

IUCN Eastern Africa Programme

Forest and Social Perspectives in Conservation

Land, People and Forests in eastern and southern Africa at the beginning of the 21st Century

The impact of land relations on the role of
communities in forest future

by Liz Alden Wily and Sue Mbaya



January 2001

Community Involvement in Forest Management in Eastern and Southern Africa

This publication is one of four publications which review various aspects of Community Involvement in Forest Management in Eastern and Southern Africa. The four reviews are:

Alden Wily L. and S. Mbaya (2001): Land, People and Forests in Eastern and Southern Africa at the beginning of the 21st century. The impact of land relations on the role of communities in forest future. Nairobi, IUCN-EARO.

Mogaka H., Simons G., Turpie J. and L. Emerton (2001): Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa. Nairobi, IUCN-EARO.

Kigenyi F., Gondo P. and J. Mugabe (2001): Community Involvement in Forest Management in Eastern and Southern Africa. Analysis of Policies and Institutions. Nairobi, IUCN-EARO.

Clarke J., Grundy I., Kamugisha Jones R., Tessema Y. and E. Barrow (2001): Whose Power? Whose Responsibilities? An Analysis of Stakeholders in Community Involvement in Forest Management in Eastern and Southern Africa. Nairobi, IUCN-EARO.

The review by Alden Wily and Mbaya is longer than the other 3 reviews, as the DFID office in Eastern Africa provided additional funding for this particular study.

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Cover photo: Villagers confirming the boundary of Gologolo Forest Management Area, Lushoto, Tanzania. Village and Forest lands, Lushoto. "Now you are entering the Forest area of Gologolo. This Forest is protected and managed by the people of Gologolo jointly with the Government of Tanzania - The Gologolo Forest Rules apply". *Credit: Liz Alden Wily*

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PREFACE

The regional profile series on ***Forests, People and Policies from around the World - Linking Learning with Policy Formulation*** provides a written forum to foster exchange between regions and nations regarding the rich experiences of the world's people in maintaining existing forest and regenerating degraded ones. This project is implemented by IUCN, both globally and with different IUCN regions, with funding from DFID and the Ford Foundation. By analysing community forestry strategies, common issues and effective actions can more readily be identified. The profiles include the following types of information:

- Overviews of national forest management histories
- Brief ecological descriptions of the region's forests
- Summaries of forest administrative systems and policy frameworks as they relate to local communities
- Case studies illustrating the roles indigenous people, local forest communities, and the greater civil society play in forest management
- Abstracts of regional networking organisations
- Assessments of national strategies, needed policy actions, important lessons, and constraints.

This project of the *IUCN Working Group on Community Involvement in Forest Management (WG-CIFM)* has so far produced 3 regional profiles, namely for Canada and the USA, South East Asia, and for Meso America. Two other profiles are in preparation, namely for Europe, and Eastern and Southern Africa. The Eastern African Regional Profile project received substantial additional funding from DFID through NRI to enable four more detailed thematic reviews to be undertaken. This is one of the four reviews. They are:

1. Land, People and Forests in Eastern and Southern Africa at the beginning of the 21st century. The impact of land relations on the role of communities in forest future.
2. Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa.
3. Community Involvement in Forest Management in Eastern and Southern Africa. Analysis of Policies and Institutions.
4. Whose Power? Whose Responsibilities? An Analysis of Stakeholders in Community Involvement in Forest Management in Eastern and Southern Africa.

While some duplication has arisen, it has allowed different groups of experts distinctive focus on the issues. The four reviews formed the basis for a training workshop on community involvement in forest management that was held in Uganda in June 2000 for 55 participants from 14 countries (Sudan, Somaliland, Ethiopia, Uganda, Kenya, Tanzania, Zambia, Malawi, Mozambique, Zimbabwe, Botswana, Namibia, Angola, and South Africa). They came from both government and civil society. All this material has been compiled into the **Eastern and Southern African Regional Review on Community Involvement in Forest Management**.

POLICY BRIEF

Policy findings

The way in which forest land is owned, directly influences the status of the forest, its condition and the way in which it is managed. Ownership also determines the parameters of the relationship of forest-local communities with the forest.

In general, where local tenure has been revoked in favour of state tenure (such as in reserves) or where local tenure has been undermined through weak support in state law, local forest custodianship is undermined. Conversely, the greater the security of local forest tenure, the stronger the interest and will of the community towards its security.

Secure forest ownership may be viewed as the most powerful stake a community may hold in forest future and the pivot upon which their involvement in forest future may be most profoundly and securely based. It provides a stable platform upon which the community may develop a regime of sustainable and sustained management. Where arrangements of community custodianship amount to virtual ownership, they may have the same effect. This may be achieved through acknowledging or designating the community as the management authority.

There has been a tendency in policy-making to pay inadequate attention to the tenurial foundation of forest future and to assume that local interests in forests are restricted to issues of immediate use and benefit, and to structure participation around this. Considering their custodial interests ignored or downgraded to user rights only, this approach runs the risk of being self-fulfilling with the main concern of the community being to secure the only stake they are being offered, access rights or a share in benefits being gained by other parties from the forest.

The state loses the opportunity to devolve management to the extent needed to be effective and lasting, and communities lose the opportunity to root their forest-livelihood interests more profoundly and soundly. Especially where forest revenue sharing is the basis of participation, transformation of the management regime may be minimal and local investment in forest future may be unstable. Nor do user-centred arrangements readily apply to those forests in most need of more localised and sustained protection and management, forests which are too degraded, or too valuable in their catchment functions or biodiversity, to sustain the product extraction upon which access rights or benefit-sharing may be premised.

Matters of land ownership are under a great deal of change at this time in the region. This is being realised mainly in new national land policies and new laws regulating the way in which land may be held and secured. A critical sphere of impact is upon rural communities, and especially those who hold their land in customary or other informal and locally regulated ways.

Widespread failure in state law to give legal weight to customary tenure and to the customary capacity of those regimes to support the ownership of properties in common, may be identified as the single most influential factor in the

relationship of people to forests this past century. Had state law recognised common properties as group-owned private estates, the foundation for locally-based forest management would have been nurtured and become a viable regime for retaining and sustaining forest in its own right.

It is new provision for just such a capacity that marks a dramatic turning point in the history of forest management at the turn of the century. A trend is underway which now makes customary rights in land legal tender and directly includes the right of people to own land in common. Through this communities in several states are finding their tenure over local forest commons secured. As private property this renders these estates less vulnerable to appropriation and to the dominance of individualising forces, prompting subdivision of forest and other local common property.

At the same time, and being driven by similar democratising forces, forest strategies and legislation are themselves under reform, including new consideration of the role of civil society in forest future. In a growing number of countries, the capacity for communities to retain (and in some cases re-secure) local forest as private property is encouraged and constructs for this provided, mainly in the form of Community Forests.

Policy-making implications

The implications of these developments for policy-makers are considerable. Among the more general:

- The commonality of concerns and processes among countries in the region is such that a great deal may be learnt from each other; cross-country exchanges will prove increasingly useful.
- Questions as to in whom, and at what level of society, forest guardianship is vested, need closer attention in policy-making in order to more genuinely and positively transform the way in which forests are secured and sustained over the longer-term.
- The opportunities beginning to be afforded modern forest management through land reform are considerable, and should be taken advantage of. In turn, as a main sector dealing directly with natural resources of both local and national import, new strategic thinking in forestry has a lot to offer land policy makers, and an important role to play in implementing new frameworks for integrated tenure and resource management.
- For changes in land and forest relations to be successful, both spheres need to give attention to issues of community-level formation. This includes support for the emergence of communities as identifiable institutions and with legal personality, able to be endowed with meaningful powers of (resource) management. In 2000, 'community' shows potential for emerging as one of the most important new constructs through which society and its resources may be more successfully governed. Processes which look to communities as custodians over local forests represent an important new avenue for this development.

SUMMARY

I THE CONTEXT

This is a study about land, people and forests.

Specifically, it examines the relationship of people's rights in land to the manner in which they may be involved in the management of forests. The setting is eastern and southern Africa (hereafter 'the region') at the turn of the century. These countries form the basis of the study: Tanzania, Uganda, Kenya, Zambia, Malawi, Zimbabwe, South Africa, Namibia, Mozambique, Lesotho and to a lesser degree, Botswana and Swaziland. Only occasional reference is made to Rwanda and Madagascar. Burundi, Angola and Zaire are not covered. Although outside the region, aspects of changing conditions in Eritrea and Ethiopia are noted.

FOREST

Whilst forests of all types are considered, natural forests are the focus. Natural forest represents a massive, unevenly distributed resource in the region of several hundred million hectares. Its character is primarily dry woodland, dominated by the invaluable *miombo* class. Moist montane forest comprises less than three million hectares.

FOREST AS NATURAL COMMON PROPERTY

Given the character of forests as unsuited to subdivision into individual plots, the study is less concerned with the rights of individuals to forest estate than the rights they hold, and may hold in the future, *in common*. Difficulty associated with common ownership has been the single most influential factor in the tenurial history of forests in the region. With hindsight, this has been to the detriment of forests, community rights in forests, and to government roles in forest management.

COMMUNITY

The social sphere of interest of this study is forest-local community. Forest-local communities include those living within or next to forests. These groups are generally rural, poor, and dependent upon forests as integral to their main agricultural or pastoral livelihood. The land they may own is the primary means of their production. The extent to which this includes or excludes forest is a matter of growing concern to them.

COMMUNITY INVOLVEMENT IN FOREST MANAGEMENT

Late 20th century interest to involve such communities in the management of forests arises from recognition of the failure of central governments to halt, let alone reverse, continued loss of forest resources or to prevent the degradation of even those forests which they have brought under their own aegis (reserves).

In the common search for new strategies, attention had turned to the very sector which, for most of the past century, had been reviled as the source of problems, forest-local communities. To different measure, each state opens the 21st century with a commitment to involve these people in the processes of securing and sustaining forests ('forest future').

Community involvement in forest management (CIFM) is not exclusive to the region. A comparable trend exists world-wide. Developments in South Asia in the 1970s-1980s generated state-people co-management paradigms of particular influence. The more recent initiatives in Africa are nonetheless home-grown and in matters of tenure significantly advance South Asian paradigms in some cases. Borrowing of strategies internal to the region is widespread, particularly among southern African countries that have been strongly influenced by the wildlife habitat-centred Campfire programme of Zimbabwe.

As background, the study looks at the character of existing initiatives towards CIFM. To date these are mainly new, discreet projects, begun and supported usually with foreign project aid. Few began before 1990. In extent they range from several projects in Kenya, Namibia and South Africa to a plethora of initiatives in Tanzania and Mozambique.

BENEFIT-SHARING PARADIGM

Significant distinctions exist in the approaches to CIFM being adopted. Two main paradigms emerge. The first is less forest-centred than product-centred and until recently, dominated by the use of one forest resource, wildlife. Benefit sharing is dominant in southern Africa at this time, building largely upon the catalytic experiences of the Campfire programme in Zimbabwe. Communities are involved largely as legalised local users and/or as beneficiaries of a share of forest revenue, often generated by externally operated commercial users. Or, jobs are provided, or buffer zone developments launched, to lessen forest product dependence.

In whichever form, this approach is less concerned to alter management practice than to secure local co-operation to management. It does this by trading access, benefits or investment into the area. Often the only role communities play in management is to assist in protection, reporting intruders to foresters. Sometimes they may be required to in effect pay for their access rights by keeping perimeter boundaries clear.

POWER-SHARING PARADIGM

A second and more recent approach involves forest-local communities as managers. Determination as to how the forest will be used is a secondary matter and proceeds only from this repositioning of authority. The aim in power-sharing approaches is to localise management and into the hands of that group of society perceived as having the strongest and most sustained vested interest in the forest's future; the local community.

The process is devolution. Localisation is intended to bring management to a level where it may be most effective and cheaply sustained. By awarding controlling powers, the state seeks to provide the incentive for the community to launch and sustain management.

Implementation of power sharing is various. This may range from uneven sharing of authority, to co-management, to cases where ownership of the resource itself is recognised as belonging to the community. This rarely occurs without a condition that the forest area remains dedicated to the purposes of forestry. Power-sharing approaches are most developed in Tanzania and Lesotho and emerging in Namibia, Malawi and Uganda.

DIFFERENT PERCEPTIONS OF LOCAL INTERESTS

Differences in approach result from different degrees of official willingness to release powers. Limitation often proceeds from the reluctance of the state to lose the income advantages of private sector investment, or from fear that communities cannot be trusted to sustain forests.

