commission marginalised gender issues. While women may have participated in its hearings, it is important to know that the type of questions it posed meant that women could not articulate gender issues” (BK, personal interview, 2001). Shivji quotes the co-chair of the Land Tenure Study Group (LTG), Professor Anna Tibaijuka as accusing the Commission of arguing for the maintenance of the status quo in relation to gender relations in the midst of extremely radical reforms about land tenure reforms (Tibaijuka, quoted in Shivji, 1998. p. 83). Shivji defends the Commission’s approach to gender issues, arguing that the Commission’s terms of reference did not require it to focus on gender issues and also that women’s rights issues in relation to land were succession law issues and therefore outside the purview of land law reform (The Land Commission, 1994, p. 249). The third defence was that

¹⁹ The Feminist Activism Coalition, Fem Act which was started in the 1980s to promote co-operation among human rights activists working on gender equality issues was formalised in 1995 by about fifteen organisations. The Fem Act has a number of coalitions to help it work towards the implementation of the Beijing Platform for Action. These include the violence against women, human rights, constitution, NGO policy, food security, civic and voter education, gender budge and the land coalitions. For each of these smaller coalitions, a member of the Fem Act is assigned the lead role in organising activities with the support of other members (TGNP, 2000).

²⁰ It is interesting that the concerns of the Land Forum were referred to as progressive issues and distinguished from gender issues (See for example, TGNP, 2000).

women would in any case benefit from the reforms being proposed in the Lands Commission Report. As Shivji argues the case,

"It is true that the Commission did not; and could not, given its mandate, go into any great detail to suggest gender reform. Yet to my mind, the group is probably understating the possible radical effect of including the names of both spouses on the customary certificate" (1998, p. 83). See also the Presidential Commission on Lands, vol. 1., p. 249).

Manji (1998) responds to Shivji by arguing that only a narrow interpretation of the Commission's brief which puts gender issues outside its areas of concern. Secondly, that the division of law into areas of succession and land as though they were discrete is quite artificial. Moreover, women's land issues are not only in relation to succession. As she argues,

"It is possible that such matter, far from relating solely to succession matters, may have included, for example, women's difficulties in exercising effective management and control of land, problems of access to land and, in connection with the problem of land alienation through land grabbing, details of the specific ways in which this has impacted upon women food producers" (Manji, 1998, p. 652).

It is noteworthy that TAWLA appears to share the view of the Presidential Commission that succession is the main problem area for women's land rights. In 1997, when TAWLA executive members met President Mkapa, of the seven demands they made of the government, inheritance and succession was second. The others were the recognition of sex in defining discrimination in the constitution, violence, women in decision-making, poverty eradication, women and environment and gender parity in the enjoyment of citizen rights. Nowhere is general access to land discussed (TAWLA Special Bulletin, May 2000). The government also appears to see the issue in this light. The commission argues that succession did not fall within the commission's mandate. And yet the President of Tanzania directed that the Commission address the issue of female succession. Time constraints did not allow them to look in detail, according to Commission (p. 250).

Manji also makes a more general critique of the Land Commission Report's approach to gender issues. She notes that the commission does not make proposals based on the evidence it has heard, but attempts to demonstrate that its recommendations would have a positive impact on gender relations, without explaining how or why. The Commission believed that its recommendations on the radical title, the recording of names of spouses on the land certificates and the recommendation that land could not be disposed of if the Council of elders had reason to believe that the spouse and children of the disposer would be impoverished, and if a spouse's agreement is not sought, would address many of the injustices women experienced in relation to land. While the latter two recommendations can be seen to be in the interests of women, in the case of the radical title, the Commission admits that it is on less firm ground. While it argues that the recommendation to vest radical title of village land in the village assembly should theoretically undermine the concept of clan land, the Commission accepts that this may not happen because clan lands did co-exist with public lands and the impact of the public land concept on clan land was not very clear.²¹ However, the Commission argues that "vesting of lands in the village assembly, on the other hand, is much closer to home. Village assembly is a body in which both men and women participate. The impact of this on gender relations so far as land is concerned remains to be seen" (p. 249). Not surprisingly, women's rights activists, with the exception of a few, did not see what was in this provision for them.

Unlike other issues for which the Commission is able to match a discussion of the law with practice, in the case of gender and land rights, it focuses mainly on stating the laws of succession and then making recommendations for reforming them. The Commission's less than thorough approach to

²¹ Interestingly, TAMWA reports that there was division in the gender and land coalition around the radical title with some persons expressing concern that some men might take advantage of this to sell their land if they felt that they had the sole right over it (interview with JM, 2001). Whether or not these concerns are reasonable is not the point. That they are expressed shows that it is not enough to demonstrate that women may benefit from having the radical title vested in the Village Assembly.

gender issues returned to haunt the NGO coalition, which coalesced around the Land Commission Report.

Interestingly, only a year before the Land Acts were passed, Manji had noted that gender equality issues were almost totally absent from the mainstream of the debates around land reform. Manji's article, published in 1998 and probably based on research in 1997, was before the most intense period of advocacy around the land reforms and therefore did not anticipate some of the developments. While it is the case that initially, women's land rights issues did not receive much attention from the Land Commission, the Government and the Land Forum, by the time the Land Acts were passed, gender equality issues came to acquire national status, complete with dedicated coalition. So from a position of marginality, women's rights advocates were able to position their issues in a way that made them worthy of attention from all the protagonists in the debate. That Shivji should have written a chapter on gender and land in his review of the land reform process in defence of his positions (Shivji, 1998) as well as subsequent criticisms of the gender and land lobby's positions and strategies after the Land Acts were passed (Shivji, 1999) suggests that the issues had some presence in the national space.

In that same vein, Manji's critique of the gender and land coalition needs qualification. While it is true that the gender land task force's critique of the Land Bills was not written with the same level of sophistication and detail as the Land Forum's well argued and articulate Declaration, the GLTF position paper did raise a number of important questions. For example, one of the issues which engages Manji's attention, the capacity of women to access the judicial process to enforce legislative protection is also raised by the GLTF in relation to the draft laws' provision declaring discriminatory customary law rules null and void. This issue also came up in interviews (Interview with TS, 2001). While it may not have discussed the pros and cons of the different approaches to customary law as the Shivji Commission did, the GLTF statement makes clear that it did not support either an evolutionary or customary law approach and states reasons why. This is not to signify this writer's agreement with its proposals about customary law, but simply to draw attention to their existence.

