Not yet democracy: reforming land tenure in Tanzania

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International Institute for Environment and Development

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LAND RIGHTS RESEARCH & RESOURCES INSTITUTE

Not yet democracy

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IIED welcomes and will consider publication of any constructive comment on the subject of this book with a view to expanding debate on land tenure reform in Tanzania

Not yet democracy

reforming land tenure in Tanzania

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For my children

Natasha & Amil.

Their innocent **humanity**

gives hope

that all good

is not dead

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Preface

I did not begin writing this book as a discourse on democracy. I discovered it in the course of writing, and that is how democracy is presented throughout the book.

In January 1991, I was appointed by the President of the United Republic of Tanzania to chair a Commission of Inquiry into Land Matters, which visited all but two districts of the country. For me, personally, it was the experience of a life-time to hear villagers narrating their woes and demanding their right to participate in the control of their major resource, literally their life-line, land. This was a lesson in democracy in flesh and blood, away from all the textbook formulae of the University's learned tomes.

The report of the Commission was submitted in November 1992. *My task was over, but my heart was caught by the battle-cry of the village communities – 'hatukushirikishwa'* ('we did not participate'). In a country where some of us, as student revolutionaries, had denied that there was a 'land question' and yet had proclaimed on our banners, 'the central question of the revolution is democracy', I learned that land was, indeed, the core of democracy. That is the message that runs through this book, which was originally written as a paper for presentation at a conference in Arusha in January 1995; since then I have written numerous other papers on the issue which have been incorporated here.

The book analyses the main problems of land tenure in Tanzania, the alternative processes and structures of land tenure reform recommended by the Commission and the critiques of its Report. The government's response and the Bill for a new Land Act are also discussed against the wider background of the interplay of political, social and economic forces.

In writing the book, I have incurred the usual debts. The Chinese used to say that women hold up half the sky (I don't know if they still do!). *Parin, my partner for over twenty years now, probably holds up* more than half of our share. Without her assiduous care and penchant for providing comfort, I would probably have failed to achieve the writings I have done. I owe thanks to the International Institute for Environment and Development (IIED), the Faculty of Law at the University of Dar es Salaam and Land Rights Research and Resources Institute for agreeing to publish the manuscript. In Charles Lane I found a good friend whose immeasurable patience and constant encouragement simply shamed me into working round the clock to complete the manuscript. To him I owe a deep debt of gratitude. I am grateful also to Margaret Cornell for her careful editing and to Nicole Kenton and Pamela Harling of IIED for their assistance in seeing the manuscript through the Press.

Issa G. Shivji, Dar es Salaam, August 1997

List of abbreviations

BLC	Board of Land Commissioners
CLC	Circuit Land Court
CVL	Certificate of Village Land
DANIDA	Danish Development Agency
EA	East African Law Reports
EACA	East African Court of Appeal Law Reports
HAM	Certificate of Customary Land. This is the certificate issued by the Baraza on registration of the village title
IFI	International financial institutions
IIED	International Institute for Environment and Development
IMF	International Monetary Fund
IPC	Investment Promotion Centre
ITR	Individualisation, Titling and Registration
LRC	Law Reports of the Commonwealth
LTG	Land Tenure Study Group
MLHUD	Ministry of Lands, Housing and Urban Development
NAFCO	National Agriculture and Food Corporation
NLC	National Land Commission
NORAD	Norwegian Organisation for Research and Development
RCR	Registrar of Customary Rights (on National Lands)
SAREC	Swedish Agency for Research Cooperation for Developing Countries
TCPO	Town and Country Planning Ordinance, Cap. 378
USAID	United States Agency for International Development
VA	Village Assembly
VC	Village Council

List of Kiswahili words/phrases

ardhi ni mali ya taifa	land belongs to the nation
azimio	declaration
boma	pastoral homestead
Baraza la Wazee la Ardhi (plural *Mabaraza*)	Elders Land Council (This is the quasi-judicial body for settling land disputes at the village level and also registering village titles, HAM.)
Hati ya Kukodi Ardhi ya Mila	Certificate of customary lease
Hati ya Ardhi ya Mila	Certificate of customary title
hatukushirikishwa	we were not involved/we did not participate
kabaila	feudalist
kaya	household
kibanda	small house or hut
kulaks	rich peasants
kushirikishwa	to let someone participate
madaraka mikoani	power to the regions
mali ya taifa	nation's property
manamba	migrant workers in colonial times
mgongo kwa mgongo	back to back
mradi wa taifa	national project
Nyarubanja	semi-feudal land tenure system
shamba	farm
ujamaa	collective (traditional use: 'familyhood')
uswahilini	poor urban area
utawala mikoani	ruling the regions
wazawa	indigenous inhabitants

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Part I

Problems of land tenure

Chapter 1

The conceptual framework

The legal and administrative machinery governing land tenure in Tanzania Mainland[1] has its genesis in the colonial period. The land regimes established by the German (1885-1916) and British (1918-61) colonial authorities assumed that the indigenous occupants had no ownership rights over land. This was a convenient assumption. The colonial state not only exercised political sovereignty installed by conquest, but was also interested in exploiting the resources (in this case land and labour) of the colonised peoples. The property regime it established was intended to facilitate such exploitation, the central mechanism being the placing of all lands in the hands of the state. Property and sovereignty were thus merged in one entity. The vesting of radical title (ultimate ownership and control) to all lands in the state by the relevant legal instruments was the fundamental premise of the colonial land regime.

The British land policy was influenced by two major considerations: the status of Tanganyika as a Trust Territory, and the development of the colonial peasant/plantation economy for the production of cheap agricultural raw materials. The tensions and conflicting interests between the peasant and plantation sectors of the economy underpinned much of this policy and the colonial administration. The legal regime developed by the British was based in essence on giving the state a free hand, as and when necessary, to control and alienate indigenous lands, unencumbered by any legal obligations. On the other hand, the colonial state had to legitimise its laws and actions as being in the interests of the native population, as required by the Trusteeship Agreement.

The Land Ordinance passed by the British in 1923 (No.3), which is still the prime basis of the land tenure regime, sought to do this by:

i) declaring and defining customary tenure without securing and statutorily entrenching customary titles and rights;
ii) authorising the Governor to make land grants in the form of rights of occupancy limited in time which in practice meant alienation of indigenous lands to settlers and foreign corporations; and
iii) preserving the over-arching control of the state over land by vesting the radical title in the state which in turn was legitimised by the hortatory provision that land "shall be held and administered for the use

1 The United Republic of Tanzania is a union of two countries, the former Tanganyika and Zanzibar. Land is not listed as a Union matter in the 1977 Constitution of the United Republic of Tanzania. This book deals with land tenure in the former Tanganyika or Tanzania Mainland, as it is now commonly identified.

and economic benefit, direct or indirect, of the natives of the Territory...".

Sections 2 and 3 of the Ordinance declared all lands to be public lands *"under the control and subject to the disposition of the Governor to be held and no title to the occupation and use of any such lands shall be valid without the consent of the Governor"*. The vesting section was qualified by a proviso safeguarding the validity of titles and interests which were lawfully acquired before the commencement of the Ordinance. It is legally unclear as to whether this proviso safeguarded the customary rights of the indigenous people. In fact, the legal ambiguity concerning indigenous land rights was the hallmark of the colonial land jurisprudence. The omission of customary rights from the 1923 Land Ordinance raised criticisms in the Permanent Mandates Commission of the League of Nations (Lyall 1973). Hence the amendment in 1928 which expanded the meaning of the right of occupancy to include 'the title of a native or a native community lawfully using or occupying land in accordance with native law and custom' (Land Ordinance (Amendment) Ordinance 1928, No.7). Since then the customary land titles have come to be called 'deemed rights of occupancy'.

The Ordinance authorised the Governor to make grants of land in the form of 'rights of occupancy' for periods of up to 99 years. Such grants are called 'granted rights of occupancy', the right of occupancy being defined as the right to the use and occupation of land – a concept first used and applied in Northern Nigeria (James 1971). Although akin to the English lease, the courts construed this land right as *sui generis* with its own peculiarities (*Premchand Nathu v. Land Officer* (1960)). This was the tenure under which the colonial state alienated lands to non-natives including immigrant communities and foreign companies. The powers of the Governor, *inter alia*, to fix rents and revoke, under certain circumstances, granted rights of occupancy were defined in law. Further terms and conditions of the grant were stipulated in the certificate of occupancy, which made security dependent on use by attaching development conditions to every right of occupancy (see Land Regulations 1928 and Land Regulations 1948, Government Notice 232/1948).

Overall, the relation between the state and the statutory rightholder was in essence contractual and regulated by law. The same could not be said for customary rightholders.

The defining section of the Ordinance which ostensibly recognised customary titles, or deemed rights of occupancy, was only declaratory. It did not define the rights of customary land holders as against the state, nor were these rights entrenched in law in any form. The lands occupied by indigenous people remained public lands under the control and subject to the disposition of the state. The occupation and use of land by customary holders was validated by the colonial courts by

assuming constructive consent on the part of the Governor. The customary titles were categorised as *permissive* rights (*Mubena bin Said v. Registrar of Titles* (1949); for further discussion see Chapter 8). This had a two-fold effect on their nature and status: although they were *recognised* by law they were not *protected* by it, but were held, so to speak, at the discretion of the Governor. Thus, they fell squarely within the domain of administrative policy and action rather than being regulated by law. This suited the colonial interests well. So long as the state was interested in peasant and pastoralist production, customary landholders would be deemed to have permissive rights regulated by 'native law and custom' ie. customary law. But when the colonial interest required alienation, customary occupants could be evicted purely by administrative action, which would simply be legally interpreted as withdrawal of the Governor's implied permission. In short, customary land rights had no legal security of tenure.

Lack of security of tenure in the case of deemed rights of occupancy was thus a deliberate creation of colonial policy, ingeniously translated into law through the device of declaring all lands 'public lands' vested in the Governor. Contrary to the oft-repeated claims of the pundits, insecurity of tenure is not inherent in customary land regimes. It was a colonial creation which, like many other colonial creations, was attributed to the customary system.[2] This attribution was not without consequences. In academic writings, judicial interpretation and administrative practice customary tenure came to be identified and treated as inferior to statutory or common law tenure. The result was a dual land tenure system organised hierarchically in which progress was seen and presented as a movement away from the (traditional) customary to the (modern) statutory form of land tenure. 'Progressive' or developmental land tenure reforms from the late colonial period (the 1950s), through the modernisation policies of the post-colonial 1960s to the current liberalisation, have been based on the assumption that insecurity is endemic to customary tenure. I will give a few illustrative examples.

Colonial land policy in Tanganyika, as observed earlier, was heavily influenced by the potential and actual conflict between the peasant (indigenous) and the plantation (foreign/settler) sectors. Following World War II, Britain drew heavily on colonial resources to finance its reconstruction (Brett 1973; Rweyemamu 1973). In the early 1950s peasant production of cash crops was enhanced very often by the use of state coercion. Concurrently, the government abandoned its previous restraints on large-scale land alienation to non-natives. A Government Circular of 1953 (Tanganyika Government 1953) argued that it

2 Recently there has been a steady stream of studies on how the colonial state construed customary law. It must be emphasised, however, that such 'construction' was not a one-sided affair, but a contested terrain involving a process of struggle between what might be called the ideologies of domination and of resistance (see Channock 1991; Maroclani 1996).

would be in the interests of natives to imitate the modern methods of production employed on non-native lands. Modernisation was the ideology whereby the government sought to rationalise further alienations of land to foreigners. Between 1949 and 1957, the average area of land alienated was 260,400 acres: five and a half times more than the annual average of the previous 26 years. During those eight years, over 2.3 million acres were alienated compared with 1.2 million in the previous 26 years (Tanzania 1994,Vol.I).

At the same time, partly as a consequence of the recommendations of the East African Royal Commission of 1953-5 (East African Royal Commission 1955), government land policy moved quickly towards advocating individualised freehold tenure. The Commission made what are now standard arguments against what was then called 'tribal communal tenure' in favour of individualised tenure.

A free market gives to the buyer access to land for those economic purposes which are consistent with the price which he has to pay for it and ensures to the seller the opportunity to dispose of the land which he is unable to utilise adequately in relation to the price which it would fetch. Where the market is not free, either because of tribal restrictions which prevent its purchase, sale or lease, or because it is encumbered with restrictions on transfer which have no relation to economic circumstances, access to land may be rendered impossible for those members of the community who are best able to use it in accordance with its market value (East African Royal Commission 1955).

These arguments became the rationale for Government Paper No.6 of 1958 (Tanganyika Government 1958) proposing to move towards the freehold system and abolish customary tenure. The proposals were never translated into law. Julius Nyerere, at the head of the nationalist movement, strongly opposed it in his famous paper '*mali ya taifa*' ('nation's property') written in 1958 (reprinted in Nyerere 1968). For the next two decades TTR (individualisation, titling and registration) was not on the cards. Yet the underlying assumptions and prescriptions of the modernisation ideology continued to inform and direct the policies of the post-independence period with varying (mostly adverse) effects on customary lands.

The First Five-Year Plan adopted immediately after independence was based on the World Bank Report, *The Economic Development of Tanganyika* (World Bank 1961) which was based on modernisation principles. To modernise traditional peasants or pastoralists meant removing them from their traditional surroundings so as to integrate them in the world capitalist market through the production of cash crops for export. The transformation approach recommended by the World Bank involved settling selected farmers in villages supervised by a government agency, the Rural Settlement Commission. The Commission would be granted a right of occupancy by the Minister under

the Land Ordinance, while the settlers would hold the land under specified derivative rights. The Rural Settlement Commission had significant supervisory and managerial control over the settlers, which would be enforced through a series of by-laws backed by criminal sanctions (see Land Tenure (Village Settlements) Act, 1965, No.27).

A similar philosophy informed the Fallon Report, published by a USAID Mission to Tanganyika, which formed the basis of the Range Development and Management Act, 1964 (No.51). By 1966, however, both village settlement schemes and rangelands projects were acknowledged to have failed (Cliffe and Cunningham 1973; Jacobs 1980). The reasons given were over-capitalisation and top-down management, with patronising attitudes on the part of the bureaucrats and international agencies towards peasants and pastoralists (Coulson 1982). As Coulson observed:

> *"The view that peasants are primitive, backward, stupid – and generally inferior human beings – dominates the rural chapters of both the 1961 World Bank report and the Tanganyikan First Five-Year Plan"* (Coulson 1982:161).

And he concludes:

> *"The transformation approach can be understood as a desperate reaction to peasant resistance: if there was no other way of making the farmer grow more crops, then the last hope was to take him right away from his 'traditional' surroundings, to settlement schemes on which, in return for land, he could be made to follow the instructions of the agricultural staff"* (ibid.:162).

What were presented as production-oriented arguments had fundamental implications for land tenure. These are succinctly summarised by the Land Commission.

First, the implication of the statutory systems described in both the cases – village settlements and range development – was to remove land tenure from the domain of customary law and assimilate it in the statutory system of right of occupancy. Second, there was an implied perception of the evolution of the tenure system to some form of individual tenure under the firm supervision of a statutory body or a government department. Third, the land tenure and land use systems were to be administered and managed from the top through a series of detailed regulations, rules and by-laws. Breaches of these provisions would result in criminal sanctions as well as loss of land rights. Thus force was integrated in the supervision of production and security of tenure was tenuous. Fourth, the participation of the peasants and pastoralists themselves in the use, planning, administration and management of land had virtually no role. Finally, as should be clear, both the perceptions of the people on land tenure embedded in their customary systems and their land rights deriving therefrom were disregarded (Tanzania 1994, Vol. I).

Although the post-Arusha villagisations took off from different ide-

ological considerations, top-down state-centred attitudes, on the one hand, and perceptions of the backward nature of customary tenure, on the other, continued to underlie the programme, as will be explored in the next Chapter. With the *Ujamaa* policies[3] in retreat and IMF-inspired liberalisation at the centre of the current agenda, the assumptions and perceptions of the market-driven ITR have once again resurfaced. This will be discussed in some detail in Part III.

Suffice it to draw attention to one piece of evidence which is often ignored in the debate on the virtues of ITR. In both the immediate pre-independence period when the colonial government was proposing ITR and in the post-independence period (1961-6) when the settlement schemes were at least indirectly based on ITR, production of peasant crops cultivated within customary land regimes rose significantly. From 1954 to 1959 exports of cotton rose by two and a half times in terms of volume and cashewnut production doubled. Between 1955 and 1960 coffee production rose by 40 per cent. The increase in African production was due more to changes in price policies and the lifting of restrictions on African co-operatives than to reform of customary tenure (Coulson 1982). Again between 1960 and 1968, when the settlement schemes were proving a huge failure, small-scale African agriculture continued to expand production – cotton by 13 per cent per annum, coffee by 12.5 per cent, and cashewnuts by 9 per cent (*ibid.*). Clearly, customary tenure, which is constantly accused of acting as a disincentive to production, did not in this case impede production.

Admittedly, increased production came from the rise of capitalist peasantry and the vibrancy of the co-operative movement controlled largely by rich peasants. Differentiation in the countryside no doubt accelerated (Iliffe 1979). The development of rural capitalism was taking place within the structures of a world market based on exports of cash crops (Iliffe 1971). Whether this development could have been sustained is doubtful. But this raises different issues relating to the structures of the national economy rather than to matters pertaining to land tenure. At the least, the evidence demonstrates that given the opportunity, customary tenure is both adaptable and capable of facilitating increased production.[4] Let us now turn to problems of land tenure in the post-independence period.

3 These were a set of policies to implement the policy of socialism and rural development declared by the Arusha Declaration of 1967 under the country's first president, Julius Nyerere.

4 Recent studies elsewhere in Africa have borne this out (see Platteau 1992; Migot-Adholla et al. 1991).

Chapter 2

Problems of land tenure in the post-Arusha period I: nationalisation and villagisation

Colonial legacy

The legal land regime established principally under the Land Ordinance was taken over virtually unaltered by the independent state (see Tenga 1987). All lands declared to be public lands were now vested in the President in place of the Governor. Since independence the government has not promulgated any explicit land tenure policy except for the abolition of both freehold titles,[5] the semi-feudal system called *nyarubanja*[6] and the passing of legislation against absentee landlordism.[7] None of these measures amounted to land tenure reform, or had land redistribution as its objective. At best, they were what has been described as land tenure conversion (Okoth-Ogendo 1996).

The abolition of freehold titles had only symbolic value. Freeholds were in any case a German colonial relic affecting only a small proportion of the land. Even then the land under freehold was not 'nationalised' or acquired by the state. Freehold titles were converted first into government leases and eventually into long-term (99-year) rights of occupancy granted automatically to former holders and dating from the time of conversion.[8]

The Rural Farmlands (Acquisition and Regrant) Act of 1966 was intended to cover situations where the landholder himself was not the developer and the land was substantially developed by an occupier. It covered only pre-1948 grants and the Minister had discretion to apply the Act to particular situations. The philosophy behind the Act – 'land to the tiller' – had some potential for the redistribution of alienated lands in areas of land pressure. But the Act was never perceived as such, nor was it applied to redistribute land to cultivators. Where alienated land was taken over, it was done through special legislation, and in any case was placed in the hands of parastatals and co-operatives.

All in all, changes in land tenure came about indirectly through

5 Freehold Titles (Conversion) and Government Leases Act 1963,No.24 (Cap.523). See also Tanganyika Government 1962 for reasons.
6 Customary Leaseholds (Enfranchisement) Act 1968,No.47.
7 Rural Farmlands (Acquisition and Regrant) Act 1966,No.8.
8 Government Leaseholds (Conversion to Rights of Occupancy) Act 1969,No.24.

other policies rather than as a result of consciously conceived national land tenure policy. We shall examine changes in policy and government structure in four different areas which have had major impact on land tenure generally and customary tenure in particular.

Post-Arusha *Ujamaa* and nationalisation

Following the Arusha Declaration of 1967 and the policy of *Ujamaa*, rural development policies revolved around two poles – large-scale agriculture and ranching under parastatals and small-scale agriculture under villagisation. At the same time, it was the rural *kulak* (rich peasant) who was seen as the *kabaila* (literally feudalist) and targeted as the 'enemy' of *Ujamaa* (see the formulation in the Arusha Declaration). The overall direction of the economy, based on the production of cash crops for export and integration within the world capitalist market, was not affected. If anything, it was further intensified. The role of the state in production, management and supervision became more direct. The value of the assets of agricultural parastatals increased five-fold from some Sh.56 million in 1964 to Sh.250 million in 1971 (Coulson 1982:Table 23.1). Invariably the parastatal sector was run in association with foreign capital and management, including the current frontliners of privatisation like the World Bank and USAID (see, for instance, *ibid.*:Tables 24.1-3).

Since 1967, the role of the state through legislation and administrative action was reinforced and deepened (for a theoretical treatment see *Shivji 1987*). Top-down bureaucratic management and utterly condescending attitudes towards rural communities on the part of both the government and the ruling party were expressed without restraint, the latter frequently translated into the application of force, albeit thinly veiled by law (Shaidi 1985; Williams 1982; Shivji 1990). More often force was used directly in the form of arbitrary administrative action and policy directions. Villagisation itself was a forced resettlement of millions of peasants, with no authority in law.

Parastatals took over nationalised assets including land, which they held under rights of occupancy. More land, very often belonging to customary holders in the villages, was alienated to them through government allocations justified by the notion of 'public interest' or 'national project' (*mradi wa taifa*). The highly publicised land dispute between one of the larger parastatals, the National Agriculture and Food Corporation (NAFCO) and Barabaig pastoralists in the Hanang district of the Arusha region is a case in point (see Lane 1996). This conflict illustrates in microcosm virtually all aspects of the post-independence land and production scenario. NAFCO was established as a statutory corporation in 1969. Around the same time the government decided to go in for a gargantuan wheat project with the assistance of the Canadian International Development Agency. The scheme

was based on large-scale, heavily mechanised production along the lines of Canadian prairie farming. It has involved the alienation of some 100,000 acres, roughly a quarter of the best grazing land belonging to Barabaig people. Important sources of water, ancestral places of worship and some of the best agricultural land have been enclosed within NAFCO farms. Both Barabaig pastoralists and Basotu wheat farmers who had attained high levels of production in the 1950s and 1960s have been affected (Raikes 1971). This is another example where incipient accumulation from below by the rich peasantry was considered inimical to *Ujamaa*. The government/foreign capital venture integrating the domestic economy further into the world capitalist system was presented as promoting 'socialism' and in the national interest.

In typical fashion, under the guise of a national project, land was alienated to NAFCO without any consultation with the people, ie. the customary owners and occupants. As found by the court in a civil case between the villagers and NAFCO (*Mulbadaw v. NAFCO* (1981)), the government did not even follow the procedure of the Land Acquisition Act of 1967 (No.47) for compulsory acquisition. The assumption was that the customary owners had no legal rights – precisely the position adopted by NAFCO's counsel in arguing that the procedures of the Land Acquisition Act did not apply to customary owners.

We have seen that these attitudes date back to colonial times. The colonial state, however, for political reasons, adopted an administrative policy that native communities ought to be consulted before land was alienated, although the state was not bound by the results of the consultation. The post-colonial administrators did not even go through the motions of consultation. One official witness in the case cited above explained the procedure that had been followed:

> *"When we start a project the peasants are informed through the instruments of the Government and the Party. A letter is written from NAFCO Headquarters to the Regional Party Chairman who was then also the Regional Commissioner [sic]. He then spreads the message to the villagers through the Katibu Kata [ward secretary], etc.. The NAFCO Manager in the area also assists in the spread of the information.*
>
> *"In the 1980/81 season we had to move people out. The procedure followed was to inform the Katibu Kata of the affected area. On 29 March 1979 I saw the Katibu Kata to instruct him to move out the peasants who were in the area earmarked for expansion"* (ibid.:4).

Thus directives from the top implemented bureaucratically and often enforced through legal and extra-legal coercion have been the typical *modus operandi*. There is ample evidence that the Barabaig people throughout resisted the alienation of their lands. On more than one occasion they were forcibly evicted, including the burning of their

houses and property and assaults by NAFCO employees or the police at the behest of the NAFCO management (*ibid.*; Lane 1996; Shivji and Tenga 1985; Kisanga Commission 1993). The otherwise narrowly focused Kisanga Commission, which was appointed to investigate human rights abuses by NAFCO following international pressure, had to concede that the people themselves had never been involved in the planning of the project:

> "*The Commission emphasises the importance of involving the targeted people in drawing up and implementing plans which concern their areas. This arises from the fact that many Barabaig villagers were not involved fully when NAFCO farms were being established in Hanang District; they were made aware only when they were told to start moving away*" (Kasanga Commission 1993:54).

Arrogant attitudes towards pastoralists and what are considered as their outdated customary systems of tenure were characteristically demonstrated in the submissions made by the NAFCO management and government officials before the Land and Kisanga Commission (see Tanzania 1994, Vol.II; Mwaikusa 1997). There is an additional reason for the NAFCO management to be particularly aggressive in the defence of large-scale alienations. There have been long-standing allegations that NAFCO managers and other officers have been involved in their own private wheat farming. Land has been hired from pastoralists and NAFCO resources have been used for private benefit. The Kisanga Commission confirmed the practice:

> "*[S]ome managers and other employees of NAFCO farms, especially those who have been on the farms for long periods, have involved themselves in large-scale individual farming of wheat, through the practice of hiring land. In so doing they have contributed to the process of making the Barabaig shift from time to time*" (Kasanga Commission 1993:35).

Ironically, while Barabaig wheat farmers' development was stifled and suppressed in the name of *Ujamaa*, the 'outsider' bureaucrats' private accumulation was facilitated by public/state resources (including intimidation) through *Ujamaa*. The NAFCO management admitted the existence of private farming by some managers in its statement to the Kisanga Commission. In terms reminiscent of the colonial argument justifying the alienation of land to non-natives, it "*asserted that the system should be continued for the purpose of demonstrating improved farming or agriculture to the people*" (ibid.:23).

The NAFCO dispute is by no means untypical. The Land Commission received overwhelming evidence showing large-scale encroachment by parastatals, District Development Corporations, state institutions such as the army, prisons, national services, parks and reserves on customary individual and village lands. A number of major disputes of this kind have been documented in volume II of the report. The story varies, the details are different, but the theme is the same;

villagers and rural people holding land under customary tenure have no security. Their lands are under constant threat of alienation by government institutions ostensibly for 'national projects' or in the 'public interest', but very often in favour of high and middle-level bureaucrats or well-connected 'outsiders'.

Security of tenure was further undermined by villagisation and the way it was carried out.

Villagisation

Following the Arusha Declaration the policy of villagisation centred around communal production in villages as opposed to the earlier transformation and improvement approaches of the 1960s (Nyerere 1968). The establishment of *ujamaa* villages was slow and communal production within them minuscule. By 1973 the ruling Party had grown impatient with the lack of progress and abandoned its earlier methods based on voluntarism and persuasion. It was decided to make villagisation compulsory and the President ordered that by the end of 1976 the whole rural population should have moved. Thus began 'Operation Tanzania' which resettled millions of peasants and pastoralists in old or newly formed villages.

The operation was carried out by senior party members and the state bureaucracy. The central government bureaucracy had been decentralised in 1972 on the recommendation of the US management company, McKinsey & Co. (Coulson 1982; Mushi 1978). It was thus ideally placed to supervise villagisation at the regional and district levels (Mwapachu 1976). There is now considerable evidence that force was used arbitrarily; the militia, Field Force Units and other armed bodies were deployed; local people were not involved in the planning, and many technical errors were made in the location of villages and the selection of farming and dwelling sites. The Land Commission observed:

> *"One major feature of the 'operation', stands out above all. There was total disregard of the existing customary land tenure systems as well as the fact that virtually no thought given to the future land tenure in the newly established villages"* (Tanzania 1994, Vol.I:43).

Villagisation had a major impact on land tenure generally, and the rights of rural land users in particular. In effect, it amounted to a major land reform. Yet that is not how it was conceived, planned or implemented. The result was confusion in tenure and the total undermining of security for customary landholders. Curiously, villagisation opened up possibilities of alienation of village land on a scale greater than even that of colonial times (Tenga 1987). Problems related to three areas – the legal framework, village land allocation and village planning – demonstrate the extreme fragility of customary rights and the extent of alienation/expropriation of village lands. Each of these is examined in turn.

Legal framework of land tenure in villages

Villagisation involved the relocation of existing villages and the resettlement of peasants and pastoralists.[9] Rural landholders had hitherto occupied and used their lands under customary regimes (deemed rights of occupancy) which had been tacitly recognised in colonial jurisprudence and administrative practice, although, as argued earlier, they were not secure in law.

Villagisation in effect meant the expropriation of customary rights and the compulsory acquisition of land under customary regimes. No recognisable legal procedures were followed in carrying out the process. Even the colonial policy of prior consultation was ignored. In general, post-independence government practice has had little regard for law. As far as land is concerned, colonial land law, inherited virtually intact at independence, reinforced the perception among politicians and bureaucrats that all lands not occupied under granted rights of occupancy were 'public lands' at the disposal of the President. Customary occupiers occupied such lands not so much as a matter of legal right, but at the discretion of the President, a perception neatly summed up in the Swahili slogan *ardhi ni mali ya taifa* (land belongs to the nation). Presumably, therefore, the President could do what he liked with these lands. Politically his actions would be justified in terms of 'public interest', overriding developmental policies or national projects. In the 1960s and 1970s no one needed legal justification. Neither the rulers nor the ruled sought endorsement in the processes of law (Shivji 1995). Rather, as in colonial times, the law was used as an undisguised instrument of force. In the case of villagisation no pretence was made to use the law to implement it. Although legislation was passed which could have legalised land expropriation under villagisation, it was not applied, presumably for political and diplomatic reasons.

The Rural Lands (Planning and Utilization) Act of 1973 (No.14) had little to do with planning and utilisation. It was a thinly veiled attempt to confer open-ended powers on the President and appropriate Ministers to 'extinguish' customary 'rights' without due process or any legal redress. The Act gave the President uncontrolled powers to declare any part of Tanzania a 'specified area'. Once an area had been declared as such, the Minister for the time being responsible for regional administration was authorised to make regulations to control virtually any land use in the area. More important, he could provide through regulations for 'the extinction, cancellation or modification of the rights, titles and interests in or over the parcels of land falling wholly or partly within the specified area, or in or over any building within the specified area' (section 14). Theoretically, the Act could

9 Some regions like Kilimanjaro were either not affected or affected only marginally. Here too villages were registered, but they had already existed and land continued to be governed by customary law and practices.

have been used to declare the whole of rural Tanzania a 'specified area' and extinguish customary rights *en masse*. Politically this would have constituted a major embarrassment. In practice, as the later use of the Act was to show, a direct and wholesale attack on customary rights could easily have provoked massive resistance. In the event, the Act was used only on one or two occasions to legalise pre-villagisation 'operations' which had been mounted to resettle people affected by floods or famine (for example, the Rufiji area under Government Notice 125 of 1974). Significantly, villagisation was not challenged at the time in the courts. A few cases ultimately involving such a challenge ended up in the lower courts with decisions based more on political considerations than on legal entitlements. Even the higher courts adopted a similar attitude.