This is underlaid in turn by different perceptions as to the nature of local interests in forests. Benefit-sharing approaches tend to be founded on a view that forest-local citizens are only interested in forest products, and accordingly locate participation in a user and product-centred framework.

Power-sharing approaches recognise that the right to influence and even control how the forest is used represents the more important vested interest of local communities, and that this interest is driven often by customary custodianship over a resource which is integral to the local socio-environment.

Local livelihood concerns are central to both approaches, but sought to be met in very different ways. The former seeks to deliver certain immediate needs; the latter to relocate livelihood interests in a longer-term frame and within a context which the community itself may control and regulate.

Decision-making and enforcement powers

Predictably, the main indicator and measure of community involvement in forest management (as compared to involvement in forest benefit) is the extent to which forest-local people make management decisions, and are able to enforce them. Review of current projects shows that these capacities range from non-existent to considerable, in direct correlation with the extent to which the community is involved as user or manager, beneficiary or actor.

Tenure rights as integral to approaches

Levels of local jurisdiction also inevitably correlate positively with levels of local tenurial interest over the forest, either existing or as being developed through the project. That is, the extent to which a forest-local community is recognised as the owner of the forest or at least as its custodian (guardianship without ownership), directly shapes the role it will be permitted and assisted to adopt in the management of that forest.

THE NEED TO ROOT CIFM SECURELY BEYOND ACCESS RIGHTS

Benefit-sharing and access-centred approaches have proved useful in interesting local people in forest management. However, the study finds the power-sharing paradigm altogether more powerful than the benefit-sharing paradigm.

The latter tends to signal only minor alternation in the actual mode of forest management and may even increase management costs through supervision and monitoring requirements. Revenue-sharing developments have shown themselves vulnerable to the instability of largely-external market forces and vulnerable to state will to maintain local access rights in the face of competing commercial interests. Even where it is only the access rights which centres the relationship, a tug of war over the share of access granted may underlie, and undermine relations. Over-use of the resource to meet the needs/demands of the local partner may threaten sustainable use.

This kind of concerns currently face three major product-centred programmes in the region: Tchuma Tchato in Mozambique, Campfire in Zimbabwe and the Muzama initiative in Zambia. All are now beginning to turn to ways to root local benefits more securely, through increasing community jurisdiction or tenure.

Product-centred developments also tend to be self-limiting to areas of medium to high extractive potential, unsuited to forests closed to use for reasons of catchment or biodiversity, or because they are so degraded – circumstances which encompass many (and perhaps most) forests and woodlands in the region.

THE POSITION OF THE STUDY: MOVING FROM NEEDS TO RIGHTS

The hypothesis of this study is that community involvement in forest future is not a matter of social correctness and inappropriately founded on a narrow conception of local needs, but a fundamental and urgent necessity for forest security - upon which local livelihood, environmental support and other aspects in turn may more reliably depend. That is, posing participation in a framework that is only concerned with local forest use, ignores and may actually damage, the real adjustments to both forest management and forest-local livelihoods, that are required.

To elaborate, the sphere where strategic reform is most required, is not in the re-framing of forest *access* or *benefit* to include communities but in restructuring from where, how and by whom, forest future is to be owned and controlled. In the process, forest management thinking will shift from a paternal focus upon local needs towards a focus upon local rights and capacities.

Making communities custodians

The route towards this is devolution of forest management authority. This combines the need to bring management operations and authority to the most local level for sustained efficiency and effect, with the need to recognise the role forest-local people are able to play as those with the strongest and potentially most lasting interest in the forest.

Custodianship ideally founded upon ownership

This will be all the more effective if local authority is founded upon local ownership of the forest. This is not least because it removes the forest from the ills of open access and diffused responsibility which public property has come to imply.

In general, governments are reluctant to devolve ownership they have already secured over forests (reserves). In such cases, devolution of authority if not forest ownership becomes a reasonable strategy.

Overall, whether in terms of becoming forest authorities in their own right or forest owners, provision for forest-local *custodianship* is the single most important investment in the future of the regions' forests, and the source from which rational distribution and regulation of forest access and benefit, will in turn be most sustainably fashioned.

Helpfully, experience in the region to date suggests that when granted control and especially ownership over a forest, local people find it in their own interests to rigorously retain the area as forested, to the benefit to all members of the community, rather than to the sub-group which might gain from its conversion to farms. This reaches into the heart of the dynamics which sustain commons, and which depend ultimately upon acknowledgement of community ownership.

PROPERTY RELATIONS AS THE FRAMEWORK

Discussion as to the centrality of tenure to custodial forest management focuses upon four issues:

- ◆ *first*, the way in which state and community interact in the matter of land tenure;
- ◆ *second*, where and how forests are located in the tenure environment (to whom do they belong or are assumed to belong);
- ◆ *third*, the extent to which land in each nation may be held in common in legally-recognised ways, a crucial facility to the retention of forests as intact estates and especially crucial to community forest tenure, and
- ◆ *Fourth*, underlying all the above, the way in which informal or customary rights in land have been handled over the decades and with what effect upon community forest rights.

LOOKING TO LAW

To explore these issues reliably and without recourse to incidental or anecdotal practice, the study turns to state law as the concrete foundation from which constraints and opportunities proceed. The provisions of state (statutory) law determine even customary rights. Practices in the field are secured (or de-secured) by law. Whilst national policies reach the populace more widely than laws, it is laws which are precise and binding in their terms, and the platform from which new strategies may be exercised or constrained.

Questions as to how far laws are obeyed, implemented or used, correctly arise. However, for our purposes here, new laws accurately reflect where strategic thinking has reached and what kind of opportunities may be availed. Even when legislation is not applied, they will have an effect, used over time by those seeking to exploit its opportunities and providing precedents.

DEMOCRATISATION

Main attention is placed upon *changes* that are occurring in both land and forestry sectors. The study notes how these do not exist in isolation but are part of wider changes. These are most characterised by a shift in the relationship of the state with civil society. The wave of new constitutional law in the region is the paramount indicator of this socio-political transformation. Alteration is broadly towards enabling ordinary citizens to play larger roles in managing society and its resources.

Whilst it would be rewarding to identify this as steadfastly the case, with the rights of especially the rural poor accruing, the reality is more ambivalent, with a good deal of polarisation of interests and authority. The result is that the paths being carved out towards improved local natural resource security are erratic and still partial. So also, the extent to which democratisation refines and focuses the functions of government, is slow and uneven.

Still, such democratising reforms are not easy to recall once embarked upon. Practical changes launched tend to promote the trend further. This is demonstrably the case in respect of community forestry interests: where communities are being introduced into forest management, this sets in train new relations which take on their own momentum and begin to empower other elements of the governance relationship. Community itself gains greater socio-institutional form, and force.

THE FUTURE

In respect of community rights in forest future, two founding requirements emerge:

- ◆ *First*, the need for community itself to gain stronger social and legal form, with the endowment of powers to act in legally enforceable ways. It is no mistake that a main finding of this study is that progress in community-based forest management correlates well with the extent of socio-institutional form existing at the grassroots in each state;
- ◆ *Second*, the need for state law constructs to be developed which – for the first time in a century – enable communities to hold property like forests as group private property in reliable and justiciable ways. This is a development already underway in some countries.

II LAND RELATIONS

Land ownership in eastern and southern Africa is, at the turn of the century, significantly constrained and more properly referred to as the ownership of *rights* or *interests* in land, all states, with one exception (Uganda) vesting explicitly or by implication, ultimate ownership in themselves.

SIGNIFICANT STATE POWER AND CONSTRAINT

The intentions of this radical title as no more than national trusteeship or as the source from which the state may control the distribution of property, varies widely. In some states, at least those persons who hold registered and absolute interests in land (such as in freehold tenure) feel their occupancy is secure.

In most others, the very notion of what constitutes private (landed) property has been interpreted with increasing rather than decreasing abandon, and had the effect of de-securing rights in law and in practice, and those of unregistered landholders in particular. Sovereignty and domain tend to have merged into increasingly material notions of land holding, and in the hands

of states or presidents who have increasingly acted as more landlords than trustees. As the 21st century opens, that “land is owned by the state” has unusual force in the region and in Eritrea, Ethiopia, Tanzania, Zambia, Malawi and Mozambique in particular.

Elsewhere state tenure is primarily centred upon certain spheres of land. This is illustrative in the unusual strength of the construct of Government or State Land, into which a great deal of property has been drawn, often with minimal compensation, and for purposes that are sometimes distant from public needs.

GOVERNMENT & VIRTUAL GOVERNMENT LANDS

Particularly pernicious for many citizens has been the retention rather than demise of the colonial-derived construct of native areas. These were and remain *virtual* state lands. They operate today as the Trust Lands of Kenya, the Communal Lands of Namibia and Zimbabwe, the Customary Lands of Malawi, the ex-homelands of South Africa, and until recently, the Public Lands of Uganda.

These are lands distinctive for being vested in presidents or agents of state, who or which are able to appropriate, allocate or reallocate these lands with minimal real constraint, the protective clauses of constitutions notwithstanding. Extraordinarily for the year 2000, millions of Africans occupy communal lands as but tenants at will (of the state). This fact is integral to the difficulties occupants experience to secure forests and other common properties in these areas.

Conversionary processes

A corollary constraint upon local tenure security has derived from the steady relocation of legally acknowledged land relations into a narrow range of European-derived forms this last century. The central thrust has been towards individualisation of ownership of rights in land, a process which on its own has done much to reduce forest lands through subdivision and the de-securing of community-based reference systems in landholding.

Failure to recognise customary rights as delivering property

The above have been driven by views of African tenure regimes and the land rights they deliver, as amounting to less than ownership and unworthy of the same level of legal support awarded regimes with non-local origins.

The uniform declaration of the sanctity of private property in constitutions has simply not applied to customary rights. Nonetheless, this is precisely how the majority of citizens possess land at the turn of century. Moreover this is a form of possession that holds agrarian logic and is supported by notions and regimes that have accordingly proven tenacious.

If any security has been held out at all to the majority of citizens in the region, it has not been to the act of holding land itself but to the act of registering that landholding. That is, it is not landholding or private property (rights) themselves that are sacrosanct in modern African land law: it is the Title Deed. Those who own land or rights in land in unregistered ways

simply do not have security. This has mainly affected those who acquire, hold and transfer land through traditional mechanisms. The urban poor, including those who lose customary land through urban expansion, have also lost security or failed to gain it. Those who hold rights in familial contexts, such as women, have also lost rights through shortfalls in state land law.

Insecurity manifests in different ways. In Kenya for example, customary rights in land permissively exist, pending compulsory conversion through adjudication and registration to freehold and leasehold rights. In the interim these rights are subject to being involuntarily set aside and reallocated to others by both trustees (County Councils) and the state (Commissioner of Lands).

A broadly similar case exists in Malawi in respect of Customary Lands. In Botswana, the one country in the region to integrate customary law into state law upon achieving independence, nonetheless makes no provision for communal lands to be registrable entitlements. Customary rights may only be registered for residential and agricultural lands. In Zimbabwe, the wholesale ownership of untitled land by the President allows certification of rights only over land used for business premises or service developments.

In Tanzania, because new land laws have not been formally declared operable, the occupancy of land by more than 20 million people exists in a peculiar legal limbo-land, with neither customary nor statutory rural land ownership having apparent force. A similar situation exists in Eritrea where implementation of new tenure law also has not begun, and in South Africa, where ex-homeland residents still live in land owned by the state, and with no clear routes yet offered to secure that occupancy as either ownership of the land or ownership of rights to occupy the land.

The result overall is the same: if the land is customarily or informally held it has limited recognition under state law. Even should recognition be sought, the avenues are limited, usually requiring conversion into regimes that do not necessarily embody customary characteristics or accord with the logical tenurial profile of the property.

Failure to recognise communal landholding

Failure to give customary regimes a real place in state law has meant failure to provide statutorily for one of its central capacities: to enable groups of persons to share the ownership of a defined tract of land. Nor has the last century seen any attempt (save an aborted development in Kenya in the 1969-70s) to provide for such commonholding within the imported freehold and leasehold regimes. And this is despite the capacity for this to occur existing in English land law, the body of law from which most modern African law in the region derives.

The capacity to hold land *in common* is a central tenet of customary tenure regimes throughout Africa and delivers a wide range of common properties, among which forests and woodlands are major. Its absence in modern law has most undermined local forest tenure.