Manji's comments about the conduct of the land debate by feminist groups in Tanzania also raise a number of issues. She criticises them for their failure to see the importance of the land reform debates because of their preoccupation with employment and for their technocratic and legalistic approach to the issue when it came to their attention. Because of their late entry, she argues, they were not able to set the agenda for the debate on women's land rights but came to react to reports and draft legislation. The class composition of the dominant women's groups limited their capacity to engage with an issue which concerned rural women most and also created a conflict of interest because they stood to benefit from liberalisation in a way in which rural women could not (Manji, 1998; See also Shivji, 1998; 1999). Some of these points are useful. For example, it has been observed that the main beneficiaries of the liberalisation of land markets will not be the people who cannot survive without land, i.e. poor men and women. On the contrary, it is they who will be pressurised to sell the land they survive on to meet pressing basic needs (Interview with BK, 2001). Also in interviews, TAWLA did focus on issues such as the ability of businesswomen to use land as security for loans from banks and the growing ability of women to purchase land in surveyed areas (Interview with JM, 2001). However, as formulated together, these arguments create a picture of NGOs such as TGNP and TAWLA, which is only partial. The most problematic of these points are about the class composition of the feminist groups and the influence of Western feminist and foreign aid agendas on their work. This ignores the general class character, aid dependence and general culture of civil society advocacy groups in Africa. Groups such as Hakiardhi, TGNP and TAWLA are populated by persons of similar background and operate in similar ways.²² And yet, they have taken different positions in the land

²² The TGNP which has had to defend itself against comments about its class composition has argued strongly that through one of its structures, the intermediary networks, community based organisations representing rural women participated in the TGNP and its work on land reform in at least five Districts (Interview with AM and MJ, 2001).

debates. There has to be more to this than class interests. To pursue this point to its logical conclusion would disqualify much of the academic writing and civil society advocacy in Africa today.

The critique of the reactive, technocratic and legalistic approach to the land reform issues taken by the GLTF is fairer. The idea that the problems of the Land Acts could be fixed by the addition and subtraction of a few paragraphs of legislation is of course problematic as Manji has pointed out. Undoubtedly, the GLTF's position paper on the land reforms can be described as technocratic and legalistic. In a situation where there is not a shortage of feminist research and writing about women's land rights in Tanzania (Mbilinyi, 1988; Omari and Shaidi, 1992; Lusugga and Hidaya, 1996, Odgaard, 1997; Odgaard, undated; Migiro-Mtengeti, 1990), engaging with this literature would have been very beneficial to the position paper. This literature itself is not complete and an enquiry along the lines of the Lands Commission, but on a much smaller scale, would have yielded information about the present state of land relations and gender as well as valuable material about the ways in which rural women strategize to increase and strengthen their access to land under both customary and statutory law. For example, Lusugga and Hidaya note that more knowledge on gender and land is needed, particularly more current and micro level research which analyses specificities and changes and also how women respond to their changing tenure situations (Lusugga and Hidaya, 1996; See also Mbughuni, 1994 and Birgegard, 1993). In leaving the task of drawing up its positions to the women lawyers alone (all the authors of the GLTF position paper were TAWLA members), and in not providing an overview of the current situation on gender and land relations, the GLTF probably did deprive itself of the opportunity to make a fuller and stronger statement about women's land rights. This no doubt influenced its positions on customary law, as well its less than full engagement with, and silence on, some of the other issues raised by the Land Forum. The fragility of the civil society alliance can be attributed to this problem, but also to the fact that the Land Forum also did not take the trouble to engage fully with gender issues.

Reactive and legalistic documents do have their value, particular when one is trying to influence the chapter and verse of a piece of Legislation.²³ The GLTF did go beyond its documents in its actions. The non-lawyer sections of the task force, especially the groups involved in community mobilisation and media work did re-interpret some of the legal points in political terms. For example, in publicity material produced by the TGNP, the wider concerns about the Land Bill, which include the classification of land into village, general and reserve lands, the problem of land grabbing, the interests of the already marginalised rural population, the youth, questions of tribalism and the question of customary law and its treatment of women were all raised. An appeal to President Mkapa refers to his inaugural speech and to a SADC heads of state declaration to promote women's rights, as opposed to law and the constitution (TGNP, May 1998). In the next section, some of the issues of convergence and divergence among the different parties- the Presidential Lands Commission, the Government, the Land Forum and the Gender and Land Taskforce will be discussed.

4. THE DEBATES AND THE PLAYERS

a. The Government versus Shivji and the National Land Forum

The government's positions are reflected in the National Land Policy, statements by the President and other officials quoted in various workshop papers, the Land Acts and in McAuslan's defence of the legislation he drafted. An interview with the head of the Land Development Service of the Legal Department of the Ministry of Land and Human Settlements also clarified some of these positions.²⁴ Essentially the government's view of the Land Commission was that it was one of a series of activities the government had initiated to deal with land tenure reform. For example, it was stated in

²³ The Land Forum also commissioned and or benefited from such documents, see Maoulidi, S. undated; Wily, L. undated.

²⁴ Interview with Fidelis Kashumba Mutahyamilwa

the interview that, after the Lands Commission report, further studies were conducted by different experts on different aspects of the Land issues raised by the Commission and it was these studies which formed the basis of a workshop which was held before the National Land Policy was drafted. However, the government position also seemed to be that the differences with the Commission were minor matters of detail. For example, it was argued during the interview that more than 90% of the Shivji recommendations had been accepted, one of the few exceptions to this being the Commission's suggestion that Village Assemblies be put in charge of village land. This was rejected on grounds that Village Assemblies were too amorphous and ill defined to be held accountable. Instead, the Village Council, a constitutional body was given this role²⁵. This position is in clear contrast with Shivji's contention that the National Land Policy and the Acts were totally opposite in spirit to the Commission's Report. He argues that the differences between the Commission Report and National Land Policy especially lie in the latter's demonstrated distrust for ordinary people and their elected representatives and in its values, assumptions and biases which are in the traditions of the modernisation and developmentalist paradigms (Shivji, undated).²⁶ Shivji suggests, that while the Land Acts had adopted some of the terminology and recommendations in the Commission's Report, its tinkering with those recommendations had resulted in the removal of the Commission's perspectives on "justice, community participation and the development of a more legitimate Tanzanian common law" (Shivji, undated, p. 20).

Some important differences emerge from the debates. For example, there is disagreement between the government and the Shivji Commission about the nature of the problems of land tenure. While the National Land Policy suggests that the land tenure system is fundamentally sound (1997, p. 9), Shivji argues that it is fundamentally flawed (See also Heyer, J. and William G. (undated); Ngware, 1997; Rugumamu, 1997; and Kapinga, 1998 who share Shivji's position). Thus the National Land Policy sought to modify the existing system of land tenure, advocating a retention of its central tenets,²⁷ while the Shivji Commission, on the other hand, made a fundamental recommendation, that the executive be divested of the radical title. The logic of this recommendation permeated many of the more detailed recommendations in the Land Commission Report and this would have had significant consequences for the State. For example, the Commission sought to deploy the principles of separation of powers and independence of the judiciary, by separating land administration and adjudication from the executive. Both the National Land Policy and the Land Acts on the other hand strengthen that linkage. In the Acts, the Commissioner for Lands in the Ministry of Lands becomes the individual and institution of last resort and highest supervisory decision making, the institution to which the Village Councils are accountable, and which has the power to take over the management of village land, if in his or her view, the need arises (Shivji, undated; Kapinga, 1998). Shivji argues that this decision left untackled some of the serious problems identified by the Commission. These include the virtual collapse of the land dispute machinery, overlapping jurisdiction between various bodies, long delays in dispute settlement, inaccessible organs of justice whose decisions were considered unfair and unsatisfactory (Shivji, undated).