The other piece of legislation often, albeit mistakenly, cited as an authority for land tenure in villages is the Villages and *Ujamaa* Villages Act of 1975 (No.21). This Act, however, does not provide for land tenure as such, but is an enabling piece of legislation delimiting the *territorial* jurisdiction of villages and providing for their registration. Demarcation of boundaries for the purposes of the Act does not amount to vesting any ownership rights in the village, as was correctly observed by the court of appeal in the *Mulbadaw* case (*NAFCO v. Mulbadaw* (1985), unreported).

The Act sets up the Village Assembly (a meeting of all adults in the village) and the elected Village Council of some 25 persons, a subcommittee of which, consisting of five members, deals with land matters. Under the law, the Village Assembly has very little power, while the Village Council is subject to the over-arching powers of District Councils, District Commissioners and directions from the Minister of Lands.

The Minister issued Directions (Government Notice No.168 of 22 August 1975) under the Act providing for the allocation of land in villages. The land for the village was to be allocated by the District Development Council. The Village Council, in turn, would allocate to each household (*kaya*) a piece of farmland and an acre of land for a dwelling house. An allottee could not dispose of this land without the approval of the Village Council. These Directions leave unanswered the basic issue of the land tenure which would govern land allocated during villagisation. Even as a limited piece of legislation, the Act was pregnant with a host of problems. As the Land Commission queried: 'Where, for instance, did the District Development Councils get the land to enable them to allocate it to the Village Councils? How were the land rights – mostly *"deemed rights of occupancy"* – on the lands allocated to the villages to be dealt with? (Tanzania 1994,Vol.I:45). In any case, with the reintroduction of local government, the Act was repealed and its institutional provisions merged in the Local Government (District Authorities) Act of 1982 (No.7). The Directions have

therefore lapsed and are no more law. The legal framework for village land remained unclear and a potential source of enormous conflict.

In practice, the original allocations made in villages during villagisation, as we have seen, had no authority in law. The procedures followed differed from region to region and within regions. Overall policy was set by the Party but interpretation and implementation was the task of local committees consisting of regional and district bureaucrats and party leaders. In some areas with a concentration of rich peasants, like Hanang, Babati and Mbulu districts, the villagisation programme achieved land reform involving redistribution. But, as would be expected of redistribution from the top without involvement of the people, the process was arbitrary and involved the abuse of power and inevitable acts of nepotism.

Elsewhere, as in Mara region for instance, villages were relocated and boundaries redrawn. This left boundary problems between and among villages which remain unresolved to this day. Unscrupulous officials have taken advantage of the confusion thus created to allocate village land to powerful and rich outsiders at the expense of villagers.

The villagisation programme produced no new legal framework for village land tenure, nor did it provide security to village land. To the extent that people settled in the 'new' villages and carried on their business, the underlying perception was that they were governed by pre-villagisation customary tenures. We have already seen that customary rights under colonial jurisprudence, and administrative policy and practice derived from the 1923 Land Ordinance, were extremely ambiguous and their security fragile. Villagisation destroyed what little was left of the security of deemed rights. Apprehension about their land has since haunted villagers as the evidence collected by the Land Commission and recorded in twenty volumes[10] clearly demonstrates.

The higher judiciary, particularly in the late 1980s, began to take some hesitant steps towards providing greater security of tenure to customary landowners. In the *Mulbadaw* case, for instance, the High Court held and the Court of Appeal agreed (*obiter*) that customary rights stood on the same footing as granted rights in so far as the procedures for compulsory acquisition were concerned. The due process procedures of the Land Acquisition Act, 1967 were applicable to both types of rights. In effect, the Courts were saying that the grant of a right of occupancy made by the President under the Land Ordinance on a piece of land previously held under a deemed right of occupancy would be invalid unless the deemed right was first lawfully acquired in terms of the provisions of the Land Acquisition Act. This was undoubtedly a big step forward in land law jurisprudence, with far-reaching consequences. But judicial policy-making has strict limits and

10 These have been deposited in the East African section of the University of Dar es Salaam library and the National Archives and are open to researchers.

can have contradictory effects. In the case itself, for example, the Court failed to carry the principle it had enunciated to its proper conclusion. In fact, the Court came down in favour of the appellants, NAFCO, on the rather tenuous grounds that the claimants had not shown that they were 'natives' entitled to hold customary rights.[11]

In a later case, the same Court of Appeal, in the leading judgement written by the same judge, took several steps backward, virtually undermining the principle it had laid down in *Mulbadaw*. In the case of *Nyagwasa v. Nyirabu* (1985), the Court seemed to be saying, albeit implicitly, that a plot of land in a registered village could be granted validly by the President to an outsider even though there was no approval (let alone consultation) of the Village Council for such a disposition, because the President and his delegatees (state institutions) were a 'superior landlord' under the Land Ordinance. This position was sufficiently incongruous and inconsistent with the proclaimed policies of villagisation underlying the Villages and *Ujamaa* Villages Act to evoke a dissenting judgement from a senior judge. In his dissenting opinion, Judge Makame succinctly put his finger on the central contradiction of the post-villagisation land tenure when he said:

> *"The spirit and effect of the [Villages and Ujamaa Villages] Act, and the various regulations made under it, is, among other things, to place the land within the jurisdiction of the village at the disposal of the village and its kayas, under the administration of the village, for the economic and social transformation and development of the village and its inhabitants. The States [sic] decided that it should be so, and it would defeat the objective of the law if grants over the same land were made, even by superior authorities, without consultation, or at the very least knowledge, of the village authorities"* (p.17 of the mimeographed copy of the case report).

These inconsistent and contradictory opinions of the judges demonstrate, at the least, utter confusion in the legal framework of village land tenure.[12] What is more, they also reflect the limits of judicial policy-making. It would not be far-fetched to say that giving security of tenure to customary holders via judicial decisions within the overall existing legal framework can very well work against the interests of the most disadvantaged rural landholders. This can be seen clearly in hundreds of cases filed by relatively better-off peasants in Hanang and Mbulu districts following the liberalisation of the 1980s. These cases have been brought successfully to the courts by the former customary owners against current post-villagisation occupiers (including Village Councils) who were allocated land during villagisation. Their claims

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11 There were 67 plaintiffs – one village, 48 Iraqw, 16 Datoga and 2 Somalis (Shivji 1990).

12 Judge Mustafa in *Mulbadaw* seems to be making this point, albeit in a typically judicial understatement, when he observes: 'In my view the law in Tanzania on Land and Land Tenure is still developing and certain areas are unclear and would have to await the necessary legislation' (p.6 of the mimeographed copy).

based on customary rights have been upheld by primary courts. The result is that villagers are evicted as trespassers. They lose their lands and livelihood through no fault of theirs. The whole process amounts to a forcible reversal of villagisation.

In one sample of land cases pending before the Primary Court of Karatu, the Land Commission found that some 92 suits (arising from villagisation) were filed in the first seven months of 1992. These involved 89 people claiming to recover land from 565 present occupiers. Of these 565, five were village councils, three were churches, one a mosque, one a plot occupied by the women's organisation (UWT) and one occupied by the youth organisation (*Vijana*). The total land claimed was some 1,693 acres (see Box 1).

Box 1: Distribution of claimants and respondents by land area, Karatu Primary Court, 1992 January-July

Land Area (acres)	*%age of Claimants (n.89)*	*%age of Respondents (n. 565)*
0-4	16	87
5-10	27	10
11-15	18	2
16-20	10	0.4
21-30	12	0.2
31-40	2	nil
41-50	7	nil
51-70	6	nil
71-100	1	nil
Over 100	1	nil

Source: Tanzania 1994,Vol.I:54-5.

As the Land Commission observed:

> *"While at one end a small group (16 per cent) seems to be trying to improve its allocations during villagisation by claiming a little more, at the other end there is a significant group of the former, relatively large, landholders desirous of reclaiming their former lands held under customary rights. ...*
>
> *"As was to be expected, the family heads from whom land is claimed are very small landholders, allocated land during villagisation. Thus 97 per cent are below 10 acres. ...[T]he 0.6 per cent holding more than 15 acres are all either village governments or the churches who were also allocated land during villagisation.*
>
> *"If these cases succeeded, it would displace some 565 family-*

heads or close on 3000 people. In the 11 cases that succeeded before the Primary Court of Mbulumbulu during 1992, for example, 6 claimants recovered 64 acres from 11 respondents. Of the 6, only two recovered 44 acres or almost 70 per cent of all lands in dispute. The same two claimants have another 7 cases pending before the same court in which altogether they are claiming 56 acres against 9 respondents. If they succeed in all these cases, all told, the two will have displaced 17 families, recovering 120 acres in the process" (Tanzania 1994,Vol.I:55).

The peasants in the affected areas told the Land Commission that they were witnessing massive dislocation and expropriation of their lands twice within a decade. The first time they were resettled on their current lands under Party directives and by force. This time they were being evicted, again by force, by the police under Court orders. The situation proved to be so disruptive and potentially violent that the government in desperation (and contrary to the advice of the Land Commission) steam-rollered through Parliament a clearly ill-conceived piece of legislation called the Regulation of Land Tenure (Establishment of Villages) Act, 1992 (No.22). This Act sought to extinguish pre-villagisation customary rights in villages established during the villagisation process, the objective being to remove the legal basis of cases filed, and to be filed, by the former owners. The Act also went further and established a dispute-settlement machinery with customary tribunals as the courts of first instance and the Minister of Lands as the final appellate tribunal.

The shortcomings of this Act are analysed elsewhere (Shivji 1994). Suffice to say that the Act, as was predicted by the Commission, was declared unconstitutional by the High Court in *Akonaay v. Attorney General* (1993), which decision was confirmed by the Court of Appeal, on the grounds, *inter alia*, that the extinction of customary rights was in breach of the right to private property provided in the Constitution (article 24). This is considered a constitutional and land judgement landmark (*Attorney General v. Akonaay* (1994)). Yet its re-reading of colonial jurisprudence and political economy is debatable, in the present author's view, and could create even more legal confusion. What is more, the ultimate decision in the case went against the customary owner on the very tenuous ground that his rights had been extinguished by an earlier Government Notice which came into effect before the Bill of Rights became operative. This was undoubtedly a desperate attempt by the Court to safeguard villagisation in the volatile Arusha region.

The government reacted by amending the Act (No.18 of 1995), by reformulating the provisions so as to meet the Court's objection. The net effect so far is that neither the judgement nor the amendment has had the desired effect. An overwhelming number of cases filed in Babati and Moulu districts in early 1996 involved land matters. On a

tour of these districts the Chief Justice was reported as ordering the Primary Courts not to hear land matters until the government had sorted out the land issue (*Rai* 28 March-3 April 1996 and *Mtanzania* 30 March 1996). As the Land Commission had pointed out, the havoc in land tenure wrought by villagisation could not possibly be resolved either by *ad hoc* legislation or by judicial policy-making. The solution to the problem is essentially political and involves a complete overhaul of the land tenure system.

Village titling

The current project of village demarcation, titling and registration traces its origin to the National Agricultural Policy (Agripol) enunciated in the report of a government task force in 1982 (Tanzania 1982). The report does not contain any elaborate analysis of land tenure. Its underlying assumption is that an individualised system is the most appropriate system of tenure to enhance investment in land. Given the strength of populist policies at the time, the authors of the report recommended individualisation in a somewhat indirect fashion, namely, that villages should be given titles of 999 years, and villagers sub-titles of not less than 33 and not more than 99 years.

In 1987 the Party directed the government to complete village demarcation and titling within five years ie. by 1992. The motive behind this decision was the belief of at least some party leaders that titling would give villagers and village lands greater security.[13] In practice, as will be seen, village titling turned out to be yet another source of insecurity for customary holders.

The Land Commission did not come across any serious study or planning of the process of village titling nor an appreciation of its implications. Nonetheless, village titling began in earnest in 1987, under the existing legal regime established by the Land Ordinance. Rights of occupancy are granted to Village Councils, since neither the Village Assembly nor the village as such is a corporate body. It is then expected that villagers will, in turn, be given leases from the village right of occupancy. The whole programme, as the Land Commission shows in its report, is fraught with major conceptual, legal and practical problems.

By June, 1991, out of some 8,471 registered villages, only 22 per cent had been surveyed, some 15 per cent of certificates prepared, and only 2 per cent of the certificates registered. The process of surveying, preparation of certificates and registration under the present legal regime is very elaborate, lengthy and expensive. Ordinary certificates take anything between 6 months and 2 years to prepare. The time that village titling was taking caused considerable anxiety in official circles

13 This was the perception of Julius Nyerere, as he made clear in his interview with the Land Commission. If so, in legal terms the Party was badly advised.

and a number of evaluating teams were formed. But the delays and consequent complaints are probably not the most serious problems of village titling. It is the unexpected and unintended consequences that are of greater concern.

First, the grant of rights of occupancy to the Village Council mean that 'ownership' of all land within the village is being vested in the council. This gives the council, and therefore other government institutions which control it, unfettered powers over village land. In relation to outsiders, the council could well in theory refuse to alienate land, and this, the Commission found, it has done in a few cases. On the other hand, there is nothing to prevent the Council, or its leadership, or its Land Committee from granting land to outsiders behind the back of the Village Assembly and against the interest of the villagers.

Secondly, the granting of a right of occupancy to a village without first clearing the existing deemed rights of villagers to village lands amounts to a double allocation of right and, following *Mulbadaw*, is probably invalid.

Thirdly, the right of occupancy granted is a statutory tenure governed solely by statute and principles of common law. What is really being done therefore through village titling is to abolish customary tenure and impose statutory tenure in one fell swoop on a countrywide scale.

Fourthly, it is expected that once the village has received its title, villagers will be given leases. Creating leases from a right of occupancy itself involves accurate cadastral surveying and demarcating, titling and registering. What is more, it involves the preparation of technical agreements (of sale? gift?) between the Council and the villager. As we are talking of millions of leases to be prepared and registered, the process is very expensive. Neither the villagers nor the government has resources to pay for such a process. Kenya initiated a very similar process in the 1950s and to this day it has not been completed. Consequently in Kenya there is now serious reconsideration of the whole programme of adjudication, consolidation and registration of land, as it was called (Platteau 1995; Bruce and Migbot-Adholla 1994).

Fifthly, the law governing leasehold tenure is the 1925 property law of England imported through reception clauses. Are the villagers of the Tanzanian countryside in a position to understand and accept the 1925 English law governing their land rights?

Finally, no one seems to have thought through the issue of how rights to be registered as leases will be determined. Inevitably, there will have to be prior adjudication if the leases are to be based on pre-existing customary rights. Any process of adjudication and registration cannot fail to give rise to numerous boundary disputes, claims and counterclaims over the same parcels of land, etc. What machinery will adjudicate to determine these rights and to resolve disputes? Studies of the Kenyan programme have shown that the process of adjudication

became a means for the powerful and privileged to claim and register lands belonging to original customary owners (Gibbon *et al.* 1993).

Village titling itself has already given rise to boundary problems. A number of surveys have had to be stopped until they are resolved. There have been cases of villages obtaining certificates under suspicious circumstances or without consulting neighbouring villages, thus giving rise to intense, and in some cases violent, conflicts. There is, for instance, a running battle between Sonjo and Maasai villages on boundary questions. The Maasai villages, fearful of their lands being alienated to outsiders, have been demarcating and titling their villages with the assistance of a local and a foreign NGO. In the process, the Sonjo claim that the Maasai have encroached on lands traditionally belonging to them. The issue on the ground, regardless of what the land register proclaims, remains unresolved. The fact that the Maasai villages hold certificates of occupancy is no solution. It is in fact the source of the problem. Elsewhere, the *ad hoc* and often panicky reaction of the authorities in situations like this has been to revoke contentious certificates. This in itself undermines the process of titling and its credibility and exacerbates the conflict (see, for instance, Tanzania 1994, Vol.II:dispute No.30).

In short, village titling, the most pronounced programme of land tenure reform initiated so far by the state, is burdened with serious flaws and can have devastating consequences for the land tenure system of the country and the land rights of the rural poor. What is more, in practical terms, it is simply not feasible and has always been likely to be abandoned in midstream, leaving in its wake only more disputes and problems. In fact, titling has now been abandoned and the National Land Policy makes this clear (Tanzania Ministry of Lands 1995).

Land allocations in villages have also facilitated large-scale alienations of village lands, thus further contributing to the apprehension of villagers. This is discussed in the next section.

Allocation of village lands

The Land Ordinance provides no procedures or machinery for the allocation of land. Since lands are vested in the President, it is the executive arm of the government and its machinery which are directly involved in allocation. The President's powers are delegated to the various officers of the Ministry at the time responsible for land, currently the Ministry of Lands, Housing and Urban Development (MLHUD). Procedures for land allocation have largely developed administratively with few institutional and legal checks and balances besides those that normally apply to government bodies.

In the post-independence period there was major reorganisation of the state machinery. Under the one-party system the liberal model of a

'party-neutral' civil service was abandoned. Instead, the civil service was expected to be politically committed to the ruling party. By and large, the state bureaucracy was also de-professionalised as appointments were based more on political criteria than on professional merits.

In 1972 the government accepted the recommendations of the McKinsey report on decentralisation. As has been observed repeatedly, this was not decentralisation of power as such, but the decentralisation of the central bureaucracy (Mushi 1978). The immediate effect was a proliferation of the bureaucratic apparatus at regional and district levels. Local governments with some semblance of representation were abolished and replaced by party-approved and government-appointed officials (Pratt 1976).

Decentralisation was acknowledged to be a failure by President Nyerere in his speech 'Ten years after the Arusha Declaration' (Nyerere 1977). Local government structures began to be reintroduced in 1978 and a law to that effect was passed in 1982. These major and rapid changes in the organisation of the executive arm of the government had a serious impact on the machinery and procedures of land allocation as land was vested in the executive. The result was that land administration was totally disrupted. Lines of accountability were blurred, institutions and their jurisdiction became unclear and confused. In addition to these overlapping jurisdictions, party officials and civil servants were also frequently involved in the allocation of land and the resolution of land disputes. The resultant confusion was exploited by unscrupulous officers who rode roughshod over the land rights of the less powerful in society. Multiple allocation of plots in urban areas and grabbing of land in the countryside have now become a pattern, and with it a proliferation of land disputes, grievances, complaints and social instability. There have been an increasing number of reports of violent clashes between parties involved in land disputes.

The Land Commission found that there was an unresolved tussle between local government authorities (particularly the City Council of Dar es Salaam) and the Ministry of Lands as to their respective powers of land allocation. The Prime Minister's Office was obliged to intervene, with the result that the Ministry issued a circular dated 21 July 1989 setting up a hierarchy of land allocation committees from district to national level. These committees are made up of councillors appointed by the relevant Regional Commissioners and government officers from different departments who attend in their official capacity. The district committee is chaired by the District Commissioner, with the District Land Development Officer acting as its secretary. Similarly the regional committee is chaired by the Regional Development Director with the Regional Land Development Officer acting as secretary. The national committee is chaired by the Commissioner for Lands. The land allocation powers of these committees are specified in

terms of particular types of plots and are limited by acreage in relation to the allocation of farmland. District committees can allocate farmland up to 100 acres, regional committees between 100 and 500 acres, while the national committee allocates farmland of more than 500 acres.

The Dar es Salaam City Council was not happy with this structure and had instructed its councillors and District Land Development Officers not to attend land allocation committee meetings (Tanzania 1994, Vol.I). In practice, the Land Commission found that the committees barely functioned. District and Regional Commissioners with their respective land development officers wielded ultimate power in allocation decisions. At the national level, senior civil servants and political leaders, both in central and local governments, tended to be most influential. In short, it is probably accurate to say that the committee system has not functioned at all.

Box 2: Allocation of village land

An outside applicant for village land, typically for an area running into hundreds of acres, approaches either the District or Regional Land Officers or Commissioners. He is advised to obtain the consent of the village concerned. Such consent is embodied in a set of minutes of the Village Council signed by the chairman and secretary. However, the Land Commission found that in practice the matter hardly ever goes to the Village Assembly as a whole. At best, it might be discussed by the village land committee. In most cases, therefore, alienations take place behind the backs of villagers and against their wishes. In other cases, reluctant land committees are pressurised and intimidated into giving way. The Land Commission found a host of examples of abuse such as the forging of minutes. In some places chairpersons and other village functionaries pleaded that they had no alternative but to approve alienations because they were told that these were directives from the Minister of Lands or State House. In sum, one decisive fact emerged from much of this evidence. The Village Assembly as such has no say in the alienation of village land and no control over it. The Village Council is structurally and legally powerless to defend the land interests of the village against outsiders supported by powerful district, regional or national leaders. As the law stands, the Village Council is answerable to the district authorities rather than to its Village Assembly.

Yet even if it had functioned, the structure itself is a further illustration of the common problem – lack of public participation – raised again and again to the Land Commission. The committees are top-heavy with appointed government officers whose methods of working are typically secretive and top-down. There is no provision for the involve-

ment of villagers and ordinary members of the public. Transparency, openness and democratic participation are certainly not aspects contemplated in setting up the administrative machinery and its procedures.

The Land Commission was told that, as a matter of administrative policy, no village lands were allocated without consultation and approval of the Village Council concerned. The way this operated in practice is illustrated by the typical scenario given in Box 2.

Admittedly, this malpractice did not run smoothly because the villagers showed great tenacity in protesting, complaining and even manipulating one institution of the state or party against another. In other cases, the villagers simply overthrew their corrupt village leaders who were known to be conspiring with important outsiders. Generally, life for the outside occupier who had been allocated land irregularly or against the wishes of the village was made difficult to the extent that, in spite of his certificate of title, he too suffered from perpetual insecurity.

Village planning

Village planning is usually presented as land-use planning. There is, however, no law covering village planning in this sense. The Town and Country Planning Ordinance of 1954 (Cap.378) is geared more to urban than to rural areas. Not surprisingly it is town planners who have been involved in village planning at various stages. A study undertaken for the Land Commission showed that village planning has gone through three stages. During the villagisation process, village planning under town planners was seen as a process of planning human settlement, dwellings and public utilities rather than planning for productive purposes. This was largely a failure. Thereafter there was a lull in both villagisation and land-use planning. The third stage followed the Agripol Report (Tanzania 1982), whose accent was on titling. During this stage the focus shifted from planning orderly settlement to determining the existing and projected land needs of villages with a view to delimiting their boundaries. It is this aspect which is directly relevant to our discussion here.

The Land Commission found that the striking point to emerge from the Agripol study was that *"there has been utter confusion between demarcating of villages for the purposes of establishing boundaries and formulation of land use plans for an orderly exploitation of village land resources"* (Tanzania 1994,Vol.I:48). While such confusion might not be deliberate, it is by no means innocuous. The setting of village boundaries determines the amount of land under village jurisdiction as opposed to state bodies and officials. It is obvious that central government officials prefer more land under their control in order to facilitate alienations and allocations to outsiders (or, in the contemporary liberal-

isation idiom, 'investors') without the protests, complaints, and constant 'harassment' of villagers. The consultants to the World Bank noted this when they described the tension over the issue of village demarcation as follows:

> *"Ministry officials [ie. in the Ministry of Lands, Housing and Urban Development] are somewhat ambivalent and divided in their attitude toward the village titling program, which, they note, was mandated by the Party. Officially, they say that it will enable villages to prevent encroachment and land grabbing by outsiders, resolve potentially troublesome boundary disputes between villages, and, in the longer run, facilitate individual sub-titling and provide the basis of mortgage credit. Unofficially, they worry that too much land is being titled under village jurisdiction and that there will not be enough left to allocate for development by non-local investors. Partly because of this concern and partly because of the bias toward top-down planning, one faction within the MLHUD has argued with some success that village land-use planning should precede demarcation or at least titling"* (Tanzania 1994,Vol.I:23).

Clearly, put in more pragmatic and non-diplomatic language, it is being said that government officials would prefer to retain as much land as possible under their control. This, in turn, implies that the process of village demarcation itself is becoming a means of alienating village lands and 'expropriating' customary land rights. Indeed, town planning has been the process for displacing and dispossessing indigenous customary land owners, as we shall see in the next chapter.

Chapter 3

Problems of land tenure in the post-Arusha period II: urbanisation and liberalisation

Urbanisation

Towns developed in colonial Tanganyika as centres of commerce and government administration and settlements of expatriate and immigrant communities. The African urban population was considered temporary and transient, its main role being to provide a supply of unskilled labour (East African Royal Commission 1955). Urban land tenure closely followed this pattern and these assumptions. Thus immigrant communities were granted rights of occupancy for from 33 to 99 years. They lived in prime areas (near beaches, on hills, etc.) and in town centres. The African population lived in temporary housing in 'native quarters' (*uswahilini*) either on short-term rights (of 1 to 5 years) as licensees or as 'squatters' on public lands, tolerated by the authorities for as long it was expedient to do so. Under the Land Ordinance short-term rights of occupancy are granted and can be revoked by administrative officers. They carry little security of tenure, and even less procedural protection.

Since independence urbanisation has moved ahead by leaps and bounds. Annual growth rates of some 10 per cent for cities like Dar es Salaam have been cited. On the one hand, there has been increased demand for plots. On the other, the resources to prepare plots and service delivery have been diminishing. At the same time, the rapid changes in the government administrative machinery alluded to earlier have resulted in disruption. The incomes of the civil service and administrators generally have failed to keep pace with inflation. All this has resulted in malpractice, corruption, abuse and general misallocation of plots.

Problems of urban land tenure may be summarised on three levels. First, there is the granting and disposition of rights of occupancy in town centres and surveyed areas. Second, within the towns there are, in the language of the Town and Country Planning Ordinance (TCPO), the so-called 're-development areas'; these are essentially the squatter and slum areas or *uswahilini*. Third, there are peri-urban areas which are being rapidly engulfed by the expanding town boundaries. Under the TCPO these are the areas which have already been declared or earmarked as planned areas.

Allocation and disposition of plots

Under the TCPO the Ministry of Lands is responsible for planning and orderly settlement in urban areas as well as the land delivery system. The Ministry draws up general master plans and detailed (layouts) planning schemes. The latter chart areas and their uses and earmark plots ready for survey, allocation and registration. Evidence to the Land Commission revealed that from the early 1980s to mid-1990s the planning schemes have failed to keep pace with urban population growth. Thus in practice allocation of land (from town planning drawings) may precede survey, and in many cases the land concerned may not even appear on the plans. New plots, not on the plans, have been created while existing plots have been subdivided. Pressures from above and inducements from below have led land officers to allocate plots in open spaces, recreation grounds, school compounds, cemeteries and even ecologically fragile areas such as beaches and natural drainage areas.

Double or multiple allocation has become a familiar phenomenon. One person may hold a Letter of Offer on a plot, while another may have a Certificate of Occupancy and a third may be carrying a note from some big wig instructing a land officer to grant the bearer a plot – all to the same plot! Such grants may have been made by the same or different authorities. The phenomenon of multiple allocation has gone hand in hand with the proliferation of allocation authorities. The courts, the Ministry and party offices have been inundated with problems of multiple allocation. The Land Commission estimated that, of the total number of plots allocated by the City Council of Dar es Salaam between 1985 and 1989, those double-allocated ranged between a minimum of 8 and a maximum of 18 per cent. There were on average 200 disputes involving double allocation in the various land offices and courts of Dar es Salaam between 1983 and 1989 (Tanzania 1994,Vol.I).

The official explanation for this state of affairs is the inadequate data storage and retrieval system, lack of resources to reorganise it and inefficient personnel – in short, some kind of managerial/personnel issue. While these problems do exist, to attribute a pattern of consistent maladministration to poor record keeping is unbelievable, to say the least. Every one knows that land files are constantly misplaced, records mysteriously disappear, certain transactions are not recorded and so on. These cannot all be attributed to human error, incompetence or 'acts of God' alone. Any one who has dealt with land cases in the courts and examined witnesses knows that many of these 'explanations' are not accidental, but the intentional results of the abuse of authority. This has been greatly facilitated by a lack of accountability, transparency or legal and institutional checks and balances in the top-down system of land tenure administration.

Redevelopment areas

All major towns and cities, in particular Dar es Salaam, have slum and squatter areas or unplanned settlements. Government officials and politicians with visions of modernisation consider them as eyesores to be razed to the ground. Town planning is seen as the expulsion of squatters and the granting of land to those who can 'develop' it in accordance with stringent building regulations.

The Land Commission received evidence that officials often use their powers of revocation, or refusal to renew the short-term rights of occupants of unplanned areas, on various pretexts. The same plot is then granted to a more powerful or wealthier applicant on a long-term right of occupancy, while the original occupant is pushed out. This is how indigenous occupiers are 'evicted'.

Under the Town and Country Planning Ordinance, built-up areas may be declared re-development areas for the purposes of planning. In these situations land is acquired under section 34 of the Land Acquisition Act, 1967. This is common procedure employed by the government in the clearing of unplanned settlements. The result is that indigenous owners are dispossessed in favour of wealthier outsiders. In theory, a sitting occupant could apply for a long-term right of occupancy. In practice, he does not have the resources to fulfil the building conditions which go with the granted right of occupancy in urban areas.

There is another procedure affecting redevelopment provided under section 27 and the Third Schedule of the TCPO, which does not divest the existing occupiers of their pre-existing rights. But this procedure is not preferred by town planners and developers. In one incident discussed below, where the procedure was applied, the law was manipulated to effect expropriation.

It is also true that owners of short-term rights with dilapidated houses, or houses which do not meet the building regulations, voluntarily sell off their rights for a couple of million shillings. The purchaser then has the plot surveyed, obtains a long-term right of occupancy, demolishes the house and builds a 'modern' high-rise building. Meanwhile, the original occupant becomes homeless and probably ends up in a slum. This is what has been happening in Kariakoo (in the city of Dar es Salaam) for which the 'victim' is blamed. It is argued that the original occupier is foolish to sell off his land. But the fact is that it is not foolishness which makes the occupier sell his land. It is the fear that the government may declare the area a redevelopment area, in which case the land would be compulsorily acquired for the minimal compensation payable for 'unexhausted improvements' – perhaps a few thousand shillings. In this case he loses land as well as money. It is in anticipation of such an eventuality that indigenous occupiers are persuaded to sell off their land for what is undoubtedly a tempting price (but not necessarily its market value).

