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United Nations Research Institute for Social Development (UNRISD)

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

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. Wold 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 where 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 title[3] 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 reform[4] (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 were 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