Apart from taking a lighter view of the land tenure situation, government side has suggested that the radical title needed to remain with the government to enable critical decisions of national import on land be made without too much trouble. Shivji for his part argues for a separation between the radical title and the government's ability to acquire land for national and public purposes (Shivji, undated).

²⁵ (interview with FKM, 2001; But see Shivji's argument that Village Councils were implicated in a failed land titling system in the 1990s and also that being under District Councils, they were not directly accountable to the community (Interview with IS, 2001)

²⁶ Shivji supports this with a quotation from McAuslan that the Commission's recommendations if followed would be "giving vast powers to totally unqualified people and relying on their innate common-sense", a cause of action which could be described as naïve in the light of the abuses which occurred under a similar act of faith, operation *Vijiji*, under which villagisation took place (McAuslan, quoted in Shivji, undated).

²⁷ e.g. the radical title in the President as trustee on behalf of citizens, the control of land speculation, the continued recognition of only the statutory and customary rights of occupancy; and the recognition of use and occupation as the basis for rights in land.

Another difference, according to Shivji was in relation to customary law. The Commission, he argues, sought to expand the notion of customary law being used in the courts and also turned the repugnance clause²⁸ on its head, as well as redefining the role of the *wazee*, “the elders” within the land adjudication system. Shivji argues that their role should be more to introduce communal notions of justice into the adjudication process as opposed to simply advising the courts, because indeed, there were often competing perspectives of justice.

“The Commission wanted to create an enabling legal framework which would let people’s sense of justice, rights, fairness and reasonableness from the bottom jostle for hegemony with the ‘imperial/colonial/ positivist’ notions embedded in received law-‘common law, principles of equity’ etc. – innate in the professional dispensers of justice. As a matter of fact, the Commission recommended that the definition of customary law should be broadened to include custom per se recognised by a Tanzanian community or neighbourhood besides ‘native law and custom’”, he argues (Shivji, undated, p. 24).

In this connection, the elders, the *wazee* were to sit in all cases, not as advisors on customary law but to “impart the community’s sense of justice and fairness and force the professional judge to take full account of the same” (p. 24).

Finally, there were some differences in approach to land tenure reform. For example, McAuslan is quoted as arguing that a more detailed new land law in which legal rules replace administrative and political action based on goodwill and common-sense is more revolutionary than the far reaching policy proposals recommended by the Commission (cited in Shivji, undated, p. 23).²⁹ Shivji argues in response that many of the abuses in land tenure were committed not by local people but by well informed officials whether within national level institutions or the newly decentralised structures. In Shivji’s view, the question of certificates of customary occupancy would not be much different from processing a granted right of occupancy. Such large scale titling is not feasible and is like to go the way of other attempts. It represents an attempt to smuggle individualisation, titling and registration through the backdoor. This view is disputed by the government on grounds that titling is discretionary with regard to customary land rights and only mandatory with regard to statutory rights in land. However, all landholders are encouraged to register their titles in order to enjoy the advantages (Interview with FKM, 2001).

Shivji found strong support for his views in the National Land Forum, which he was instrumental in establishing. The key issues identified by participants in its inception workshop in 1997 as constituting the basis of a national debate in land were similar to those points of contention between the Land Commission and the government.³⁰ The Forum demanded a national debate on land. Indeed, the Declaration’s first criticism of the Land Bill was the undemocratic approach to its drafting and preparation.³¹

²⁸ The repugnancy clause is an omnibus provision within colonial jurisprudence which subjects all customary law provisions to European notions of equity, justice, morality and good conscience.

²⁹ Not surprisingly, the position that detailed legislation is preferable to shorter legislation, which is unclear about procedures, is shared by the government. As is argued in interview, “the procedures for the new Land Acts are clear and that is why some people are claiming that the new laws are too long. Length is important to clarify all processes, as opposed to the past when we had a very subtle Land Ordinance, which was not very clear on the procedural aspects. Now we have come out with very clear provisions indicating what you ought to do in case you are applying for the right of occupancy or to process your entitlement. To simplify the length of the procedures, we have the forms which have summarised the lengthy procedures indicating what questions you need to answer so as to qualify for the right you are applying for” (interview with FKM, 2001).

³⁰ The nine issues for debate identified by the Declaration are in the areas of the radical title or the ownership and control of land, the classification of land into general, village and reserved land, the authority of land administrators under the Bill and accountability institutions. Others were the acquisition of land by foreigners, the grabbing of village land, adjudication, titling and registration, gender equality and land rights and the dispute settlement machinery.

³¹ Many commentators have made this critique of the land reforms. See for example Mbilinyi, 1999, undated.

The preamble to the Declaration asserts that the Bill was prepared under pressure from the IFIs and donor agencies by a consultant paid from a loan, which Tanzanians would have to repay. Also, that there was no proper consultation and the recommendations of the Land Commission, which had collected the views of the people, had been ignored. Thus the Bill does not address the interests of the large majority of land users in taking away their rights to participate in decision making processes with regard to land and in endangering their security of tenure, facilitating the ability of foreigners and a few wealthy and powerful to acquire land belonging to the poor. Beyond democratic process, the preamble of the Declaration charges that the Bill seeks to perpetuate the discrimination and inequality of vulnerable groups such as women, pastoralists, hunters and gatherers, youth and the small and poor peasantry, as well as instituting complicated bureaucratic processes for administering land (National Land Forum, 1997).

The Declaration, a well argued and strong document, uses the format of raising the issues it wants to critique, stating what the provisions of the bill relating to this issue imply and making recommendations for more “majority friendly” Bill. Many of the recommendations are similar to the Land Commission’s positions and therefore will not be repeated in detail. An example of this is in relation to the radical title. In relation to land classification, the Declaration recommended that land should only be transferred from one category to another after consultation and with the consent of the Village Assembly. Also, that land administration should be under accountable bodies. The Declaration, however, was weak on the issue of women’s land rights. It simply contends that the Bill’s claims to promote gender equality are not realised in its provisions. Beyond this statement, no specific recommendations are made to promote gender equality.

b. The Gender and Land Debates: the Gender and Land Taskforce, Shivji and the Government (The Ministry of Community Development, Women’s Affairs and Children).