These fears are borne out in the case of Kariakoo. The Town and Country Planning (Dar es Salaam Land Redistribution) Order, 1989 (Government Notice No.374 of 24 November 1989) made under section 27 of the TCPO declares the following as re-development areas: Kariakoo area between Morogoro Road, Lumumba Street, Nkrumah/Pugu Road, Shauri Moyo/Uhuru Street, Kigogo Road and Msimbazi River, Kelco, Yombo-Temeke, Mlalakuwa, Msasani Village, Ubungo, Kimara, Buguruni, Vingunguti, Majumba Sita, Gongo la Mboto, Mbagala, Mikocheni and Kawe, Mwananyamala Kisiwani, Tandale, Hananasifu, Kinondoni Shamba, Mtoni, Tandika and Manzese.

Paragraph 2 then goes on to provide:

> All the land specified in this Order shall vest in the President on the coming into effect of this Order, the President shall thereafter allocate the land so vested in him for the purposes specified in the detailed schemes.

The effect of this provision is to divest all owners in specified areas of their land interests. It could be argued that paragraph 2 is *ultra vires*. So far as is known, the Government Notice has not been challenged. The draft of the redevelopment plan for Kariakoo shows that over 50 per cent of the houses in the area are dilapidated and would have to be demolished; 90 per cent of these are held on yearly short-term rights of occupancy. It is, therefore, the lower class of indigenous inhabitants with their Swahili-type houses who would be expropriated in the process of redevelopment. The Government Notice and the Plan, as far as one can tell, have not so far been implemented. Rumblings of opposition can be read between the lines in the submission of the city councillors to the Land Commission. The councillors defended voluntary sales which, they argued, were imposed on the people because of the worthless compensation paid by the government on expropriation.

Under the circumstances, it is not surprising that sales have continued at an accelerated rate. For an occupant who is not protected by law and is usually at the mercy of officialdom, the rational thing is to sell rather than be evicted by force with a promise of worthless compensation. As a result, Kariakoo has recently seen a mushrooming of high rise buildings of poor construction that are changing its indigenous character, with the probable creation of another unplanned settlement (on its way to becoming a slum) elsewhere.

Peri-urban or planning areas

The expansion of town boundaries is effected by the declaration of planning areas under the TCPO. In planning areas building controls are supposed to be exercised by the requirement that no construction can take place without planning consent. During the colonial period, the legal position of sitting occupants within planning areas was typically ambiguous. The assumption seems to have been that on declaration of a planning area the rights of customary owners are extin-

guished automatically by law. This assumption presumably became the basis of the administrative policy underlying Government Circular No.4 of 1953 (Tanganyika Government 1953) which stated (para.12):

> It is the intention that in a township all the land should be 'alienated' from tribal tenure and that Africans should obey the same laws of the territory with regard to their occupation as members of any other race. The disposition of land in a township has become largely a matter of town planning but administrative action does lie with the District Commissioner in the case of expanding townships, for which new and wider boundaries are proclaimed by the Governor, in dealing with the question of rights of Africans living in accordance with African customary law on land which it becomes necessary to include within a township.

The 'rights of Africans' referred to were restricted to the 'provision of an alternative plot', entitlement 'to take away the materials of the demolished house at his own expense', and compensation for 'unexhausted improvements'. It is doubtful if the provision of an alternative plot could have been legally enforced.

Be that as it may, the land structure and the legal and policy assumptions were taken over and continued with independence. In the 1960s, the then Minister of Lands, Settlements and Water Development reaffirmed the principles underlying the 1953 Circular (James 1971). In the late 1970s and 1980s, when policy statements are rarely come by, land officers could not even cite the 1953 Circular or the Minister's speech as their authority for the assumption that customary rights were extinguished on the declaration of planning areas. By the 1980s even minimal 'rights' for the provision of alternative plots and payment of compensation had become illusory.

Compensation is hardly ever paid before dispossession. The amounts are paltry and have long been overtaken by inflation, resulting in universal dissatisfaction with compensation. The Land Commission received evidence that the offer of alternative plots is virtually inoperative. The plots either did not exist, or if they did, they were not prepared for allocation, and in any case, bore no relationship to the value of the land taken over. The fact is that even the minimal 'rights' promised in the 1953 Circular do not exist on the ground.

Meanwhile, urban expansion and declaration of planning areas has moved on apace. The boundary of the city of Dar es Salaam now has some fifty villages within it. In the peri-urban areas indigenous inhabitants occupying farmland are being pushed out by various means. More powerful and richer inhabitants from the towns either buy out or evict the original inhabitants through court orders and official processes. A typical scenario is for a bureaucrat, a businessman or woman, or a professional to buy farmland from the original occupant under 'native law and custom', evidenced by a note possibly witnessed by the chairman of the Village Council and/or party branch. Transfer

of land between natives[14] does not require the consent of the Commissioner for Lands. On the strength of the note the purchaser gets a land officer to order a survey of the plot and issue a letter of Offer. Once the survey is done and a deed plan prepared, a certificate is issued. In practice, given the breakdown of procedures and the low morale of public officers, none of the steps in the process takes place without pressure from above ('official' instructions) or inducement from below. This means that only the powerful and influential are successful in acquiring plots in urban areas, at the expense of the weak and the disadvantaged.

Land speculators establish 'week-end' farms on the perimeter of the city in anticipation of the expansion of city boundaries. The expectation is that eventually, as the town boundary expands, such a farm could yield several plots to be sold off at very high premiums. As the Land Commission put it: "*Evidence from Kibamba, Makongo, Kimara, Kawe, Mbezi, Bunju and Boko – in short, villages surrounding Dar es Salaam – all told the same story of the expanding town consuming surrounding lands while casting out the original land owners*" (Tanzania 1994:76).

Town planning, therefore, has literally meant the expropriation of customary lands and the extinction of land rights. Following the *Mulbadaw* case, the judicial attitude towards customary rights began to show some sympathy. In *Nyagwasa v. Nyirabu* (1985) the Court of Appeal made a tentative statement that it was not prepared to accept that the declaration of a planning area alone extinguished customary titles. This was followed in *Kakubukubu v. Kasubi* (1991). The full implication of these decisions on the security of customary tenure in urban and peri-urban areas, however, is yet to be drawn out. But it is unlikely that the problems of the urban land tenure system, just like those of rural alienations, can be fully resolved by the piecemeal and contradictory process of judicial law-making. The problem lies at the root of the land tenure system and the administrative machinery that is crying out for major reform.

The testimony of a witness from Nzega district speaks for the way people perceive the problems of urban land tenure:

> "*I have lived in this township (Nzega) for a long time. Once the District Commissioner appointed me a member of a committee to investigate complains regarding expropriation of people's farms. We were appointed because there were a lot of complaints about the issue. When we questioned the aggrieved persons as to the cause of their complaints, they invariably said their shambas [farms] were being taken away by 'town planners'. Plots reserved for schools are being allocated. You find people building right in the middle of a*

14 Under the Land Ordinance, 'native' is defined to mean 'any person who is a citizen of the United Republic and who is not of European or Asiatic origin or descent'.

road. When you enquire, the answer is "the 'town planner' is responsible". It is the town planner who is accused of permitting haphazard constructions. Even the original owners of land are not consulted when allocations are made. All these complaints in relation to shambas being taken away that you have heard today can be traced back to 'town planning'. The outsider who has never lived in the area is the one who is allocated land. Outsiders even come armed with certificates claiming land. In the primary school of Kitongo children had their farm. But a person came claiming that the farm had been allocated to him. He built a garage. This rich man could have built his garage somewhere else. But where would our children farm? Should they go five miles looking for a farming area and abandon their studies? Another person was given a plot right in the middle of the road leading to the police station. But, it is said, the town planner has allocated that plot to him. All these areas being complained of were people's farms which were being cultivated for their livelihood. All this area has now been allocated to one person. This 'town planning' is devastating people's plans. Is there no one to whom this 'town planner' is accountable? (Tanzania 1994,Vol.I:73-4).

More analytically the East Africa Royal Commission observed the same tendency more than forty years ago:

> *"Thus it comes about that urban expansion in East Africa means the taking in of these urbanised peripheral areas, and the eviction and compensation of the African occupiers of the land in them becomes an inevitable part of the process. This may be contrasted with the position in the United Kingdom, where expansion would be mainly an administrative change not involving wholesale extinction of the land rights of the inhabitants, and where an urban council requiring land for a specific purpose such as rehousing would normally try to obtain and develop land for it. This expropriatory type of expansion would not be necessary if the peripheral areas were properly organised and had a system of land tenure which gave clear and secure titles to the holders of plots"* [Emphasis added] (East Africa Commission 1955: 221-2).

The substance of this comment clearly points to something more basic than ordinary problems of inefficiency, incompetence or lack of integrity of personnel – the so-called managerial and administrative problems.

Liberalisation

In the mid-1980s the government adopted policies for the liberalisation of the economy as a result of various internal and external pressures (see Campbell and Stein 1991). The central thrust of the policies is to create an enabling environment for a free market, encourage foreign investment and privatise state companies.

All three have had a direct impact on land alienations and dispositions as well as land tenure policy, although a fully worked out land policy has yet to emerge. The policy debate will be reviewed in Part III of this book. Meanwhile, as the evidence before the Land Commission shows, the overall ideological atmosphere created by liberalisation has had direct and indirect impacts on land, particularly the lands held by customary owners in the villages and peri-urban areas. The move to recover land in villages through court cases reviewed above is not unrelated to the relaxation of *ujamaa* and the price rises in agricultural commodity markets (Tibaijuka *et al.* 1993). Other effects will be examined under three interrelated headings: promotion of (foreign) investment, privatisation and real estate development.

Promotion of (foreign) investment

The National Investment (Promotion and Protection) Act, 1990 is the legal instrument under which the government hopes to attract investors, particularly foreign investors. Section 26 provides that where an investor is granted a certificate of approval by the Investment Promotion Centre (IPC), the Minister responsible for land 'shall grant him on such terms and conditions as may be prescribed a lease of appropriate land for a term suited to the requirement of his enterprise'. A proviso to the section stipulates:

> Provided that land belonging to any registered village shall not be leased for commercial activities other than joint ventures with the village government or the village's co-operative society, save that such land may be sub-leased by the village itself for small or medium-scale public or private economic activities. Any lease granted under this section shall be for a term not exceeding 99 years.

A number of assumptions regarding current tenurial relations underlie the provision. As currently formulated, the provision has a number of legal problems and tenurial implications. It is not clear how the Minister for Lands is supposed to carry out the mandatory provision of land to an approved investor. But more problematic is the concept of a joint venture between an investor and a village government. In practice, more often than not, the so-called joint ventures are nominal. The real motive of the investor is to acquire land. The result is invariably the alienation of village land under the guise of a joint venture. There has been no serious study of the projects approved by the Centre and the procedures for granting land to them. The Land Commission did, however, receive considerable evidence of proposals or actual alienations of land to 'investors'.

Box 3: Land alienations

In Magu district of Mwanza region there is an unresolved dispute between the Game Reserve authority and the Kijereshi tented camp on the one hand, and villagers of Ramadi, Lukungu and Kijereshi on the other. A private investor was given a permit to establish tented camps in the Reserve. The villagers allege that the camp owner has extended the boundary beyond the reserve thereby encroaching upon village lands (Tanzania 1994,Vol.II:No.32).

It was often alleged, for example, that game hunting companies are given exclusive licences to hunt game at the expense of the traditional hunting rights of indigenous hunters and gatherers such as the Hadzabe (*ibid*.:No.35). The latter are excluded or denied permits.

A number of conflicts between hoteliers and villagers in relation to land and water rights in or around national parks or beaches and the coast were received by the Land Commission. The villagers of Amani Gomvu in Temeke district of Dar es Salaam, for example, alleged that a hotelier had been granted more land than originally agreed and that he had actually taken over land which was used as a graveyard (*ibid*.:No.15).

Recently, a case in Loliondo became a public scandal when newspapers revealed that an Arab potentate had been given exclusive rights of wildlife hunting over hundreds of acres. This, however, is not as exceptional as it was made out to be. Even more outrageous was the grant made in 1979 to one H. Steyn which is discussed in the text.

The Land Commission received a complaint from the Wildlife Division of the Ministry of Tourism, Natural Resources and Environment on the proposed alienation of land for 'natural ranching'. This complaint was the subject of the Land Commission's preliminary report No.2. It illustrates some typical features of modern investment in Tanzania's rural lands that has the approval of IPC.

An Irish company was given a certificate of approval for a project involving a grant of a right of occupancy on the Simanjiro plains of Kiteto district sometime in 1991. The proposal was to occupy land which fell across the migration path of wildlife, particularly wildebeest. The occupier would shoot game when they stepped on his land and export the meat to Europe where it is increasingly preferred to other red meat. The project had earlier been refused by the Wildlife Department on the grounds that it amounted to game cropping and would have had very harmful effects on the reproduction cycle of wildlife (Tanzania 1994, Vol.I).

Another contentious project was the proposed alienation of some 200,000 acres of Kiteto district to a locally incorporated company purportedly dealing in cattle products. The company had foreign shareholders with connections with a locally owned

Box 3 continued

company of consultants. The local Maasai had vigorously opposed the alienation. The then Minister of Lands approved the application, while her successor reduced it to 50,000 acres. Meanwhile, on the strength of a Letter of Offer the company had already started operations in the face of bitter opposition by surrounding villagers and complaints from the local Members of Parliament.

After more that five years of tension the issue was finally determined against the company. The company then moved to Ngorongoro district where it was interested in obtaining around 100,000 acres. In 1992 it was granted around 25,000 acres in the village of Ololoskwan on the following conditions; a) that the village should be given 10 per cent of the company's shares; b) that the company would facilitate the production of good heifers for the villagers; c) that the company would repair the village's broken-down vehicle; and d) that the company would reconstruct/rehabilitate the village dip (Tanzania 1994, Vol.II,No.5).

Although this application was approved at all levels, opposition from the villagers continued. According to recent research, the conflict is still going on and cases have been filed in the High Court by both sides (Oxfam UK and KIPOC 1996).

A number of controversial alienations have been justified over the past few years in terms of promoting investments and attracting foreign investors. Land has been alienated to hoteliers for the purposes of tourism in or around national parks and on prime beach sites. There have also been examples of exclusive hunting rights granted to foreign 'investors'. Land has been alienated to breeders of exotic birds, cultivators of flowers and miners of gems.[15] There have been proposals for projects for game ranching, game cropping and cattle ranches. A number of these projects have run into controversy giving rise to conflicts. A few examples from the Land Commission's report given in Box 3 illustrate the nature of these conflicts. A typical illustration is the following.

In April 1979 an expatriate settler was offered a right of occupancy over some 381,000 acres in Laigwanan extending over Lolkisale, Makuyuni-Monduli and Kiteto districts in Arusha region. Part of the land fell within game controlled areas and covered migration routes of wildlife from Tarangire National Park. Villagers and local pastoralists traditionally using the land were not consulted by the authorities. The land was registered in the name of a locally registered company, the Rift Valley Seed Company Ltd.

15 For increased mining activity and the resultant land conflicts, see Chachage 1995.

One of the conditions of the offer was as follows:

> The right being situated in a game controlled area, the occupier shall abide by the provisions of the Wildlife Conservation Act and the Regulations made thereunder or any enactment in substitution thereof, save that, subject to the provisions of section 50 of the Wildlife Conservation Act, the occupier shall; (a) kill any animal within the land under the Right in protection of life and property; (b) surrender to the government any valuable trophy from such animal killed and report to the nearest Game officer within a reasonable time; and (c) expel any animal which shall be found in or entering the land under the Right.

The Land Commission found the inclusion of such a condition in a right of occupancy strange and undesirable:

> *"It leaves the resolution of the conflict of interest between a private occupier and conservation needs in the hands of the occupier, the latter clearly having considerable leeway and freedom. What this provision clearly suggests is that there was and is a serious conflict of interest between a game controlled area and an occupier and that an attempt was made to overcome the conflict by the said condition rather than refusing the grant in the first place"* (Tanzania 1994,Vol.II:34-5).

The company had made use of only some 16,000 acres or 4 per cent of the original grant. One witness stated to the Land Commission that when the company attained full capacity it would have required between 30 and 40,000 acres or only 10 per cent of the land grant.

In 1983 the company was taken over by the government under Act No.20, while the occupier, H. Steyn, was expelled from the country. Eventually, the Rift Valley Seed Company was handed over to a parastatal, NAFCO, which has developed only the northern portion. Other areas have been settled by villagers and some have been alienated to safari companies and other influential outsiders.

In 1994 the press reported that Mr. Steyn had been given back his land (*The Express* 13-19 May 1994). This raised an outcry and as a result the offer was withdrawn and Mr. Steyn was apparently left with only 14,000 acres. It was even alleged in some papers that the reason behind the opposition to the return of the 381,000 acres to Mr. Steyn was not patriotism, but rather self-interest; a number of 'big shots' were alleged to have occupied the land after Steyn's expulsion (*Shaba* 15-21 February 1994). Whatever the truth of these allegations, the fact remains that a very large area of land was alienated without consultation of the customary owners and against national, in this case including conservation, interests (Tanzania 1994,Vol.II:No.7).

Under the guise of liberalisation, there has developed what is now popularly called 'land grabbing' by persons in positions of power or material wealth and influence. This is particularly prominent in the Arusha region, although it is not confined to it. In Loikisale village, the

Land Commission was given a list of 70 names and areas of land alienated to politicians and bureaucrats contrary to the procedures laid down, and against the wishes of villagers. The list reads like a 'Who's Who' of national, regional and district government and party people ranging from Ministers through Regional Commissioners to Police Commanders, and including private companies which presumably must have found favour with the powers that be. It involves some 19,000 acres of land, the largest alienation being around 1,000 while the smallest is 100 acres (Tanzania 1994,Vol.II:No.6).[16]

Given the paucity of records, the discrepancy between acreages on the register and on the ground, and the non-registration of letters of offer, it is not easy to estimate the extent of alienations in recent years. The Land Commission compiled a partial picture of the registration of 'offers of right of occupancy'[17] over plots of farmland exceeding 30 acres in the Moshi and Dar es Salaam Registries of Documents for the period 1987-92. The Moshi registry covered Arusha, Kilimanjaro and Tanga regions (north-eastern zone) while the Dar es Salaam registry covered Dar es Salaam, Coast, Morogoro, Mtwara and Lindi regions (coastal zone). Land registered during the period amounted to 205,358 acres belonging to some 400 property holders, the average size of holding being around 1,132 acres (Tanzania 1994,Vol.I). However, these figures do not include a few very large-scale alienations to foreign companies (some of which have become contentious) which are carried out at national level and eventually registered in the Registry of Land rather than Documents. Nevertheless, the figures can be considered indicative of broad trends. They are summarised as follows by the Land Commission;

> *"First, it is clear that only relatively large holders – over 200 acres – register their land. The rest own under customary rights. Thus for the north-eastern zone, the proportion of registered land in the category of holdings of over 200 acres was over 90 per cent, while in the case of the coastal zone it was almost 95 per cent. Broadly, these proportions correspond to outsider/villager division in terms of ownership as well.*
>
> *"Secondly, the average size of holdings below 500 acres does not differ a lot between the two zones. But the average size in the range of over 500 acres in the coastal zone is over 5000 acres while that in the north-eastern zone is over 1500 acres. Thus large-scale alienation in the coastal zone – and this is primarily in Morogoro – is very large.*

16 For a detailed study of alienations and the plight of the Maasai in Simanjiro, see Igoe and Brockington, forthcoming. I am grateful to the authors for letting me see their draft.

17 'Offer of a right of occupancy' should be distinguished from a 'letter of offer' of a right of occupancy. The former refers to an allocation of unsurveyed land, which is usually registered in the Registry of Documents. The latter refers to the allocation of surveyed land and eventually results in the grant of a certificate of occupancy which is registered in the Registry of Titles (James 1971).

"Thirdly, alienation in the range of 200-500 acres in the coastal region is common, with over 200 holders. This reflects the scramble for farmland around Dar es Salaam mainly by 'outsiders' resident in the city. This phenomenon was clearly one of the subjects of complaints received in evidence. ...

"Fourthly, the concentration of ownership is marked in the case of the coastal zone. Within the registered land, one-fourth of the holders owned over 90 per cent of the land. And the average size of holding in the range above 200 acres was 40 times that of the average holding in the range below 200 acres. ...

"It is clear that land alienation and subsequent registration is essentially a phenomenon related to taking over of village farmlands by persons from outside the villages. This is borne out by a large body of evidence received by the Land Commission" (ibid.:31-2).

Privatisation

Privatisation of land has taken various forms causing inevitable conflict between the interests of the villagers and the new owners. With economic liberalisation, some of the former owners of abandoned farms and estates have returned to claim their properties which still appear in their names on the Register. In other cases, former owners have sold their interests to 'new' owners, or banks have moved to foreclose mortgages and sell off the mortgaged property. In all these situations, the villagers had settled on alienated lands. In many cases registered villages had been established with the encouragement of the authorities. Yet the settlers are now being threatened with eviction by the old or new owners or purchasers reclaiming their lands. In regions of land shortage, like Arumeru and Tanga, vast tracts of land were alienated to settlers and sisal estates, giving rise to bitter opposition from the villagers. The demand now is to redistribute the land to peasants and pastoralists who have developed it over the years rather than give it back to the so-called 'owners'. But the authorities have failed to react positively to this for fear of scaring potential investors away. In a few cases, the Land Commission found that even where titles were revoked with a view to redistributing the land, it ended up in the hands of well-connected individuals rather than the villagers:

"Speaker after speaker at public hearings in Arumeru spoke bitterly about land being given away to foreign ostrich breeders and flower growers who are busy evicting food-growing indigenous peasantry. We were told that the fight for independence was for land; the people had yet to get their land, and therefore independence" (Tanzania 1994:62).

In other cases, with the privatisation of parastatals or the parastatals themselves selling off land, it has ended up in the hands of 'outsider' individuals or companies. In 1986, the government sold off some nine sisal estates, a total area of 49,000 acres, at an average price of less

than five US cents per acre (*Daily News* 14 August 1992, quoted ibid.:63). Yet there is a demand to give land to former sisal workers who had settled in the area, and who are being threatened with eviction. Two 'disputes' noted by the Land Commission (Vol.II), and summarised in Box 4 overleaf, illustrate some of the points made here.

Real estate development

In urban and peri-urban areas economic liberalisation has accelerated at such a pace that customary lands are being brought under statutory tenure. With the influx of foreign enterprises and service industries – banks, foreign exchange bureaux, insurance companies, hotels, and casinos etc. – there is an increased demand for commercial premises and residential buildings. A number of real estate development companies have come into being. Prime plots are being carved up by local entrepreneurs and leased out to foreigners at very high rents. Others are having their farm lands in peri-urban areas surveyed and certificates obtained in anticipation of the expansion of town boundaries. Real estate speculation has begun in earnest. As has been shown, this will ultimately mean the expropriation of customary lands by richer and more powerful elements in society.

The developments described above have given rise to debates and demands made by different sections of society as to how land tenure should be organised. This will be reviewed briefly in the next chapter.

Box 4: Loss of land through privatisation

Luhembe is a registered village situated in the Kilombero area of Morogoro region. Sometime in 1974, the District Development Corporation of Kilosa district applied to the village for some 2,000 acres. The Village Council was opposed to it and the matter was taken to the Village Assembly which refused to grant the application. The District Commissioner continued to exert pressure on the village. Eventually, he forced them to give in and the Corporation took possession of the land. Some villagers occupying the land were compensated; others were not.

The Corporation operated the farm for some years but the project failed. The Corporation defaulted on its loans from the Tanzania Investment Bank (TIB). The farm was eventually sold to a private company to meet the mortgage. For reasons not clear in the evidence, the amount of land advertised by the TIB for sale, eventually surveyed (by private surveyors in the purchaser's employ) and registered in the name of the company, was 6,000 acres.

It appears that after the sale the villagers were allowed to use some 2,000 acres for a time and were later told to pay Sh.3,000 as compensation to the company. The villagers complained about having to pay compensation for what they considered to be their own land which had originally been taken away from them without their approval or compensation.

Luhembe is a prosperous village but suffers from land shortage. A part of the village has been taken over by the Kilombero Sugar Company, while another part has been absorbed into the Mikumi National Park. It was also alleged that some areas of the village are used by the top officials of the company; the villagers do not know how they obtained this land (Tanzania 1994,Vol.II:No.31).

In Kilimanjaro region, a considerable amount of prime land had been alienated to settlers during the colonial period. Some of this was nationalised in the late 1960s, but many of these farms were inefficiently managed by the government or the parastatal bodies put in charge and were more or less abandoned. Former workers (*manamba*)[18] settled on these farms, but were not given any formal titles or security. In the case of one farm of some 850 acres in Hai district the title of the former owner has never been revoked. However, evidence to the Land Commission testified that a big agricultural parastatal was using the farm and had leased it out to a private seed company. The parastatal was trying to have the farm formally allocated to it, while at the same time 'former workers' who had settled on the farm (supported by Hai district administration) wanted to have it allocated to them (*ibid.*:No.19; see also No.24:).

18 The term *manamba* refers to migrant workers during colonial times, some of whom settled in the areas surrounding the farms and plantations where they were originally employed.

Chapter 4

Towards a new land policy: preview of social forces

Since the abandonment of *ujamaa* policies and the adoption of economic liberalisation, official and semi-official pronouncements have been made about the creation of a land market. Suggestions have been put forward to individualise land tenure on a freehold basis, or at least to install secure, long-term and unrestricted leaseholds outside the over-arching control by the state (Bruce 1994). In this respect, consultants have been working, under the sponsorship of the World Bank, on overhauling the legal framework. The goal is to create a private property regime in land which will also facilitate the negotiability and transfer of real property (see, for example, Steptoe and Johnson 1993). It is in this context that calls are being made to streamline legal and administrative procedures and the machinery involved in the allocation, supervision, registration and titling of land.

A 'free market' means different things to different people. While foreign advisers and local bureaucrats generally agree that the state should withdraw from direct ownership, there would probably be no agreement on the extent and nature of its indirect intervention. For instance, 'free market' proponents of all persuasions recognise an active role for the state in creating an enabling environment for the 'free market'. In this regard, they see no contradiction in advocating a non-interventionist state, on the one hand, and urging the state to create a legal, policy and administrative framework to facilitate the operation of a land market, on the other. At the same time, local bureaucrats whose rent-seeking depends on their formal role as administrators and supervisors would be very reluctant to give up their ultimate authority and decision-making powers over land (Hoben 1995). We have already seen how this tension is constantly reflected in such issues as the demarcation of village boundaries and the vesting of radical title in the executive (see also Chapter 8).

The same logic underlies the status of customary tenure, particularly in urban and peri-urban areas. It is often argued that customary tenure is not appropriate for the modern conditions of urban areas. In villages too there should be encouragement to convert customary into statutory tenure. These arguments are premised on modernisation and neo-liberal models which have resurfaced in the Tanzanian development debate of the 1980s and 1990s. In practice, as we have seen again and again, the conversion of customary to statutory tenure inevitably

leads to the expropriation of customary lands. It makes such lands available to those who can mobilise resources and have influence in the corridors of power. The delegitimisation of customary land regimes as 'backward' often goes hand in hand with the implicit rejection of control over land matters from below by customary owners – communities of indigenous land users. The tension between top-down administration of land and bottom-up democratic control continues, therefore, to be one of the nagging issues of land policy.

These issues are further complicated by the tension between immigrant communities (Asians, for example) who have historically wielded economic power, and the rising numbers of African entrepreneurs who are seeking a place in the liberalised economy. In relation to land, arguments are often heard that only *wazawa* (indigenous inhabitants) should be able to own, or should be given priority in the ownership of land,[19] which they can then use as equity in joint ventures with foreign investors. In this respect, the active intervention of the state is sought. Private indigenous entrepreneurs, who would otherwise support the 'free market' and a non-interventionist role for the state, would probably argue for the state retaining radical title as an ultimate control over the allocation and supervision of land. This has a two-fold purpose: (a) to give *wazawa* an edge over non-*wazawa*, specifically when it comes to going into partnership with foreign investors; and (b) to ensure that once land is allocated to enterprising 'modern' *wazawa*, other traditional *wazawa* – villagers, 'squatters', customary claimants, etc, – do not disrupt their security of tenure by protests, complaints and disputes. The tension between natives and non-natives, and between citizens and foreigners, in relation to accessibility to land and its resultant impact on social differentiation, continues to be another unresolved area of land policy.

As will be argued later, these tensions cannot be understood except in the larger context of the economy as a whole and the envisioned path of development which itself continues to generate its own contradictions. The first phase of government under the leadership of Julius Nyerere pursued a kind of state capitalism, inspired by the ideology of *Ujamaa*, with the active support of western social-democratic states and the World Bank in its Macnamara phase. The second phase under President Ali Hassan Mwinyi uncritically embraced liberal adjustment policies under the dictate of the International Monetary Fund (IMF) and western 'donors'. The policy directions of the third phase under President Benjamin Mkapa have yet to be spelt out in any coherent manner, but the pressures and policy controls asserted by western governments (and NGOs) and the World Bank/IMF continue unabated. To all intents and purposes, policy-making seems to be slipping out of

19 See statements attributed to Mr. Lowassa, the former Minister for Lands, Uhuru 26 September 1994.

the hands of the government into those of the international financial institutions and their consultants. Be that as it may, over the last five years efforts have been made to formulate a land tenure policy, apparently under the prompting of World Bank officials and consultants. Officials of the Ministry of Lands have produced several drafts simultaneously with the Land Commission's report. The *modus operandi* of how a proposed land policy should finally be adopted – through public debate from below or official pronouncements from above – itself remains unresolved. The policy debate will be discussed further in Part III.

Widespread land alienations, increased insecurity of customary rights, and the growing apprehension of villagers about their land, have been exacerbated by the policy of liberalisation. Whether national land policy and the eventual legislation should simply reflect the existing trend or should reverse it in favour of peasant and pastoral village communities is currently the bone of contention. It is in this context, and in what ultimately is the political domain, that the recommendations of the Land Commission should be evaluated.