Its absence is however intricately linked to the absence of support for traditional regimes of landholding in general. Historically, it was arguably less official anathema to customary tenure than to perceptions as to its *communal* capacities that prevented customary rights entering national law as registrable entitlements.

This in turn was underwritten by misunderstanding of communalism in pre-industrial agrarian land relations, only now beginning to be unravelled in official thinking. In most cases, customary land tenure and communal land tenure were lumped together as one, and the latter interpreted not as private property at all, but a regime of land access – and one to which there were no boundaries, producing much-feared open access.

LAND REFORM

Fortunately, for the remote rural poor and citizenry in general, the right to property, as defined in national policy and law, is changing in eastern and southern Africa, and in ways that are proving advantageous to their interests. Similar if less advanced developments are slowly occurring in West Africa (Cote D'Ivoire and Niger especially).

The extent of land reform in the east and southern region is remarkable. Other than Botswana, which undertook significant reform in the 1960s, it is only Angola, DRC and Burundi (all countries at civil war) which have *not* embarked upon a land tenure reform of some sort. Even Kenya, which 'reformed' land relations in the 1950-60s, has created a Commission of Inquiry into Land Law Matters with a view to new reform (1999).

AN UNSETTLED AND UNSETTLING PROCESS

The impeti are diverse country to country. Nonetheless, there is striking commonality in both the foci eventually settled upon and the processes through which they are dealt with. With an amount of over-simplification, the following general features may be remarked:

- Land *law* reform is central to the development. In some countries, even new policy formulation is foregone in favour of setting out the new parameters in legal terms from the outset (Eritrea, Zambia, Uganda) (BOX ONE).
- Constitutional law reform has an important role in this development.
- The classical objectives of land reform to redistribute property is not the main objective in the region, save in those countries which make restitution of land lost through racially-discriminatory laws, an objective (Zimbabwe, South Africa and to a lesser extent, Namibia). However, a break upon continuing polarisation in landholding, if not redistribution, should eventuate through other means, and especially through the changing status of customary land rights.

BOX ONE
STATUS OF LAND REFORM IN EAST & SOUTHERN AFRICA 2000

New Constitutions

Zimbabwe 1980 (key tenure amendment 2000)
Namibia 1990
Mozambique 1990
Zambia 1991
Ethiopia 1992
Zanzibar 1992
Lesotho 1993
Malawi 1994
Uganda 1995
Eritrea 1996
South Africa 1996

Constitutions under review: Rwanda, Swaziland, Kenya, and Tanzania

New National Land Policies

TANZANIA, 1995
MOZAMBIQUE, 1996
SOUTH AFRICA, 1997
NAMIBIA, 1999

Draft National Land Policies

ZIMBABWE, 1998-99
MALAWI, 2000
ZAMBIA, 2000
SWAZILAND, 2000
RWANDA, 2000
ETHIOPIA, 2000

New National Land Laws

ZIMBABWE Land Acquisition Act, 1992 (revised 1996)
ERITREA Land Proclamation 1994, 1997
NAMIBIA Agricultural (Commercial) Land Act, 1995
ZAMBIA, Lands Act, 1995
MOZAMBIQUE, Land Act, 1997
ETHIOPIA Rural Lands Proclamation, 1997
UGANDA Land Act, 1998
TANZANIA Land Act, 1999, Village Land Act, 1999
ZANZIBAR Land Tenure Act 1992
SOUTH AFRICA - 8 laws 1994-1997

Reform in Policy & Law Planned

KENYA, 1999 Commission of Inquiry
LESOTHO, 1996 Commission of Inquiry
BOTSWANA, 'planned'

- Land *tenure* reform – changing the way in which land is understood in law as owned or rights in land held – is not everywhere an early intention of the reforms but quickly entered the agenda. This is again of direct importance to all those who hold their land in unregistered or informal ways.
- The process of land reform is proving more complicated, time-consuming and contentious than any Government initially imagined. Despite most countries beginning up to a decade or more past, only Uganda, Ethiopia, Mozambique, South Africa and Zimbabwe have begun to implement the reforms and are themselves only in the earliest stages and in each case, still grappling with issues of considerable public contention.
- Intentions typically alter as planning gets underway. For example, whilst beginning with the intention to make land more freely available on the market place, Tanzania has ultimately increased limitation in many respects (1999). Uganda's initial objective to create a single uniform system of land ownership ended up making four distinct regimes legal (1995) as is likely also to be the case in Malawi.
- What is reformed is also proving less stable and more partial than originally espoused by politicians, recommended by the ubiquitous Commissions of Land Inquiry created, or as urged by international donors; and for reasons which are more often than not political. Stops and starts blight process. As a result, founding new policies may take years to be finalised or approved (Zimbabwe, Malawi, Lesotho, Namibia, Rwanda, Swaziland). Drafting of crucial new legislation may be delayed or even suspended (Namibia, South Africa). Even when a bold new law is enacted, its implementation may be so weakly supported as to undermine its purpose (Uganda), or its commencement date left hanging (Tanzania). Amendment or regulations (Uganda, Mozambique) may quickly modify the substance of a new law, or announcement made that a new policy is in the works that will have the same effect (Zambia).
- The manner in which Governments are conducting land reform raises questions of strategic soundness, with widespread failure to ensure its socio-political legitimacy among the majority, the poor and the rural.
- In not a single case, for example, has any state set out to reform property relations through the community-based and participatory strategies these same states espouse as the right approach in most other spheres of development. With periodic exceptions (and Mozambique outstanding among them and Malawi showing signs of following suit), land reform is state-driven and delivered, popular participation sought mainly in the vein of consultation, and consultation itself sometimes deliberately limited (Ethiopia, Tanzania, and initially, Rwanda) or the results ignored (Namibia, Zambia).
- The costs of this failure are beginning to be experienced. Plans are emerging as unworkable or too cost (Uganda), or simply not accepted, forcing their return to the drawing board (Eritrea, Zambia, Namibia, Uganda). Slowly, the mode of reform is having to change as the demand for more popular input and more locally workable reform, increases.

- **One impact is upon law-making itself. So far this has been expressed less upon the way a law is made than in the way it is presented and made accessible. New laws are beginning to be made more widely available to the public in simplified form and sometimes in translation (Uganda, Tanzania, South Africa). Within the law itself, conventional boundaries among different bodies of law show signs of being breached with matters of public law and administration and family law beginning to appear in land laws. The style of law is changing too: with more attention to procedural detail, in order to be user-friendlier and to heighten administrative transparency.**
- **Land law reform is becoming an objective in its own right, with a common drive towards formulation of not only a single basic land act but one which is genuinely national in its character, independent of colonial-derived and associated current metropolitan laws. Both objectives are proving difficult to achieve, with the new land laws of Tanzania so far coming closest to achieving this.**
- **If, as noted earlier, land reform arises out of wider social reform, so too is it reinforcing those changes and prompting change in other sectors, and in ways which gather pace over time. This is evident in new attention being paid to local government reform, and reform in a host of natural resource sectors, each of which gains from the demands of changing land relations placed upon them. The wave of forest reform described later is a case in point.**

CENTRAL CONCERNS

Issues which all states are having to deal with centre upon first, the question as to what constitutes a right to land in the first place, and second, what should be the relation of state and people in matters of land holding. Whilst this fundamentally concerns the strategic implementation question as to how far the state should pay for redistribution and other aspects of land reform or leave this to the land market, the common *tenure* issues arising include:

- **How far should land itself, and powers over land, be vested in the state?**
- **At what level of society and with what degree of autonomy from the executive should property relations be regulated and administered and with what extent of popular participation?**
- **How should the rights of women in land be handled, a sector of society ill-served by both customary and European tenure law but now definitively the most important productive force in agriculture in most states?**
- **How far should the rights of long-term residential farm-workers be realised as ownership?**
- **On what conditions should rural tenancy be tolerated and security supported?**
- **How should the informal occupancy of the still-growing millions of urban poor be dealt with?**
- **How critical is recordation of rights to security and how may a simple, effective, sustainable and accountable system be established?**

- How should unregistered, customary landholding be dealt with in the law? and -
- How should commonage and common rights in land be regarded in the law?

CHANGES IN THE RIGHT TO LAND

There is common direction in resolution of these questions. Broad trends are outlined below.

State-people land relations

There is uneven development in respect of powers of state over land. Most countries are embedding rather than releasing their ultimate powers over property (Tanzania, Eritrea, Ethiopia, Mozambique, Zambia). However, there is widespread reframe of this ultimate tenure as trusteeship. This is also being seen in West Africa in the deepening concept of a common heritage in land.

There is minor diminishment of power of states to appropriate private property. Zimbabwe excepting, the main improvement is in the rates of compensation payable and in some countries, a marked improvement in the procedures through which land may be appropriated (South Africa, Uganda and Tanzania).

By far the greater restraint upon wilful appropriation derives indirectly, through the entry of customary estates into the realm of private property, due compensation if appropriated. At the same time, governments firmly retain the right to issue concessions and licences over most classes of land, which demonstrably undermine local tenure in especially woodland areas (Zimbabwe, Mozambique).

Devolved tenure administration

There is a strong move towards devolving the administration and regulation of tenure, both outside the executive and towards the grassroots. This is most pronounced in Uganda where District Land Boards and their supporting Parish Land Committees will operate in entirely autonomous ways from either central or local governments. Moreover, unlike the case in Botswana, they will act only as administrators, not as owners, increasing their accountability.

An equivalent if different democratisation of tenure administration will occur with the commencement of the 1999 land laws in Tanzania, at least in respect of rural lands, now classed as Village Lands. The elected government of each village (Village Council) will be designated Land Manager charged with carrying out adjudication, registration and entitlement of land within their respective village areas. Variations of this approach are under consideration in Malawi, Swaziland and Zimbabwe, at least in reference to communal lands. Taken as a whole, these developments bespeak marked increase in the participation of civil society in tenure decision-making, in accessibility to machinery and procedures, in accountability to clients, and therefore, it is hoped, transparency. Registration of rights in land should be speeded up.

Devolving land dispute resolution machinery

Similarly, more and more countries are removing land dispute machinery fully or partially from the judiciary into local civil tribunals. The objective is to speed up resolution, reduce enormous backlogs and improve accountability to disputants (Uganda, Tanzania). Mediation services to keep land cases out of the courts in the first place are also being put in place (South Africa).

A regulated market in land

There is ambivalence as to how far the market in land should be promoted and regulated. The output is an increase in the right to sell property in principle but often only the improvements to the land (Tanzania, Ethiopia, Eritrea, Mozambique, Zambia, Zimbabwe, Rwanda, Namibia). Sales will be commonly subject to permission of the land administration authority, whose power to impose conditions are widely heightened. There is as widespread limitations as to whom certain classes of land may be sold, generally geared towards the protection of peasant landholding.

Excepting South Africa, foreign access to land is being limited, non-citizens being permitted to own land only through national level approval procedures and for proven productive investment purposes. In almost as many countries, new law permits non-citizens to lease land only from the state, to exclude them from accessing customarily held lands.

Strengthened use-centred conditionality

Despite little evidence that conditions have been adhered to in the past, many new laws are entrenching requirements for occupancy and use of lands as a means to inhibit land hoarding, speculation and absentee landlordism (Tanzania, Mozambique, Botswana, Eritrea, Ethiopia, Namibia). Proposed land policy in Zimbabwe and Malawi are emphatic that both customary and freehold rights should depend not upon title, but upon actual use.

As is the case in West Africa, conflict is arising as to how far non-agricultural use is accounted for in these regulations. Hunting and gathering in particular remains outside this domain. Pastoral rights are more widely affected but also sometimes being accorded new protection (Tanzania).

Ceilings on the size of holdings are being imposed in the laws of Tanzania, Eritrea, Ethiopia, Zambia, Botswana and existing in Lesotho. Even Kenya, famous for the unbridled rights of private property has announced that a tax on vacant or under-utilised lands will be one of the first tenure reforms to be introduced. Imposition of taxes and stringent planning regulations affect freeholders in South Africa, Zimbabwe, Namibia and Swaziland in increasing, rather than decreasing, degree.

New recognition of the rights of weakly-tenured sectors

Dramatic new attention is being given to the landholding of previously weakly tenured- sectors. This prominently includes legal provision to regularise and register the occupancy rights of farm workers who have been paid with land use rights (South Africa) and virtual emancipation for certain types of tenants (*mailo* in Uganda).