The GLTF’s paper outlining its positions was presented by one of its authors during the a meeting on the Land Bill Organised by the National Land Forum in 1998. It was one of only two presentations made at this forum, which was chaired by the chair of the National Land Committee. The GLTF’s recommendations focused on four issues- customary law, titling and registration, representation and youth (The Gender Land Task Force, 1998). Interestingly, the document made no reference to the ongoing controversies, such as that around the radical title and related issues.

On customary law, the group felt that the declaration in the land bills that customary land law would continue to be the law governing land rights in Tanzania was unconstitutional and against women’s rights since customary law rules in 80% of Tanzania either excluded women from inheriting lineage/ clan land or did not allow them to pass on such land to their children. Also, it would contradict the presumption of joint property under the Law of Marriage Act 1971. In relation to the proviso that if customary law was against the constitution it would be declared null and void, the group felt that this would be difficult to enforce, because one would have to file a case with the constitutional court and that it could take many years before judgement, thus denying justice for a good cause. Also, that it would be difficult for most ordinary people, particularly women to hire advocates. Women in rural areas would be in an even worse situation because no legal aid services were available there. Therefore they recommended three possible courses of action:

- a. acknowledgement that labour contributes to the development of land and therefore should give a spouse joint occupancy rights in land belonging to one of them.
- b. the abolition of customary law and institution of statutory law to guide land relations³²
- c. strict separation of land between clan and family land so that customary law will govern the former leaving family land and the rest of land under statute (the Gender Land Task Force, 1998).

³² In interview, TAWLA says its demand was the amendment of customary law practices to remove the discriminatory provisions (Interview with JM, chairperson of TAWLA, 2001).

On titling and registration, the gender land task force was more concerned about joint occupation and ownership of spouses than with which institutions would best deliver justice to village communities, including women members. It recommended that the law provide for joint occupation and ownership between spouses and recognise the rights of spouses even where they have not been registered once they have contributed labour. Selling of such land without the consent of either spouse should be a punishable offence and the sale should be regarded as voidable at the instance of the spouse who has not been part of the deposition. According to the GLTF, this would accord women security in land and reward their investment in labour whatever the form of marriage.

On representation, the group criticised the Land Bill as being poor on the representation of women and youth in that the ratio for men and women was by far in favour of men (1/3 of women), while the youth are not even represented. There is also a critique about the Bill's reference to those knowledgeable about customary laws as been discriminatory in the sense that those usually considered knowledgeable tend to be men, when the reality could be quite different. It therefore recommends the equal representation of men, women and youth on village land committees and also warns of tribalism.

During the discussion which followed the presentation, additional gender equality concerns, such as the gender biased language of the Bill and its silence on the issue of single mothers' land rights, there were attempts by participants to raise the implications for women's rights in land of issues such as the radical title, the liberalisation of land markets, compensation for state acquisition of land, the implications for land relations of the separation of powers between the executive, legislature and judiciary in the administration and management of land and the classification of land as general and village land. The rights of immigrants and pastoralists were also raised. The GTLF's recommendations about customary law did not appear to have been debated during the workshop. However, it is clear that this was a subject on which there was no unanimity within the National Land Forum. The most comprehensive statement of the Forum did not demand the abolition of customary law, or even its reform through legislation. It became clear as time went on that there were differences within the Land Coalition, the Gender Land Task Force representing a distinct strand within it. In addition to differences about how to respond to discriminatory customary law rules, some members of the Gender Land Task Force also did not share the dominant position within the Coalition about the radical title (TGNP, 2000). This was confirmed during the interviews. For example, Mrs Tabitha Siwale of the WAT, a former government Minister who was an MP during the passage of the Lands Acts, made clear her position that the radical title should remain with the President (TS interview 2001). By the time the Land Acts were passed, these differences within the Land Coalition had become quite sharp.

The Ministry of Community Development, Women's Affairs and Children, with the support of the World Bank³³ commissioned a participatory rural appraisal in five Regions in mainland Tanzania³⁴ to collect views of communities on the gender dimensions of land tenure issues and the extent to which the national land policy and proposed land bills had addressed them. A founding member of TAWLA, Magdalena Rwebangira (Rwebangira et al, undated), led this study team. While the study questioned the claim of the Shivji Commission to have engaged in widespread consultations,³⁵ it shared the

³³ It is not clear if the World Bank's role in this study was more than financial support. It seems that the World Bank also provided financial assistance for the studies commissioned by the Ministry of Lands post Shivji Commission. Interestingly, Shivji reports that the World Bank offered to assist the Commission with consultants, but did not provide support when the Commission indicated that it already had all the expertise it needed locally (Interview with IS, 2001).

³⁴ The communities, Kilimanjaro, Kagera, Arusha, Mbeya and Lindi were chosen for their contrasts in relation to traditional practices as well as descent and inheritance systems, the extent of land pressure and shortages arising from plantation agriculture, reserved and alienated land and mining.

³⁵ It states in the introductory section that "few district officials, often one in each district workshop had heard or participated in the meetings of the Presidential Commission on Land Matters (Shivji Commission). Almost all participants in the villages had not heard of the Commission's work or the National Land Policy (Rwebangira et al, undated unnumbered page)".

Commission's main findings and conclusions about customary law rules and the representation of women on village structures. For example, the study agrees with the Commission that the effect of registration of co-ownership by spouses would render changes in inheritance laws unnecessary. Also, in so far as the Village Land Bill outlaws discriminatory customary practices, it could be argued that inheritance laws have now been somewhat modified by the Bills (Rwebangira et al, undated).

The study examined land tenure practices and found that in all the study areas, women lacked direct access, user rights and control over land. For many women, access to land was indirect and came through husbands, fathers, sons or administrators. This situation existed in both patrilineal and matrilineal areas.³⁶ In a few districts (e.g. Rungwe and Mbeya), male and female youth were given small pieces of land to farm for themselves, with girls usually receiving smaller pieces than boys (p. 3). In many cases, not only did married women not control land, but they also did not control the livestock and farm produce and did not make the decisions about what and when to grow. Even women's much cited control of food produce was limited to that for home consumption. In this connection, examples were cited of matrimonial conflicts in Kilimanjaro arising from recent male involvement in the dairy business, traditionally women's work, but now proving to be more lucrative than male dominated coffee growing business. It was notorious in all communities that women lost their investment in matrimonial land on divorce. As well, widows could access land only through their children, or if they were themselves inherited, or if they returned to their natal family land, where in many cases, they could not inherit unless there were no brothers or their male offspring. Even where women inherited some land, their right to sell off or bequeath such property/ inheritance had been the subject of fierce contestation because of fears that land would be lost to the clan. In some patrilineal communities women are not allowed to settle on their father's land with their children. It was noted that an earlier study had found that in Kagera, women's desire to sell clan land was so they could acquire property which could be left to descendants without clan interference (Rwebangira, 1994, cited on p. 5).