The Land Commission makes it explicit that a national land policy cannot be determined outside the envisioned path of development. The Commission reviews past developments which were invariably premised on notions of modernisation based on large-scale production, thus directly or indirectly undermining smallholders. It argues that for the foreseeable future Tanzania is likely to remain a small peasant/pastoralist economy. Small producers and the production of (particularly food) crops for subsistence and for the market (particularly the domestic market) should be the cornerstone on which to base a national land policy. The so-called outside investor, whether local or foreign, has little interest in producing for the domestic market:

> *"His interest lies in high rates of profits in the first place, rapid returns in the second place and accumulation of his profits in a 'safe' haven outside in the third place. Such an investor is unlikely to produce food, and even if he does, he will produce it for the temperate export markets regardless of the need at home. Moreover, his access to land has more often than not been at the expense of the food-growing local peasantry or the livestock-holding pastoralists who consequently find themselves landless and without food"* (Tanzania 1994, Vol.I:138).

The Commission recognises that there are internal forces, within village communities, which have the potential to be the engine of accumulation and investment in the rural sector, and which hold out great promise for national development, as opposed to investors from outside village communities:

> *"These forces develop spontaneously as a result of differentiation in the smallholder economy. In the literature, they are often described as 'rich peasants' or kulaks. We distinguish them from capitalist*

farmers. Unlike the latter, the former are not simply managers and supervisors but continue to work on their land. In the past, they were identified as 'real exploiters' and therefore stifled and suppressed. We believe that at this stage of our development they are one possible agency of accumulation from below or a national agrarian and pastoral development, albeit capitalist. There is some chance that such type of development would be organic and integral to our society, national and democratic in character and sustainable in the long run" (ibid.:138).'

The Land Commission constructs its recommendations for a new land policy in the context of encouraging the processes of accumulation from below (see Neocosmas 1993), taking full account of the evidence it received. While land tenure policy alone cannot guarantee the desired direction of development, it can nonetheless facilitate it if reinforced by complementary policies and structures in other sectors. In the light of evidence which condemned the existing non-participatory land structures and practices, the Commission adopts a democratic land dispensation as the cornerstone for its recommendations on the institutional and legal framework of land tenure. In short, in its recommendations the Commission is guided by the perspective of autonomous and democratic national development as the desired path of development. It is in the context of a democratic national dispensation that the recommendations of the Land Commission can best be understood. The recommendations are summarised and discussed in Part II.

Part II

Democratisation of land tenure: recommendations of the Land Commission

Chapter 5

Land tenure policy and structure

Land as a constitutional category

Land is an important resource and central to the life of the nation. Land policy and the system of ownership of land (land tenure) should be a matter of long-term development defining the very character of the country. Major principles governing land should be the result of a broad national and social consensus and should therefore be embodied in the Constitution. These are not matters which should be left to be defined by the government of the day and embodied in an ordinary Act of Parliament. All land in Tanzania should be divided into national lands and village lands. There should therefore be no land whose tenurial status is unknown or ambiguous. The Land Commission recommends that the main contours of a new land tenure system should be stipulated in the Constitution.

There are additional reasons why land ought to be a constitutional category. First, by making it such, the system of land tenure acquires a high profile and legitimacy. This is important if land is not to be subjected to the vagaries of short-term politically motivated changes and administrative decisions. The review of experience in Part I demonstrates the disruptive effect on land tenure and rights when land is subsumed under ordinary law and administrative practice.

Second, while the Constitution can also be amended, constitutional changes usually attract greater attention and public debate. By making land a constitutional category, changes in the tenure system proposed by an incumbent government would have to be submitted to public debate, wide scrutiny and broad consultation with people beyond their representatives in parliament.

Third, in the current debate on the nature of democracy and the new constitutional order, it is hoped that linking land to the Constitution will bring into focus one of the central issues of democracy – democratisation of control over land (see Oloka-Onyango *et al.* 1996; Kibwana *et al.* 1996; Shivji 1997a).

This proposal by the Land Commission is undoubtedly a major departure from the past, when neither the Constitution nor land was considered as of central importance by the state. It also departs fundamentally from the current debate on the Constitution and democracy. This latter debate has tended to concentrate on élitist and bureaucratic concerns about 'adjusting' (in the shadow of structural adjustment?) the organisation and administration of political power, while excluding

the concerns of the large majority of people relating to the use and control of resources. To be sure, the two sets of concerns are not unrelated, although they may be presented as such in the official discourse. In the popular consciousness land and democracy are invariably linked and 'discussed in the same breath', as the evidence before the Nyalali Commission on the Party System[20] (Tanzania 1992) and the Land Commission shows. The Nyalali Commission observed:

> "*In the course of its regional and district tours, this Commission received many complaints from the general public in respect of land policy and tenure in the country, specifically Tanzania Mainland. These complaints no doubt are basic in so far as they relate to and affect the welfare of the society. This Commission, however, restrains itself from making specific recommendations since it is aware of the existence of another Presidential Commission under the Chairmanship of Professor Issa Shivji, dealing specifically with land tenure and policy. This Commission believes that Professor Shivji's Land Commission will look into the whole matter in detail and give appropriate recommendations*" (Vol.II:59).

The Land Commission Report devotes a whole chapter to popular participation:

> *"The central focus of a large majority of complaints received by the Commission in rural areas was that the villagers concerned had not been involved or had not participated in the decision complained against. Hatukushirikishwa ('we were not involved') was the constant cry. In fact, this is the theme that runs through and underlies virtually the whole of Part I. The demand for participation was not made in any general fashion but with respect to specific issues of administration of land. ...*
>
> *"In urban areas, there was no direct evidence of the demand for participation except from inhabitants of the so-called 'squatter' and peri-urban areas. Relatively better-off inhabitants of the centres of towns and suburban areas probably know how, and have enough material and political clout, to 'get around' and therefore do not feel the same need to participate in the administration of land. Other inhabitants often complained of lack of consultation and information on proposed planning, surveying or other land developments in their neighbourhoods. ...*
>
> *"From the opinions expressed by witnesses, the Commission formed the impression that villagers expect to participate in the making of decisions on land allocation, in the processes of delineating their village boundaries and in the processes of alienation and disposition of land. These matters, unlike in urban areas, are considered to be of a public, not a private, nature by rural folk. It is*

20 The Nyalali Commission was appointed by the government to discover people's views on whether they wanted to continue with the one-party system or go multi-party. Following the report, the Constitution was amended to permit multi-party politics.

outside the terms of reference of the Commission to examine in any great detail the structure of participation in the villages. But in view of the constant demand for participation in land matters heard in villages, the Commission concluded that no land policy or tenurial system at the village level can ignore the structures of participation in the village" (Tanzania 1994,Vol. I:94).

The Land Commission is clearly acknowledging an inseparable link between land and democracy in popular perceptions. In this regard popular perceptions are not very far removed from what political economy theories teach us. There is a deep structural link between the use and control of resources and the organisation and exercise of power. Control over resources is the ultimate source of power. The people in their own way have interpreted democracy to mean control over land through direct participation in bodies supervising and administering it. The Commission's recommendations give this popular understanding a constitutional and institutional framework in which it can operate.

Diversification and democratisation of the source of radical title

The most fundamental characteristic of the land regime under the Land Ordinance is the monopoly of radical title over all lands vested in the President as Head of the Executive. The Commission recommends the diversification and democratisation of the source of radical title. National lands should be under a National Land Commission (NLC) whose governing body would be the Board of Land Commissioners (BLC). All national lands would be vested in the BLC to be held in trust for the use and benefit of the people of Tanzania. Village lands would be vested in their respective Village Assemblies (VA)[21] to be held for the use and benefit of villagers. Both the BLC and the VAs are established by the Constitution from which they derive their corporate status.

The 'trust' in this context is conceived to be not only a political, but also a legal trust. This is a departure from colonial jurisprudence which construed 'tribal or native lands' held in trust by colonial state organisations to mean a 'political trust', in which case a breach of trust had no remedy at law. According to the recommendation of the Commission, the Land Commissioners, as political trustees, would be accountable to the National Assembly, while as legal trustees they would be in a fiduciary relationship with the people of Tanzania. As

21 Village Assemblies and Village Councils were set up following villagisation. Their structure is provided for in the Local Government (District Authorities) Act. 1982, No.7. This has been amended several times following constitutional amendments providing for a multi-party system. The Commission's recommendations were made before the latter amendments. In any case, the recommendations would require considerable modification of the existing village governance.

beneficiaries, members of the public would have a *locus standi* to hold the trustees answerable through judicial process. The Commission argues against any detailed teasing out of the various incidences of such a trust in a statute. It maintains that these should be allowed to evolve through a process of creative (judicial) law-making based on practice as it develops on the ground and drawing from the experience of other similar institutions.

The Land Commission takes extra precautions to avoid the possibility of the NLC developing into a monolithic central bureaucracy. This is done by providing checks and balances within its structure, including the provision of semi-autonomous divisions and elected ward and district land allocation and planning committees at the district level. But the most important check would be the fact that the NLC does not administer all lands. The Commission believes that the fact that village lands are vested in over 8,500 Village Assemblies in relation to which the NLC's role is strictly *advisory* would provide a formidable countervailing power.

The Commission's recommendations do amount to a substantial modification of the existing state structure which was constructed in the image of the colonial state. The modified structure is represented diagrammatically in Figure 1. The administration of land is disconnected from the executive arm of the state at both the highest (state) and the lowest (village) levels. The NLC is not another ministry or parastatal in charge of land, just as the Village Assembly is not another rung of 'local government'. The NLC is conceived as an extra-executive body independent of the executive. In this regard it is analogous to the judiciary. Yet unlike the judiciary it is an executive, and not an adjudicatory or a representative body. Again, unlike the judiciary it is directly under the supervision of and answerable to Parliament through: (a) the National Assembly's Lands Committee, (b) the parliamentary confirmation of Presidential nominees for membership (including the Commissioner-General) of the BLC; and (c) the removal of commissioners before expiry of their tenure through parliamentary impeachment procedures. In effect, while the NLC has executive independence, and in that regard may be seen as virtually a 'fourth' arm of the state, the proposal does not offend the basic constitutional principles of the separation of powers, the supremacy of parliament, and the independence of the judiciary.

At the village level, land is delinked from the Village Council which is the executive arm at that level, and linked to the organ of direct democracy, the Village Assembly. The independence of the judiciary from the village executive expresses itself in the independence of the *Baraza la Wazee* or Elders Council.

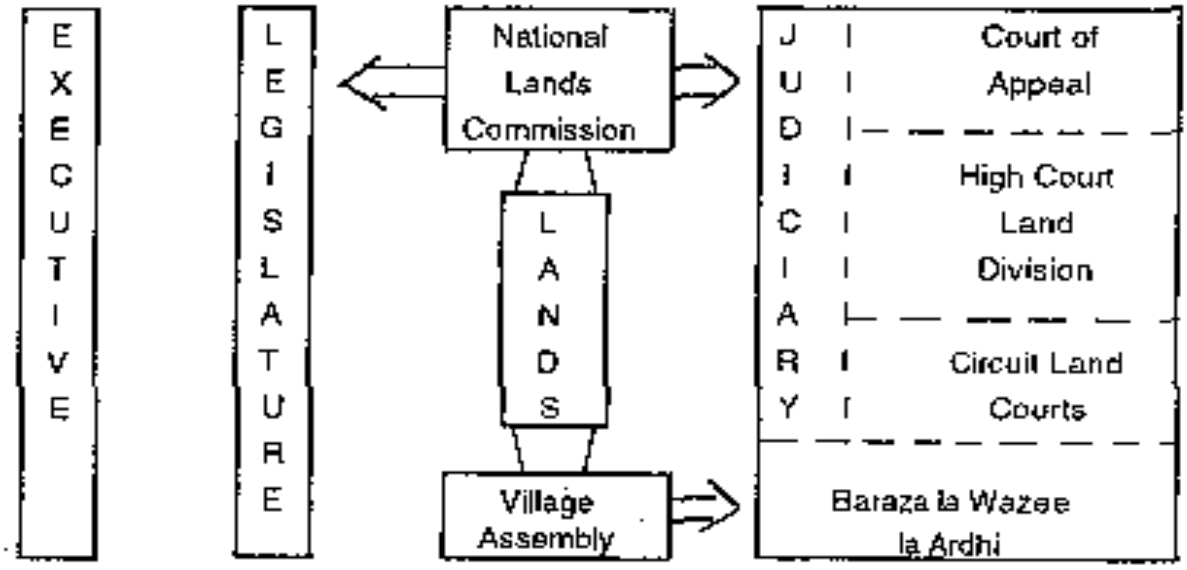
The main features of regimes for village and national lands are summarised below.

Village lands

Demarcation and vesting of village lands

The division between village lands and national lands takes the former as the point of departure. Thus national lands are defined as all lands which are not village lands. The linchpin of this division is by whom and how village boundaries are defined. As has been shown in Part I, this has hitherto been contentious. The right of the villagers to own, control and supervise village lands can be rendered inconsequential if they are not also involved in determining village boundaries. The problem of demarcating village boundaries constitutes the basic contention between the central and local government bureaucracy embedded in state organs ranging from the Ministry to District Councils on the one hand, and villagers on the other, about who ultimately decides how much land falls within the village. More village land means less land under the control of the state. This, in turn, determines the power and resource base of the state bureaucracy and those who have leverage over it.

Figure 1: Proposed place of land in the general state structure



Source: Report of the Presidential Commission of Enquiry into Land Matters, Vol.I:148

Often this basic contention is presented as an issue of land-use planning or developmental and ecological management. The planner's argument runs something like this. Rational land use can only be determined by competent and expert personnel. As villagers lack competence and resources, the state should assist them to plan their land use. The most rational way of demarcating village boundaries is, therefore, to base them on formal land use plans (see, for instance, Tanzania 1994,Vol.I, Minority Report I).

Economists and resource managers argue that villagers do not have the capacity to manage their lands productively and rationally. Their traditional methods of extensive cultivation and grazing lead to land degradation. The effective way to conserve land is to withdraw it from villager's control (see, for example, the SECAP dispute, Tanzania 1994,Vol.II:No.39). Policy-makers and development practitioners argue that if villagers were to determine their boundaries then virtually no land would be left for national developmental projects since village boundaries run back to back (*mgongo kwa mgongo*) (see Tanzania 1994,Vol.I, Minority Report II). It is therefore important that there is a reasonable balance between lands allocated to villages and those retained by the state to ensure that 'the Government is not left in a situation where it is a beggar on land matters' (ibid.).[22]

All these arguments have a number of things in common. They assume a top-down relationship with peasants and pastoralists, and that rationality and efficiency are the function of technical expertise and 'scientific management' in which ordinary people have no role except as objects to be planned for and managed. The relation between the village land user, land and the state is seen as one of management and administration rather than of rights and obligations. In short, development is seen as a technical process of modernising backward people, in which the state is the central agency. In reality, as is clear from the above, the argument about the demarcation of village lands is ultimately concerned with the struggle over the major resource, land, and is primarily a matter of political struggle rather than scientific planning or efficient management.

The Land Commission places the producers (cultivators, pastoralists or hunters/gatherers) at the centre of its analysis. Its recommendations on tenurial reform revolve around the need to protect village lands. The point of departure for determining village boundaries is the perception of the villagers themselves as to their boundaries. The setting of boundaries should be a process of consultation and negotiation between adjoining villages. Where conflicts are not resolved, they should be forwarded to the Circuit Land Court (CLC) for final determination. Where agreement is reached, the matter should be submitted to the CLC for registration and certification. The CLC issues a Certificate of Village Land (CVL), not a certificate of title. The CVL is evidence of vesting only. It is not negotiable in any form and cannot be used as collateral. Yet, the CVL is not simply a certificate of registration that a village obtains on being registered under the current system, and which delimits the territorial jurisdiction of the Village Council. The CVL is evidence of the root title over land vested in the Village Assembly which is the superior landlord in its corporate capacity.

22 It is interesting that this formulation was repeatedly used in lieu of argument by policy-makers commenting on the Land Commission's report (see Part III for further discussion).

The supervision, management and allocation of village lands is vested in the VA and exercised by it in its public meetings. Powers over land matters are not to be delegated to the Village Council. Although the VC can put forward proposals relating to land, it is the VA, as the most democratic body in the village, which is the forum of discussion and decision-making on land matters. Neither the VA nor the VC is to have powers of adjudication over land disputes. All land disputes and claims, whether between villagers, or between a villager and the Village Council or the Village Assembly, will be heard and determined by the *Baraza la Wazee la Ardhi* (the Elders Land Council).

Inalienability of village land to an outsider

Village lands are primarily for the use and benefit of villagers and shall be inalienable to outsiders. A villager is defined as a person who is: *"(a) ordinarily resident and works in the village or (b) whose major means of livelihood is derived from working on village land or (c) who is traditionally recognised as a villager by the village community"* (Tanzania 1994,Vol.I:152). For this purpose state institutions, parastatals, and companies which are not exclusively owned by villagers are 'outsiders'. On the other hand, companies jointly owned by Village Assemblies and co-operatives would be considered as 'villagers'.

Evidence before the Land Commission revealed the tendency for outsiders to become nominal villagers by making cash contributions with a view to obtaining village land. Their sole interest is obtaining land. This trend is found all around Dar es Salaam where politicians and bureaucrats have their 'weekend' farms or have built luxury residences. They originally obtained the land by becoming nominal villagers. Eventually this land is surveyed and Certificates of Right of Occupancy are obtained. As a result, village land is effectively removed from the domain of customary law and the jurisdiction and control of the village. Such people, in the Commission's view, should be kept out of village lands. On the other hand, there is a natural movement of people between villages. Generally, the newcomers are accepted by the host communities. These cases would fall within the definition of 'villagers'. There may also be cases of people from urban areas who want to settle in a village. Again such people would not be excluded if they had been accepted as villagers by the host community.

However, there is another category of outsiders who can be allocated village land. These are people interested in small-scale investment (in a flour mill or a shop, for example, or services, school, mosque, church, hospital, etc.) which is of mutual benefit. Such people can hold land from the Village Assembly by way of customary leases and licences, as discussed below. The Commission recommends that customary leases should be closely regulated so that they do not become another means of permanently alienating large tracts of village land to outsiders. Conditions for customary leases should be stipulated by statute, although a

Village Assembly may impose additional conditions. The Commission recommends the following minimum conditions:

"*i) A customary lease shall not exceed a period of 10 years but may be renewed.*

ii) It shall be for a specified purpose of the kind already suggested above but not exclusively for agricultural, horticultural, pastoral or like activity.

iii) The area of land granted on customary lease shall not exceed 3 acres.

iv) The lease agreement shall be in writing and registered in the Village Land Registry and the lessee issued with a simple certificate called ***Hati ya Kukodi Ardhi ya Mila****. Like all other registrations done by the Baraza, the registration of leases will also be the subject of scrutiny by the CLC.*

v) Customary leases can only be granted by the Village Assembly on unoccupied village lands, for which the VA may charge rent.

vi) Customary leases shall be non-transferable" (Tanzania 1994, Vol.I:153).

Licences can be used to grant land to outsiders for the purpose of exploiting (a) agricultural resources for renewable periods not exceeding five years, or (b) underground resources, in which case it would be done in consultation with the relevant government body.

Registration of rights

The distinction between a villager and an outsider is particularly important, because only a villager can claim '*customary ownership*' of land in the village under the scheme proposed by the Commission. The main legal regime governing village lands would be customary tenure. This would include: (a) lands claimed under customary law (the current deemed rights of occupancy); and (b) lands properly allocated to villagers by the village authorities. Any villager claiming land on this basis would be able to have his/her land registered with the Village Land Registry.

The Village Land Registry is to be a simple system of recording land rights and dispositions in the village, which can be maintained by the village without much outside help. The *Baraza la Wazee* will administer and be responsible for registration, while the Clerk to the *Baraza* will act as the Registrar of rights over village lands. Registration will be carried out through an open hearing which any villager can attend and make his/her views known. Registration of land rights is placed in the framework of the judicial process rather than seen as an executive act.

On registration, the owner – whether an individual, a family or the clan head, as may be the case under local customary law – would be issued with a simple certificate called *Hati ya Ardhi ya Mila* (HAM). The boundary of the customary owner's land will be demarcated in the presence of members of the Village Council appointed for that purpose

by the VA, entered on the certificate and countersigned by neighbours who share boundaries with the owner. Any dispute will be resolved by the Baraza la Wazee. Holders of HAM would be required under VA rules to identify their boundaries by planting prescribed trees to act as *prima facie* evidence of the accuracy of the boundary.

While the HAM will carry the name of the owner, it will also be mandatory to include the name of spouse or spouses. Where an owner owns a plot in another village, the name that will appear on the certificate in the latter case will be that of the person who actually works the land and the name of the spouse will appear as the second name. In this way the Commission hopes to make an inroad into the problem of gender inequality which is often found in the customary land tenure regime.

The legal implications of including a spouse's (in practice the wife's) name on the HAM certificate, in respect of ownership rights, rules of succession and matrimonial division of property on divorce are not spelt out by the Commission. The Land Commission was of the view that these should be allowed to develop through judicial interpretation by the *Baraza la Wazee* and higher courts in the context of existing and evolving relationships and values in the village community. Such an evolution of Tanzanian 'common law' would be more organic and would have greater legitimacy than statutory law imposed from above. This issue is discussed further in Part III.

Ceiling on ownership and dispositions

In keeping with its major premise of encouraging and facilitating accumulation from below, the Land Commission recommended that there be a statutory ceiling of 200 acres on land ownership in the village. This was arrived at by taking into account the experience of the country's rich peasant economy, particularly in Hanang, Mbulu and other districts. This upper limit was considered adequate for medium-sized ranch activities and mechanised agriculture. However, it is only a statutory upper limit. Within it Village Assemblies may set lower ceilings in line with their own requirements. Whatever ceiling is applied, the rationale is to permit limited differentiation of ownership *within* the village, while at the same time guarding against the accumulation of land by a few villagers rendering others landless. The Commission believes that this will allow the development of productive peasant entrepreneurship, while hindering (or at least making difficult) hoarding of land for speculative purposes.

A villager who has the maximum land holding and who wants to expand, would be given priority in the allocation of national land.

The HAM as a certificate of ownership will be negotiable and transferable except to outsiders. In this way a limited land market within the village will be created. All transfers of land, whether by way of sale, gift or inheritance, must be registered with the Village Land

Registry, otherwise the transfer would not be legal and would transfer no interest. All transfers, except by inheritance, would also require the consent of the *Baraza*. Without it a disposition would be null and void. The *Baraza* is not to refuse consent unless it finds that:

"*i) the spouse of the transferor has not consented to the transfer;*

ii) that the transferee is an outsider;

iii) that the transferee will thereby exceed his/her land ceiling in the village; and

iv) that the disposition will leave the transferor without means of livelihood" (Tanzania 1994, Vol.I:155).

In principle, the HAM can be used as collateral to obtain credit. But because it is not transferable to an outsider, it cannot operate as effective collateral for obtaining loans from outside the village. In any case the latter has proved to be an ineffective form of credit system as many studies have shown (see below, Part III). The Commission expects that the internal negotiability of the HAM, and its use as a guarantee (pledge), will create an enabling environment for the development of an indigenous credit system. Exactly how this could evolve will have to await developments, but it does open up new possibilities.[23] It certainly does not hinder borrowing and lending of land, which is already a common practice in rural areas. Although it is not made explicit in the report, it seems that such borrowing/lending as a limited form of transfer of interest in land would require consent and registration. If so, it would provide a healthy form of regulation for the system which would otherwise be open to abuse.

Inalienable lands, commons and compulsory acquisition

Certain village areas that need to be conserved (water catchment areas, beaches, sacred sites, etc.) would be inalienable and under the direct control and supervision of the Village Assemblies. Areas for common use, such as pasturelands, village farms and so on, would also be under VAs. Where common areas, particularly pasturelands, extend over more than one village and have been traditionally used by neighbouring villages, the respective VAs can enter into joint management agreements to regulate such areas collectively.

Compulsory acquisition of land for public purposes will remain. However, as this power has frequently been abused, at village as well as national levels, the Commission lays down strict conditions for its exercise. HAM land may be acquired by the VA for the benefit of the village as a whole; for example, to build a school or construct a road. If this happens, the land holder shall be entitled to compensation for unexhausted improvements and also offered an alternative plot.[24]

23 This could result in the emergence of a money-lending class. However, even if it does, it need not be pernicious.

24 Provision of an alternative plot cannot, of course, go on for ever. Monetary compensation as a last resort would still be available. Much will depend on the direction of development of the overall economy.

Acquisition will not take effect unless these two conditions are satisfied.

If a public authority needs to acquire village land for a specified public purpose (ie. the exercise of powers of *eminent domain*), for example, the laying of electric cables, this would have to go through the VA and undergo the fullest consultation. In such a case, the land acquired will be jointly vested in the VA and the acquiring body. The Commission recommends that 'public purpose' should be strictly and rightly defined in law.

Safeguarding villagisation

The Land Commission recommends that villagisation be safeguarded through 'saving' provisions. Thus the constitutional stipulation that all village lands are vested in the Village Assembly will be qualified by a *proviso* which protects existing customary rights apart from those affected by the process of villagisation. The effect of this would be to extinguish the customary rights of the relevant pre-villagisation owners by virtue of their not being saved. There would also be a *proviso* that allocations made during villagisation by properly constituted authorities, and according to the policy and procedures provided by the then ruling party (even if such did not have authority in law), would be deemed to be customary titles registerable as HAM. The idea of this is to save and protect the achievements of villagisation and accommodate and assimilate allocations made at that time within the customary tenure regime (see the discussion in Shivji 1994 and Part I above).

National lands

Coverage

National lands are those which are not village lands and are to be administered by the National Land Commission (NLC). The Land Commission recommends land reform through the redistribution of land in areas of shortage such as Arumeru district and Tanga region. The saving and conversion provisions mean that some alienated areas under granted rights of occupancy would revert to being village lands. In spite of this, substantial areas currently under granted rights (for example, urban areas) and statutory allocations (such as reserves, parks, etc.) will fall into the category of national lands. Some areas under deemed rights, and peri-urban areas already declared planning areas, would also come within this category.

Disputes as to what is village and what is national land would be resolved by the judicial machinery, with the Circuit Land Court having original jurisdiction.

Forms of land holding

The Land Commission recommends two major forms of land holding

on national lands; right of occupancy and customary rights. Rights of occupancy will be what are currently called granted rights of occupancy under the Land Ordinance. In this respect all the major provisions of the Land Ordinance will be retained, with necessary changes integrated into a Basic Land Law Act. The distinction between granted and deemed rights will no longer hold.

The existing incidences of the right of occupancy and procedures for registration will be largely retained with three major changes. The maximum period for a right of occupancy will continue to be 99 years, and the minimum 21 years. Short-term rights of occupancy will not be permissible. Existing short-term rights will therefore be converted to long-term rights. The second change is that horizontal tenure will be introduced, enabling different persons to hold rights of occupancy (or customary rights) to apartments, for example, in a building on the same plot. Thirdly, building regulations will be linked to the term of the right of occupancy and not to the location of the plot, ie. whether it is in a high, medium or low density area.

The Land Commission also recommends a different concept of town planning, arguing that zoning into different density areas is based on the colonial practice of racial segregation which was adopted uncritically at independence. Customary owners indirectly lose their lands by failing to meet more stringent building regulations in low density and medium density areas. People of modest means end up having to build in high density areas. Most urban services are also based on zoning. Low density areas are provided with better services than high density areas. The result is the sprawling of slums with insecurity of tenure, on the one hand, and low density areas engulfing peripheries and pushing out original occupiers, on the other. Disadvantaged town dwellers lose out on both counts – land and services. It was to take account of the problem of expropriation of customary owners in peri-urban areas and general lack of security of tenure in the so-called unplanned (meaning slum) areas that the Commission developed a new land right on national lands called 'customary right'.

Customary right[25]

In the view of the Commission the concept of 'customary' is broader than that in 'native law and custom' as defined in the Land Ordinance. The Commission recommends that 'customary land holding' should include land held "*under custom through long occupation and usage which is recognised by the community or neighbourhood where the land is situated...*" (Tanzania 1994, Vol.I:161). This would typically cover an urban periphery or a 'squatter' area which is occupied by different 'native communities' (including possibly members of non-indigenous groups), but has developed a sense of neighbourhood tradition,

25 This should not be confused with the right of customary ownership of village lands.

custom and an 'informal' system of rights and obligations. Such land would also be covered by the notion of 'customary right' and therefore registrable. On registration, the customary right holder will be granted a Certificate of Customary Right for a maximum term of 99 and a minimum of 5 years, with an option to renew which cannot be denied.

The idea here is that the owner of a *kibanda* (house/hut) in *uswahilini* (poor, African areas), for example, would be able to register his right and opt for a term under which he is able to meet building regulations immediately. Should he, in future, be able to meet more stringent regulations he would have the right to extend his term to the maximum of 99 years. On the other hand, if he was not able to do so he would be able to have his shorter term renewed as of right.

The customary right will have the same security of tenure as a right of occupancy. It is negotiable and can be used as collateral. The primary difference between these two rights lies in their origin, registration and renewability. Right of occupancy is granted, customary right is claimed and established through a process of adjudication and registration. The process of registering a customary right is simpler and is done by the Registrar of Customary Rights. A customary right can be renewed as of right (unless it is of 99 years or exceeds 99 years when all the renewals are added up), while the renewal of a right of occupancy of less than 99 years can in theory be refused.

In sum, national lands would be held from the Board of Land Commissioners (BLC) under two forms of title only – right of occupancy and customary right. And this would be the case regardless of who is the landholder – an individual, company, parastatal, statutory body, local authority or government institution. Existing statutory allocations (eg. national parks) or government allocation (eg. ministerial buildings) will be converted to an appropriate right of occupancy. Certificates will provide appropriate conditions such that they will not be negotiable, nor can leases be created out of them. Similarly, public places, recreation areas, school compounds, etc. will be held under a right of occupancy.

Allocation

In recommending a new method and new procedures for allocating land, the Commission is mindful of the fact that the existing practice of urban planning has in effect been expropriatory. One of the major effects has been an expanding population of 'squatters'; for Dar es Salaam it is currently estimated to be around 60-70 per cent. Secondly, many abuses in the process of allocation (for example, double allocation) can be attributed to secretive/bureaucratic procedures with no participation from the users of the land. It is the recognition of these problems, among others, that underlies the Commission's view that the 'security of tenure' of sitting occupants should have precedence

over planning processes, and that all procedures of planning, surveying and allocation should be conducted openly and transparently in such a way that land users and other members of the public are fully involved. The Commission, therefore, recommends the following sequence in the allocation process:
Registration –> Planning –> Surveying –> Certification –> Allocation.