More widely, schemes of regularisation are being legislated for to enable the urban poor to secure their squatter occupancy as ownership.

Women are also gaining land rights in the reform movement. In several countries wives are given clear opportunities to secure independent or co-ownership rights to family property (Eritrea, Ethiopia, Tanzania, Mozambique). Irrebuttable spousal co-ownership of primary household land is a more exact and controversial plan in Uganda. Malawi, Zimbabwe and Swaziland are also considering measures to enhance women's right in more than declaratory ways.

Should these proposals eventuate as law (still much in doubt), then gender-related land reform may well represent the most dramatic positive alteration in domestic land relations for a century, and one which could impact directly upon the future of agriculture: as co-owners rather than the primary labour force on the farms of their husbands, a major impediment to the modernisation of smallholder agriculture could be removed.

NEW RECOGNITION FOR CUSTOMARY RIGHTS

Driving many of the above changes is the more fundamental alteration in the status of customary rights. With exceptions (Botswana), customary tenure has been only permissively recognised in state laws, and not provided statutory machinery to operate. The assumption has been that it would disappear on its own through commoditisation, through forcible conversionary processes, or did not amount to ownership in the first place and need not be secured.

In 2000, the persistence of customary rights in land and the regimes that uphold them (customary tenure) is having to be recognised by policy makers. Decision has to be made whether to maintain the status quo, to accelerate conversion into European-derived forms, or to finally recognise customary tenure regimes as legal tender and to provide properly for their exercise.

For the majority of citizens in the region, the fate of customary land tenure is the issue of land reform that most directly affects them. It is also the central concern to the tenurial future of the community – forest relationship.

Its resolution is also proving the most influential upon decisions in other spheres. Indeed, if there were a single point of radicalism in tenure reform occurring in Sub-Saharan Africa today, it is this; that for the first time in one hundred years, states are being forced to recognise the customary land right as not only legitimate, but equivalent in the eyes of the law to those which may derive from more formal and statutorily-defined regimes.

Leading the way

So far in the region, the source of new legal recognition for customary land rights is in the new land laws of Uganda, Tanzania and Mozambique. These recognise customary land rights as lawful landholding, to be upheld by courts, and equivalent in security to other regimes.

In addition these laws provide for their use through what are inevitably customary or locally driven regimes. In Mozambique, the machinery for this is weak and procedures still being developed through Regulations under the law (1998, 1999). In Tanzania and Uganda, the machinery has been encompassed in community-based regimes in respectively the village land management regime and parish land committee regime outlined earlier.

Further, these countries have come to the conclusion and put into law, that such property rights should be able to be certified by documentation – in short, titled. And all this, without the conventional conversion to freehold or leasehold forms, and without loss of *community reference* to provide the evidence and legitimacy of these rights. In addition, none of these states has determined to codify customary tenure, an intention proving problematic in some West African states. Instead, within certain bounds, it is left up to the community to determine the incidents of what is customary. Differences by community and just as important, differences over time may occur.

A still fragile development

It would be incorrect to suggest this development as yet widespread. Indeed, when given the opportunity to adopt this strategy Zambia (1995) chose to assure customary landholders security only through converting their rights to leasehold, currently the case in Kenya and Malawi. Nor did Namibia's Communal Land Reform Bill 2000 provide fully for customary tenure, by neglecting to make common property registrable, a bill now under redraft.

In Eritrea and Ethiopia, customary rights have been abolished altogether in favour of the state's version of what majority landholding should constitute (Limited Lifetime Usufructs).

Whilst policy proposals in Zimbabwe (1998-1999) looked set to provide for customary tenure in ways similar to Tanzania, action has halted with the preoccupation upon white settler tenure issues. The bold intentions of a drafted Land Rights Bill (1999) in South Africa towards recognition of local tenure regimes have been suspended. The indications are that primary title over ex-homelands may be vested in Tribal Authorities, a development which may do little more for occupants than change the identity of their landlords.

Important policy proposals for customary tenure by the Malawi Land Commission, 1999 now put into draft Policy (2000) remain undecided, as do those of Swaziland (1999). Both do however seriously contemplate giving customary rights the full weight of law as registrable entitlements and providing for their devolved administration to the community level.

GIVING LEGAL FORM TO COMMON PROPERTY RIGHTS

Common properties like forests are deeply affected by these changes. For by recognising customary tenure, the customary capacity to hold land in common is also legalised and made justiciable.

Accordingly, the land laws of Mozambique, Tanzania and Uganda make it explicit that not only one person or even two, but any group of persons (family, clan, community, village, tribe) may be recognised as owning land, and able to register this fact and receive a title deed expressing it.

This will have immense impact upon the status of common properties. In fact, the construct is seen as of such utility that the Uganda and Tanzanian laws make it possible for even persons who do not hold property customarily in this way, to secure such group entitlement through their own regimes (freehold, granted rights, etc.). South Africa had provided (a more complicated) opportunity for this in its Communal Property Association Act 1996.

Recognising layers of rights in land

An additional helpful provision is the idea that different persons may own different rights in the same land, another aspect of customary landholding not adopted in state law over the last century. Therefore, new land law in Tanzania, for example, sets out how agriculturalists and pastoralists may own rights in the same land for different purposes.

CHANGING NOTIONS OF TENURE

Through the above, notions of tenure underpinning land relations are seeing alteration, and most illustrate the manner of reform that is actually, if uncertainly, underway.

Redefining the place of individual ownership

First, the very conventions of titling which underpin the history of modern African tenure are being re-made. Previously recordation, registration, and the issue of evidential documentation (titles) were inseparable from the individualisation of the ownership of that property/rights in it. At its most simple, only one name could appear on the title deed. The damage this has done to domestic property relations on the continent has been immense, quite aside from the constraint this has placed upon group and community tenure.

Now, the link has been broken. Whilst certification remains an impregnable strategy towards land security throughout the region, it is no longer necessarily for the purpose of *individualisation*. The need for documentation, to record and certify rights in land of whatever origin and ilk, emerges as a singular strategy on its own. Step by step, this need is being disassociated from necessarily European forms of landholding.

Widening the meaning of private property

Related, the idea of what constitutes private property has begun to expand its conventional boundaries to embrace a simple – and traditional – idea that, as above, spouses, families, clans, groups and communities may also own private property, as private, legal persons in the eyes of the law. This has been a facility provided previously only in the form of trusts, companies, and other associations, more suited to corporate property, and invariably linked to freehold or leasehold entitlement.

Providing for local level reference systems

Recognition of customary tenure changes procedures. Certification may be verbal and verbally endorsed (Mozambique). The community itself may conduct the adjudication, recordation and entitlement process (Tanzania). The incidents of the title may be in accordance with their local preference (Uganda).

Entering new incidents into state tenure law

The manner of incidents of land rights has also widened to encompass those of customary relevance. In some cases these may exceed the provisions of rights provided under existing statutory systems. In Tanzania for example, where customary rights may be held in perpetuity, this exceeds that provided for statutory rights so far issued by the state, which have limited term.

Modernising communal tenure

The meaning of communal tenure has also seen change. Communal tenure is now seen in two distinct ways. *Communal tenure* becomes the communal reference system through which customary rights are allocated and administered. These regimes usually include provision for individual, family and group rights. *Communal land* becomes a tangible estate in land, held by a definable group of people. After years of obfuscation, this arrives as a rather surprisingly delivered rescue, of what now must seem to many a modern law-maker, an obvious construct, and one which should have entered state law many a decade ago.

However, in the process, a certain amount of reconstruction of traditional notions has been effected, rendering this important development as much *modernisation* of customary tenure as its recognition.

Reconstructing customary tenure as community-based tenure

This relates to a subtle alteration in meaning as to what is customary. For in particularly Tanzania and Mozambique, what is really being brought into state law is less customary tenure than tenure arising from local regimes, and which may or may not have a clear foundation in custom or its rules and laws.

This constructively acknowledges social change at the local level. In Mozambique, for example, years of civil war led to such massive population dislocation that any one community may comprise several layers of occupants, each with its own version of what is traditional in tenure matters. By relocated rights as *community-based* rather than necessarily customarily-based, this side-steps likely conflicts, and roots decisions not in what traditional leaders say, but in what the community membership of today agrees.

Particularly where allegiance to traditional authority is in demise or conflict, this may represent a helpful liberation from an emerging area of frustration and conflict. Where it is not, landholders may simply embed the notions of tenure they traditionally follow and the allocatory and supervision systems that support them, in their decisions.

Tanzania represents a perhaps clearer example of how customary tenure is in reality being reconstructed as community-based tenure. There, the village-making strategies of the 1970s served to relocate traditional patterns of settlement and with this, traditional tenure regulation, into a new village-based framework. Many customary rights were lost, whilst others were by default or design sustained. Whilst in practice the regimes adopted by most village governments have been largely founded upon traditional norms and practices, strictly speaking, what exists today is not customary tenure or customary rights at all, but *village tenure* and *village land rights*. Nonetheless, following a long legal tradition in that country, these are named customary in new law (1999) and registrable as Customary Rights. Village Land Managers themselves are bound to “attend to local customary rules and norms”.

Modernising the ethics of customary tenure

How far they may do so is also seeing important reconstruction. For practice may not transgress parameters which derive directly from constitutional law. New constitutional law throughout the region is notable for its increase in bills of rights, establishing rights which sometimes depart substantially from customary norms; this notably improves the land rights of children, the disabled and most especially, women.

Of such developments legal marriages are being made, not only of customary and statutory law, but also of traditional and modern community-based tenure regimes. The vigour that is being given is not ultimately to custom, but to the operation of localised and devolved land rights systems, a trend that is surprisingly democratic.

III THE IMPACT OF LAND RELATIONS ON FOREST RIGHTS

There may be no doubt that land rights directly influence and indeed control the extent to which local communities have been able to own forest lands in the past and the extent to which they may be able to do so in the future.

Over most of the last century, the tenurial relationship of forests and communities has been stressed to say the least. Recognition that they may even possess tenurial interest in forest land has been slight, and effected only in default of more powerful interests acting to secure the forest for themselves.

The most powerful of these forces has been the state itself, in its steady appropriation of local forest lands as reserves in service of national concerns. In this process, local tenurial interests in forests are extinguished, reduced at most to access rights, which are themselves only permissively applied.

The dominance of tenure regimes which have the full backing of state law, have in addition encroached upon community forest tenure, leading to recurrent linked processes of individual appropriation and conversion to agriculture, settlement and commerce.

Now however, the new century opens with an increase in opportunities for forests to be secured intact by local people, through recognition of local and particularly communal rights in land as legitimate and to be upheld in the event of dispute.

How far, we must now ask, is this changing situation, still limited though it is, reflected in the strategies of the forestry sector, the sector which broadly controls the status and management of forests throughout the region? The question gains special pertinence given that thinking as to how forests should be secured and managed in the future, is itself now widely under review in the region and beyond.

**BOX TWO
FOREST REFORM IN EAST AND SOUTHERN AFRICA 2000**

New National Forest Policies

Zanzibar, 1995
Malawi, 1996
South Africa, 1996
Mozambique, 1997
Lesotho, 1997
Zambia, 1998
Tanzania, 1998
Kenya, 1999
Namibia

New National Forest Policies in Draft

Ethiopia, 2000
Swaziland, 2000
Uganda, 2000
Zimbabwe

New National Forest Laws

Ethiopia, 1994
Zanzibar, 1996
Malawi, 1998
South Africa, 1998
Lesotho, 1999
Mozambique, 1999
Zambia, 1999

New National Forest Laws in Draft

Tanzania, 2000
Kenya, 2000
Namibia, 2000
Uganda, 2000

FOREST REFORM

Again, in examining this matter, we are confronted with a wave of reform at the turn of the century and one which is also most tangibly delivered in new forest legislation (BOX TWO).

Emerging devolution

The main thrust of this development has been institutional. The trend is (unevenly) towards lessening the concentration of authority over forests and decision-making at the centre and in the hands of central government. This is being removed often into the hands of semi-autonomous bodies (South Africa, Zambia, Uganda, Tanzania, Kenya) or through the establishment of new advisory bodies with representation from civil society (most fully the case in South Africa). There has been concomitant rise in opportunities for the private sector, non-government agencies and forest-local communities to participate in forest management.

Without exception, the last group of citizens is identified as a key player, most clearly articulated in those states that make devolution a main objective (Tanzania, Lesotho).