In relation to clan, village and district decision making and adjudication structures, the study found that women's representation tended to be below the prescribed minimum number, which itself did not give equality of representation.³⁷ Workshops conducted during the study attributed this to women's reluctance to compete for such positions and also to commit time to these structures when they are elected. For their part, women cited lack of time left off from household chores, a lack of conviction that their presence would make a difference as well as having to negotiate their participation in such structures with husbands. The study also found that women were unhappy with the composition of dispute settlement institutions for reasons of corruption, under-representation of women and bias against them arising from prejudices and ideologies which cast them as less reliable protectors of clan land than men (*ibid.*, p.7).

The particular problems of female-headed households were examined. The study found that their issues had been ignored in the land reform processes. These households headed by divorcees, widows and single women were generally excluded from accessing land unless inheritance rules allowed it. Village governments were in principle disposed to allocate land to them, but much of the good land was under customary law and so they were disadvantaged from the start. Purchasing land was open to them, but they rarely had the resources to go down that route. The study also found that women tended to be enthusiastic about titling because they were interested in co-ownership of family property. Men were concerned that it could be used to levy new taxes as well as lead to the dissipation of clan land through women bequeathing clan land to children who would be members of other clans. There was also a preference for statutory courts, not because they were considered free of corruption but because they could hand down binding decisions, as opposed to the decisions of traditional courts.

³⁶ According to the Lands Commission, 80% rural communities are patrilineal and 20% matrilineal (1994, Vol. 1, p.249).

³⁷ For example, the study notes that although village councils have been in operation since 1975, it was only in 1992 that they were required to have at least 8 women out of their membership of 25. The same kind of proportions are prescribed for Ward Tribunals.

The main finding of the study was that there was a demand for giving full land rights to women, including the ability to bequeath land to descendants. Also that education to promote women's rights in land was a necessity.

Three main demands were generated by the study. These were the joint ownership of land by spouses, equal representation of women and men, including the youth in decision-making and adjudication bodies and sensitisation and education campaign before and after the passage of the new laws. Concerns were expressed about the problems that could be generated by giving clan land to women. It was felt that co-ownership of spouses' self acquired land and also allocating women their own share of such land, could only circumvent these problems. The problem identified here was that much of the best land was clan land. Therefore laws promoting discrimination under inheritance rules on all land, no matter its status should be repealed.

5. THE POST-MORTEM: REAL GAINS FOR WOMEN OR CO-OPTATION OF GENDER EQUALITY DISCOURSES?

The passage of the Land Acts generated a new round of activity, largely in the nature of post-mortems, but also some education work around the Acts. Among the civil society groups which had participated in the advocacy activities around the land reforms were those who felt that they had substantially achieved their aims (TAWLA, WAT)³⁸ and others who had no cause to celebrate (Shivji, 1999; Hakiardhi). The TGNP's balance sheet approach to the outcome of the land reform struggles captured by its view that there were "achievements and gaps" (TGNP, 2000) straddles the divide between these two opposite camps. See also interview with AM and MJ, 2001. This position is also shared by the LHRC.

TAWLA lists among the positive provisions in the Acts the equal representation of women on various committees, the outlawing of discrimination against women, children and persons with disabilities in holding, acquiring, transmitting and dealing with land and the rendering null and void of discriminatory customary law rules denying women the ability to transfer and use land. Others gains are the rights of women to acquire and register land in their own names, the recognition of the interest of a spouse whose name is not on the title deed and gender neutral language (TAWLA, 2000).

The TGNP is in agreement with TAWLA and others that they were successful in making some important changes to the Land Act. Like TAWLA it cites the provision that women can own land in their own capacity and also through their families³⁹ and equal representation of men and women on all land adjudication bodies.⁴⁰ In addition to the above, the Ministry of Land also cites the fact that in the case of dispositions e.g. mortgage, leases or sale of matrimonial land, there is a prerequisite for the consent of the spouse. Another provision is that spouses of a person have first priority in the event that this person surrenders land to the village. If there is more than one wife, the first wife has priority (Interview with FKM, 2001). Beyond these agreed gains, the TGNP mentions the provision that no

³⁸ TAWLA's position is qualified by its view that gender equality is likely to be achieved incrementally rather than in one large bang, and therefore what was achieved is important in that regard. Also, that the law even if favourable cannot work on its own without people becoming aware through education of its provisions (Interview with JM, 2001).

³⁹ Section 3(2) of the two Land Acts 1999 provides that "the right of every adult woman to acquire, hold, use, deal with and transmit by or obtain land through the operation of a will, shall be to the same extent and subject to the restrictions as the right of any adult man". Section 3(3) says that "for the avoidance of doubt, it is hereby declared to be the law that where during the course of any marriage, either spouse acquires an interest in land in their own name and for their own occupation and use, whether in practice the spouse shares that occupation or use or not and by whatever lawful means that acquisition occurs, that interest in land belong exclusively to the spouse who acquired it and shall not under any circumstances be regarded as part of the property of the other spouse".

⁴⁰ Section 60 (2) says "where a village council establishes an elders Council, that council shall consist of not less than five nor more than seven persons, of which not less than two shall be women..."

investors are allowed to own land and the special provisions to protect pastoralists as achievements. Unlike TAWLA, however, the TGNP considers the Act's provisions on customary law to be unsatisfactory.⁴¹ The LHRC agrees with the TGNP on this issue. It argues that the conditional acceptance of customary law does not go far enough because it places the onus on people who feel particular provisions are discriminatory to challenge them. In their view, something has to be done to ensure that customary law conforms to the Land Acts (interview with JW, 2001).

An issue on which the LHRC, Hakiardhi and the TGNP all agree is that the retention of the radical title by the President was a grave setback for the coalition and presented dangers for the implementation of the advances women's rights advocates have secured on paper.⁴² The claims and counterclaims about the achievements and setbacks of the various coalitions are worth a more detailed consideration. Even the more acrimonious exchanges contain in them clear differences of approach both to alliance building and to the substantive issues.