Stage I: Registration

The allocation or drawing up of planning or redevelopment schemes for any area of national land should be preceded by the registration of existing rights. The first step is to declare a registration area. All those who claim an interest in a registration area are required to register their claims within a specified period. The Registrar of Customary Rights (RCR), assisted by elected Neighbourhood Committees, should adjudicate and register these claims and issue Certificates of Customary Rights. Demarcation is to be by the general boundary method and sketches will be signed by neighbours to show their agreement with the demarcation of the plot. The certificate carries the condition that the owner will accept minor modification of his rights and participate fully in any subsequent planning or redevelopment schemes.

The person claiming a customary right will have to show that he/she had such a right at the time of the passing of the proposed new law. In areas which are already declared planning areas and the declaration has not lapsed, the claimant has to show that he/she would have had a customary right, if the new law had been applicable, at any time between the declaration of the planning area and the date of the passing of the new law, unless the claimant disposed of that right voluntarily, in which case no claim would lie. This takes account of many complaints received by the Land Commission from former occupants of planning areas who had been forcibly evicted without compensation and without offers of alternative land.

At the end of registration, security of tenure is provided by the issue of registered titles. Unoccupied lands available for allocation are identified, to be followed by planning.

Stage II: Planning

Planning would take place under the procedures currently provided by the TCPO, with appropriate amendments. Planning schemes (or redevelopment schemes in already built-up areas, as the case may be) would be drawn up and discussed in public meetings through elected Land Planning Committees at ward and district level. From this would emerge land-use plans and layouts broadly identifying land uses such as residential, business, farmlands, etc. The next stage would be the surveying of plots.

Stage III: Surveying

Surveying would be based on already approved detailed schemes (lay-

outs) and would take place in consultation with the appropriate elected Land Planning Committees. The Commission recommends that, where applicable, the neighbours of a plot being surveyed (representatives of neighbouring communities) should witness the survey and sign the sketches. Final deed plans should also bear the signatures of neighbours or representatives of neighbouring communities.

Stage IV: Certification

This is a totally new stage. When the land earmarked for allocation has gone through the processes of registration, planning and surveying it is ready for certification. The appropriate organ of the NLC will submit survey plans identifying plots by numbers with full documentation to the Circuit Land Court. The CLC will scrutinise the application in a public hearing at which any member of the public can raise objections on a point of law, policy or environmental requirement, etc. Even if there is no objection, the CLC will have to satisfy itself that all the procedures have been followed and that adequate opportunity for public participation has been given. Only when a certificate is issued is the said land deemed available and ready for allocation.

Stage V: Allocation

The Commission recommends two types of land allocation: government allocation or allocations for public purposes, and allocation of residential plots for the applicant's own personal occupation which do not attract any premium although a reasonable rent may be charged. Any parcel of land used for profit would be auctioned to receive bids for premium and land rents. The funds so raised go directly to the NLC to finance the land delivery system. Citizens will have priority over non-citizens in such allocations. Allocation to non-citizens for any purpose will attract a premium.

Once the necessary certification has been received from the CLC, public advertisements would call for applications and tenders. The applications and bids for tenders would then be submitted to the relevant Land Committee for deliberation and allocation.

The deliberations of the Land Committees will be open to the public. The allocations decided on will be followed by the issue of Letters of Allocation accompanied by deed plans and CLC certificates. Within six months of the date of payment of the necessary premium and rents, the relevant body of the NLC will issue a title.

Disposition, compulsory acquisition and compensation

The principles applying to transfers, acquisition and compensation in the case of village lands are also applied to national lands. Rights of occupancy and customary rights can be transferred (through sale, etc.), but need to have the consent of the appropriate district or ward Land

Committees. Without consent, transfers would be null and void and cannot transfer interest.

So while a land market is explicitly recognised, it is regulated to take account of over-arching social and economic interests. The Commission asserts that there is no such thing as a free market. Markets should be used *selectively* and *discriminatively* in the light of set policy goals. Thus the state itself (the NLC in this case) sells land by charging a premium and rents depending on the purpose for which the land is to be used. By the same token, while the sale of land between private persons requires consent, such consent shall not be refused unless:

"i) *the sale is clearly for a speculative purpose, or*

ii) *it will result in a change of use, or*

iii) *it is against the public interest, in which case the public interest must be clearly specified, or*

iv) *it 'will leave the transferor either landless or without shelter or is one of undeveloped land'" (Tanzania 1994, Vol.I:170).*

Even in this last case, consent may not be refused if there is a firm agreement between the seller and buyer that, in consideration for the partial assignment or transfer of a customary right (or a right of occupancy), the purchaser will build for the seller on the latter's part of the interest (whether vertical or horizontal) an apartment or house consistent with the development conditions attaching to a right of occupancy of not less than 33 years. This is to enable a person of means to buy land for his/her needs, while at the same time enabling the seller with meagre resources to obtain shelter.

The selective use of the market is consistent with the Commission's overall approach of development from below to avoid the polarisation of village society into a small unproductive, land-holding rentier class at one end and a landless marginalised majority at the other, or in the case of urban areas a small real estate 'bourgeoisie' and a majority of slum-dwellers.

In the case of compulsory acquisition, the Commission recommends that the exercise of the state's powers should be strictly defined and regulated. The landholder should be compensated at rates closer to market rates for unexhausted improvements, and there should be allocation of equivalent alternative land elsewhere. As a last resort, where alternative land is not available, compensation *in lieu* should be payable.

Chapter 6

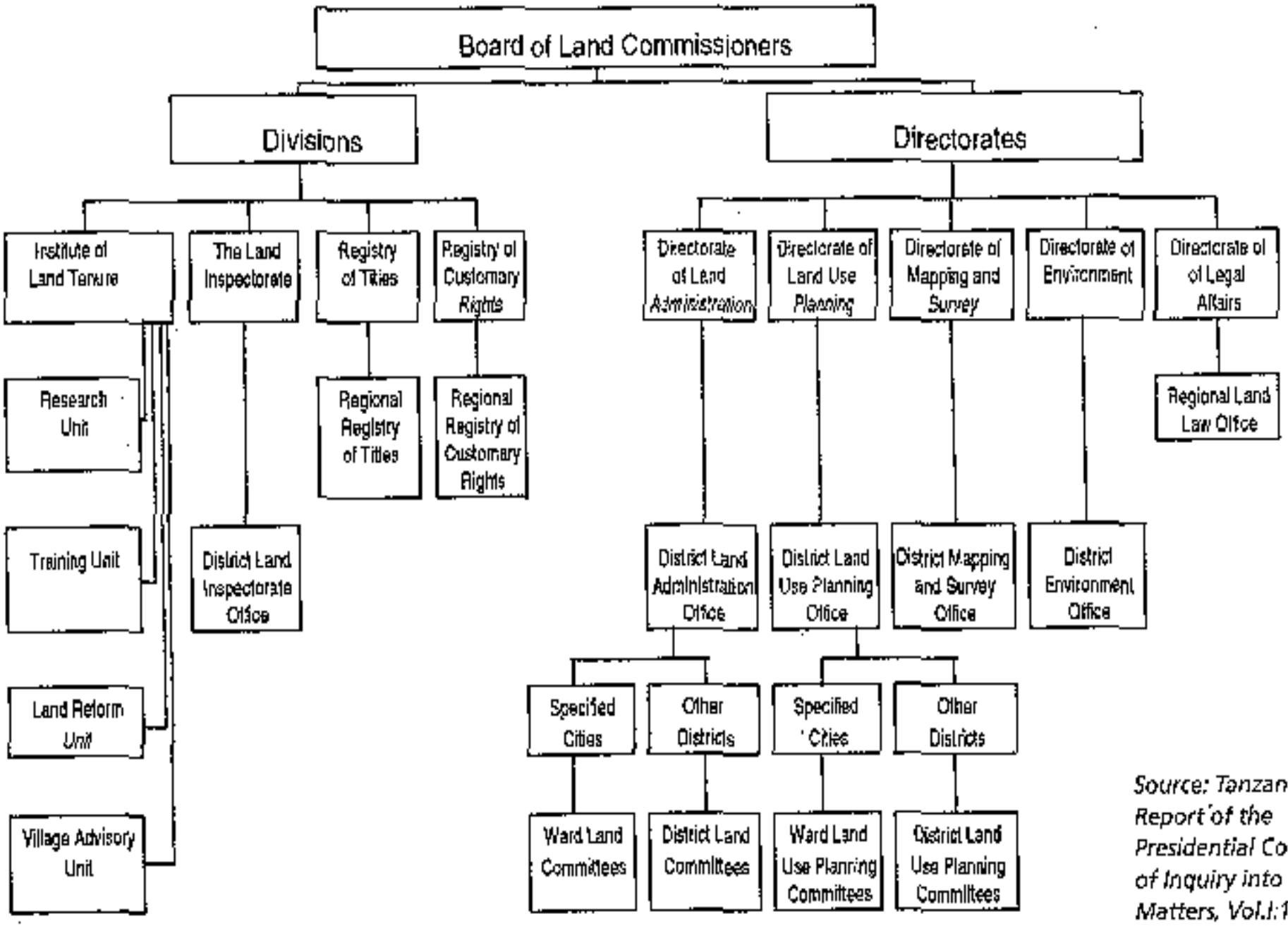
Institutional and legal framework

National Land Commission

The Commission made a number of recommendations regarding the structure of the National Land Commission. These are summarised in Figures 2 and 3, the main features of which are outlined below.

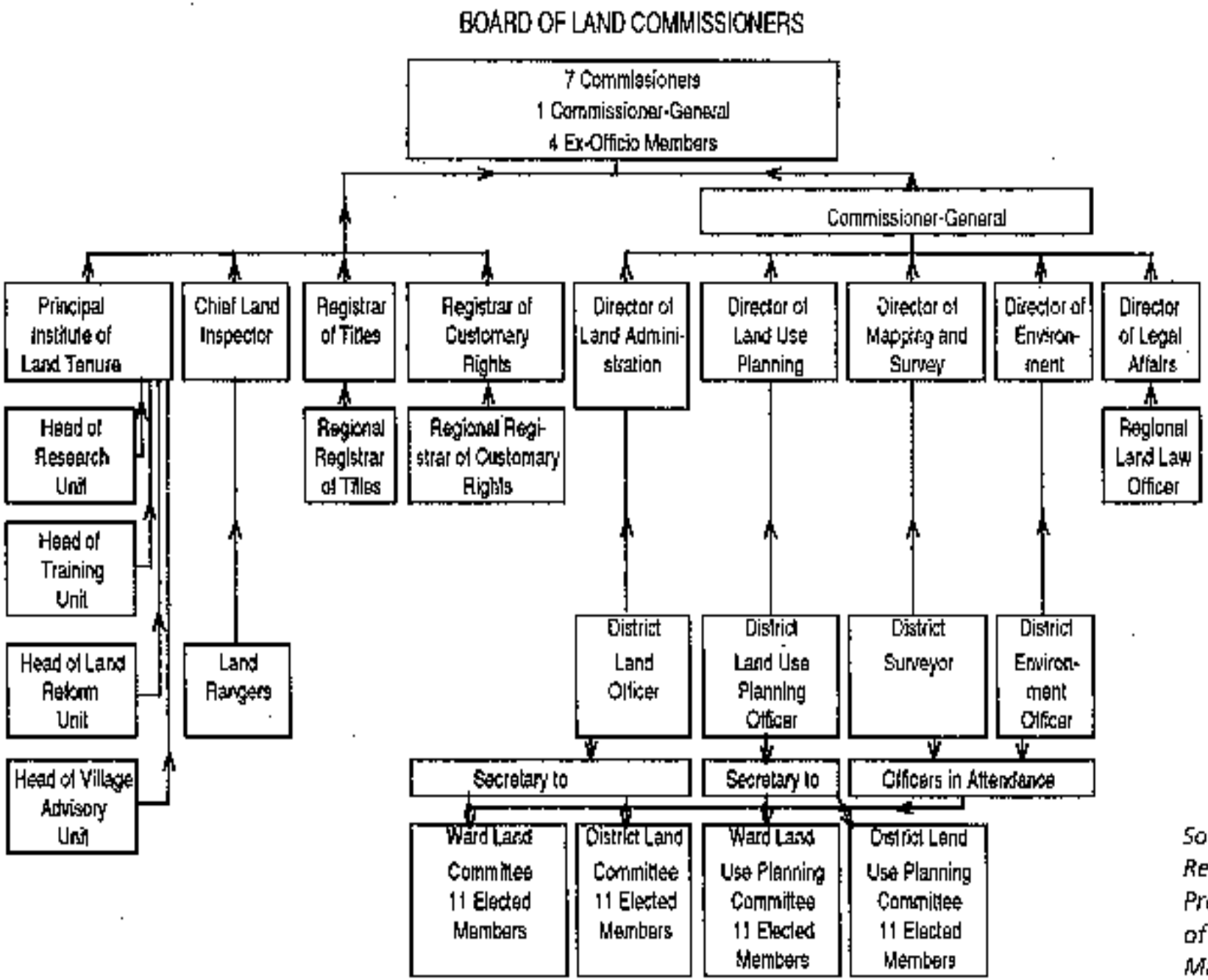
1) The Board of Land Commissioners will consist of eight commissioners (at least two of whom should be members of Village Assemblies), including the Commissioner-General who will be the chief executive of the NLC, but not the chairman of the BLC. There will be four ex-officio members of the BLC – namely, the heads of the semi-autonomous divisions: the Principal of the Institute of Land Tenure; the Registrar of Titles; the Registrar of Customary Rights; and the Chief Land Inspector.
2) Commissioners will be nominated by the President and confirmed through public hearings (akin to confirmation hearings in the US Congress) by the Lands Committee of the National Assembly. They will hold office for a definite term and can only be removed before the expiry of their tenure by a process of impeachment in the National Assembly. The heads of the divisions will be appointed by the BLC.
3) There will be five directorates under the Commissioner-General including a Directorate of Environment. The other four are more or less similar to those existing under the current Ministry of Lands. The most important change is that ward and district land and land-use planning committees are to be elected. These form the grass-roots base of the NLC. The District Land and Planning Officers serve as secretaries to the committees. The planning committees participate in planning and surveying. The land committees are responsible for allocation and giving consent to dispositions.
4) The other important recommendation is the creation of four semi-autonomous divisions, including the Institute of Land Tenure, which will contain four units: Research Unit, Training Unit, Land Reform Unit and the Village Advisory Unit. The Institute conducts the training of all land and judicial officers before they take office as well as providing refresher courses. The Village Advisory Unit is strictly only advisory to VAs. It also helps to train personnel for keeping the records of Village Land Registries as well as collating and centralising village records.

Figure 2: The National Land Commission organisational chart



Source: Tanzania – Report of the Presidential Commission of Inquiry into Land Matters, Vol.I:176.

Figure 3: The National Land Commission – accountability of officers



Source: Tanzania – Report of the Presidential Commission of Inquiry into Land Matters, Vol.I:177.

Village Assemblies and *Baraza la Wazee*

The composition of VAs is already provided in law – all adult members (aged 18 and over) of the village. The Commission recommends a quorum for VAs, and a mandatory minimum percentage of women to ensure their participation in decision-making. VAs will elect five elders to constitute the Council of Elders (*Baraza la Wazee la Ardhi*). They will hold office for a term of three years, renewable for two terms. This can be revoked by a majority vote of the Assembly. To ensure the separation of powers, a member of the *Baraza* shall not at the same time be a member of the Village Council.

Machinery for settling disputes

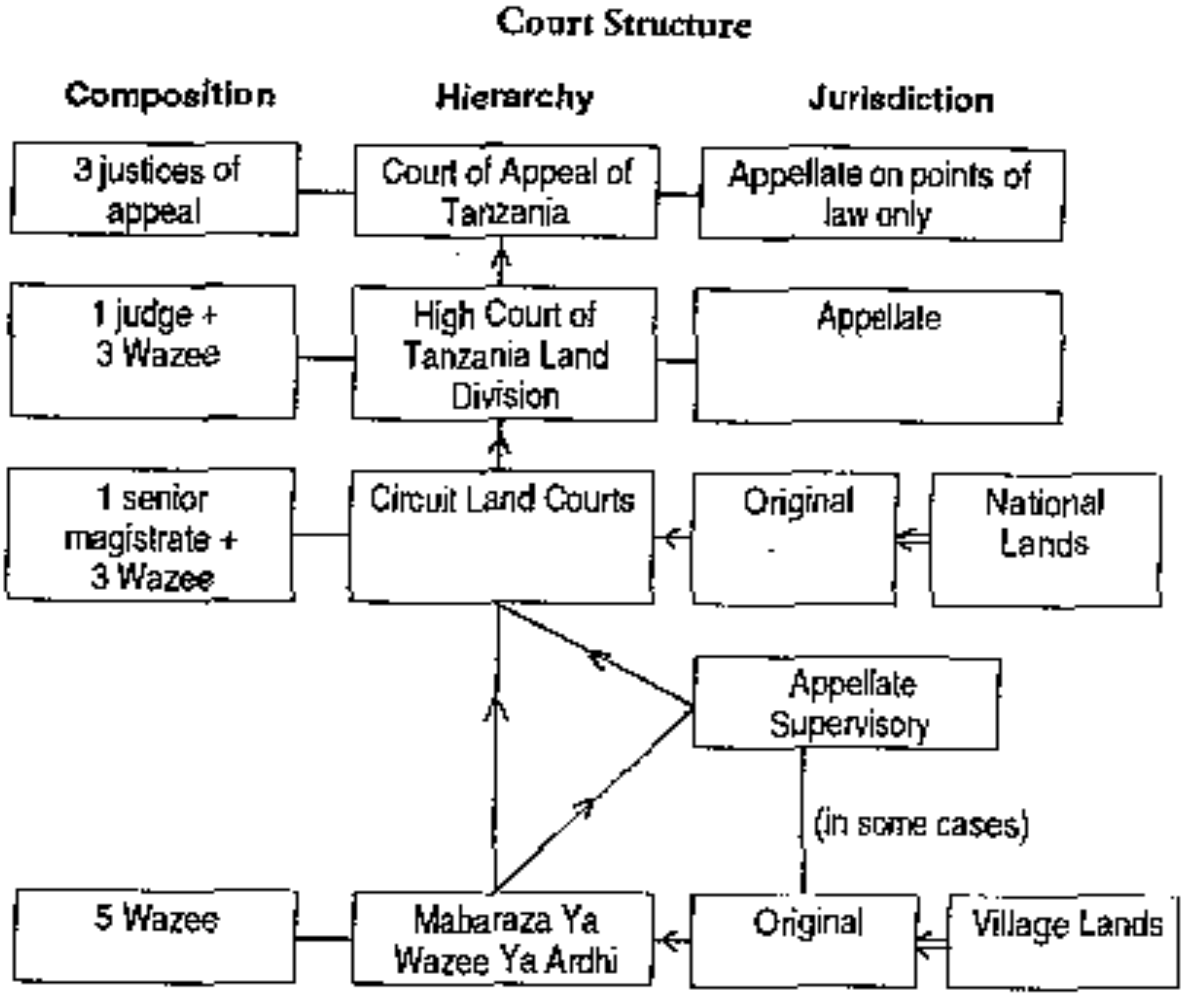
The Commission considered and rejected creating an administrative or quasi-judicial machinery for settling land disputes located in the executive arm of the state. The problem of such mechanisms is that they lack efficiency as well as legitimacy, and undermine the constitutional principle of separation of powers and the independence of the judiciary. Tanzanian experience shows that administrative tribunals for settling land disputes invariably end up being located in the Ministry responsible for lands (compare customary tribunals under the Customary Leaseholds Act 1968, now modified by the Regulation of Land Tenure Act 1992). Such bodies have come under heavy criticism and are the subject of widespread complaints.

The Land Commission anchors its dispute-settlement machinery *firmly within the judiciary, while modifying* it in two important respects: the creation of the *Baraza la Wazee* at the village level, and the participation of the elders (*Wazee*) in the Circuit Land Court and the High Court (see Figure 4).

The *Baraza la Wazee* will have exclusive and original jurisdiction in all land matters arising in the village, including certain criminal matters to do with land. The Circuit Land Court will have appellate and supervisory jurisdiction over the *Baraza*, as well as exercising original jurisdiction over land matters arising on national lands, or disputes between villages or between a village and the NLC. To make the CLC accessible, it is required to hold its hearings *in situ*, ie. where the land in dispute is located.

The CLC sits with an advisory panel of three elders. However, the elders have to give their considered opinion on all issues as well as on what would be a fair and just decision. In this respect, their role is different from that of assessors in some criminal trials. The magistrate or judge will not be bound by the opinion of the elders, but will be required to give his reasons for agreeing or disagreeing, the idea being to bring community values to bear upon magistrates and judges. The Commission hopes that in this way a body of Tanzanian common (land) law can develop which is sensitive to the community's sense of justice and fairness.

Figure 4: Dispute settlement machinery



Source: Tanzania – Report of the Presidential Commission of Inquiry into Land Matters, Vol.1:200.

Legal framework

The Land Commission identifies major sources of land law under the new system. It also discusses in some detail how the transition from the old to a new tenure structure may be made by safeguarding certain existing rights and converting others to be compatible with the new system. The conversion provisions recommended by the Commission are constructed in such a way as to address past historical injustices involving large-scale alienations of village lands, without at the same time creating a groundswell of new grievances.

The Land Commission identifies four major sources of land law under the new land law regime: the Constitution, Basic Land Law Act, customary law and received law. The Constitution will stipulate the main framework for land tenure, particularly the vesting of village lands in the VAs, and national lands in the B.L.C. The Basic Land Law Act will bring together all land laws as amended and modified in the light of the Commission's recommendations.

Customary law will continue to be the main law regime governing village lands. However, it will not be the same customary law as currently, but will be modified in some major respects by constitutional and other statutory provisions. Many of these, such as the vesting of radical title in Village Assemblies, the election of *Wazee*, or the registration of customary titles through the process of open hearings, are all modern democratic innovations.[26] As the Commission observes: "*The principle here is to facilitate modernisation of the tradition from below rather than attempt to oust tradition by imposing modernisation from above*" (Tanzania 1994, Vol.I:193). The Commission hopes that its suggested framework will allow an organic evolution of customary law in response to changing conditions and values: "*In this way, we anticipate the development of a body of Tanzanian* common law *which will be a creative blend of statutory and customary laws guided by democratic constitutional principles*" (ibid.:193).

Received law will continue to apply as residual law, particularly in matters relating to leases, mortgages, conveyancing, etc. The Commission suggests two modifications. First, when applying received law the courts may take into account developments in common law and principles of equity in common law jurisdictions other than that of England. And, second, such law should not be repugnant to the Basic Principles of National Land Policy and principles of justice and equity held in common by Tanzanians. Here the Commission has turned on its head the colonial repugnancy clause which provided that 'native law and custom' (customary law) might apply provided it was not repugnant to good sense, justice and morality. In practice this meant, of course, the good sense, justice and morality of colonial judges and was used both to subordinate and reconstruct customary law and practices in the image of the colonial power (Mamdani 1996). We now turn to examine the critiques and reactions to the report in Part III.

26 For example, the expansion of the meaning of 'custom' beyond the colonial definition of 'native law and custom' to include legitimate practices of mixed communities and neighbourhoods. Some critics seem to have identified the Commission's position of continuing with customary law as conservative, 'romantic' and backward. They have missed the point, though. A careful reading of the report would show that the recommendations of the Commission could have profound effects on customary law. It is the overall democratic institutional and legal structure of the report which is important for evaluating the place of customary law in the land tenure system suggested by the Commission.

Part III

Debating land: the making of the policy and the law

Chapter 7

Critiques of the report I: the radical title

The government reaction

The Report of the Commission was presented in November 1992 (Volume I) and January 1993 (Volume II). It is a well-known tradition that, following a commission of enquiry on a major policy matter, the government publishes a White Paper stating its position on the recommendations made. The report and the White Paper then become available to the public for debate.[27] The Commission in its report as well as the presentation speech suggested this procedure to the President.

As it turned out, the government never produced a White Paper. A researcher discovered that, only two months after the submission of the report, senior officials in the Ministry of Lands had drafted a Government Position on the report (Sundet 1997).[28] But "*this is a little-known document which has been kept out of the public domain*" (ibid.:108). The later drafts of the national land policy emerging from the Ministry of Lands were apparently based on this document and in substance repeat the position taken in the draft position paper.

In fact, a ministerial committee within the Ministry of Lands had begun work on land policy in 1990 (ibid.) and worked parallel to the Commission. It was the officials involved in this committee, assisted by foreign consultants, who were the prime force behind the document which was eventually produced as the National Land Policy (Tanzania Ministry of Lands 1995) and which became the basis of the new Land Act.

Meanwhile, a local newspaper (*Business Times* February 1994) serialised some parts of the Commission's report. This was probably instrumental in the then Minister of Lands permitting the publication of the report by the Scandinavian Institute of African Studies.[29] The publication enabled some limited discussion of the report in the English-language newspapers, but there has been virtually no debate on the draft land policy of the Ministry. Instead, various drafts of the Ministry's policy were discussed in closed workshops of invited guests – mainly civil servants, top officials from parastatals, judges and some

27 It was this type of procedure, albeit in a colonial framework, which enabled Nyerere to react to the then Tanganyika Government's Paper No.6 of 1958 setting out proposals for transforming the land tenure to freehold following the report of the East African Royal Commission (1955) (see Tanganyika Government 1958 and Nyerere 1968).

28 I am grateful to Geir Sundet for letting me have a copy of his Ph.D. dissertation.

29 The present author made the necessary contacts with the Scandinavian Institute and facilitated agreement with the Ministry for the publication of the report.

selected private law practitioners. These workshops were financed by loans from the World Bank and organised by hired foreign consultancy firms.[30] The same pattern was followed in discussing the several drafts of the new Land Act prepared for the government by a consultant, Professor Patrick McAuslan, on contract from the British Overseas Development Administration (now the Department for International Development).

The lack of serious public debate on the policy and the proposed law was the central theme taken up by workshops organised by local non-governmental organisations in 1996 and 1997. These were initiated by a land rights NGO, the Land Rights Research and Resources Institute (LARRRI – Hakiardhi) which became active in 1996. In May 1997, several gender, pastoral and media NGOs came together with other activists to form a National Land Forum to campaign against the new Land Act and develop a national debate on land. Their declaration called *Azimio la Uhai* is reproduced in the Appendix to this book.[31]

Probably the most important point to emerge from this brief review of the aftermath of the Commission's report is the singular reluctance of the government, advised and led by a small group of senior civil servants in the Ministry with foreign advisers/consultants,[32] to allow a public discussion and debate either on the report or on its own policy drafts.[33] This, as will become clear from the positions taken in the drafts, was not simply a traditional bureaucratic dislike of public input, but a reflection of the vested interests in maintaining firm bureaucratic control over the country's major resource, land. We shall return to this issue in subsequent chapters.

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30 The second draft of the policy coming out of the Ministry was prepared in March 1993 after which there was a long lull as the liberalisation of the political system picked up. Meanwhile, with the help of World Bank loans American consultancy firms continued to be hired to assist in the drafting of the policy. Steptoe and Johnson were hired in February 1994 and another American consultancy company, Tropical Research & Development, Inc. (TR&D), in September 1994. The latter company assisted in organising the January 1995 workshop in Arusha financed by the World Bank. This is the workshop which in the government's view amounted to participation and consultation. Apart from the chairman of the Commission, whose attendance at the workshop was facilitated by an NGO, no other member of the Commission was invited to attend.

31 A consultative meeting of the bishops of the Evangelical Lutheran Council of Tanzania meeting in Moshi, 12-17 August 1997, passed a resolution supporting the Azimio and calling on the government: (a) to desist from sending the Land Bill to Parliament in October so that a national debate could continue; and (b) to stop alienating land to foreigners until the new policy had been fully discussed and approved by the people.

32 To be fair, some foreign consultants would have personally liked a public debate, but they were probably too prudent to join issue on this with senior ministry officials and thereby jeopardise their lucrative contracts and the leverage that they (and their 'employers') otherwise exercise on the government.

33 It is also not without significance that the ministerial work on drafting the land policy was financed by World Bank loans, while the money for the Commission came from the Tanzanian Treasury. Except for a small grant from Oxfam to enable them to visit Botswana, Kenya and Zimbabwe, the commissioners had decided early on in their deliberations not to seek outside funds nor to accept any such offers, in order to maintain, and be seen to maintain, their independence in carrying out the task entrusted to them by the President of the country.

Critiques of the report

As already noted, there has been no widespread debate on the report or the policy. A few criticisms of the report, however, have emerged from consultancy and research reports written by Tanzanian and foreign researchers. The only significant critique in a popular medium was by Dr. John Shao in the then weekly, *The Express* (see 16 March to 30 April 1995 issues). A well-funded Land Tenure Study Group (LTG), co-chaired by Professors Anna Tibaijuka and Frederick Kaijage, has produced policy recommendations and partial critiques of the report (see LTG 1995). Their papers, originally prepared for consideration by policy-makers, were serialised in the English-language newspaper, *Business Times*.[34] In what follows I shall first discuss some of the major points raised in the critiques by independent writers before looking at the position taken by the National Land Policy. The criticisms are so intertwined that I have decided to deal with them under two major headings: the issue of radical title and the question of gender and land. In Chapter 9 I also deal briefly with the different perspectives on law and justice that underlie the draft of a bill for the new Land Act and the Commission's report.

Radical title

The position of the Commission that the Land Ordinance, 1923 in effect vested the radical title (in the meaning of ultimate ownership and control) in the state has been hotly contested by a number of writers. As a Kenyan consultant put it, the issue of radical title "*has generated so much heat, but little light*" (Okoth-Ogendo 1995:48).[35] To understand better why this is so we need to appreciate the historical,

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34 The analytical framework of the LTG reports is somewhat confused and inconsistent. Its political position seems to have been influenced by its explicit standing as stated in the 'acknowledgements' to the paper presented at the Arusha Conference in 1995, which states: "*The LTG operates on the principle of collaboration with Government authorities and donor agencies*". It is not surprising therefore that, among other things, it fully endorses the vesting of radical title in the state (see LTG 1995). For more sympathetic reviews and comments, see Havnevik 1995; Campbell 1996; Coldham 1995; Sundet 1997. For an interesting and more critical, if somewhat patronising, review, see Kelsall 1995. For more internally based commentaries and review, see *Change* 1997. Palmer (1997) has produced an excellent literature review of the land tenure issues in East and southern Africa.