THE CHANGING TEMPLATE OF 'RESERVATION'

Legal notions as to who owns forests and who *may* own forests, who manages forests, and who *may* manage forests, is seeing change. These find immediate expression in the process of forest reservation, conventionally one of the main tasks of forest enactments.

Reservation, or the act of dedicating a surveyed area of land to forestry, has been the common and core construct of forest management strategies this last century. The output has been Forest Reserves, Forest Parks or Demarcated Forests, of which there are over one thousand in the region today. The mechanism for creating these reserves, has been appropriation, the withdrawal of what was as often as not informal local common property, into the intended protective custody of the state.

Now, whilst the strategy of setting aside forest for its protection remains uniformly the centre-piece of forest management, important shifts are occurring in its meaning and implementation. These include disjunction of legal or popular assumptions that a reserve is synonymous with state ownership. Thus in Tanzania, for example, the Land Act 1999 establishes reserved land as a land *management*, not land tenure category, a class which says nothing about who owns or may own the reserve. The same disassociation is being implied in other laws, mainly through recognition of the possibility that communities may create their own forest reserves.

GIVING COMMUNITIES THE OPPORTUNITY TO CREATE THEIR OWN RESERVES

This is the single most important new provision in the wave of forest law occurring. Only Kenya's proposed new law makes virtually no provision in this sphere. Provision is most developed in the case of Tanzania, through provision of two constructs: Village Land Forest Reserves and Community Reserves (distinct only by virtue of whether or not the whole village or a sub-group of the village owns the forest reserve). Lesotho's new land law also provides for Community Forests and Co-operatives Forests. The draft forest law of Namibia provides for Community Forests as is expected in the upcoming Uganda Forest Bill.

Drawing on a long tradition of Village Forests, the new forest law of Malawi provides for a reconstructed form of Village Forest Areas, but this time to be owned by the communities, not District Councils. Mozambique provides for a more limited category, confining declaration to community forests to areas of socio-ritual importance.

The main spheres where such new reserves will be created are in the currently unreserved woodlands of the region. These amount to more than one hundred million hectares and in many countries represent the greater proportion of the nation's total forest estate. This is because reservation has been more concerned until relatively recently to secure moist and montane and closed canopy forests, most of which are now indeed held as government forest reserves.

AN OPPORTUNITY TO RETRIEVE FORESTS

Several new forest laws make it possible for forest-local communities to re-secure ownership of such forests lost to them. In South Africa this arises out of the constitutional commitment to land restitution, which directly affects many State Forests, a fact recognised in the National Forests Act 1998. The new Forestry Act of Lesotho (1999) makes the divestment of Government Reserves a prime objective and sets out the procedures. The Tanzania draft Forest Bill 2000 provides for the Minister to alter the status of a National or Local Authority Forest Reserve to become a Village or Community Reserve. Following the Land Act 1998, which provides for local people to seek the review of the status of Reserves, new forest law in Uganda, still under early draft, will almost certainly provide the same kind of opportunity.

In all cases, the mechanisms for devolution are to be implemented on a case by case basis and implicitly conditional upon the retention of the estate as intact forest.

REINING IN THE POWERS OF STATE OWNERSHIP

There is a corollary shift occurring in the terms upon which governments will themselves retain and manage their own forest reserves. Through land reform, Government Land in general is being more definitively shaped towards public use and relocated more firmly as property *held in trust*, not to be perceived as the private estates of government.

Government Lands of most obvious interest to the national community such as reserved are the main target of consequent constraint. Thus the Land Act 1998 warns the Uganda Government that it may not sell or lease reserved properties. Policy proposals in Malawi and Zimbabwe seek constitutional amendment to put the same principle into effect. The Forest Bill of Kenya proposes to vest ownership of State Forests in the planned new Forest Service to remove the current legal capacity of the Commissioner of Lands to dispose of these properties virtually at will, a capacity which has resulted in the loss of nearly half a million hectares of forest to often private at will; a capacity, resulting in the loss thousands of hectares of reserved forest developments.

LIMITING APPROPRIATION OF LOCAL FORESTS

Similarly, it is through land reforms that limitations upon the power of state to appropriate yet further property into its own sphere is seeing limitation in new forest legislation. This is mainly the result of the new recognition being given to unregistered customary land rights in rural areas. As now private rights, communal rights to woodlands will require full compensation – a sure disincentive to their appropriation.

More cautious procedures for new reserve making embody these changes. This is most developed in the Forest Bills of Tanzania and Namibia which require justification as to why the forest could not be better sustained and managed as a community forest reserve. Both countries have demonstrated their commitment to this principle by halting gazettement processes designed originally to create new government-owned forest reserves.

THE FUTURE PATTERN OF RESERVES

These provisions are not casually provided for. Instead, they build in most cases upon emerging pilot experience. In Tanzania for example, commencement of the new forest law will see some 500 declared Village Forest Reserves formally recognised. In order to facilitate the creation of many more, the process of formalization is decentralised to the district level.

Looking ahead, it is likely that by far the greater proportion of new forest reserve owners in the region will be local communities. This is because new reserves will be created out of currently unreserved and usually customarily held lands, and held not by individuals but by groups of persons such as village communities. The main distinction among reserved forests will be between those held by the state and those held by the people. A classification of government and non-government forests may arise. The latter will include not only community forests but those owned or held under long lease by the private sector. This is a development strongly encouraged in many new/proposed forest laws (South Africa, Tanzania, Zambia, Uganda).

COMMUNITIES AS FOREST MANAGERS

Even greater alteration in the state-people forest relationship is being seen in respect of how forests are to be *managed*.

Again, unreserved resources are the main focus for local participation. When it comes to forests important enough to have been already designated as Government Forest Reserves, community participation is more erratically posed. In general, Tanzania is positioned at one extreme in this respect, and Zambia at the other. A clear opportunity to *autonomously* manage a Government Forest is provided in the former, through the declaration of Village Forest Management Areas embracing all or part of a Government Reserve. Some nine National Forests have already seen development in this. South Africa's new law encourages communities to apply to manage a State Forest, autonomously or in partnership. The same potential exists in the forest laws of Zanzibar, Lesotho and in a less developed way in Mozambique, and in the Forest Bill of Kenya. In contrast no provision is made for communities to be party to the management of State Forests in Zambia.

In general partnership management is preferred, and most community involvement will be subject to joint management agreements, which will share rights, roles and responsibilities among state and community (or NGO), and probably very unevenly. In a few states, local involvement is so strongly encouraged as to be obligatory (Tanzania). Local roles as managers may be limited in reality, if current pilot paradigms are illustrative (Zimbabwe, Mozambique, Botswana, Malawi, Zambia). In Zambia, participation in Local Forest management may only occur through Joint Forest Management Committees that are more notable for the dominance of government representation than for the token community representation.

Nor may autonomy in management of even locally owned forests be assumed. In some cases, local management of Community Forests is dependent upon the formal support of Forestry Administrations in ways that restrict real authority very significantly (Malawi, Namibia).

THE POWER TO MANAGE

Differences in legal provision for empowering local communities as forest managers reflect operating paradigms and conceptions of community interests. Where benefit sharing has been dominant, the institutional basis for community involvement being provided in the law tends to be shaped around this objective.

Thus, proposed Joint Management Committees in Zambia, Local Resource Management Councils in Mozambique, Management Authorities in Namibia and Forest Associations in Kenya, are fashioned largely around the task of allocating access rights and/or distributing benefits among the local population. This is also the case in respect of Zimbabwe's Village Committees in its few pilot schemes of co-management, and less pronouncedly the case in respect of Malawi's Natural Resource Management Committees. The extent to which these bodies may gain real powers beyond this role is often unstated or vague. Sometimes these may only accrue through the designation of a local person as an Honorary Forester.

This tasking could not contrast more strongly with the way in which the Tanzania Forest Bill lays out the roles and responsibilities of Village Forest Management Committees. These are to arise through community-based election and be accountable to the electorate but lodged as sub-committees of Village Councils, thereby securing a share of powers these Governments hold to act and enforce Village By-Laws. Committees are to plan and execute management in all its parts, from protection to the regulation of access and the handling of offenders. They may determine what parts of the forest are to be used and not used and for what purposes, the level of products which may be extracted and by whom. Fees may be set and collected, permits issued, and fines levied. Those breaking the rules, whether members of the community or not, may be apprehended. Should they fail to pay the set fine, they may be taken to court, where the magistrate is bound to rule by the terms of the Village Forest Management By-Law, enacted by the Village Council/community.

The Village Council itself may be sued should it fail to manage the forest in the manner which it, the Committee and community, have set out in the By-Law. Not surprisingly, thus far community-based forest management in Tanzania tends to be conservative, closing degraded areas to use, and limiting access to the remainder to manageable levels.

COMMUNITY FORMATION AND POWERS

The above points to the fundamental role of community formation in defining its role in forest management in new forest act. Points of reference relate to whether or not local community has defined social boundaries, acknowledged discrete institutional form, and accessible powers of regulation at its disposal which may be successfully applied beyond its own membership.

For if there is one essential to working community-based forest management, it is the need for communities to be able to determine who may access the forest and to be able to effectively exclude those whom it determines should not have access, or at least not free and unregulated access. For this to be workable, the rules must have weight beyond those which customarily, or for modern social reasons, members of the community feel obligated to adhere, and in ways which are justiciable in the courts. These are automatically assumed powers of government forest managers, and for communities to operate successfully as forest managers, they too need these powers.

The findings of the study suggest that the measure of these attributes as already existing in the construction of community determine the manner in which communities are being posed as *actors in management* in the first place - in the field, and in new forest policies and laws. The more strongly community is socio-legally defined, the more strongly it is being identified and supported in new forest law as a forest manager. The weaker the institutional identity of community, the more likely it will be involved as beneficiary and forest user. The same effect has been seen in the extent to which local people will be involved in the administration of land relations.

DEVOLVED GOVERNANCE AS A PLATFORM

There may be little doubt that the extent to which decentralised government has been put in place in a country, acts as a catalyst to the formation of community identity and over time, its empowerment as both authority and land owner.

In some states, almost no devolved governance machinery exists at all (Mozambique, and to a lesser extent, South Africa). In others, there has been minimal development below the conventional district level (Zimbabwe, Zambia, Malawi, Kenya, Botswana). Often the real powers of even these authorities are limited. Some councils serve as as much agencies of central government as autonomous entities. Only in a few states has local government been extended to the grassroots and given socio-legal form (Tanzania, Uganda).

Elsewhere, organization and empowerment at the community level tends to be left to traditional and informal authorities, or sub-sector organization (women's groups, burial societies, youth groups, etc.). These do not however possess the regulatory powers needed to bind non-members of the group, or even the members themselves, in legally enforceable ways.

It is no surprise therefore that most new forest laws are having to identify entirely new constructs through which community involvement may be expressed, as named above. Whilst far from satisfactory in most cases, such constructions do open avenues for local participation in forest management. Through their use they may enhance community identity and socio-institutional formation. Over time, such agencies may demand and secure greater powers. They are also likely to look to tenure security to underwrite their authority. This will add force to the emerging new concern to recognise existing rights in rural land.

IV CONCLUSION

In conclusion, there may be no doubt that there is a revolution of sorts underway in the region in the role ordinary citizens may play in forest future. This may be illustrated by the fact that a mere ten years past, a study such as this would have examined forest policies and forest laws, for the extent of access they granted local people. The state's generosity could have been safely measured in the comparative number of bundles or fuelwood headloads permitted. In 2000, these documents and changing practice have been examined for the extent to which they grant these same local people the opportunity to own or control the forests themselves and to regulate their access.

Of such changes, state-people relations are undergoing sharp change and steps towards democratisation being realised in the most practical of ways. Over time a social transformation of sorts may accumulate in which local communities play increasingly important roles. With hindsight it may be remarked, that turn-of-the-century efforts to more seriously involve communities in forest future, were in a small way, catalytic.

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Matters of tenure, and of law, are complex. More importantly they are under considerable change at this time. Certainly some information provided here will be out of date by the time of publication. The study represents the situation as existing in mid 2000. In other cases we may have misinterpreted the intent of the law. Presentation of facts, opinions and analysis, are our own, and should there be misrepresentation, we bear sole responsibility for this.

INTRODUCTION

This paper represents one of four theme reviews commissioned by IUCN towards building a comprehensive profile on the subject of community involvement in forest management in eastern and southern Africa.