For example, Shivji asserts that women's groups were used by the State to divide civil society ranks because their demands were more easily met and did not threaten the free market paradigm and the promotion of foreign investors over local communities. In the interviews, some participants in the GLTF also expressed discomfort about a sense of co-optation and manipulation by government (See interviews with TAMWA, MM, 2001). However, members of the coalition felt that the demands being made by the Land Forum regarding the land reform process and citizens' participation and the radical title were unrealistic, considering the government's record of concessions. Therefore it was considered more productive to ensure women had a fair deal in whatever was on the table and that whatever gains were made could be built on in future struggles (Interviews with TAWLA and TAMWA, 2001). Also, the Shivji Commission was not considered to have done well by women (Interviews with MM, AM and MJ, TS and BK, 2001). Shivji himself admits that there was a lot of opposition to gender equality issues on the Commission, but argues that the single female commissioner was not the most vocal on gender issues (Interview with IS, 2001). The differences between the two groups can be seen to have arisen from the fact that TAWLA felt that the major issue was women's rights while Hakiardhi felt it was the radical title and the overall interests of small-holders and pastoralists, under which women's rights could be subsumed (but which were not!) (interview with AM and MJ, 2001).

An advertisement put out by the Ministry of Lands and Human Settlements to publicise and defend the Land Acts is revealing in what it conveys about the distance between elements of the Land Forum and the GLTF on the one hand and the character of the alliance between the government and the GLTF on the other hand. Under the heading of Civil Society Participation and Contribution to the Legislative Process, the advert states that several NGOs had formed the GLTF (and names each of them) to ensure that the new Legislation addressed women's land rights in the area of customary law, the right of women to acquire title and to register land, representation of women in land committees and issues related to the youth. The advertisement goes on to state that another land task force, Hakiardhi, indirectly participated with the GLTF, but notes that the Ministry had no formal interactions with Hakiardhi.⁴³ The GLTF then comes in for praise for inviting the government to

⁴¹ Section 20 (2) "Any rule of customary law which denies a woman the right to acquire, hold, deal with, transmit or receive by will or by gift or by any other means any interest in land for the reason only that she is a woman, shall be void and inoperative and shall not be given effect to by any village council or village assembly or any person or body exercising any authority over village land or in respect of any dispute over village land or in any court or other body before which a matter concerning village land is brought for adjudication or determination".

⁴² WAT disagrees strongly with the Hakiardhi position. In the interview, it argued that it was more straightforward to have land vested in the President because to vest it in Village Assemblies would create inter-tribal conflicts and would disable the government from being able to address local problems in land tenure (Interview TS, 2001)..

⁴³ That the issue went beyond the lack of formal interaction was elaborated during the interview when it was said that Shivji's conduct of his campaign was not democratic. It was said that Shivji had been invited to present his views to the National Assembly at Dodoma. "However, MPs felt that what they had put in place was

participate in discussions and supplying government with its resolutions. The advertisement asserts that these demands were taken into account in the legislative process, the acknowledgement by the GLTF that some of its concerns were addressed in the Acts was cited as evidence of this co-operation. The advert goes on to argue that similar changes were needed on the Succession and Marriage laws to ensure that the Land Acts made a difference to their lives (Ministry of Lands and Human Settlements Advert, the Guardian, January 30th 2001).⁴⁴

The advertisement's praise of the GLTF does not fully account for the contestation within the GLTF itself nor the intense lobbying and other forms of advocacy it took the GLTF to achieve the gains women's groups were celebrating. There were indications during the interviews that there were differences in attitude to the government, as well as tensions about the way different members of the coalition had conducted themselves during the campaign (interviews with TGNP, TAMWA, 2001). For example, it was mentioned that the GLTF's work had been complicated by the fact that one of its member organisations had participated in the Ministry of Community Development, Women's Affairs and Children's study on the land reforms. Also, it was said that originally the Ministry had a representative in the GLTF, who had had to withdraw as the process developed (interview with TAMWA rep, 2001). Also, the fact that one of the leaders of a GLTF member organisation was an MP and a member of the ruling party was considered to be a mixed blessing. It gave the GLTF access to government over some issues but also undermined its positions in relation to others. It was felt that there were times when loyalty to the party line got in the way of work for the Gender and Land Coalition. The intense lobbying of Parliament, which had to take place in the period just before the Acts were passed made this situation very complicated (Interview with AM and MJ, 2001).

The politics within Parliament itself around the customary law clause in the Land Act Bill have also been hinted at. At different points in time, it would seem the provisions that women would have equal rights to men in access to land and that while customary law would be the law governing land, it was not to be discriminatory, were in danger. It took very intense lobbying of the Prime-Minister and some members of Parliament that put it back in the form in which it finally appeared in the Act (Interview with TS, 2001).⁴⁵

Some of the charges laid at the door of the gender and land coalition are depressing in their familiarity. Women's groups (with the exception of a few) have been cast as slightly less than clued, easily co-opted and pandering to foreign agendas, allowing their aid dependency to determine their agendas (Shivji, 1999; Manji, 1998). Shivji describes one of his critics, Tibaijuka as "a fierce feminist but otherwise mainstream economist", hinting at an ideological basis for their differences. He however does not accord the same consideration to the women's rights groups in the land tenure debates. As he notes in acerbic tones, "legislation to outlaw gender inequality in the laws of succession might be a short cut and pleasing to advocacy groups who would have something to show to their sponsors and feminist lobbies in Western capitals. But experience shows that this would not necessarily benefit the large majority of women in the village. What is more, it is obviously contrary to a democratic bottom up approach" (Shivji, 1998, p. 89).⁴⁶ Putting Shivji's style of debate to one

all right for the people they were representing in parliament, so the Bills were finalised. So I was surprised to hear he still had problems. In a democratic process, once parliament has given him the opportunity to present his views, he should not go into the streets demanding that the law not be applied until the same parliament which has passed the bill reverses its positions. There was 100% for the law in Parliament. Even the opposition approved it as the type of law that should take care of Tanzania's interests (Interview with FKM, 2001).

⁴⁴ The co-operation between the government and the GLTF was mentioned again during the interviews (interview with FKM, 2001).

⁴⁵ Unfortunately, not enough information was gathered during the Tanzania interviews about the currents in Parliament. On the face of it, Parliament stood to gain from the executive being stripped of the radical title. At another level, the vast majority of MPs were members of the ruling party and therefore supporters of the present executive. Therefore, their debates on gender equality provisions as well as the issue of the radical title and other matters would have been interesting.

⁴⁶ And yet, the coalitions, which Shivji worked with also, received resources from foreign donors, whether directly or indirectly. The National Land Forum's Declaration on land rights carries an Oxfam copyright, no

side, the latter part of the above quotation raises an important question about the pros and cons of different approaches to securing women's rights, even beyond issues of land tenure. One such issue is how to respond to discriminatory customary law rules.