35 This was yet another report on land tenure submitted by one more consultant. It was financed by FAO and submitted to the government through the National Land-Use Planning Commission in the Ministry of Lands. The policy- and law-making process on land was thus fragmented among, at least, four bodies working simultaneously and at cross purposes: the ministerial committee dominated by senior civil servants in the Ministry and financed by the World Bank; the Presidential Commission, financed by the Tanzanian Treasury; a Kenyan consultant reporting to the National Land-Use Planning Commission financed by FAO; and a British legal consultant financed by the British ODA. Different organs and departments of state working on similar major issues and financed by different foreign funding sources (each vying for influence and leverage) is a not untypical scenario in Tanzania, where policy-making, particularly since liberalisation, is increasingly donor-driven.

social and political context of the concept of radical title as applied and practised in Tanzania.

The historical and jurisprudential context

The concept of radical title is rooted in the feudal history of England from which that country's modern land law emerged. As the leading text-book on English land law puts it; "*Every acre of land in the country was held of the King*" (Cheshire 1967:12 *et seq.*). But the King was also the political sovereign. Political sovereignty and ownership therefore become merged. To this day, despite their historic separation, confusion between the two, particularly in the former colonial jurisprudence, persists, and not without reason, as we shall see.

The establishment of nineteenth-century imperial rule in Africa and elsewhere brought in legal concepts pertaining to the ownership of land. In the case of the British Empire, which distinguished legal rationalisation of its conquest in terms of dominions, colonies, protectorates and trust territories, distinctions were quite refined. These found their way into the formulation of colonial laws, although, in administrative and political practice, they probably made little substantive difference, in particular to the colonised and their interests (see Meek 1946).

The most persistent issue concerned the kind of land rights the Crown had in its various foreign jurisdictions *vis-à-vis* native land rights, and whether these differed, depending on the status of the foreign possession. At least three terms – 'Crown lands', 'native lands' and 'public lands' – were used in earlier legislation, at times interchangeably and inconsistently and in practice meaning different things in different situations. The case law based on it has also been inconsistent, as has been the use of the term 'radical title' (see Roberts-Wray 1966). Having analysed this confusion, Roberts-Wray tried to extract some very tentative general principles. For a colony "*the radical or ultimate title to the land vests in the Crown*" (ibid.:636). In the case of Protectorates (a situation, I would argue, closest to trust territory), the principles are:

> "*In a Protectorate, feudalism, as such, has no operation, but the common law rights flowing from it may apply if they are either major Prerogatives or imported as part of the common law: and if jurisdiction is acquired by conquest or agreement ... the land ... is at the disposal of the Crown ... rights of property are to be respected: with the result that private ownership is unlimited and the tribal or other rights of the inhabitants (not amounting to private ownership) can be extinguished only by the consent of the occupiers or in accordance with statute, and they continue to exist unless the contrary is established*" [emphasis added] (ibid.:636).

Similarly, after examining the correspondence of the Colonial Office,

the opinions of Law Officers and the decisions of courts including the Privy Council, Claire Palley concluded as follows on the issue of Crown rights to land in Protectorates:

> *"Whether the Crown chose to respect land rights of native peoples became, in each instance, therefore, a policy decision. In Nigeria land rights were respected. In East Africa, in Southern Rhodesia, and Swaziland, all areas of white settlement, the Crown decided to exercise its powers and to override native land rights. Although there is a presumption that private rights should continue, Crown action inconsistent with such rights would serve either to extinguish or to modify them"* (Palley 1966:83).

The point of these principles and observations, for our purposes, is that we should look primarily at the scheme of the Land Ordinance as a whole, the administrative practice of the colonial state and the specific colonial case law rationalising and justifying this practice. Political statements made in the League of Nations debates are of only secondary use since they tended to be largely hortatory.

Sections 3 and 4 of the Land Ordinance, which have remained substantially the same since they were first drafted in 1923, contain the following main elements:

i) that all lands are declared to be public lands;
ii) that this does not affect the validity of any titles lawfully acquired before the date of the commencement of the Ordinance;
iii) that all public lands and rights over the same are under the control and subject to the disposition of the President (formerly the Governor); and
iv) that no title to the occupation and use of any public lands is valid without the consent of the President (formerly the Governor).[36]

There is little doubt that these provisions were ambiguous and nowhere in the Ordinance was it made clear that African rights were protected by law. In the debates of the League of Nations Permanent Mandates Commission questions were often raised as to the implications of the Land Ordinance for the land rights of the 'natives'. Van Rees, a Belgian representative on the Commission, examining the term 'public lands', arrived at the conclusion that the term did not mean 'State lands', but that the intention of the draftsman was not to establish *"a legal relation between what are known as 'public lands' and the State, and that consequently he had in view merely an administrative relation in the sense that these lands have been placed in their entirety under Government control"* (quoted in Lyall 1973:86). This, it seems to me, was the crux of the matter. The colonial state did not want to

36 Before the 1928 amendment, the Ordinance also provided that the titles safeguarded by the proviso had to be proved within five years. Clearly therefore this could not apply to native titles. After a careful examination of the law including case law Lyall (1975, Chapter 5: passim), in my opinion, correctly argues that the proviso did not safeguard native titles. Contrary arguments by Shao (1995) are simply not persuasive, besides being contradictory, in that Shao accepts that native lands became part of 'public lands', in which case a fortiori the rights over those lands were not safeguarded by the proviso.

be bound by legal provisions to protect the so-called 'native land rights'. The ambiguity in laws of the term 'public lands' allowed the state to proclaim to the League of Nations that it was legally committed to protect native land interests, while in practice enabling it to determine its relationship with the natives in terms of changing administrative policy. Andrew Lyall, in a careful study of the land law and policy of the period, concludes that the function of the Land Ordinance was not "*to give Africans secure legal title to their land. Its object was to satisfy the Permanent Mandates Commission that this had been done, whereas in fact giving as much scope to the administration to make radical changes in policy if this proved necessary at a later stage*" (ibid.:98).

The other critic of the Land Ordinance in the Mandates Commission, the British representative, Frederick (Lord) Lugard, grasped the implications of the provisions quite correctly when he argued consistently (a) that public lands included customary lands; (b) that placing all lands under the disposition of the Governor, and the declaration that no title to land was valid without the Governor's consent, in effect meant that there was "*no assurance of undisturbed possession of lands which might have been occupied by a native and his forefathers*" (quoted in Lyall 1973:90); and (c) that in his view the proviso validating land held prior to the commencement of the Ordinance did not apply to lands held by natives because they could not prove title in any case, since the context clearly implied that the proving of a title had to be done by documentary evidence, an impossible task for the large majority of indigenous land holders (ibid.).

These criticisms eventually led to an amendment of the Land Ordinance by expanding the definition of 'right of occupancy' to include 'the title of a native or native community lawfully using or occupying land in accordance with native law and custom' (Land Ordinance (Amendment) Ordinance 1928, No.7). The amendment was another sop. It made little difference to the lack of legal security of native rights, except that now there were two categories of land holding: the 'granted right of occupancy' and the 'deemed right of occupancy'. In fact, the amendment only reinforces the view that the radical title is vested in the Governor, in that both types of land are *held of the Governor* in the immediate sense just as under the feudal system all lands are held "*of the King either immediately or mediately*" (Pollock and Maitland, quoted in Cheshire 1967:13). The full quotation from Pollock and Maitland is quite apposite to the Land Ordinance. They say:

> "*The person whom we might be inclined to call the owner, the person who has the right to use and abuse the land, to cultivate it or leave it uncultivated, to keep all others off it, holds the land of the King either immediately or mediately*" (ibid.:13).

The 'person whom we might be inclined to call the owner' in Tangan-

yika, ie. the native occupier, had and has even fewer rights in that s/he cannot leave the land uncultivated because s/he could incur criminal liability under numerous compulsory cultivation by-laws (see Part 1). S/he cannot keep all others off his/her land either. Until very recently, for example, s/he could not keep off the person with a granted right of occupancy whom the courts considered to have a better title (see *Nyirabu v. Nyagwasa* (1980)).[37] And he certainly could not keep off the President who, as the Tanzanian Court of Appeal stated in the case of *Nyagwasa v. Nyirabu* (1985), is the *"basic and root source from which all title to land in Tanzania is derived"* (p.13). Various provisions requiring the consent of the Village Council before land is transferred among people themselves, according to the Court, *"do not concern the superior landlord, an outside authority in the person of the President"* (p.14).

In a number of cases decided during the colonial period, the courts interpreted the Land Ordinance to mean that African occupation of land was merely 'permissive' and that no adverse possession could be set up against the government. In *Mubena bin Said v. The Registrar of Titles* (1949), Sir Graham Paul, the Chief Justice of Tanganyika, stated:

> *"It seems to me ... that possession has been proved for the requisite period but that the obviously difficult thing is to prove adverse possession as against the German or British Governments who undoubtedly as a matter of policy permitted the inhabitants generally of the Territory to use land for their reasonable requirements of residence and sustenance without any special grant to any individuals. To satisfy the Registrar that the possession was adverse in this case evidence would in any view be required of something definite in the occupation of the applicant or his predecessors to take that occupation out of the category of the admitted general permissive occupation by all the inhabitants of the Territory"* [emphasis added] (quoted in Lyall 1973:88 fn.).

The category of the admitted general permissive occupation by all the inhabitants virtually coincides with what are called the 'deemed rights of occupancy' held under 'native law and custom'. This position was repeated in other cases. In most of them, the African applicants were trying to establish that they owned an estate in land equivalent to a freehold (or fee simple) and therefore registrable. In a long line of decisions quoted and discussed in the case of *Mtoro bin Mwamba v. The*

37 In this case the High Court decided in no uncertain terms that existing customary rights are extinguished on declaration of a planning area and that a granted right of occupancy is superior to a deemed right. The Court of Appeal disagreed on this point, but decided for the grantee of the right of occupancy on the ground that the aggrieved customary holder did not have a valid customary right because the seller had not obtained the consent of the Village Council. When the advocate argued that the President who had granted the right of occupancy had not obtained the consent of the Village Council either, the Court sharply retorted that the consent requirement could not possibly apply to the 'superior landlord' who was the source of all titles in the country.

Attorney General (1953), the colonial courts proceeded on two mutually reinforcing arguments. One, that African customary law did not know of a concept of land ownership equivalent to the largest estate in English law, ie. an estate in fee simple, which was the only one which could be set up against the government. And two, that however long a period of possession a 'native' might establish, this was only 'permissive' occupation and could not be set up as adverse possession, adverse to the colonial state.

In this, the courts assumed that the 'natives' occupied and used land by virtue of an assumed *consent* on the part of the Governor in terms of the sections of the Ordinance discussed above. The whole tenor and logic of these arguments is consistent with only one interpretation, namely, that the colonial state was the ultimate owner and controller of all lands and behaved as such. What is important is not what the colonial state declared itself to be in the councils of the League of Nations, but what it practised in the country. In the Legislative Council debates in 1926, while assuring the 'natives' that they would not be disturbed in their occupation of land so long as they continued to use it, Governor Cameron asserted that "it was a right to the use of the land, and not to its ownership which is vested in the Governor for the benefit of the tribe" (quoted in Lyall 1973:150). There could hardly be a clearer statement of what the Land Ordinance meant in reality.

Ambiguous and hortatory statements made by British representatives in the Permanent Mandates Commission and the articles of the Trusteeship Agreement have led writers like John Shao (1995) and Okoth-Ogendo (1995) to assert that the provisions of the Land Ordinance do not amount to vesting the radical title in the state; that the land is owned by the public at large and the state is only a 'manager', a 'trustee' or an 'administrator'. Yet both these authors agree, and cannot deny in the face of massive evidence, that the so-called manager, trustee[38] or administrator has been *"for nearly a century"* involved in *"the systematic misuse of the obligations of trusteeship in the process of land delivery, administration and control"* (Okoth-Ogendo 1996:49) resulting in insecurity of tenure and appropriation of the lands, particularly those of customary occupiers. Both also know that

38 Shao says that the land being under the control and subject to the disposition of the Governor meant that it was vested in him in his capacity as a trustee and not as owner: 'As trustee or manager the governor [after independence the President] can regulate the use and the transfer of land between the owners, that is the Tanganyika public, but cannot legally act as the owner'. First the governor, and now the President, has far more powers over land, including those of allocation and granting of rights of occupancy and revocation, than simply those of regulating transfers. Secondly, if the term 'trustee' is used in the legal sense, then indeed the trustee is the legal owner of the property held in trust, except that he has to deal with the trust property for the benefit of the beneficiary. Thirdly, if the term is used politically, it has virtually no content except as part of the patronising colonial and neo-colonial political lexicon under which the 'natives' are too immature to take care of themselves and therefore their property has to be held and administered on their behalf by a trustee who, after independence, is the all-benevolent head of state, the 'father' of the nation, etc.

"the chaotic state in which land-use practices are now in" (ibid.) is in no small measure due to the rent-seeking activities of the bureaucracy in the President's Ministry of Lands which are uncontrolled by the Land Ordinance. In other words, the state has, to all intents and purposes, acted not only as an owner, but as an irresponsible one! What, then, is the practical significance of making hair-splitting distinctions between a 'manager' and an 'owner' as Shao does? It seems to me that the significance lies not so much in what concepts are used to describe the problem, but what use is made of these concepts to offer solutions. This is where the Land Commission and its critics really part company.

Having argued that the location of the radical title makes no difference ('more heat without light'), Okoth-Ogendo fully confirms his agreement with the national land policy document that it should continue to be vested in *"the people at large"*, and *"that its control and management will continue to rest in the President as trustee"* (1995:49). What is the legal and practical significance of the phrase 'people at large' is not explained. Presumably it has no more content than the preambles in many dictatorial and semi-dictatorial constitutions declaring that all power is derived from the 'people'. It is the 'control and management' which are of real significance and for this the consultant has no more concrete recommendations than those which may be summed up in the now fashionable formula that the 'control and management' should be transparent, participatory and judicially reviewable. Who would disagree? In this regard, the proposed draft bill for the Land Act to be discussed in the next section would fully satisfy Okoth-Ogendo's prescription, and yet, as we shall see, it puts far more power in the hands of the (miscreant) land bureaucracy than the existing law.

John Shao is a little more circumspect. He disagrees with the policy paper's statement that land should be vested in the state. He argues that the new law should put an end to the 'tendency of the President acting as an owner of the land or appropriating to himself functions which are specific to ownership' (Shao 1995). And this should be done by getting rid of the concept of 'public lands' and moving to the concept of 'private ownership of land', presumably individualisation, titling and registration (ITR) based on freehold. Whether this would also be democratic, participatory or equitable from the standpoint of the large majority does not concern him, so long as the state, which is supposed to install the free market and private ownership at the same time, continues to protect 'natives' from 'non-natives'.

It is precisely in the use made of the conceptual device of radical title in offering 'solutions' that the Land Commissioners distinguish themselves from their critics. The Commission's recommendations, as we have seen, revolved around diversifying and democratising the land tenure system. In this, the concept of radical title is used as a *legal device* around which to weave more participatory legal and institution-

al structures which would, among other things, hold the bureaucracy accountable. But this would also, to a considerable extent, have reduced, if not removed, the basis of the bureaucracy's power and a major source of surplus. It is not only the bureaucracy that has a vested interest in the *status quo*, but also those from the emerging civil society with leverage over it. Thus the Land Tenure Study Group, which by its own admission *"operates on the principle of collaboration with government authorities and donor agencies"* (LTG 1995:2), also comes down strongly in favour of *"vesting the radical title in the Executive"* (ibid.:8). The LTG arrives at this conclusion through a different route which may be discussed briefly.

Based on the opinion sought from two lawyers (see Rutinwa and Mukoyogo 1994), the LTG argued that it was not the Land Ordinance which 'created' and 'vested' the radical title in the Governor (later the President). Rutinwa and Mukoyogo put it thus:

> *"The radical title, or 'the eminent domain' as it is also known, is not and cannot be created by statute. It is an inherent right of the sovereign which he acquires by the same process by which sovereignty is established"* (Rutinwa and Mukoyogo 1994:4).

In relation to the Land Ordinance, they go on to conclude:

> *"It is for this reason that we are of the opinion that, by declaring all lands as public lands vested in the Governor, Cap.113 did not create the radical title. The radical title over Tanganyika lands was vested in the German sovereign immediately he asserted his political authority over this country. It was taken over by the British monarchy after the First World War as an incident of the transfer of sovereignty over Tanganyika from the Germans to the British. Cap.113 simply gave this legal situation a statutory expression just as the Acquisition of Lands Act, 1967 [sic] did when it gave the President power to compulsorily acquire land with compensation"* (ibid.:5).

Rutinwa and Mukoyogo are, in my view, correct when they say that 'eminent domain' is the emanation of sovereignty, but incorrect when they argue that radical title is also the emanation of sovereignty because it is just another name for 'eminent domain'. This confusion between 'eminent domain' and 'radical title' is understandable only in the context of the history of feudal land law. That it should spontaneously reappear in the colonial jurisprudential consciousness probably reflects the great affinity of the colonial political economy to the feudal one.[39] Be that as it may, the position is that neither legal writers, the courts, nor the colonial Law Officers assumed, as the preceding discussion shows, that what the Land Ordinance did was simply to declare an incidence of eminent domain.

39 Even the political economy of peasant production in a colonial-type situation, based on extra-economic coercion as it is, bears a striking resemblance to feudal or semi-feudal forms of exploitation. See Shivji 1987, reprinted in Forster and Maghimbi 1992, and Mamdani 1987.

Roberts-Wray touches precisely on this confusion between two different conceptions when he says:

> *"This ownership of the country is radically different from ownership of the land: the former can belong only to a sovereign, the latter to anyone. Title to land is not, per se, relevant to the constitutional status of the country; land may have become vested in the Queen, equally in a Protectorate or in a Colony, by conveyance or under statute – numerous Orders in Council and Ordinances have been enacted for this purpose"* (Roberts-Wray 1966:625).

He approvingly cites Salmond's distinction between 'state territory' and 'state ownership'. Land may be said to 'belong to' the Crown when it is territory of the Crown (a conception of public law) or the property of the Crown (a conception of private law), the first being the subject-matter of a right of sovereignty or *imperium*, the latter of the right of ownership or *dominium*. Salmond himself thought that the English feudal law under which *imperium* and *dominium* (territory and property) belonged to the Crown (the state) was imported into the colonies and, therefore, the Crown had both territorial jurisdiction as well as proprietary rights. Roberts-Wray, on the other hand, argues that that was not so and that it could only be created by a statute such as was done in Tanganyika under the Land Ordinance.[40]

Finally, it must also be pointed out that the leading decision of the Court of Appeal in the *Akonaay* case did not explicitly go into the jurisprudence of the radical title. But it could be argued that by accepting that *"the President holds public land on trust for the indigenous inhabitants of that land"* (p.11), it affirmed the position, probably in terms clearer than the earlier colonial case law, that the radical title in public lands is vested in the state. This is not inconsistent with the Court's holding that the deemed rights of occupancy held by customary occupiers amounted to 'property' or 'ownership' rights (albeit held of the President) for the purposes of article 24 of the Constitution which protects property.

Whereas the independent critiques argued about conceptual issues and whether radical title was ever vested in the state while arriving at virtually similar solutions, the drafters of the policy had no problem in finding the location of the radical title. Even more, they wanted it to be located without ambiguity in the state and they drew upon the *Akonaay* case for support (at p.3). This was the position of the Policy Paper to which we now turn.

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40 To be fair to Ruruwa and Mukoyogo, when it comes to recommendations, they agree with the Land Commission that the radical title should be divested from the Executive. But, if so, this is inconsistent with their position that the Executive holds radical title by virtue of sovereignty, in which case it presumably cannot be divested except probably by the constitution. (I am grateful to Ruruwa for making available to me a copy of their comment.)

The National Land Policy

All the policy drafts, including the Government Position on the Commission's report, took the position that all lands in Tanzania should continue to be vested in the President as 'trustee on behalf of all citizens', since the system established by the colonial state was 'fundamentally sound'. The Government's Draft Position rejected the Commission's recommendation of divesting the Executive of the radical title in the following terms:

> *"The President as Head of State is responsible for the development of the country and the well-being of the people, and land being an important element for development has to be controlled by the President. If land is vested in [the] Board of Land Commissioners and the Village Assemblies then the Government will be turned into a beggar for land when required for development. Instead of simply acquiring land for public purpose under the Land Acquisition Act the Government will now be required to apply to the Board of Land Commissioners. In the villages the Government is an outsider and can only be given land of not more than three acres at a time for less than ten years. The Government will not implement its policies in that way. The Investment Promotion Policy will be impossible when the Government does not have a say in land matters. Land has to remain in the hands of the Government ... the Commission has not given enough reasons for the departure"* (quoted in Sundet 1997:109).

The policy rationalisation here and throughout the policy document is cast in an uneasy blend of an inherited mode of authoritarian modernisation from the top, and the current orientation of liberalisation, marketisation and privatisation, all driven by the perceived need to promote foreign investment. The notion that the powers of the top bureaucracy should be circumscribed by having to go through consultations and applications to independent Boards or, worse still, grassroots Village Assemblies, is simply unacceptable in this developmentalist rhetoric.

The statement that the investment policy would be impossible to implement if the government did not have a say in land matters is interesting and revealing of the whole thrust of the disagreement with the Commission. The Commission simply recommended that the villagers and the people as a whole should have *a say in land matters.* To those who drafted the government position, this was equivalent to saying that 'the Government does not have a say'! If indeed the investment policy would be impossible to implement because the people had a say in land matters, then, one would have thought, there must be something wrong with the policy. But no, for the policy makers, there is something wrong with the people, particularly the villagers. In this they may not be very far from the truth. Many attempts at large-scale

land alienation, under the guise of investment promotion and acquisition for 'public purposes', have been met with protest and resistance by village communities. In many of these instances, the villagers have pointed out, and the Commission provided evidence for it, that there is no public purpose involved; rather there is only private greed and bureaucratic graft. If indeed that is what 'investment policy' is, it would be difficult – but probably, alas, not impossible – to implement it in any legal and institutional structure of openness, democracy and transparency as suggested by the Land Commission through the device of divesting the radical title from the Executive and vesting it in Village Assemblies and an independent Board of Land Commissioners.

The real significance for the bureaucracy of vesting the radical title in the President is not only the power of management and administration that this gives them, but the power of ownership – of allocation and alienation of land – that goes with it. No wonder that the second most important policy statement in the National Land Policy is that *"The Commissioner for Lands shall be the sole authority responsible for land administration"* (Tanzania Ministry of Lands 1995:10). As we shall see below, this turned out to be the most important brief to the draftsman to draft a land law centralising and concentrating the administration of land in the Commissioner for Lands (see Chapter 9).

The mood and orientation of the leading drafters of the policy are well summed up by the remarks of those interviewed by Sundet. The then Minister of Lands, Mr. Komanya, said, *"most issues [of the Report] were agreed upon"* but *"the problem was the proposed solution"* (Sundet 1997:113). What was the problem with the solution? Mr. Luhuva, then a senior official in the Ministry, felt that it was unfortunate that Shivji [the Commission's Chairman] was so much against the Executive, and that he tailored the Report towards this end [ie. divesting the Executive of the radical title] (ibid.:113).

This review shows that the heat generated by the Commission's recommendation on the issue of radical title was not simply conceptual and academic, but went to the root of the problems of land tenure in Tanzania. What is more, and this is the linchpin, the solution proposed through the use of the legal device of diversifying the location of the radical title struck at the basis of the economic power of the political and bureaucratic class and its emerging allies in the civil society.

Chapter 8

Critiques of the report II: gender and land

The criticism

One of the most severe criticisms of the Land Commission's report related to the question of women and land. One of the more vocal critics has been the co-chair of the Land Tenure Study Group (LTG), Professor Anna Tibaijuka, a fierce feminist but otherwise a mainstream economist. The Group states:

> *"Surprisingly, despite the extremely radical reforms being recommended by the Land Commission, when it comes to gender relations, the report argues virtually for maintaining the status quo! Perhaps this should have been expected since the Commission was made up of 9 men and only 1 woman [sic!] ... True, the Land Commission makes some commendable fundamental improvements to improve the security of land tenure for women ... However, progressive as it may seem, this recommendation is not likely to help women very much if they are not given direct land rights, ie. to be identified as joint owners of household land"* (LTG 1995:41).

It is true that the Commission did not, and could not, given its mandate, go into any great detail to suggest gender reform.[41] Yet, to my mind, the Group is probably understating the possible radical effect of including the names of both spouses on the customary certificate. In any case, the policy paper did not accept this recommendation in spite of the female members of the Cabinet and even their fellow male politicians jumping on to the gender bandwagon while at the same time excluding the larger issue of democratising land tenure. The suggestion that women should be given 'direct land rights', which is repeated in the Group's paper several times, is not very clear. On the whole, it is first necessary to define the gender problem with regard to land and the way it has been posed before we can adequately address it. This is what I shall try to do briefly below.

The problem defined

There are at least two different levels and three different types of problems discussed when the issue of women is debated in relation to the land tenure system. Unfortunately, in much of the debate that has

41 The Commission was made up of eight men and one woman. While the message conveyed, that the progressive gender position was in a minority of one, is probably true, the Group may be surprised to learn that the minority of one was not necessarily the female Commissioner!

taken place in the country so far, these levels and types are not always distinguished, thus causing not only confusion but probably offering, in my view, wrong solutions.

The two levels of discussion are the level of the family and the larger social level. For the purposes of our discussion the larger social level in the countryside may be defined as the level of the village/community. Various types of problems in which the female gender is generally discriminated against may be grouped under three general headings: ownership/access to land; control over the fruits of labour or participation in decision-making processes, and issues relating to inheritance and divorce. Each of these is discussed separately.

Access/ownership of land

In much of the earlier discussion on land tenure, some feminist literature formulated the problem as women having no, or unequal, access to land. In practice, of course, this way of formulating the problem was simply inaccurate, particularly in the rural areas/villages of Africa. First, it was a generalisation which could not hold for all countries nor for different communities in a single country. Secondly, empirical evidence clearly shows that in fact it is the women who are the real producers/labourers on land as, indeed, is the case in Tanzania. The issue is therefore not that women do not have access to land.

Once this position is more carefully analysed, it becomes clear that what is really being discussed is not so much lack of access to land, but ownership of land. Ownership itself is a complex concept when it comes to land. Broadly, there is the western-feudal concept of Roman law which, put simply, means a bundle of rights to own, control, use, abuse and dispose of land. This right is in perpetuity. This is what comes close to the so-called freehold system. And in much of the debate in Tanzania on the land tenure system, freehold ownership is considered to be the best way to advance capitalism by those who would consider themselves opposed to socialism. But freehold ownership has little to do with capitalism. It is in fact a remnant from the feudal past in Europe. In our case, it is considered an advanced form of land ownership by some misguided advocates[42] of market-capitalism simply because of the mistaken perception that Nyerere, in his zeal for socialism, nationalised all land by abolishing freeholds. As we have seen, land was, in a sense, nationalised in 1923. What Nyerere did was to abolish the freehold tenure which, in any case, involved only a small portion of the land. What is more, the owners of these freehold titles were not dispossessed of their property in land. Instead of freehold, they were given 99-year rights of occupancy from the date of abolishing their freehold titles. Whatever be the case, what is incontestable is that freehold ownership of land is not necessary for capitalism to flourish (see, for example, Bruce 1994).

42 For instance, Shao (1995) and LTG (1995) seem to advocate this form of ownership.

This brings us to the second concept of ownership which could be described as market-capitalist. This means ownership of certain interests (bundle of rights) in land which are defined, secure, guaranteed and, most important of all, can be transferred (ie. sold) on the market at the will of the owner. In other words, the three most important elements of this form of ownership are (a) transferability or negotiability of the land; (b) security; and (c) clear definition of interests. It is this type of ownership which usually finds expression in the system of titles. Under the present system in Tanzania the right of occupancy is precisely this type of ownership, with one major difference, namely, that the use and transferability of the right of occupancy is ultimately controlled by the state.

It must also be pointed out that security of interests in land (called security of tenure) can exist without there being free transferability or negotiability. So one does not need titles to ensure security of tenure. Titles are necessary to facilitate *transfer* of land which in turn requires a clear definition of interests.

So when female gender advocates demand that women should be able to own land in their own name, they should be clear first as to what type of ownership they have in mind; second, how that ownership or property right would be made available to women (ie. through the market or by some affirmative action of the state); and, third, that whatever they mean by ownership and whatever they demand is clearly connected with the larger question of what type of system of land tenure (ownership and control) exists in the country and what is desirable and whom it would benefit.

The last question is very important to bear in mind when advocating women's rights to land because empirical evidence from other African countries demonstrates that imposition of the form of market-capitalist system of land ownership discussed above (described as individualisation, titling and registration, ITR) has neither (a) benefited peasant and pastoral communities; nor the women within these communities; nor (b) facilitated national development, capitalist or otherwise (Bruce 1994). I shall not go into detail in citing this evidence. Suffice it to give two quick examples. A land tenure expert in Kenya, pointed out in one seminar that less than 2 per cent of women were titled in the Kenyan ITR reform.[43] Tomasevski pointed out that a UNESCO survey of rural women's land ownership in different periods of African history found that the 'modernisation' of legal systems or of agricultural policies often eliminated the previous common usage of land and led to the exclusion of women from land ownership: "*With independence, the new states retained that imported land ownership legislation while also making use of the pseudo-traditional types of*

43 Okoth-Ogendo delivering a paper at the Subregional Workshop on Land Tenure in Addis Ababa on 11 March 1996.

tenure which dropped the idea of community usufruct (which was fair to women) and made men the sole owners".[44]

It must also be pointed out that under the existing statutory and customary system in Tanzania neither men, women, nor communities own land in the feudal sense or in the unrestricted capitalist-market form discussed above. All lands are vested in the President, ie. the state. But titles in the form of rights of occupancy exist and can be owned by both men and women, and a section of women do own them, particularly in urban areas. If a proportionally larger percentage of women do not own them, it is largely because of their poverty, a problem which involves both men and women, and partly because of the patriarchal system which favours men/boys. The latter problem exists at both the family and the larger social levels, particularly with regard to decision-making on resources including land.

Under the customary system, again, there is no concept of ownership in the two senses discussed above. But men as clan and/or family elders or village leaders do play a virtually exclusive role in decision-making about the allocation and disposal of land. Customary rules of disposal of land as inheritance are especially prejudicial to women. But this relates to the second set of issues which involve 'control' rather than 'ownership'.