It addresses the function of property relations in community involvement in forest management. It has been written by Liz Alden Wily, a land tenure and community forest management specialist based in Nairobi, assisted by Sue Mbaya, an environmental scientist, in Harare.

THE APPROACH

In mid-1999, a list was prepared of thirty or so aspects of tenure that needed investigation in order to gain an accurate picture as to how rights in land support or constrain community involvement in forest management. Contact was made with more than thirty persons from Djibouti to Madagascar, inviting them to contribute attributed responses or papers. With a couple of exceptions, this approach met with little success. From what was intended as a speedy review, building upon the knowledge of others, became of necessity a study of primary sources – the laws, policies and related documents en-framing land and related forest rights throughout the region.

Ultimately this served our purpose well. The law most precisely reflects property relations and State-people relations in matters of governance and management. Widespread changes in constitutional, land, forest and administrative law at this time reflect and embody the direction of changes occurring at the turn of century.

The mode of this study is comparative, with continuing examination of commonality and difference in the handling of property rights in respect of rural community. To facilitate reference, main facts are periodically presented in table form. ANNEXES provide more detail and examples.

THE STUDY AREA

It is regrettable that the countries of eastern and southern Africa are unevenly covered, depending upon information available. Burundi, Angola and the Democratic Republic of Congo are not covered. Occasional reference is made to Rwanda, and Ethiopia and Eritrea although they are not strictly speaking in the region. These twelve countries provide the core of the study: **Tanzania, Uganda, Kenya, Mozambique, Namibia, Zimbabwe, Zambia, Malawi, Botswana, Swaziland, Lesotho and South Africa.**

THE SUBJECT

World-wide, the subject of this IUCN review series is community involvement in forest management, hereafter CIFM.

Community, forest, and management may be diversely meant and understood and the meaning of *involvement* even more so. *Land tenure* is a complex subject.

Accordingly this paper provides a rather more lengthy setting than might otherwise have been the case.

Briefly, *forest* (the most easily described) is used throughout as embracing all forms of woody biomass, save that growing on farms. This means that it includes forest types from moist montane to dry, open woodlands and coastal mangroves. Although most forests in the region are woodlands the generic term forest is used. Forest, rather than trees, and forest tenure, rather than individual tree tenure, is the focus.

Reference to *community* is obversely implied, here narrowed to mean only those people who *live in* or *near forests*. Forest adjacency has come to form an important construct in considerations as to the level of tenurial interest and forest product dependency. Proximity is alone an obvious determinant as to who may be most effective in forest management and on a sustained basis.

The meaning of land and its possession, or *tenure* may be as cursorily defined here, for this is elaborated throughout the paper. Land obviously provides a home place and the primary means of production in predominantly agrarian sub-Saharan Africa. Often it represents the only capital wealth of the household, is the sphere into which most labour is invested, and new wealth, such as it is, accumulated and transferred to the next generation.

Forest land is frequently within the socio-spatial and tenurial sphere of the household and especially, the community. The manner in which this land is secured by households or community, and the way in which the state recognises and protects this right, is of fundamental concern to forest-local communities. The source from which the state operates its policies and practice as to land including forest land - even that held in customary ways - is *state law*, and state *land* law in particular.

The question which this study seeks to answer is this:

how far may forest-local people in the region secure rights of access, rights of management, rights of jurisdiction and rights of ownership over forests in their locality?

These are topical concerns of modern forest management. At the beginning of the new millennium, Governments throughout the world acknowledge forest-local community as an important factor in forest security and in some states, as the central factor. Broadly, their participation is now sought. This marks a change from the dominant position of the last century in which local people were posed as an enemy of conservation, and strategies centred upon constraining their access or control. As will be shown in this study, the withdrawal of prime forest estate from local jurisdiction represented the centre-piece of colonial and post-Independence forest strategies. Much of the recent reconsideration of the role of local people in forest management has its origins in recognition of this strategic failure.

In the last decades of the century, inadequate manpower and finance in the face of growing populations and pressure upon resources was routinely identified as the cause of the failure of forestry departments to halt the dramatic loss of forests, and more money and manpower were advocated as the solution. In time it became clear that the structural regime within which forest protection and development is posed was fundamentally flawed and needed reform.

Without exception, the relationship of state and people in respect of forests is slowly becoming the centre-ground of change. Social or *community forestry* names the change. To varying degrees it reflects wider and more democratic change in the way in which citizens participate in development and governance. Changing property relations hold a pivotal place in this slowly accruing social transformation.

THE HYPOTHESIS

At the beginning of the 21st century it is hardly necessary to posit that CIFM is positive, useful or necessary. Practical involvement is widely underway.

The *manner* in which CIFM is pursued is more various, and hypothesis more usefully posed. The parameters within which different approaches operate range from experiences where CIFM is but consultative to cases where involvement in forest management is community-based and directed. In the former range of developments, communities are tending to play passive roles in management and their involvement is being sought less to alter the regime than to secure local co-operation to it.

This review is primarily concerned with developments in the latter, more ambitious range, and especially where controlling authority and sometimes ownership of the forest, is directly vested in the community, as the foundation upon which forest security may be built.

The founding hypothesis of this study is integral to this, that the ownership of resources, and the ownership of rights in resources, rather than the right to access resources, is the realm in which community involvement will be most effective. It is also the realm in which the utility of community involvement will be most rigorously tested. It is our argument that community propriety over forest resources will of necessity come to form a more and more central foundation of 21st century natural resource management.

Our position is that forests not only are helped by, but *require* the vested interest of surrounding local communities if they are to survive, and that the most potent vested interest of all is to have acknowledged tenure over the forest. Only where this may not be achieved, will recognition of local guardianship (controlling management authority) have the same impact. Devolutionary strategies accordingly become a priority.

Where new thinking and practice will be most productively focused in the early decades of this century, is not if this should be so, but how best and safely to make it so.

THE STUDY

The study is presented in five chapters. Chapter One, *Forests & Communities*, provides background on the resource itself, overviews the direction in changing forestry laws and critiques current CIFM initiatives in the region.

Chapter Two, *The Tenure Environment*, explores the socio-legal conditions within which rural rights to land are lodged, and the sometimes dramatic changes which are today affecting these through constitutional and land reform.

Chapter Three, *Tenure Constraints & Opportunities*, identifies and examines the factors which most directly determine whether or not forest-local communities already do or do not, could or could not, become forest owners, or custodians.

Chapter Four, *Forest Constraints & Opportunities*, examines how far new forest policies and legislation provide a meaningful new foundation for CIFM.

Chapter Five brings together conclusions under the heading *Community – the Ultimate Issue*.

Finally, it is acknowledged that the study is not short and unlikely therefore to be widely read in full. Nonetheless, we have chosen to retain the detail here, in text, tables and annexes. Our reasoning is that this volume is a potential source book. We hope that readers will find themselves able to refer to it to concrete information.

More particularly, we hope that developments in this field will so rapidly proceed that this volume will serve as a benchmark against which progress towards a significantly community-based forest future may be positively measured in years to come.

A Guide to Basic Tenure Terms

Tenure	the holding of rights or interests in landed property
Ownership	the possession of those rights or possession of the land itself
Landholding	used to cover both cases where the land itself is owned and cases where only rights or interests in the land are owned
Law	covers laws passed by national parliaments (statutory law, or state law) and law developed and followed through traditional means (customary law)
Statute, Act, Ordinance, Decree, Proclamation	types of laws passed by national law-making bodies (usually Parliaments or National Assemblies)
Bill	a draft law, before it is enacted by the legislature
Legal Notice, Regulations	subsidiary rules made under a law, usually by a Minister, given powers in the main Act to make such regulations and to issue these in a Legal Notice in the Government Gazette
Gazettement	the official announcement of a rule or law in the Government Gazette (the official information outlet for the government)
Freehold	an English form of landholding, which provides for a person/s to hold absolute rights or interests in the land (not necessarily the land itself)
Leasehold	another English form of landholding, more varied in the kind of rights it provides and generally for a limited term (number of years) and in which a landlord holds the ultimate rights in the land
Mailo	a form of landholding unique to Uganda involving a particular form of tenancy arising out of colonial law
Granted Right of Occupancy	a tenure form unique to Tanzania (but with origins in the colonial land law of Nigeria)
Radical title	an English law concept which expresses ownership of the land itself. Also known as primary or root title
Communal land	an area of land which is held either in common by a group of people, or land which has two or more levels of ownership, with one person having the right to allocate, and those allocated, having the right to occupy and use the land. Has been used (largely incorrectly) through much of 20 th century to imply <i>un-owned</i> land to which any person has access
Common property	an area of land owned jointly by members of a group or community through customary law
Communal Lands	geographically defined areas in Zimbabwe & Namibia where customary tenure legally operates but as subordinate to national land laws which may invalidate rights at any time. Radical title of these lands vested in the Zimbabwe President and the Namibian state
Trust Lands	as above, but in Kenya and where the land is vested in County Councils as trustees for the occupants although administered by the central state (Commissioner of Lands)
Customary Lands	as above, but in Malawi with the state as trustee

Tribal Lands	customary lands in Botswana but with title vested in autonomous District Tribal Land Boards, guided by state law as to how they allocate land
Deeds	paper documents recording mainly sales or other transfers of land
Titles	a paper certificate which records the owner of a particular piece of land and the kind of ownership of rights in that land
Registration	the process of formally recording rights in land
Register	the most authoritative evidence of who owns rights in which estate (i.e. more authoritative than a Title Deed), kept in a Land Registry
Alienation	the act of allocating land or rights in the land in perpetuity
Eminent domain	the right the state awards itself in order to be able to appropriate private property
Expropriation	the act of taking land legally but without giving compensation. Usually only applied during war or emergency
Compulsory acquisition	the more common act by the state of taking land, by paying for the value of the land, and/or the developments on the land, or by giving the owner alternative land
Chapter (Cap.)	chapter of the official body of national laws of that country usually dealing with a certain sector such as Land, Mining, Water
Section, Clause, Article	different terms used to denote a numbered part of the law.

PART 1: THE SETTING

This part comprises two chapters; *Chapter One, Forests & Communities* and *Chapter Two, The Tenure Environment*. The first establishes the resource setting and in particular the kind of developments already underway involving forest-local communities in the management of forests. Chapter Two examines the legal framework through which rights in land are recognised and exercised in the region. The main focus is upon current reform in these parameters.

Chapter One: FORESTS & COMMUNITIES

I THE RESOURCE AND ITS MANAGEMENT

1 FORESTS

Six points are made about the forest resource in Eastern and Southern Africa at the turn of the century. *First*, it is immense, embracing some 200-300 million hectares and accounting for upwards of a third of the total land area of a good number of countries. However as illustrated in TABLE 1.1, few states have reliable data and estimates may vary dramatically.

Second, forest broadly refers to (and is used here) to embrace the full range of woody biomass resources from moist montane forest to dry open canopy woodlands and coastal mangroves. It also includes exotic plantation estate, significant in several countries and relevant given that community involvement in forest management extends into the plantation sector in some cases (Tanzania, Uganda). On-farm woodlots are not included, although on-farm planting is beginning to add to the overall woody biomass of the region.¹

Third, by far the greater proportion of forest in the region is natural forest, mainly of the drier woodland category. Those of moist or montane character, which the term forest conventionally invokes, account for a mere three million hectares of the total resource, confined mainly to East African states.²

Fourth, woodland itself is of diverse types. The most significant is *miombo* amounting to more than two million square kilometres, extending from Tanzania³ and southern Zaire in the north, to Zimbabwe and Angola in the south and west.⁴ The dominant species are important timber providers, but *miombo* is just as famed for its multiple services, providing important spheres for grazing, wildlife (and therefore hunting) and medicinal plants. Where the landscape is hilly, *miombo* is central to water catchment for farmers and their farms.

1 Holmgren et al. 1994 found that on-farm planting in wetter areas of Kenya has resulted in the area being more forested today than at any time over the last hundred or so years, increasing woody biomass by an annual mean of 4.7 percent. Place et al. 1999 found a less marked phenomenon in respect of Uganda and no such effect in Malawi.

2 Six main vegetation zones are routinely identified for the region as a whole, ranging from the vast Zambezi phytochorion to the tiny Afromontane phytochorion in East Africa, most noted for its high level of floral endemism (FAO 1999).