In relation to women's representation in village decision-making bodies, Shivji argues that the Acts have not advanced women's cause by providing that they participate in village land councils and the national advisory board, largely because these bodies have very little power⁴⁷. Secondly, he argues that equality with men is necessary but not sufficient to create equitable access to land, if the majority of both men and women are deprived of their security of tenure and are faced with the threat of landlessness (1999, p. 8). Without male land rights, who would women be enforcing their rights against? Shivji asks rhetorically (1999). Other commentators agree. Mbilinyi's research in villages in and around the Ngorongoro Conservation Area and Serengeti National Park found that livelihoods have been eroded by the loss of vast tracts of village lands to wildlife conservation programmes and private investors in hunting and tourist companies and ambiguous government policies towards their rights. Elsewhere, mines and plantations have created land scarcity and resulted in locals becoming casual labour. The scale of dispossession in these areas has endangered more vulnerable rights in land. It has been suggested that in these situations, where communities find themselves dispossessed and impoverished by processes which also attack their cultural identity, it is logical for them to reassert tradition in discourses about land, thus worsening the situation of women on whose unpaid labour many small holder economies depend (Mbilinyi, 1999). The implication of this and other studies of land tenure and national parks, game and forest reserves (Chachage, 1996; Rogers et al, 1996) is that women's land rights cannot be sensibly discussed without reference to the broader issues of land rights of communities. The Government of course has strongly denied that the Land Acts were largely to facilitate access to foreign investors and would have the impact of worsening the problem of land grabbing. On the contrary, the government has sought to restrict foreigners from access to village land under customary law (interview with FKM, 2001).

The one recommendation that the GLTF made in its original statement that it did not succeed in getting the government to adopt was that customary law be abolished, or severely circumscribed. As a Ministry of Lands and Human Settlements lawyer notes in the interview,

"the majority of Tanzanians are holding their land under customary law. There is no problem with that. The main problem is the general set up, infrastructure and other matters that should be addressed. Even those people with title deeds do have problems pertaining to land markets and security of tenure. We have come out with improved customary rights. It is of a definite term, different from the rights of occupiers...Once there is a custom contrary to the constitution and human rights, the courts of law cannot enforce it. There may have been a time when some of these discriminatory rules were relevant, but not anymore. That is what the land act/land policy has provided that all customs discriminating against women are null and void. The constitutional customary rules, the good ones will continue to apply. Things will change with education and the learning of truth and they are even changing without education. What we have done is to provide a framework for these things to change with the support of the courts" (Interview with FKM, 2001).

The GTLF recommendation is not new. At least one other study of gender and land in Tanzania has recommended the abolition of customary law and its replacement with statutory law (Omari and Shaidi, 1992). However, other views should be noted. Lussuga and Hidayat's comment on this call is that the recommendation ignores the resilience of customary law to change (1996, p. 11). Mbilinyi, for example, argues that the decision to apply customary law and practice to village land is a case of

less! Shivji's publication on the subject in 1998 was funded by SAREC, NORAD, DANIDA through the International Institute for Environment and Development, IIED.

⁴⁷ Shivji's faith in village government has also been the subject of much comment (Manji, 1998). Mbilinyi has also noted considered from a class and analysis perspective, there are contradictory elements in village government. For example, while chiefs may be fulfilling certain functions on behalf of the colonial and post-colonial states and controlling resources on account of their position, they had to meet the needs of their subjects to remain chiefs (interview with MM, 2001).

the government supporting patriarchal laws which discriminate against women, but she does not support the recommendation to completely abolish customary law and leave land to market forces (undated, p. 3). In the context of legislative reform, and given the problems identified with the incorporation of customary law rules into statutes such as the Marriage Act 1971 and Succession Laws (interview with TGNP, 2001), it is not surprising that the lawyer led gender coalition was demanding the repeal of customary law and its replacement with statutory law provisions to guarantee women equal rights in land.

The Land Commission, and presumably the Land Forum also had differences with the GLTF on this issue. Shivji has argued that it is erroneous to see the issue in terms of customary law being anti women and statutory law being for women. In his view, the issue is more about how to make progress within the customary land tenure system, rather than abolishing it, or replacing it with another system, when there is evidence that individualisation and titling do not necessary work in favour of women (Interview with IS, 2001). In relation to law, Shivji notes,

“in effect, the Commission neither rejected wholly nor accepted uncritically the law or legal methodology to effect a radical reform of the tenurial system, but was minded to reform the statist top-down institutional structures so as to create space for the forces, conceptions and perspectives from the bottom to assert their interests” (Shivji, undated, p. 27)

Insisting that the administrative procedures proposed by the Lands Commission, e.g. the mandatory recording of names of spouses on land documents, would have been enough to begin the process of undermining male hegemony in relation to land, Shivji defends them as arising directly from interviews with the people⁴⁸ about their problems.⁴⁹ He contrasts these with demands for statutory interventions, which in his view are a top-down approach to the issue. Interestingly, this was point on which Shivji and the government were in agreement. Furthermore, Shivji argues the futility of legislative changes:

“with regard to succession laws, it is better to adopt tangential reforms in framework legislation as part of the overall democratisation process, rather than to impose hard laws backed by criminal sanctions. As the experience of the Marriage Act 1971 (No. 5) shows, hard law as such matters little, however progressive it may appear to be. It exists more in the books than in reality. If the Marriage Act (which presumes monogamous marriages) were to be strictly applied in Tanzania, for example, hundreds of marriages would simply be void and there would be thousands of illegitimate children!” (Shivji, 1998, p. 89).

This insistence on a bottom up approach to law reform while sounding democratic falls within the evolutionary approach to customary law with which many gender equality advocates do not have patience. The lawyer-led women’s land coalition were very clear about the importance of statutory law interventions to address women’s rights issues within the land reforms. In one interview, for example, it was argued, “TGNP felt that customary law will take too long to evolve. So an opportunity to pass progressive laws has to be supported because such laws can form the basis for advocacy. You can challenge what is wrong by referring to the law, even at the level of the community” (Interview with AM and MJ, 2001). This disagreement with Shivji’s negative view of legislation is not surprising. While the merits and demerits of using legislation to deal with issues of social equity can be debated, the question is what harm legal provisions will do in a situation where legislative reforms are on the agenda. If the rights of communities can be protected by legislation, why not the rights of social groups within communities such as women? The legislative process need not be top down and Shivji’s own work with the Commission proves this.

⁴⁸ But see Manji’s (1988) comments on Shivji’s use of the people as though they were a homogenous group with the same interests in land issues. Shivji’s defence is that while being very aware of class differences and interests within communities, the fears being expressed to the Commission by both men and women were with regard to foreigners coming to grab land and not rich peasants (Interview with IS, 2001).

⁴⁹ These include the requirement that village land be registered in the name of a man and his spouses and that their consent be formally given before land can be sold or alienated in any way.

6. IMPLICATIONS OF THE TANZANIA CASE FOR DEBATES ON GENDER AND LAND TENURE REFORMS IN AFRICA: DEBATES ON TITLING, CUSTOMARY LAW AND WOMEN'S RIGHTS.