Participation in decision-making processes

Although women have access to land in villages, the most important issue, which is often not expressed as such in the discussion carried on by urban-based middle-class women, is that they do not control the fruits of their labour. So although the production system in villages (peasant/cultivator areas in particular) is family-based, with the main labourers being women and children, it is the men in the family and the clan elders in the extended systems who make the ultimate decisions on the use and disposal of resources. This seems to be one of the central pillars of the patriarchal system. By the same token, within the larger national society, including governmental and non-governmental institutions, mainly men occupy the decision-making positions. The story has been told again and again and I will not repeat it here. In relation to land, however, my suggestion would be that formulating the gender problem in the countryside in this manner has different implications with regard to possible ways of approaching a solution from the over-simplistic way in which the ownership issue is posed.

One important implication of posing the problem as I have suggested is to contextualise and relate the gender issue to the larger questions

44 Submission by UNESCO in respect of the right of everyone to own property alone as well as in association with others and its contribution to the economic and social development *of Member States. Report of the Secretary General, UN Doc. A/45:52.3 of 22 October* 1990, pp.43–4, quoted in Tomasevski (1993).

of the democratisation, liberalisation and marketisation of the economy, which are currently the burning policy issues. For example: research in a number of African countries – Ghana, Zimbabwe, Tanzania, etc. – has shown that various policies under the structural adjustment programmes dictated by the international financial institutions have adversely affected the welfare of women more than men. In other words, women have been the first and the most seriously affected victims of SAPs (see Vuorela 1991; Gibbon 1995).

This point was dramatically driven home in the evidence collected by the Land Commission. Box 5 gives a typical example.

Box 5: Maasai women

In the villages visited by the Commissioners in the Ngorongoro area, the Maasai people who spoke had a single demand presented in a highly articulate single-minded fashion – that the residents should be allowed to cultivate small shambas for their own food requirements and survival. The story, paraphrased here, went something like this:

We are pastoralists not cultivators. We depend on our cattle. When times were good we used to get our flour and other requirements from neighbouring farmers and shops by selling our cattle and getting the necessary cash for food. But in recent times, our cattle herds have suffered. Pasture lands and water resources have been encroached upon by the government, national parks, and other farmers and investors. So our resources have diminished; our way of life and production have been affected. We have also been deprived of other services such as cattle dips, veterinary medicines, etc. The result is that our cattle have been dying. We do not have surplus cattle to sell. So we want to cultivate small shambas near our bomas. We don't want, and don't like, to be fed by famine relief. We are a self-sufficient people who do not have the tradition of depending on hand-outs. In any case, what is the guarantee that we shall continue to receive hand-outs.

When the Commissioners found this demand being made, invariably in the Maa language by Maasai male elders, in one of the meetings where, as usual, a group of women was sitting apart from the men, a Commissioner asked if we could hear what the women had to say. After some hesitation and cajoling, a young woman said something to this effect: we want to be allowed to cultivate shambas. I have seven children. Four of them used to go to school. Now none of them do. I have no money to buy school uniforms or books, so they have been sent home. My husband is totally frustrated; he drinks and I don't know where he goes. Our cattle herd on which we used to rely for food and cash is severely reduced because of drought and lack of pasture. I have to take care of my children. I want a shamba so that I can at least feed them! (Personal notes)

This story hardly needs any further elaboration. It illustrates the interrelationship between land tenure policies, who makes the major decisions and the impact on women and children. Incidentally, nowhere in the villages did we hear it being said – even by women – that their problem was lack of ownership of land. Rather the common problem was lack of land: 'our village land is being alienated to outsiders'. In fact, we received some complaints from women and children that their men had sold off land and run away to the towns leaving them destitute and 'orphans' – as one child who was accompanied by her mother put it! Similar results can be observed elsewhere where the so-called modern system of land tenure has been imposed, as Box 6 illustrates.

Box 6: The curse of titling

In a meeting with a group of church women in Kenya, the Commission was told that their greatest curse had been the titling system (ie. ITR). Now with these pieces of paper their men would sell off the land in strips leaving them destitute. Even the traditional clan constraints on selling off land had begun to break down. (Personal notes)

It should be clear from these illustrations that the way the gender issue in relation to land is posed will have a significant effect on the approach and solutions that are offered. I shall return to this issue in the final section. Let us now turn to the cluster of issues revolving around inheritance and divorce.

Inheritance and divorce

Much of the legitimate complaint about gender bias relates to customary and Islamic laws of succession or inheritance (see Gondwe 1988). Succession in Tanzania is generally governed by personal laws dependent on religious affiliations and ethnic groups. Because of its intricate relationship with custom, culture and religion, opinion tends to be sensitive on the issue of reforming succession laws. Nor is it clear that reform in the form of imposing some unified statutory law on succession by the state would necessarily work in practice. There are two other issues which have to be borne in mind. One is that customary laws themselves have been evolving. Secondly, within the communities too there are forces moving in the direction of more progressive developments, in favour of treating gender equally so far as succession is concerned. At the least, there is need for a deeper understanding of these complex social processes rather than a blanket endorsement of some statutory provisions from the top, or what is called the hard-law option favoured by the LTG.

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 work in practice, nor would it necessarily benefit the large majority of women in the villages. What is more, it is obviously contrary to a democratic bottom-up approach. In my view, with regard to the reform of succession laws, it is better to adopt tangential reforms in framework legislation as part of the overall democratisation process, rather than impose hard laws backed up 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 books than in reality. If the Marriage Act (which presumes monogamous marriages) were to be strictly applied in Tanzania, for example, hundreds of thousands of marriages would simply be void and there would be thousands of illegitimate children!

On the other hand, the use of the Constitution and the broader framework of land tenure laws to change the gender bias in practices and customs may have greater and more enduring effect in facilitating progressive developments within the communities themselves. For example, we already have provisions in the Constitution which outlaw gender discrimination both under the equality clause (articles 12 & 13) and in the definition of 'discrimination' (article 13(5)). This can be fruitfully used, as was done successfully by Mr Justice Mwalusanya in the case of *Ephraim v. Holaria Pastory* (1989) against the customary rule that a woman, unlike a man, cannot dispose of clan land even with the consent of the elders. Again, the private property clause (article 24) in the Constitution can also be used to encourage testators to leave their property (including land) to their female children as they wish by way of a will. An argument that the intention of the testator as expressed in the will be respected, and is protected by the Constitution, is likely to succeed, and thereby indirectly declare the discriminatory customary and Islamic laws, rules and practices unconstitutional. In fact, it is also likely to find a positive response among communities, where it has been noticed that fathers would be inclined to leave their property to their daughters who have looked after them rather than to male relatives or sons who have abandoned them (see Box 7 overleaf).

Then there is the even more oppressive customary practice that a wife who is divorced has to leave the land on which she has been working. It is true that the Marriage Act provides for the division of matrimonial property where the property was acquired by joint efforts, as was decided in the case of *Bi. Hawa Mohamed v. Ally Sefu* (1983). When it comes to the division of land in villages on the break-up of a marriage, a woman divorcee is likely to have an even stronger claim because invariably she is the worker on the land. However, as we all know, the current practice in no way accords with the statutory

law. In this regard again, I would suggest that the question could be tackled better in the larger context of general reform of the land tenure regime, as I discuss in the next section.

Box 7: Progressive Muslim leaders
In one village largely inhabited by Muslims, the Land Commissioners had an animated discussion on the Islamic laws of inheritance when we had asked the elders (*wazee*) for their opinion. To our surprise, the position of the elders was that they should be free to dispose of their property to their daughters rather than be forced by customary/Islamic rules to leave it to male heirs, even when their male heirs had not looked after them. It was the male youth in that meeting who opposed this position because they stood to lose. (Personal notes)

Female gender and the land tenure reform

The issues, problems and points of debate raised in the preceding sections have all found expression in the debate on land tenure reform. The proposed draft bill for the Land Act is a good illustration of how 'loud' noises made by explicit provisions giving prominence to gender equality can mean very little when the overall tenurial system itself is undemocratic.

As I showed earlier, the approach of the Land Commission was to integrate the gender question within the larger land tenure reform; to modernise tradition in a democratic direction rather than impose modernisation from above by statutory compulsion. The thinking behind placing both names on the customary certificate (HAM) was to make an incoad into an oral culture, while allowing the community through their own village Elders Council (*Baraza*) to work out and evolve their own conception of the implication of both names appearing on the certificate.

The approach of the proposed draft bill for the Land Act is fundamentally different. The bill, as I shall show, continues and reinforces the existing system of bureaucratic centralised control and administration of land. Generally speaking, the chief approach of the bill is what I called the market-capitalist form of land ownership, in which the central element is negotiability of land rather than security of tenure.

The bill boasts of being progressive by putting the equality of women upfront in its principles and various other provisions. While these provisions may have some educational value, they do not add significantly to the present law and the Constitution, which outlaw discrimination based on gender in any case. What is more important, though, is to analyse the implication of the general thrust of the draft

bill for village communities generally, and women and other vulnerable groups such as youth and pastoralists, in particular. When this is done it will be seen that the so-called progressive stance of the bill is more a matter of words than deeds.

To give an example: the bill provides for charging a premium and rents at market rates for lands allocated by the state. Taking the effect of this on the housing question in urban areas, under the current law and practice, many a middle-class single woman, through her own efforts, salary, savings, etc., has been able to build her own house once she has obtained the land. Clearly, if land is allocated through the market and market rates are charged, very few middle-class women (or men, for that matter) will be in a position to obtain plots of land to build their own houses.

The Land Commission approached the issue differently. It recommended that whether or not a premium and market rents are charged should depend on the use to which the land is put. If the land is for commercial/industrial purposes – that is, for profit – it should be subjected to full market rates, while if it is for citizens to build their own houses, a negligible or nil premium and rent should be payable (see Part II).

Again, it is also known that in our urban areas, lower middle-class and other poorer women own Swahili houses.[45] Under the bill such Swahili houses are likely to be bought out by richer sections of the population, as is already happening in the Kariakoo area of Dar es Salaam and other areas. Under the recommendations of the Land Commission such outright purchasing would be more difficult. The Commission recommended: first, that before such areas are declared planning areas to which building regulations apply, the land rights of *the existing occupants (by custom and tradition) should be adjudicated* by elected neighbourhood committees and certificates issued. This would guarantee security to the existing occupants. Second, the building regulations should be tied to the term of the right of occupancy. The shorter the term, the less stringent the building conditions. So a person who cannot afford expensive building may get a shorter term, say 33 years, and therefore relatively easier building conditions. Finally, no such transfer of land would be consented to by the elected ward committees, which would be authorised to withhold their consent until they were satisfied that there was a valid contract between the parties under which the purchaser had agreed to build an apartment for the seller on the same plot. This would ensure that the existing owner was not rendered homeless while at the same time allowing the person with means to obtain land on which to build.

To give another example illustrating the difference of approach between the draft bill and the Commission. The bill provides for speci-

45 These are six-room modestly built houses in 'high density' working class areas.

fied female representation on village mediation panels, which is supposed to indicate its progressive stance on women. But the mediation panels themselves do not have much power over village lands. So here is a case of giving generous representation to women in a *powerless* body, unlike the Commission's proposal of Village Assemblies and *Mabaraza*[46] on which women must have entrenched representation; both of these bodies would have important controls and power over village lands.

Conclusion

It is the contention of the present author that, first, the problem in relation to gender so far as the question of land is concerned should be clearly defined; second, that the approach to resolving the problem should be contextualised within the larger framework of democratic land reform; and, thirdly, that it needs to be appreciated that the solutions suggested do not have the same effects and implications for urban middle-class women as for village peasant women, which means that the problem of land and gender must be seen in a differentiated fashion. This is not to suggest that the gender problem should be subordinated to some general interest or approach; rather what is suggested is that the question of democratising gender relations is intricately tied up with democratising the land tenure system. This kind of approach would significantly affect the strategies that advocacy groups and gender NGOs and other women's representatives adopt in their work for gender equality and affirmative actions in favour of weaker sections. It would also help to build bridges and alliances with other land advocacy groups such as pastoral NGOs. But such an approach requires patience and protracted work, which is not always glamorous and rarely pleases the powers that be.

46 LTG made the useful suggestion of having a female presence on the Elders Council (Baraza).

Chapter 9

Law, land and justice

The making of the new Land Act

The draft of the Bill for the new Land Act was prepared by Professor Patrick McAuslan under a contract with the British Overseas Development Administration. Like the Land Policy paper, it underwent several drafts. The comments in this chapter are based on the draft which was completed around November 1996. As this book goes to press, the draft is with the Parliamentary Draftsman who is preparing the Bill and it is expected that it will be presented to the National Assembly in January 1998. Although the final Bill may undergo some changes, it is unlikely that the major principles will be modified. In what follows I outline its salient features.

The draft Bill is a long piece of legislation running into some 300 pages with over 200 sections. Its various drafts were discussed by an even narrower circle of invited guests than for the Policy paper. By definition, only experts could discuss the drafts. There was no way, therefore, that a wider body of people could participate in its formulation.

Salient features

Ownership, management and control

The draft Bill is premised on two major pillars of the Policy paper. One, that all lands are vested in the President to be held in trust for the people of Tanzania (cl.4(1)), and two, that the Commissioner for Lands is the sole authority. As Professor McAuslan's Commentary made explicit, the draft Bill is premised on the fundamental principle that *"all powers over public land stem from the President"* (McAuslan 1996a:12). As can be readily appreciated, the new provision removes all ambiguity on the location of the radical title. In very clear terms it endorses the monopoly of radical title in the head of the Executive. Whether the addition of the qualification that the President holds the land as a trustee would make any legal difference remains to be seen. In my view, it is no more than a political statement.

For purposes of management only, all public land is classified as 'general land', 'village land' and 'reserved land'. The President has powers to transfer land from one category to another, the procedure for which is detailed in the Bill (cls.5&6). The categories of reserved land are specified. They follow more or less the land reserved under various pieces of existing legislation such as the Forests Ordinance,

National Parks, Ngorongoro Conservation Area, etc. (cl.7). Village land is land that falls under the jurisdiction of existing registered or non-registered villages (cl.57), while the rest would come under the heading of general land.

On general land, allocations will be made under rights of occupancy or what currently are called granted rights of occupancy. In this the ultimate authority is the Commissioner, who is to be advised by the Land Allocation and Disposition Committee composed of officials from the Land Ministry appointed by the Minister (cl.13). Thus the existing system of committees on which there are representatives of local authorities is replaced by a clear legal system of centralised allocation. In fact the Bill makes it clear that local authorities and their officers have no power over land except as delegated by the Commissioner (cl.15).[47]

While reserved lands fall under the jurisdiction of other public authorities, the Commissioner has the ultimate decision on these lands as well, particularly in respect of granting rights of occupancy on such lands. Where there is an application for a grant in excess of 2,500 hectares, the Lands Advisory Council has to be consulted. But the President may grant the application even if the Council advises against it. The only requirement is that he must give his reasons (cl.21) (except for the requirement of giving reasons, this is not very different from the existing administrative procedures). Non-citizens may be granted rights of occupancy provided they have an investment certificate from the Investment Promotion Centre (cl.28(1)(h)). However, there is no restriction on non-citizens and non-citizen corporate bodies obtaining leases and other derivative rights on land from citizens, and presumably this does not require any certificate.

Village lands are to be managed by Village Councils under the supervision of the Commissioner. The Village Councils are ultimately accountable to the Commissioner, thus by-passing both the Village Assemblies and the elected local authorities. The Commissioner has powers to take away the management of village lands from Village Councils under certain circumstances (cl.58). In short, to all intents and purposes, the administration of land at the village level is top-down under the direct control of the Commissioner, by-passing all elected bodies at local level. Curiously, the justification given by Professor McAuslan for this is that the Bill does not subscribe to the thesis of 'the noble peasant'; left alone, peasants will always act for the local common good (McAuslan 1996c). Presumably, the Bill subscribes to the thesis of 'the noble Commissioner' who, left alone, as he is in the Bill, would act for the 'national' good! Tanzania's experience has been otherwise.

47 Hitherto there has been an unending tussle between local authorities and the central Ministry as regards conflicting jurisdictions over land. The draft Bill seeks to put an end to this by centralising land administration under the Commissioner.

Village land can be alienated to non-villagers in various ways. First, the President may transfer village land to the category of general or reserved land and then allocate it to non-villagers including, presumably, non-citizens (cl.5). If the land involved is less than 100 acres, the Village Council, after consulting the Village Assembly, has to approve. Where it is more than 100 acres, but less than 500 acres, the Village Assembly has to approve, and where it is more than 500 acres, the National Assembly or a committee of the Assembly has to signify its approval. This power is in addition to powers of compulsory acquisition under the Land Acquisition Act 1967, which can be exercised in respect of village land.

Secondly, non-village organisations – government bodies, parastatals, companies and corporations whose majority shares are owned by citizens – can also be granted customary right of occupancy for up to 99 years.[48] In the case of land occupied by non-village organisations, the Commissioner remains directly responsible for its administration. Existing alienation of village land under granted rights of occupancy will thus continue as granted rights administered by the Commissioner. In other words, the numerous disputes and scandals involving alienation of village land to outsiders documented by the Land Commission will be validated and legalised by the proposed law, the grievances of villagers notwithstanding.

Thirdly, individual outsiders who are citizens may also obtain village land provided they show that they have the intention of establishing their principal place of business or residence in the village.

Fourthly, the Village Council may grant a derivative right (for example, a lease of different duration) on village land.

Fifthly, villagers themselves holding a certificate of customary right may give derivative rights to outsiders. All in all, alienation of village land to outsiders is possible under the Bill by a number of direct and indirect means.

There are a number of major implications regarding the powers of allocation, administration and supervision reviewed so far. First, the powers of the Commissioner, down to the village level, are enormous. Now that these powers are provided by a statute, the administrative and political restraints existing in the present system under the rhetoric of *Ujamaa* (for what they were worth) have been removed. This also entails a large bureaucracy which further reinforces the avenues of corruption, control over communities and a general top-down approach characteristic of the Tanzanian state. The village body, the Village Council, is to all intents and purposes accountable to the Commissioner rather than to the Village Assembly. The Village Assembly has a perfunctory role of little substance.

48 This is undoubtedly to accommodate local interests which have been demanding special privileges to obtain land which they can then offer as equity to foreign investors in joint ventures.

Secondly, it will be recalled that the evidence before the Land Commission showed extreme apprehension on the part of peasant and pastoral communities regarding threats to their lands, ie. grabbing of village lands by outsiders. Despite lip-service paid to the protection of village lands by the National Land Policy and the draftsman's Commentary, there is very little of significance in the Bill to allay such fears. By and large, the provisions are intended to facilitate alienation of village lands and therefore provide legitimacy to 'land grabbing' while keeping 'petty trouble-making villagers' at bay.

Thirdly, existing grievances and land disputes regarding large-scale alienation to outsiders (in the language of the Bill 'non-villagers' and 'non-village organisations'), which were documented by the Land Commission in Volume 2 of their Report, are legalised and entrenched. It may be well worth considering whether a reform that does not in any serious manner address this issue can really be acceptable to the large majority of the people.

Fourthly, one of the more contentious points has been the boundaries of villages. Ministry officials would have liked to have full control over this so that they could bring as much land as possible under their control as 'general land'. The Bill takes the existing boundaries, however arrived at – whether legally or administratively, with or without consultation with the villagers concerned – to be the valid boundaries. Where there are disputes the Minister is authorised to resolve them through mediation and enquiries. The latter process, as the experience of official enquiries shows, is unlikely to be participatory, let alone perceived as fair, just and legitimate. In fact, the Ministry through the Commissioner is likely to play the dominant role in adjusting and redrawing village boundaries through the process of land adjudication.

Security of tenure

The term 'security of land tenure' means different things to different users of land, but it is often used indiscriminately and given one mainstream meaning. To the investor whose use of land is for profit, with land as one of the factors of production (a capital asset), security means two things; first, that his/her title to land is certain and non-contestable; and second, that s/he is free to pass on the title to a purchaser without constant challenges. This is the dominant meaning of secure title and the perception and rationale which lie behind the titling system. Here the investor may be direct, ie. some one who directly invests in land, or indirect, ie. the financier who advances credit to the landowner on the security of the land. In this perception, the security of tenure is connected with the negotiability of land. Titling facilitates negotiability by separating 'possession' and use from 'ownership'. Thus this conception of security is predicated on the possibility of the alienation of land from the user/owner.

The perception of peasant communities regarding security of tenure is of a different order altogether. For them land is the means of producing for survival, and possibly some surplus for the market so as to get the wherewithal to buy other necessities. For them, therefore, security means being secure from the fear of their land being alienated – a totally different conception of security from that of an investor.

In structuring its recommendation on village lands the Land Commission took the conception of the village communities as its point of departure, while allowing for the organic evolution of the market and the investor from within the community. The thrust of the Land Bill is to facilitate the so-called 'marketability' of land from village communities to non-villagers and non-village organisations. This is what lies behind the host of provisions dealing with disposition, adjudication and titling of land. Where the Bill purports to protect weaker sections (women and children in particular), it gives enabling powers to the Commissioner to do so rather than providing a participatory framework enabling the communities themselves to defend and protect their rights. Again, the top-down approach is apparent throughout the Bill. The evidence before the Land Commission, however, was very clear on one issue: village communities wanted to be at the centre of the process of decision-making in land matters, land being their major resource and life-line. Their demand was *kushirikishwa* – to be allowed to participate. The Bill is not based on any such consideration.

It must also be pointed out that the Land Commission did not totally reject the marketability of land as such. Nor is the Bill based on the concept of a totally free, unregulated market (in any case such a thing does not exist anywhere except in the heads of propagandists). The fundamental difference between the Bill and the Commission lies in the question: in whose interest, and therefore how, is the market to be facilitated and regulated? The Bill is basically structured to facilitate the market for the so-called investor who is largely assumed to come from outside the village communities, on the one hand, and from outside the country, on the other. For the Commission, the prime objective was to generate and facilitate investment primarily (though not exclusively) from inside the village communities and from within the country – what the Commission called the model of 'accumulation from below'. Two examples will illustrate the difference in approach.

As already noted, the Commission recommended, and the Bill provides, for the charging of premia and rents for land allocated by the state. The Commission recommended that the charges be based on market rates, but be charged discriminatively and selectively. For urban land, for example, a distinction must be made between a citizen and a non-citizen and between residential (ie. for own shelter) and commercial (ie. for profit) use. Thus where the right of occupancy is granted to a citizen for residential use, no premium, or only a reasonable one, and rent below the market rates should be charged. Where

the use is for commercial purposes, full market rates should be charged. The policy rationale was to facilitate owner-built houses so as to encourage the provision of housing.

The Bill makes no such distinctions. Premium and rent based primarily on market rates are to be charged for all grants, regardless of who is granted the land and for what purpose. This is obviously likely to work in favour of the small rich sections of urban society involved in real estate business while adversely affecting middle-class owner-builders of residential housing (and among these, single women in particular, gender sensitivity of the Bill notwithstanding).

Another example is found in the Commission's recommendations that dispositions in urban areas are to be regulated through elected committees, and the criteria for approval are geared *inter alia* to enabling the poor-citizen occupier of land to provide him/herself with some shelter. In the Bill, dispositions below a certain value are not regulated. Others require the approval of the Commissioner and the criteria are largely market-based without any involvement/participation of the public at large. The assumption throughout is that the Commissioner is the 'guardian' of the public interest (and presumably the 'public interest' is to encourage the market). After over four decades of statist paternalism, Tanzanians know better!

It is also interesting to note that all dispositions of village land among villagers are closely regulated and supervised by the Village Council, but that dispositions of village land granted to non-villagers are under the control and supervision of the Commissioner, while those below a certain value require no approval at all, just as in the case of granted rights (cl.82).

Adjudication and titling

Security of tenure in the investor's sense discussed above is supposed to be secured by a legal framework based on the titling system. This has now come to be called the process of individualisation, titling and registration (ITR). In the late colonial and immediate post-independence literature on land tenure in sub-Saharan Africa, the customary system (which was described as based on communal ownership) was frequently criticised for lack of certainty and security of tenure because it lacked ITR (see, for example, East African Royal Commission 1955). Progressive land tenure reform[49] was seen as transforming the customary (communal) tenure to a system based on ITR, or to use the more confused terminology of privatisation, a property-rights regime. By its very definition, reform based on ITR is both a legal and a legalistic process characterised by state supervision and, therefore, top-down. Ironically, supporters of privatisation advocate ITR, a non-interven-

49 In much of Latin America and Asia land reform meant redistribution of land from latifundia or large feudal estates to smallholders. In Africa the more accurate term would be 'land tenure reform' which, by and large, does not include land redistribution. Rather it is a change in the tenurial regime.

tionist state (or rolling back of the state) and more law all in the same breath as if these were all perfectly consistent and compatible.

The most celebrated (and now the most criticised) example of ITR reform in sub-Saharan Africa is judged to be that of Kenya. The original impetus of this reform which was begun in the 1950s was political. In the midst of the Mau Mau uprising, the colonial government initiated what was called adjudication, consolidation and registration in 'Kikuyu country' (the homeland of Mau Mau) to create a class of yeomen (middle-class) farmers who would have a stake in defending the colonial economic infrastructure if and when the political superstructure changed hands (Sorrenson 1967).

The World Bank (and related international financial institutions - IFI), whose institutional memory is notoriously short, forgot all about the political origins of ITR and until recently held up the Kenyan model as an example to be replicated in the rest of Africa. Recent independent (and World Bank) research has shown that the virtues claimed for ITR are simply not borne out on the ground (see Bruce and Migbot-Adholla 1994; Platteau 1995; Barrows and Roth 1990). Rather, ITR has encouraged even deeper and more frequent state intervention, for reasons of immediate political expediency. The processes of adjudication have frequently meant the displacement of original owners by more politically and economically powerful individuals and groups. Within the communities themselves women, young people and children have suffered as land has been lost by titleholders transferring land unhindered by the traditional clan and family controls. Records at the central registry do not reflect ownership and possession on the ground as land continues to be dealt with according to customary law. People simply do not understand nor can they afford the formal legalistic processes of registering land transfers (in any case, the western/statutory titling and registration law fails to take account of the complicated web of overlapping primary and secondary land rights based on community custom and culture).

The use of land as collateral to encourage investment in agriculture and pastoralism, which is the major defence of ITR, has simply not worked as the textbook prescribes. Where land has been used as collateral, the loans thus procured are more often than not used for commercial ventures in urban areas rather than ploughed back into agriculture. Small farmers and pastoralists are just as wary of taking out loans as the existing financial institutions are unwilling to advance them. In any case, most African societies lack a developed financial and judicial infrastructure and the concomitant culture which underpins the credit system in which land is strictly a commodity. This obvious truism of a small peasant economy has dawned only belatedly on pro-ITR ideologues.[50] All in all, studies, not only of Kenya but of

50 One of the common arguments justifying ITR has been that a land market already exists

other countries like Côte d'Ivoire, have clearly shown that ITR-based land reform takes little account of the social, economic and cultural realities of African societies. The result has been an overnight conversion of IFI consultants and western academics to the celebration of customary systems, organic evolution, preservation of indigenous communities, and so on. But this conversion is as suspect as the earlier scepticism about customary systems.

Just as the earlier ITR revolution was supposed to be performed by the agency of the state in a top-down manner at the behest and under the supervision of western governments and donor agencies, so now the evolutionary feat of prodding the customary system along is to be facilitated by the same state with comprehensive land codes conceived, sponsored and financed by the same IFIs and their allied consultants. The difficulty is, of course, that both projects assume that the larger global political economy in which the state and its imperial backers are situated is unproblematic. Lip service to democracy, gender sensitivity and participation notwithstanding, the fundamental approaches remain the same – modernising land tenure reform from above and seeking to legitimise it by using traditional forms (often no more than the term 'customary').

The Bill, it is true, does not provide specifically for ITR on village lands. It makes provision for what is called adjudication of interests in land (sub-Part 3 of Part VII). Three types of adjudication are provided for in the Act; spot, village and central adjudication. Spot adjudication is where a villager or a group of villagers apply for their interests to be adjudicated. This is analogous to what happens under the existing system when the holder of a deemed right of occupancy applies for a certificate of right of occupancy. In practice, it usually happens when a big farmer wants to secure his land by a title, or a villager wishes to 'sell' his land to a non-villager, the typical scenario being where an outsider or a non-village organisation has obtained land by a transfer under customary law and wants a certificate where the land is surveyed or an offer of a right of occupancy on non-surveyed land. Under the Bill, spot adjudication is conceived to be used for such situations. Where an individual, a group or a non-village organisation has applied for a customary right of occupancy, they may apply to the Village Council for spot adjudication (cl.98(1)) of the land. The VC determines the issue and sets the process in motion. The Commissioner has the final say in ordering a spot adjudication even if the Village Assembly objects or rejects the application.

Village adjudication takes place on the initiative of the Village

in rural/customary Africa, and therefore the role of ITR is simply to supply a legal framework. In most, if not all, cases this indicates a confusion between 'land sales' (which do take place in rural areas) and the existence of a 'land market' which assumes a robust financial and judicial infrastructure which simply does not exist in many African countries (see Izumi 1995).

Council and is under the supervision of a village adjudication committee, elected by the Village Assembly and assisted by a qualified adjudication officer. On a complaint by a group of not less than 20 villagers, the Commissioner is authorised to substitute central adjudication, virtually entirely under his supervision and direction for village adjudication. The Bill then goes on to provide detailed, provisions as to the procedure and how the rights are to be determined. The end result of the process is the issuing of a formal certificate of the customary right of occupancy sealed and countersigned by the Commissioner. It should also be noted that in the process of adjudication of whatever type, the adjudication bodies are likely to be involved in adjusting and redrawing village boundaries as well. Thus the Ministry officials resume the role of drawing village boundaries through the back door, so to speak.

In the final analysis, the process of adjudication resulting in certificates of customary rights is not very different from ITR. In fact, Professor McAuslan freely admits in his Commentary (McAuslan 1996a) that he has borrowed from the Kenyan Land Adjudication Act, 1968 and the Zanzibar Land Adjudication Act, 1989 which in turn is based on the Kenyan Act. He enters a caveat, however, that adjudication under the proposed Tanzanian Bill is very different from the Kenyan process, which has had the unfortunate results discussed above. According to him, the Kenyan process was, and is, part of the policy of individualisation resulting in a grant of freehold title governed by western/statutory law and is a *"rather top-down process, although involving, of necessity, the local community"* (ibid.:49). The broad approach of the Tanzanian Bill, according to McAuslan, is 'bottom-up'. In our submission, these are really differences without distinction. Individualisation has never meant individual ownership in freehold. It really means the defining of heritable, negotiable and transferable land rights exclusively owned by a defined legal entity, be it an individual or a group of individuals in the form of a company, for example (Bruce 1994). In any case, customary title is akin to a freehold in that it is owned in perpetuity by villagers and for a definite time (lease) by non-village organisations. Thus in principle a certificate of customary title owned by a non-village organisation is no different from a certificate of occupancy for a granted right on general land. As for the law that is applicable, the Commissioner for Lands has such powers of intervention, advice, direction, supervision, etc. over customary titles (particularly those owned by non-village organisations) that the customary law governing them would be heavily modified by statute. Furthermore, where a villager grants a derivative right (for example, a long lease) from his customary right to, say, a non-villager, they can agree that such derivative right shall be governed by statutory law to the exclusion of customary law.