3 A remnant island of miombo is found in the Kenyan coastal forest of Arabuko-Sokoke.

4 Refer Campbell (ed.) 1996 for full review of miombo woodlands.

Fifth, local determination as to what constitutes woodland varies. What are more strictly bushlands are sometimes described as woodlands. Thus, the forests of Somalia may embrace four or fifty percent of the total land area, depending upon the inclusion of acacia, shrub and bush.⁵ In Botswana, Kalahari bushlands are sometimes classed as forest and sometimes not, rendering forests either 21 percent or 46 percent of the total land area.

And *sixth*, and most important, the resource is disappearing. Few countries have accurate data on the rate of loss.⁶ Estimates vary from an annual loss of three million hectares for one country,⁷ to three million hectares for the sub-continent as a whole.⁸ As important is acknowledged loss of quality within the remaining estate itself, a decline routinely observed in most National Environmental Action Plans (NEAP) and Forest Policies. The loss of valuable flora and fauna species is also regularly observed.⁹

Forest loss proceeds from obvious immediate causes; uncontrolled clearing for settlement and farming to meet the needs of rapidly growing populations and the demand for tradable products, excessive timber extraction and increasingly, charcoal production. Not all loss is illegal or unregulated. Even demarcated forests (reserves) may be subject to revocation. The latter has been marked in Kenya where 400,000 ha of prime forest estate had been degazetted for often private farming and other interests.¹⁰ Later, institutional and legal factors supporting forest loss will be examined.

5 GTZ, undated, which records data varying from 9 to 26.3 million hectares of forest.

6 Malawi 'boasts' the highest rate of forest depletion in Southern Africa at a loss of two percent annually (Mauambeta, 2000) which the National Forestry Policy 1996, suggests may extend beyond 2.8 percent. GoM 2000 refers to a loss of 41% of forest cover since 1972. Tanzania estimates an annual loss of up to half a million hectares (National Forest Policy 1998). Much of the small forest area in Rwanda disappeared as a result of the civil war and post-war clearing of plantations for resettlement schemes (Blarel 1994, RISD 1999). Lukama, 2000 gives an annual rate of forest clearing in Zambia as 300,000 ha suggested as even higher in the 1998 National Forestry Policy. The annual rate of deforestation in Zimbabwe is estimated as 1.5 percent of the total woodland area (Nhira et al. 1998). Elsewhere the loss is below one percent; FAO, 1999 estimates annual forest cover losses as follows: Mozambique: 0.7%; Botswana, 0.5%; Namibia, 0.3% and South Africa, 0.2%.

7 Somalia, Roth, Unruh & Barrows 1994.

8 EAWLS 1999, citing FAO estimates.

9 In the case of Kenya for example, GoK 1994a recorded a loss of 48 percent of its wildlife habitat by 1986. Wass (ed.) 1995 cites research listing at least 150 tree species as 'threatened' and 160 forest bird species 'threatened and scarce'.

10 Wass (ed.) op cit., Matiru 2000.

TABLE 1.1: FOREST TYPES IN THE STUDY AREA

COUNTRY	FOREST TYPES	Estimated Hectares & Percent	Estimated Total 'Forest' Million Ha	Estimated Percent Total Land Area
UGANDA ¹¹	Tropical High Forest	925,000 18.7%	4.936	24.0
	Woodlands & bamboo	3,975,000 80.5%		
	Plantations	36,000 0.73%		
TANZANIA ¹²	Woodlands	32,299,000 96.3%	33.55	37.8
	Montane	1,061,000 3.2%		
	Coastal mangroves	115,000 0.3%		
	Plantations	80,000 0.2%		
KENYA	Montane	748,500 21.0%	1.5	2.6
	Dry forest/woodlands	211,000 64.0%		
	Coastal	82,500 2.3%		
	Coastal mangroves	64,000 1.8%		
	Western rain forest	229,000 6.4%		
RWANDA	Plantations	160,000 4.5%	0.96	
	Moist and montane	> 350,000 36.4%		
MALAWI ¹³	Plantations	> 612,000 63.6%	2.6	28
	Nat. Parks & Wildlife R. Forest Res. & Prot. Hills Woodland Customary State plantations	(11.6%) (10%) (17%) 2,600,000 ha		
ZAMBIA ¹⁴	State forests	6,270,000 16.6%	37.76	50.1
	Protected forests	410,000 1.1%		
	Unreserved forests	31,080,000 82.3%		
ZIMBABWE ¹⁵	Woodlands ¹⁶ communal	10,000,000 43.3%	23.1	59.4
	Woodlands on farms	7,000,000 30.3%		
	Protected woodlands	6,000,000 ¹⁷ 26.0%		
	Industrial forest Plantations	100,000 0.4%		
BOTSWANA ¹⁸	Woodlands	13,917,000 53.2%	24.5	46.1
	Bush lands	12,299,000 46.8%		
SOUTH AFRICA ¹⁹	Forest	327,600 1.1%	29.8 ²⁰	
	Woodland	28,000,000 93.8%		
	Plantation	1,450,000 4.9%		
	Community Forests	62,000 0.2%		
LESOTHO ²¹	Natural trees & shrub	34,685 13.6%	0.25	
	Mixed exotic/shrub	207,287 81.3%		
	Woodlots	12,996 5.1%		
SWAZILAND ²²	Montane/highland	11,000 0.7%	0.788	c.50
	Riparian	25,000 1.5%		
	Savannah/bushland	615,000 22.1%		
	Wattle	26,000 1.5%		
	Plantations	110,000 6.4%		

2 MANAGEMENT STRATEGY

Countries in the region pursue similar strategies for designating, protecting and managing forests. This is not surprising given a resource of mainly common

11 UGANDA: Uganda Forest Policy 2000.

12 TANZANIA: National Forestry Policy 1998.

13 MALAWI: Matowanyika and Marongwe 1998 after World Bank, 1997, cite total forest in 1991-93 as 3.7 million hectares.

14 ZAMBIA: Forest Policy 1998. FAO 1999 gives lower figures of 32 million hectares or 44 % of total land area.

15 ZIMBABWE: Bradley & McNamara (eds.) 1993. FAO 1999 gives much lower figures, of 9 million ha, 23% of total land area.

16 Predominantly miombo woodlands, but with teak woodlands in western Zimbabwe and Hwange National Park and mopane woodlands and acacia woodlands in lower, drier areas. In addition to woodlands, bush lands cover some four million hectares, or 12.7% of Zimbabwe's total land area (Marongwe 1999).

17 Includes woodlands managed by National Parks and Wildlife, 568,000ha and those managed by the Forestry Commission.

18 BOTSWANA: White 1998, but note FAO 1999 gives total forest as 14,262,000 ha, or 25% of total land area.

19 SOUTH AFRICA: Sustainable Forest Development in South Africa The Policy of the Government of National Unity White Paper, 1997.

20 FAO 1999 gives only 8 million ha, or 7% total land area; not clear which forests it is taking into account.

21 LESOTHO: Data variously designates forest as only including the woodlots (12,118 ha, or 0.4% of the total country area) or including also the open-canopy and low-lying shrub lands (207,287 ha) (Chakela 1999). FAO, 1999 gives total figure of only 7,000 ha forest or 0.2% total land area.

22 SWAZILAND: GoS 2000.

type and socio-economic function, and subject to common pressures and common loss. Of special relevance is the commonality of the institutional and mainly colonial heritage from which strategies towards forestry were born.

An immediate feature of policies is the core function given to the central state in determining the future of forests, with most countries having a well-established central government forestry department, dating back to the early years of colonial governance.

Shifts in strategy have of course occurred. To generalise, early policies were towards the earmarking of significant natural forest estates for clearance for valuable timber, and then their replanting with faster-growing exotics. By the 1930s, demarcation for protection of mainly montane forests for water catchment was also common, but with natural timber harvesting and exotic plantation development still very much in place. In most cases, it has only been in the last twenty years that natural forest conservation has become an objective in its own right. This has resulted in more cautious policies towards extraction of natural timber and a sharp increase in the number of species to be protected against harvesting – in law, if not always in practice.

Reservation as the central construct

In all countries, creation of Forest Reserves and Parks (or Demarcated Forests) and then prescription as to their access and use, has been the centre-piece of twentieth century forest strategy.

Nonetheless, as much if not more forest remains *unreserved*, outside Forest or Wildlife Reserves (TABLE 1.2). This largely includes drier woodland estates, perceived for most of the 20th century as less important than closed canopy forests. As drier forests also diminish, appreciation of their value has risen so that woodlands have become the main current target of reservation.

TABLE 1.2: RESERVED & UNRESERVED FORESTS (HA) IN FOREST POLICIES

COUNTRY	RESERVED FORESTS	Percent	UNRESERVED FORESTS	Percent
KENYA	1,694,000	47.5	1,874,000	52.5
TANZANIA	14,517,000	43.2	19,038,000	56.7
UGANDA	1,970,000	40.0	2,965,000	60.0
BOTSWANA	455,000	1.7	25,761,000	98.3
MALAWI	2,071,058	56	1,627,260	44
ZAMBIA	1,037,000	17.7	31,080,000	82.3
ZIMBABWE	928,066	3.7	24,830,634	96.3

3 INSTRUMENTS OF AUTHORITY

The basic instrument of state authority over forests is the forest law. Forest acts have existed as chapters in adopted European laws since the 1920s and sometimes before. Commonality then and now remains striking. Policy-makers have shared a vision of the purpose of legislation: mainly to provide for the declaration and revocation of reserves and to give a legal foundation to their control by the state. Common provisions include regulation of timber extraction, designation of protected species, the right to declare protection orders over private estates and to coerce local participation in fire-fighting.

Through all this the policing functions of forestry departments have been central, with much space devoted to the definition of un-permitted forest uses, the handling of offences and penalties therewith, and the functions and powers of forest officers.

Other legislation of influence

As with all sectors, forest acts do not alone regulate the existence and management of forests. Although Constitutions rarely address forests directly,²³ a perhaps surprising fact given the world-wide interest in environmental matters at this time. They do however lay the foundation for state jurisdiction and some declare forests the property of the state. Property law is fully central to the status and management of forests as explored throughout this paper. Water, agriculture, and land use laws play a role.

As usually declared national property, **minerals** and **wildlife**, and their laws, directly impinge upon the status of forests. Mining interests generally subsume forest interests,²⁴ a recurrent cause of the loss of forests in the region. The trend in newer legislation is towards more rigorous environmental assessment prior to allocation of mining rights, and provisions to limit damage mainly through requiring post-mining rehabilitation of the environment. Newer forest acts also attend to the issue.²⁵

Whilst protecting natural forests from demise, the dominance of wildlife conservation interests often generates conflict between wildlife and forest administrations, with a tendency for the former to co-opt forested habitats under their own aegis.²⁶ A significant portion of reserved forest does not actually fall under the jurisdiction of forestry administrations (Zimbabwe, Botswana, Uganda, Malawi, and Mozambique).

Matters of **environment** in general have a new, high profile at the opening of the 21st century, prompted by the international protocol culture of the 1990s, of

23 E.G. the Malawi Constitution only states that the State shall promote the protection of the environment through the enactment and implementation of appropriate policy (Article 12). This is similarly the case in Mozambique, Zimbabwe, Namibia and Zambia. The Interim Constitution of South Africa only stipulates that forestry is a national competence. (Article 245, 1995) Conversely, the Constitution of Tanzania makes environmental protection the responsibility of every citizen (Article 27). The Uganda Constitution, 1995, refers to forests in Articles 245 and gives local governments the function of 'forest and game policy' (Sixth Schedule under Article 189) adopted into new local government law (No. 1 of 1997) and proving a prime parameter for the terms of new forest law being drafted in 2000.

24 For example, as set out in the Mining Act of Kenya (Cap. 306), the Mining Act, No. 17 of 1979 (s.5) of Tanzania, the Mining Act (Cap 248) of Uganda and the 1996 revised Mines and Minerals Act of Zimbabwe. Although most new Forest Policies are silent on the subject that of Malawi (1996) does note the subservience of the Forest Act to laws governing land and mining.

25 For example, Kenya's Draft Forests Bill 2000, Tanzania's Draft Forest Bill 2000.

26 In Uganda, for example, the Forest Department has lost 454,000 ha of Forest Reserves to the Uganda Wildlife Authority since 1991 (Draft Forest Policy 2000).

which more than 20 directly or indirectly relate to forest resources (see later). A common output is a wave of environmental management laws, a main purpose of which is to create new agencies to co-ordinate interests across sectors.²⁷ Strategies are similar, borrowing heavily from donor agency models.²⁸ Their impact upon forest management so far has been negligible, and jurisdictional conflict between forestry departments and environmental boards is a common irritant.²⁹

The intention of these laws to involve local interests is weak. Where community concerns are indicated, these are tempered with prescription against human activity in forests.³⁰ Creation of local level forums are usually intended for advisory purposes only or to mobilise labour for environmental works.³¹

4 FOREST REFORM

Forest laws themselves are coming under revision. In most cases formulation of new *national forestry policy* has proceeded the redraft of forest law. By timing and by their nature as necessarily more precise as well as binding, new forest laws are the more accurate barometer of strategic changes.