The debates on land tenure reforms as played out in the Tanzania case raise questions similar to those in other parts of Africa but with Tanzanian specificities. Here as in other parts of Africa, the issues of economic liberalisation and land grabbing by foreigners and a few wealthy Tanzanians leading to the increasing dispossession of large sections of smallholder farmers and pastoralist communities have been sensitive questions around land reforms. As we have seen, many of the national commentators have charged that the new laws under the land reforms are really to protect foreign investors at the expense of local communities. The government of course denies this and has consciously sought to dispel this impression, citing its special provisions to protect Village land from free access of non-village people. Secondly, the experience of individualisation, titling and registration in other countries has led to a downplaying of this issue in Tanzania. There has been a suggestion that it has been introduced through the backdoor, a suggestion denied by government, who insist that registration is optional for Village lands and only a must for foreigners hoping to acquire statutory land rights. Interestingly, titling has not become the subject of the most intense debates and the government considers being able to register customary land titles to be an improvement of customary rights (interview with FKM, 2001). Instead, questions of the radical title to land and village land adjudication and administration have been fiercely debated.

A third feature of the Tanzania case is that while the new Land Acts have made explicit provisions to address some of the concerns of women and land advocates, they fall short of the demands for the reform of customary law. However, the provisions of the new Acts seem to have been enough to make a section of them happy. The discussions around customary law in the Tanzanian land reforms process raise questions about the best approach to the reform of discriminatory customary practices. Also they raise the issue of the breadth and depth of approaches to women's rights in land, i.e. whether it is enough to focus solely on gender equality when other more general issues have the effect of undermining whatever is achieved in terms of gender equality. In this connection, attention has been drawn to the dispossession of whole communities by national parks, conservation areas and mines, a situation made more difficult by the ambiguities in legislation. The suggestion is that notwithstanding the progressive provisions, women's land rights will be jeopardised further if these trends continue. The implication here is that law reforms have to be judged by double criteria. As Mbilinyi notes, "the irony is that whereas women's rights to land e.g. as wives seem to be protected under the new Village Land Law, their rights as members of communities are at risk given the liberalisation principles and the administrative structure established" (Mbilinyi, 1999, p. 5).

None of the protagonists in the land law reform debates has made a total condemnation of legislation as the way to change land tenure for the better. However, it is seen by some as an unhelpful option in relation to matters of personal law and custom, and by implication, women's rights issues, on the grounds that it is not possible to satisfy all parties and it will be breached more than enforced. There is no doubt that legislation to change social practice faces difficulties. All the parties in the debate on land tenure are well aware of this. For example, many women's rights activists and other parties speak of public education almost in the same breath as they recommend legislative measures. For example, it was suggested that education is an important way of fighting discrimination. In addition, many men were also said to be recognising the contributions of female family members to their well being (interview with FKM, 2001). The real question is whether those limits make statutory law, whether it is hard or soft law, a bad option. Or to put it another way, is there any purpose to be served by new legislation? If there is, what precisely can be legislated and what cannot be and why? As the Shivji Commission has argued, there are things to be learnt from the reform of Succession Laws across Africa. In Ghana, for example, the customary law of Succession was modified largely to give spouses and children a share in the estate of a person who died intestate. While this was a fundamental change, it was built on customary rules of Succession. In the Tanzanian interviews, it was suggested that law

reform needed to be sensitive to history, look at the positive elements of tradition, build on them and reform the discriminatory practices (interview with BK, 2001). Legislative approaches in general raise additional questions, some of which came up in the Tanzania debates. One of these is the issue of state efficiency, corruption and accountability. Proponents of wholesale privatisation of state owned enterprises and services use this argument to demand the State's withdrawal from the provision of social services. It is this same logic which underlines the demand that the State withdraw from land ownership, management and adjudication of land tenure disputes and from statutory law interventions to address discrimination in access to and control over land. Until we do away with the State, it continues to be an important instrument of change, for good and bad. Having its force behind a policy or piece of legislation does greatly influence the direction of social change and women's rights activists are well aware of this, as are those cautioning against the use of legislation to change customary practices in land tenure.

If customary law can be codified and used to great effect by the courts, then legislation, which tries to reform discriminatory customary practices, has its uses. The question of its being breached and made redundant raises an important issue of efficacy and quality of the machinery of implementation. The position that public education will address resistance to legislation is at best hopeful. It stems from a certain belief that discriminatory rules, decisions and practices in access to resources are because of ignorance. The research conducted by the Ministry of Women's Affairs (Rwebangira) suggests that there are struggles over power and resources behind the seemingly commonsensical ideologies about safeguarding clan land, which are not really questions of ignorance or lack of awareness.

The Commission's arguments suggest that Village Assemblies applying customary law are a more democratic device than state control and statutory law. For women, neither the state nor the village assembly may be the highest expression of democratic principles. While a Village Assembly may be "closer to home", in the words of the Shivji Commission, its existence may be a necessary but not sufficient condition for women's rights in land to be guaranteed. The village assembly may be more democratic and representative, but it may also have a stronger interest in protecting customary practices, such as the ones that discriminate against women. If customary practices need to be changed with care, then surely women need all the help they can get to achieve this and statutory law may be one of a number of measures that are needed, even granting all its limitations and what is required to make it work. The Legal and Human Rights Centre for example has argued that since elements of customary law are codified, they can be amended through the same processes, i.e. legislation (Interview with JW, 2001).

The Shivji Commission has criticised statutory law options- whether in the hard law or soft law tradition- on grounds of democratic principle and rights. The Commission is on weak ground here as there are competing democratic principles and rights in question. The right to one's cultural practices is being pitched against the right not to have one's livelihood threatened by discriminatory practices in the name of culture and tradition. The right to participate in decision-making on all issues which affect one's life, i.e. a bottom up approach is pitched here against the right to have democracy in substance as well as in form. Which of these principles and rights prevail at any time is more a result of the balance of forces than high principle. To ask women to wait until customary practices have themselves evolved through contest within their societies is to deny them a level playing field, and that is discriminatory. Moreover, it has been suggested that there is nothing like pure evolution (interview with BK, 2001). Evolution is influenced by many factors. Its trajectory, therefore, cannot be determined before hand unless there is some conscious intervention to influence its directions. There is no process of change, whether democratic or not, which is easy or welcome or likely to please all persons to whom it is directed, especially those who stand to lose their privileges. Can persons engaged in practices judged as undemocratic and discriminatory in turn plead democracy and rights to justify those actions? The Lands Commission itself was proposing legislation for many of its proposed changes. It would seem, then, that the question which is posed for any statutory interventions, whether it is to reform the radical title or discriminatory customary law rules, is how to bring statutory law closer to ordinary people and how to encourage its implementation in a democratic and equitable manner.

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