After examining experiences elsewhere and Tanzania's own experience of titling village lands, the Land Commission had argued against

the process of global ITR as undesirable on grounds of principle, policy and impracticability. Instead, it recommended a village-based, participatory system of recording interests and rights in land through the judicial process vested in the *Baraza la Wazee la Ardhi*, with no central intervention except as advisers if so requested resulting in the grant of a HAM certificate. If, indeed, as McAuslan claims, the process of adjudication in the Bill is simply meant to record land rights/ interests in village land for the protection of the villagers against alienation and not as part of the policy of individualisation in the sense of facilitating alienation, (discussed above), then the scheme proposed by the Commission is far more suitable, since it is simple, manageable by the village and fully participatory.

On more practical grounds one should repeat the warning sounded by the Commission. The modified system of ITR proposed in the Bill is likely to have far-reaching implications in that it is highly unlikely that the government has the resources, competence or manpower to process millions of certificates of customary title. The chances are that the process of adjudication (whether spot, village or central) is likely to be mobilised by non-villagers and non-village organisations either as potential grantees of certificates of customary title or as 'purchasers' of derivative rights, thus facilitating the alienation of village lands.

Settlement of disputes

In the preliminary drafts of the Bill aspects of the process for settling disputes proposed by the Land Commission were adopted. In the final draft virtually none of the Commission's suggestions remain. The draft Bill takes on board the existing three-tier system: primary, magistrates and High courts. The only innovation is to provide for village mediation panels (cl.236), composed of not less than five and not more than seven persons, no less than two of whom must be women. The jurisdiction of the panels is voluntary and their decisions are not binding. In effect, therefore, the existing system of dispute settlement continues.

Pastoral interests

Pastoral lands have been very vulnerable to alienation and 'land grabbing'. Historically, pastoralists have been treated as 'primitive' and backward in comparison with cultivators. Consequently, cultivators have been given preference in obtaining land. The transhumant mode of production that pastoralists follow has given rise to the perception that their lands are open for occupation and the pastoralists do not need them all and they could be put to better use (see Lane 1996). The Land Commission tried to provide security of tenure to pastoral communities by using the same device of vesting the radical title in the Village Assembly, assuming in this case that the Assembly is more or less the pastoral community. But pastoral communities exist across villages and the village culture is not too well established. The Commission's recommendations would therefore have required some modi-

fications. One of these was suggested in the Report itself, namely that villages could enter into joint management agreements to use common resources.

The draft Bill adopts the Kenyan approach of group ranches, an approach that was implicit in Tanzania's own Range Development and Management Act, 1964 (No.51) which proved to be a failure (Jacobs 1980). The Bill provides for land associations which can be incorporated for the purposes of holding land similar to the group ranches of Kenya. The latter have also become a means of land alienation to outsiders and richer members of the community. Although McAuslan claims in his Commentary (1996a) that the land associations in the Bill are different, this is another case of difference without distinction.

Summing up

There is no way, as the Commission argued, to talk of bottom-up, participatory development in which peasant and pastoral communities are fully integrated without first giving security of land tenure to the communities of land users. All experience in Tanzania and elsewhere in Africa has conclusively shown that top-down processes of land tenure reform, based on bureaucratic approaches and statutory systems of adjudication and titling, have invariably reinforced the insecurity of indigenous peasant and pastoral communities. The proposed Land Bill, whatever its differences in detail, is principally based on a top-down approach in which the Commissioner for Lands has sole authority, to the exclusion of representative bodies like the Village Assemblies and the National Assembly at the national level.

In the case of African tenure systems, it has been shown again and again that market criteria alone, which treat land as no more than a commodity and a factor of production, simply do not address the realities of the way Tanzanian society is organised around land. As the experience of the village settlement schemes and the range development of the early 1960s shows, such misconceived reforms result in failure and irreparable losses.

The main areas of concern with the new Land Bill may be summed up as follows:

- On a practical level it is clear that putting the Bill into operation would require a massive bureaucracy right down to village level. The numerous forms, permissions, approvals, etc. required by villagers and Village Councils from the Commissioner based in Dar es Salaam look quite impractical, given the realities of resources, competence and communications in the country. Villagers, too, would probably need paid scribes to fill in such forms, regardless of whether they are in English, Kiswahili or local languages. Judge Lugakingira, for instance, comments:

  "*The proposed Act is in many respects futuristic. So much is*

required under the Act, and so much of it new, that we have neither the financial nor the human resources to enable its implementation. It would, for instance, provide for over 60 prescribed forms. The Commissioner would require a sizeable library to stock the forms in their thousands and to ensure their availability and stocking even at the village level" (1996:6).

- The Commissioner and therefore the central bureaucracy have enormous powers, the exercise of which not only generates a large bureaucracy, but is also ominous for any genuine democratic process. The approach of the Bill in this regard is to provide elaborate procedures, standard forms and time limitations based on the philosophy that discretion should be controlled by law, while being oblivious of the fact that the same provisions are simultaneously empowering of the bureaucracy and disempowering of the people. What is more, in the light of the experience of Tanzania's immediate past, clothing such power with law gives it legality and legitimacy, and therefore by the same token, delegitimises whatever political and ideological constraints might have existed on the powers-that-be under populist ideologies. This is not to advocate a return to statist/populist culture, but rather a plea for more innovative and locally generated approaches to both legal and popular controls over the exercise of state power. This is one of the reasons why we have been constantly emphasising that the issue of land tenure reform is tied up with the larger question of democracy (in the sense of people's participation and bottom-up approaches) and the reorganisation of the state apparatus.
- Following from the previous two, the approach of the Bill is, in the first place, to generate a centralising tendency by its penchant for legalism and 'more' law, and then to decentralise the bureaucracy so generated, thereby bringing it closer to the people, in this case as close as the village. Tanzanians have not forgotten the disastrous experience of the decentralisation carried out under the recommendations of the MacKinsey report. The central bureaucracy was replicated and decentralised to district and regional levels under the slogan *madaraka mikoani* ('power to the regions'). (We all know what it meant: *utawala mikoani* 'ruling the regions'). Under the proposed Bill the replication and decentralisation of the bureaucracy are taken right to the village level, in the process making the elected and representative village bodies delegatees of, and accountable to, the central bureaucrat, the Commissioner, while virtually sidelining such organs as the Village Assembly and often local authorities as well. Leaving aside the question of principle, even pragmatically such a project is simply unworkable. The danger, of course, is that under pressure from 'sponsors' it will be attempted, leaving in its wake chaos, confusion and some 'irreversible mistakes'. The victims of these mistakes will be vulnerable groups and the nation as a whole, while the consultants and donors move on to 'greener pastures'.
- The Bill is singularly designed in the top-down fashion, based on the

philosophies and theories of 'modernisation' and its legal off-shoot, 'law and development'. Once again, Tanzanians do not have to learn from others' experiences. Their own failed experiments in the form of the village settlement schemes of the early 1960s and the Range Development and Management Act (1964) are living lessons.

- As already pointed out, the Act is geared to facilitate the alienation of village land, including pastoral lands. Given the character of the political economy – which we cannot go into here – it is not difficult to foresee a process of displacement and marginalisation of rural communities. It is also not difficult to see that the immediate agrarian and other investors who would be given these lands under, of course, the certificate of investment, will be those interested in the rapid exploitation of natural resources such as wild animals, exotic minerals and timber, and ecological resources, including a clean environment and biodiversity. It should also be noted that there is intense pressure from the northward-moving South African Boer farmers who have already been given large land concessions in countries like Mozambique (Chossudovsky 1996).
- The 'model' or path of development provided in the Bill (ie. 'accumulation from above and marginalisation below') and that in the Land Commission's report (ie. 'accumulation from below and national democratic development throughout') themselves deserve serious consideration rather than wholesale, uncritical absorption. The reform of the land tenure system cannot be isolated from this larger question.

Chapter 10

Contradictory perspectives on reform through law

Law and democracy

Before concluding, it may be worthwhile to discuss briefly the conceptions and approaches of the consultant who drafted the Land Bill so that we are better able to appreciate the link between law and democracy. In ordinary circumstances, this has no significance because the consultant is assumed to have followed the brief he was given regardless of his own inclinations and preferences. In this case, however, Professor McAuslan in his extra-consultancy academic lecture (McAuslan 1996b) went out of his way to explain and justify his own approach to the drafting of the Tanzanian Land Act.

The Land Commission's approach was that:

i) *the main contours and parameters of the land tenure system should be included in the Constitution so as to entrench it in public law and give it visibility;*

ii) *that there should be a Basic Framework law spelling out the broad principles and rules. Here the approach meant more* rules and procedures, *requiring transparency and accountability of government officials to elected Committees and countervailing bodies in order to control the exercise of power on the one hand, and greater flexibility and discretion at the lower level on the other, thus exposing the professional functionaries to the innate wisdom of the people; and*

iii) *customary law should continue to apply to village tenure, albeit fundamentally modified by broad democratic principles embodied in the Constitution and the Basic Land Law. To cite two examples: the* wazee *are traditionally not elected; the Report recommends they should be. It also recommends a number of other modifications – the names of both spouses on the certificate, no consent to disposition without consultation and agreement of the other spouse and children – specifically to address the bias against women in customary law.*

In effect, the Commission neither wholly rejected nor accepted uncritically legal methodology as the means of affecting a radical reform of the tenurial system, but was mindful to reform the statist top-down structure so as to create space for the conceptions and perspectives from below to assert their interests. At the same time, it rejected the thoughtless parroting of the dominant positivist/liberal market approaches to commoditise land in a blanket fashion so as to

create an enabling environment for the so-called foreign investor.[51] The Commission clearly identified the path of development (national agrarian), the site of accumulation (the village), and the agency (the rich/middle-income peasantry) and located the tenurial reform in this larger context of the political economy.

Referring to the *Baraza*, Professor McAuslan castigates the Commission for having too much faith in *"unqualified"* people and *"relying on their innate common-sense of justice to get things done; just like Operation Vijiji in fact. In the light of the evidence uncovered by the Presidential Commission of the abuse of power and the chaos that accompanied that exercise, the word 'naiveté' comes to mind to describe this approach"* (1996c:12-13). Little does McAuslan know that the abuses during villagisation were committed not by 'unqualified' people with an innate sense of justice, but by the highly qualified who had been sent to the countryside during the decentralisation (see Coulson 1982).

Professor McAuslan considers the policy proposals of the Commission as radical, but again criticises the Commission for not providing enough detailed law to implement them:

> *"The real revolutionaries therefore might turn out to be not those who propose radical policies but those who, through the NLP, propose a radical legal methodology for implementing policies; namely a detailed and inevitably lengthy new land code in which legal rules and checks and balances replace reliance on administrative and political action based on goodwill and common-sense"* (ibid.:13).

Such a legal approach to the draft Bill is a far cry from the kind of considerations briefly touched upon above. The argument is simply for *more law*, and that *per se* is considered 'revolutionary'. The basic question as to more law for whom, to effect what, and in whose interest, is not of course asked. Whether there are issues of social justice and equity involved and how these could be addressed does not seem to be the serious concern, even in Professor McAuslan's academic exposition justifying his role as consultant.

In the final paragraphs of his lecture, Professor McAuslan turns to the role of an academic lawyer and argues that the major challenge of scholarship in respect of land reform in Africa is:

> *"to rise above the merely descriptive and analytical approach to writing about land law and adopt a more policy-orientated and innovative approach which offers new models and creative ideas as solutions to practical problems of land management and if the opportunity presents itself, become involved in the challenging business of turning these ideas and models into legislative drafts; let no*

51 The immediate potential investment expected in this sector comes from Afrikaner agribusiness from South Africa which seems to be moving north. What such investment might mean for the economy and society of Tanzania can be gauged from Chossudovsky (1996), which analyses the Afrikaner entry into Mozambique.

one suggest that that is not a scholarly endeavour. Creative not just critical scholarship is needed" (ibid.:38).

Without doubt, no one would argue that academics ought not to be involved in policy debates and offer creative ideas. There is nothing new or original in that, at least not to the academic lawyers of the University of Dar es Salaam. The question, as always, is 'creative' for whom, and destructive of what? That is not new either, for it has been part of the debate by and about intellectuals in Africa, although, with the onslaught of the new type of scholarship called consultancy, we may be fast losing the capacity to raise questions of intellectual commitment. This debate on the different perspectives on justice and rights embedded in Professor McAuslan's draft and the Commission's Report (both the products of academics, one acting as a consultant, the other as chairperson of the Commission) raises a question of a different order from that posed by McAuslan. What kind of perspectives of justice, fairness, and equity are we advancing when, as academic lawyers, we are involved in law/policy reform? First and foremost, do we accept that (a) there are contradictory perspectives on justice and equity and that these are neither historically nor socially universal; and (b) that by making certain policy choices (even within the narrower confines of paid consultancies) we may be involved in creating methodologies and structures which advance certain perspectives while suppressing or delegitimising others (Shivji 1997b)?

McAuslan concludes with an interesting thought which raises a host of questions for many of us who in one way or another are involved in the current 'market-driven' reforms at various levels in Africa:

"In sum, while land law reform might, just, still be the preserve of the lawyer, the products of that reform — the new laws — are the property of the nation and the nation must be stimulated wholeheartedly to embrace those laws. Only in this way can law be made to work to restructure land relations in Africa" (ibid.:39).

Why is land law reform 'still the preserve of the lawyer'? Is it because the 'unqualified' people who form the large majority of the nation may find it too technical, and therefore beyond their reach? Or is it because the legal reforms we are proposing or are involved in have not had their (the people's) input? If the challenge of legal scholarship is to be creative and innovative, is it not possible to innovate/reform in a fashion which will translate the interests, perspectives and notions of justice and fairness of the large majority into law, or at least attempt to do so? If that is not attempted, then do we have the right to expect such a law to become the property of the nation?

These are precisely the questions that have been raised in this book. The perspectives of justice, rights and equity embedded in the law reform recommended in the Commission's Report are contradictory to those underlying the draft Land Bill. They are not only contradictory, but locked in struggle with them. In this contest one of the perspectives

is undoubtedly becoming dominant by the logic of force (the state). But whether it can also become the property of the nation, ie. hegemonic, is a different issue. The draft Land Bill, and the National Land Policy which forms its basis, have not been publicly debated; rather they were discussed in closed workshops attended by people invited by virtue of their various qualifications, whether political or professional. A call for a public debate on the policy (see Shivji 1996) has simply been ignored, while the sponsors of the consultant, and other sources, have been keen to see to it that the draft Land Bill is steamrollered through Parliament as soon as possible.

Have the people really accepted the policy underlying the draft Bill? In a few workshops held by LARRRI-Hakiardhi, an NGO whose main aim is to popularise and facilitate a debate on the Land Commission's Report, people have largely endorsed the Commission's recommendations and shown their wariness of what is suggested in the draft Land Bill (see *Rai*, February 1997 issues). Clearly then, such a law, if passed, has little chance of becoming the nation's property. A legal ideology based on a national consensus, it seems to me, can only be constructed in a contest between the existing western/statist/liberal concepts of justice and rights, and the social democratic conceptions and perceptions (right of people to life and self-determination) of the large majority of the population.

Finally, it must be emphasised that, if the law is to have legitimacy and therefore be workable, it has to be debated by the public. Crucial to its success is the extent to which the people have participated in developing its major basis. Professor McAuslan's most 'radical' recommendation *is that the law be translated into* Kiswahili and that people should be informed about it before it is implemented. This is really putting the cart before the horse; no one expects that people can seriously participate in debating a technically drafted piece of legislation running to 300 pages, even if it is in Kiswahili!

The technocrat's vision of making a 'revolution' by means of law without the people, and the bureaucrat's efforts to keep the people out of any decision-making, here coincide. Thus the powers-that-be have so far successfully excluded a serious national debate on land policy. Such a national debate at this stage would have been an historic intervention in the whole process of democratising the policy and society of Tanzania. The 80 per cent of people (in the countryside) in the Nyalali Commission's sample who rejected the multi-party system were also the people who cried out for participation – *hatukushirikishwa*! That is the cry for democracy, but perspectives on democracy are just as contradictory as those on justice, rights and law.

The process of land tenure reform is fundamentally a democratic process on a terrain which goes to the root of the existing situation. Therefore democratising land tenure is bound to be a hard and protracted struggle. Democrats cannot afford to leave it to technocrats

and bureaucrats. Issues must be joined at all levels, legislative as well as non-legislative. So long as people live in fear of their lands being alienated and so long as they do not participate in the decision-making processes affecting their lives, there is *Not Yet Democracy*.

Appendix

Azimio la uhai

Declaration of NGOs and Interested Persons on Land

Issued by the National Land Forum (A Coalition of NGOs and Interested Persons)

Preamble

The Bill for the Land Act is expected to be presented to the National Assembly in the near future. If the Bill is enacted and the President assents, it will become law.

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 live in villages and depend 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. For these reasons, it is clear that land is the primary basis for us to build and nourish democracy. Therefore the law which is being proposed will affect all of us individually and as a people. It will have an exceptional impact on our wealth, our resources, our culture and our political system.

It is also clear that the driving forces behind the new land law are the current policies of privatisation of our resources, liberalisation of trade, services and finance, free market and promotion and protection of foreign investments. These are the policies which are dictated by the International Financial Institutions (IFIs) and implemented by the Government, which argues that there is no other alternative. As a result, the land bill is premised on the claim that land has a market value; without regard of the fact that for many Tanzanians the value of land lies in its use. Further, the land bill disregards the fact that small peasants and pastoralists are the main investors in the economy of this country.

A Bill of such exceptional significance in the life of the nation ought to be discussed and debated by all of us. So, in the exercise of their democratic rights and their commitment to the interests and rights of the large majority, a number of NGOs, media institutions and concerned individuals met at Dar es salaam from the 15 to 16 May 1997 to debate the Bill.

First, the participants expressed their deep concern at the undemocratic way in which the Bill had been prepared. It was prepared under pressure from IFIs and other donor agencies by a foreign consultant paid from, presumably, a loan which ultimately will have to be repaid by the people of this country. The Bill was prepared without consulting the people either in its preparation or in discussing the draft. The whole exercise was done without regard to the opinions, recommendations, demands and grievances of the people which were collected with great care by the Presidential Commission of Inquiry into Land Matters.

Second, the participants expressed their deep concern at the undemocratic thrust of the Bill. The Bill does not take into account the interests of the large majority of land users. The Bill takes away the basic right of the citizens to be consulted and to participate effectively in decision-making processes, either directly or through their representative organs. Under the Bill, the large majority of land users run the risk of losing their lands, that is to say, their security of tenure is threatened. The Bill endangers the very life and independence of our people. It facilitates foreigners acquiring land and the few rich and powerful within the country appropriating the lands of the downtrodden and the disadvantaged.

Third, in effect, the Bill continues to perpetuate discrimination and inequality in respect of most vulnerable groups, particularly women, pastoralists, hunters and gatherers, youth and the small and poor peasantry. The Bill proposes long and cumbersome bureaucratic procedures of owning and administering land and settling of land disputes.

Therefore, the participants resolved unanimously to declare and sign the **Azimio la Uhai** and present it for debate and discussion by the public in a National Debate on Land. Views and recommendations emerging from this debate should then be the basis for drafting a new Land Bill. So as to facilitate, co-ordinate, disseminate and deliver the recommendations to the Government and other organs of the State, the participants agreed to form a Coalition of NGOs and Concerned Individuals to be called the **National Land Forum** (NALAF), to be known by its Kiswahili acronym UHAI (*Ulingo wa Kutetea Haki za Ardhi*) and elected a co-ordinating committee, the National Land Committee, to be known by its Kiswahili acronym KATAA (*Kamati ya Taifa ya Ardhi*)

The participants carefully analysed the Draft Bill for the Land Act. Instead of challenging specific sections of the draft bill, the participants decided to identify the main principles and approaches which form the basis of its main provisions and constitute its central thrust. The participants did so taking into account the basic principles of human rights, the foundations of true democracy, the basics of human equality and the present and future national interests. Finally, the participants proposed the following main issues to form the basis of the

National Debate on Land.

1. Radical title or ultimate ownership and control

The Bill:

- continues to vest the radical title or the ultimate ownership and control over all lands in the President as has been the case since the early colonial period, during which time it allowed the colonialists to alienate 'native' land.

The true effect of this is that:

- the ultimate owner of all lands is the President and not the people;
- in reality this means that the Executive arm of the state monopolises all control and has the ultimate decision-making power over the administration, allocation and disposition of all lands in the country;
- which means that the executive arm, through the Ministry of Lands and its bureaucracy, has the exclusive power to make all important decisions over the allocation, use and development of land without being required by law to consult people's representative organs such as the National Assembly and the Village Assemblies;
- the state monopoly of the radical title will significantly undermine democracy as a whole and transparency in government administration, thus creating conditions for continued abuse of power, corruption and lack of public and open accountability.

The participants recommended that:

- the radical title in village lands should be vested in Village Assemblies which are the most democratic organs in villages;
- the radical title in general and reserved lands be vested in an independent Land Commission which would be accountable and responsible to the most representative organ at the national level, that is, the National Assembly.

2. Classification of land

The Bill:

- classifies all land in three categories: general land, village land and reserved land;
- gives direct administrative control to the Commissioner for Lands over general land; gives ultimate powers of supervision to the Commissioner for Lands, or the Minister for Lands or the President over village and reserved lands, although the day to day administration is placed in the hands of the village councils and the relevant public bodies respectively;
- gives the President power to transfer land from one category to another after consulting his officers and experts.

In effect, this means that:

- officials and organs right from the village level are subordinated and accountable to the top, that is, the Ministry of Lands and the

Commissioner for Lands, *[for example: in its administrative functions over land, the Village Council is not accountable to the Village Assembly but ultimately to the Commissioner for Lands];*

- village land can be transferred to general land and allocated/sold without the villagers' consent or transferred to reserved land and then given to an investor under the excuse that the investor is in a better position to conserve it *[an actual example: thousands of hectares of village land in Rufiji Delta are about to be transferred to reserved land and be granted to a foreign company on the pretext that the investor has the ability and resources to conserve the mangroves, but actually as an excuse to alienate village land].*

The participants recommended that:

- there should be horizontal accountability so that at every level administrators are accountable to representative organs of the people;
- there should be no legal authority to transfer land from one category to another without consultation and consent of the most representative organs like the Village Assembly which includes all villagers.

3. The authority of administrators

The Bill declares the Commissioner for Lands to be the sole authority and gives him ultimate and final powers of intervention and making decisions on:

- all matters to do with the administration of land;
- allocation of land;
- adjudication, titling and registration of certificates, even in villages;
- the power to take away the administration of village lands from the village council should he think that the latter has failed to do its duty; dispute-settlement machinery.

This means that:

- the land administration and procedures are undemocratic and lack openness which could create conditions for corruption and breach of landrights of the majority;
- the procedures undermine and sideline representative organs such as village assemblies and by-pass ward, district and regional levels;
- the procedures are not sufficiently transparent; rather they are bureaucratic, expensive and likely to cause inordinate delays in the administration of land.

The participants recommended that:

- the administration of land should be placed under representative organs of land users at all levels;
- in the administration of village land, the village council and central government officers should be accountable to the village assembly;
- elected organs of land users should be consulted and be involved in planning, surveying and supervision of general and reserved lands;
- allocation, adjudication, titling and registration of land should be done

by experts who are directly accountable to the elected organs of land users;
- dispute-settlement machinery should involve elected bodies which are directly accountable to the people;
- wherever it is feasible, government officers should be advisers to elected bodies rather than ultimate decision-makers;
- the law should provide for proportional and effective representation of women, the youth and other vulnerable groups in all the organs proposed above.

4. Accountability

Although the Bill claims to have established open and transparent procedures, in reality the procedures are:
- very bureaucratic;
- top-down, undemocratic and likely to be very expensive in implementation.

This means that:
- the government will have to spend a lot of tax-payers' money to effect the procedures suggested;
- people and officers at lower levels do not have sufficient discretion to make decisions;
- the centres of decision making on matters of land will be distant and very expensive to reach for the majority;
- the procedures are, besides, impractical and likely to breed inefficiency.

The participants recommended that:
- the procedures should be open, transparent, equitable, and relatively less expensive and generally accountability should be built into them;
- people themselves should be involved at all levels in the administration of land through organs which at lower levels are elected and there is consultation, particularly of vulnerable groups including women and youth, and at national level representative organs should be involved.

5. Acquisition of land by foreigners

The Bill:
- is biased in favour of foreigners in the acquisition, ownership and use of land.

This means that:
- citizens will have to compete with foreigners to acquire land when the large majority are too poor to do so;
- foreigners will be in a position to acquire land as they wish and particularly to exploit natural resources as they like to the detriment of the ecology and environment.

The participants recommended that:

- land should be inalienable to foreigners;
- foreigners should be given land on condition that they do not own it, cannot transfer it and that exploitation of resources should be strictly controlled so that it is not harmful to the environment.

6. Grabbing of village land

Although the Bill claims to protect village land, it establishes procedures and has provisions which:

- give the President power to transfer village land to the general or reserved lands;
- enable companies and parastatals to get rights of occupancy and customary certificates of ownership on village lands, in which case it is the Commissioner for Lands who has ultimate power of supervision over it rather than village organs;
- enable outsiders to be granted village land so long as they have shown intention to reside and/or invest in the village;
- enables and allows village governments and villagers with certificates to give derivative rights to outsiders.

This means that:

- there is a possibility of village lands belonging to poor villagers and pastoralists being acquired by outsiders;
- it will create apprehension and insecurity of tenure on the part of small peasants, thus disrupting their livelihoods and production.

The participants recommended:

- there should be a legal ban on the alienation of village lands to outsiders, be it companies or individuals, without full and effective consultation of the whole village community through their most representative organs in which women and youth are fully involved;
- there should be instituted mechanisms through which villagers will be fully informed of the options available for them and present and future consequences of certain decisions before they are made.

7. Adjudication, titling and registration

The Bill:

- places particular emphasis on the adjudication of rights and titling and registration process;
- does not clearly spell out the limits of ownership rights given by the certificates;
- does not clearly spell out how the system of titling and registration will protect the interests of vulnerable groups such as women and children in family lands.

This means that:

- the owners of certificates will be in a position of disposing of land through sale or otherwise without regard to the interests of and con-

sultation with their families (that means all grown-ups in the family);
- will enable small peasants and pastoralists to sell off their lands when in distress leaving them landless and destitute;
- will make it possible for the clever and the powerful who can master and manipulate bureaucratic procedures to get certificates in their favour, thereby appropriating the land of the poor and the ignorant.

The participants recommended:
- all village land should be held collectively through the Village Assembly;
- the Village Assembly may allocate land and respective title deeds to families, deriving from the Village Assembly title;
- the title so given to families should prohibit the selling, subletting or mortgaging for purposes of obtaining credits or loans or disposing of the same in any manner whatsoever, without the consent of all (adult) members of the respective family and the Village Assembly.

8. Gender equality and land rights

Although the Bill claims to embed gender equality, its procedures in reality:
- discriminate against the female gender, in particular among small peasants and pastoral communities on the issue of ownership and control over land;
- enable male owners with certificates to sell off their land or use it as collateral without consulting all adult family members, be they male or female;
- do not give equal participatory rights to women in important decision-making processes over land;
- do not give equal and effective participation to women in the dispute-settlement machinery.

This means that:
- the bias and discrimination against women continues under the new law;
- women are deprived of their rightful place and role in controlling the processes and fruits of production;
- women are deprived of their rightful place in the dispute-settlement machinery and yet it is the women who are usually the ultimate victims of land disputes.

The participants recommended that:
- the administration of land should involve a full and effective participation of women;
- the dispute-settlement machinery should fully and effectively involve women;
- law should entrench women's rights to own and control land without harassment and insecurity;
- ownership certificates of family land should include the names of both

spouses and that land should not be transferable without the consent of both of them.

9. Dispute settlement machinery

Even though the Bill claims to provide for an efficient and equitable machinery for settling land disputes, the truth is that:

- the Bill stipulates three stages of dispute-settlement, that is, the primary court, the district court and the land division of the High Court.

The proposed machinery of settling land disputes is not significantly different from the existing one in which the large majority of people have lost confidence because:

- its decisions are frequently against the weak and the downtrodden;
- it takes very long and is inefficient;
- does not hold the hearing in places where the disputed land is situated, conducts its proceedings in a language not comprehensible to the large majority;
- is an expensive affair and therefore inaccessible to the large majority;
- breeds corruption and nepotism.

The participants recommended that the dispute-settlement machinery and procedures should be efficient, legitimate and equitable, in which people can have faith, and therefore recommended that:

- land disputes should be heard and determined by Elders Council which should have effective and proportional women participation; its members should be elected and recallable by villagers should they lose confidence in them and that the members should have a definite tenure;
- there should be circuit courts which should sit and hear cases in the area of dispute;
- there should be a special land division of the High Court and the Court of Appeal to hear land matters and which will make their decisions in consultation with the elders from the areas of dispute;
- there should be free legal aid provided by the government in land cases in the higher courts to those who cannot afford to hire counsel.

Following the analysis of the Bill and the consensus on recommendations, the participants agreed to disseminate the declaration widely to facilitate a larger debate involving more NGOs and other organs as well as the public at large, and collect signatures of all those who agree with the declaration, and eventually submit the same to the National Assembly and honourable members of parliament before the Bill is presented to the Parliament. The aim is to ensure that the final Land Act which is eventually enacted would have taken into account the views and interests of the large majority and be protective of their land rights.

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Not yet democracy: reforming land tenure in Tanzania is a first book of its kind to address the problems of land tenure reform in an East African country. In 1991, the Tanzanian government formed a Commission of Inquiry into Land Matters (CILM) and published a report in 1992, which has been hailed by many reviewers and experts as a landmark in the African land tenure literature. The Chairman of the CILM, Professor Issa Shivji, and author of this book, places the work of the Commission within its broader context and sets its findings within the current democracy debate raging all over Africa, including treatment of the proposed new Tanzania Land Act. The book adds a fresh new dimension to the literature on African political economy and should be useful to students of political science, economics, law and development studies.

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