TABLE 1.3 provides the facts of the extraordinary extent of forest law reform in the region. In summary, Kenya, Zanzibar, Tanzania, Uganda, Malawi, Zambia, Mozambique, South Africa, Namibia and Lesotho all have new forestry laws either enacted or drafted. Swaziland has a new policy in draft.

Again, there is resemblance among the concerns of the new laws. ANNEX A provides overviews of the content of four new enactments.

Institutional reform towards devolution

The main drivers towards forest law reform are not difficult to trace and have much in common with developments elsewhere in the world.³² The general impetus is recognition of the failure of most centralised forestry administrations to effectively sustain forests, the task they have almost every taken solely upon themselves this last century. Inevitably, each government is having to look to its citizens to assist.

27 In Uganda the National Environment Management Authority (NEMA) was established through the National Environment Statute, 1995, replacing the Department of Environmental Protection established ten years previously. The Kenyan Government will establish a similar agency as set out in the Environmental Management and Co-ordination Act, 1999. The Swazi Environmental Authority Act, 1992 established a comparable body. The creation of a Ministry of Environmental Coordination in 1994 preceded the promulgation of the Environmental Framework Law of Mozambique, Law No 20 of 1997 which then gave it its operating framework (Garvey, undated).

28 This includes institutional development, environmental planning and regulation, statements as to how various resources should be protected and pollution controlled, provision for restoration orders and easements to be defined, for impact assessments to be obligatory in certain circumstances, standards to be set, and the whole bound by prosecution procedures for failure to comply.

29 The tension was a recurrent theme during a 1999 UNEP Conference on Environmental legislation in Africa (Wabunoha 1999, Makawa 1999, Ugolo 1999). Claims of encroachment into the preserve of forestry is real in the law; for example, the Uganda Act declares that NEMA 'shall issue guidelines and prescribe measures for the management of all forests in Uganda' (No. 14 of 1995; s. 46 (1)), as does the Kenya Environmental Management Act (s. 44 & 47).

30 For example, the Ugandan Environmental Act provides for the Authority to 'expressly exclude human activities in any forest area by declaring a forest area a specially protected forest' (s. 46 (6)).

31 Uganda Environmental Act, s.15 & 17.

32 For example, new forest acts have been promulgated in the Gambia and Cameroon, Senegal and Mali, Vietnam and the Philippines, Nepal and Indonesia (Alden Wily forthcoming).

This wave of forest reform does not exist in isolation. Arguably it is but part of a wider socio-political and institutional transition underway at this time and in which the role of government is seeing marked alteration. Democratisation in various forms and to varying extents, is the outstanding characteristic of this emerging transformation.³³

Decentralisation and the strengthening of development strategies towards grassroot participation and empowerment feature widely in this transition. The product in law is a wave of new national constitutions, new local government laws, and new land laws. In all cases, the thrust is towards subsidiarity.

In new forestry laws, the main change is institutional, centring upon where and how authority over forests is now to be lodged.³⁴ To varying degrees, each law relaxes the conventional command and control strategies of the last century. Whilst no state takes this to the extent of removing authority from governments entirely, the devolutionary direction is everywhere evident. This is manifest in five trends:

- agentisation of the core forest authority
- widening of the basis of decision-making
- decentralisation
- privatisation of commercial forest estates
- communisation, in the sense of bringing forest-local people into forest management.

This last is the most significant measure of forest reform given that forest-local people have been consistently posed as a threat to forest conservation and management, a force from which forests had to be protected. Chapter Four examines the provisions for now involving communities in forest management in detail. The other trends are outlined below.

Agentisation

TABLE 1.4 reflects the trend. This relocates Forestry Departments into semi-autonomous public bodies. Zimbabwe has had a parastatal Forestry Commission in place since the 1950s. The three east African states and Zambia plan comparable authorities. Tanzania's is the more adventurous in that agentisation may take place at *regional* rather than just the national level, in line with strengthened national commitment towards devolution this last decade.

Agentisation is common among a range of sectors at this time and in some cases is being forcibly encouraged through the terms of loan-dependent structural adjustment agreements. The objective is to place forest management upon a more business-like footing and to render operations less dependent upon the fate of the public service as a whole. Arrangements to enable these bodies to be self-financing are prominent.

33 Alden Wily 2000b.

34 There are other commonalities not covered here, such as the purpose of new forest acts to embed and therefore enforce locally international protocols where this has not already been done in new environmental laws. Thus the Zambia Forests Act 1999 proposes implementation of the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the Convention on Wetlands of International Importance Especially as Water Fowl Habitat, the Convention on Biological Diversity and the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa. The Kenya Forests Bill 2000, proposes to recognise the African Convention on the Conservation of Nature and Natural Resources, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention on Biological Diversity, Rio de Janeiro and the Global Principles on Forestry. Cross-border co-operation is another feature being promoted globally (e.g. Malawi Forestry Act 1997). Refer GoS 2000 for complete list of forest-related protocols affecting Africa.

Significantly, in most cases, civil servants will nonetheless staff these new agencies, albeit at salary rates which exceed those of the mainstream civil service. A frequently-expressed concern is that the proposed authorities are not adequately different from the parastatal developments of past decades and many of which are now being dismantled.

Opening government to civil society

Even where agentisation is not the strategy of choice, new laws are providing for advisory and decision-making bodies that involve a wider range of sectoral representation from within government and reach into civil society for other representation. This is realised in Councils, Committees or Boards (TABLE 1.5). They typically include members from the private timber sector, environmental NGOs, research institutions, and representation from the general public.

Representation from forest-local communities is low. A main exception is the *South African National Forests Advisory Council*, 70 percent of members of which are from outside government, and of whom around half could derive from forest-local communities. This is also the only law that provides for representation to be determined through public advertisement for nominations. Uganda is currently considering instituting a similar council in its draft forest act.

Decentralisation of Government functions

New forest legislation is also making room for decision-making at more local levels of the central agency or to locally-elected governments (TABLE 1.5). Where local government is well developed (Tanzania, Uganda), rights over forests and rights to determine their future are being devolved in part to these governments. Where local government is weak, one or two new laws plan to create planning and management bodies at the local level (Kenya, Mozambique). In South Africa decentralisation of departmental powers to provinces is gathering pace but the newness and weakness of local government in rural areas does not provide a ready forum for real subsidiarity.

Privatisation

New or enhanced provision is being made for the privatisation of commercial estates (TABLE 1.6). As may be expected, the focus is upon the promotion of wood-based industries and private sector management of plantations. Three strategies are emerging: legal provision for divestment or long lease of estates; creation of state agencies to hold and manage these estates; and stronger provision for the issue of concessions and long permits over forest areas including both plantations and natural forests.

Later chapters record the state-people and private sector-people conflicts that are generated through the issue of concessions for hunting, timber extraction and tourism in woodland habitats and where local tenure is in practice, if not in law, thereby demeaned or extinguished. This is particularly a problem in Zimbabwe and Mozambique and to a lesser degree in Tanzania.

Private Forests

Landowners have always been able to maintain forests on their private land and a common clause in older forest legislation allows the state to (forcibly if necessary) impose conditions upon the landowner or to enter covenants for the management of these forests.

Such provisions are developed further in the new laws.³⁵ The draft *Kenya Forests Bill* is unusual in its offered incentives of not only technical advice, seeds and seedlings, but loans from a proposed Forest Management and Conservation Fund and the right to claim exemption from paying land rates and other charges in respect of a registered private forest area. Private Forests need not only be natural forests or plantations and may include arboreta and recreational parks, also encouraged by the law.

A novel addition is that private landowners are encouraged to donate or bequeath part or all of their land to the state or to a local authority, education institution, Forest Association or NGO for forest development. This will be gazetted and named after the donor if s/he so agrees. Change of purpose from forestry will not be permitted.

Such provisions target large landowners. Of more interest to our subject is how far poorer smallholders are being encouraged in law to set aside and retain scarce woodland resources on their farms, covered in Chapter Four.

³⁵ See South Africa National Forests Act, 1998, s. 8; Malawi Forestry Act, 1997, s. 26; Zambia Forests Act, 1999, s. 35; draft Kenya Forests Bill, 2000, s. 32; Namibia Forest Bill, 1998, s. 16, Tanzania draft Forest Bill, Part V.

TABLE 1.3: FOREST POLICIES AND LAWS IN MID 2000

COUNTRY	CURRENT FOREST LAW	CURRENT FOREST POLICY
UGANDA	Forest Act Cap 246 (1964) Amendment in 1998 following Land Act, 1998, redefined certain Reserves as Central Forest Reserves and 192 Reserves as Local Forest Reserves to be held in trust by District or Lower Local Government Councils. New forest law in draft.	NEW POLICY IN DRAFT; 1999-2000 Likely to be approved by Parliament 2001. Will replace 1988 Forest Policy and provide basis for new Forest law.
TANZANIA	Forest Ordinance Cap 389 (1957) Draft Bill for the Forest Act 2000 Expected to be enacted in 2001	National Forest Policy, March 1998
ZANZIBAR³⁶	Forest Resources Management and Conservation Act, No. 10 of 1996	Forest Policy, 1995
KENYA	The Forests Act, Cap 385 (1962) with origins in 1942 Act) Draft Forestry Bill 2000 Expected to be enacted in 2001	The Kenya Forest Policy, 1999 Drafted in 1995, replaced The Forest Policy Sessional Paper No. 1 of 1968
ETHIOPIA	Forestry Conservation, Development and Utilisation Proclamation, 1994	Forest Policy (1998) still in draft
ERITREA	Proclamation No. 192 of 1980 New law in draft	
MALAWI	Forestry Act, 1997	National Forest Policy, 1996
ZIMBABWE	Forest Act, 1948 (30+ amendments since) Revised edition 1996. Communal Lands Forest Produce Act 1987	Forest Policy for Tribal Trust Lands 1968 Revised Forest Policy in the 1980s; no substantial change since.
ZAMBIA	Forestry Act, 1999	National Forestry Policy, 1998
BOTSWANA	Forest Act, 1968 (one amendment 1980)	
NAMIBIA	Draft Forest Bill, 1998-2000 Expected to be enacted in early 2001	Draft Forest Policy, 1998
SOUTH AFRICA	National Forests Act, 1998 Management of State Forests Act, 1992 Forestry Laws Rationalisation and Amendment Act, 1994	Sustainable Forest Development In South Africa, White Paper, 1996 National Forestry Action Plan, 1997
MOZAMBIQUE	Forest & Wildlife Act, 1999	
SWAZILAND	The Forests Preservation Act, 1910 The Natural Resources Act, 1951 The Private Forests Act, 1961 Drafting of new law planned in 2001	Drafting of new Forest Policy underway in 2000 subsidiary to the National Land Policy (draft)
LESOTHO	Forestry Act, 1999	National Forestry Policy, 1997

³⁶ Tenure and forestry matters are not a union matter and therefore the Zanzibar House of Representatives makes its own laws and assented by the President of Zanzibar.

TABLE 1.4: CURRENT AND PROPOSED FOREST AUTHORITIES

COUNTRY	CURRENT & PROPOSED CORE FOREST AUTHORITY
UGANDA	Currently Forestry Department in Ministry of Water, Lands & Environment. Will be replaced by a semi-autonomous, self-financing NATIONAL FORESTRY AUTHORITY (NFA)
TANZANIA	Currently Forestry & Beekeeping Division (FBD), Ministry of Environment, Natural Resources & Tourism. Forest Policy 1998 is for FBD to establish EXECUTIVE AGENCIES at both national and local level , charged with managing specific sectors or forests, or activities. These will be self-financing agencies owned by Government. Forest Bill does not elaborate these agencies which come under Executive Agencies Act, 1997 , able to be adopted by any sector. Local Governments (District Councils & Village Councils) manage forests also and given prominent role in draft forest law
ZANZIBAR	Forest Administrator in Government Ministry.
KENYA	Currently Forestry Department in Ministry of Environment & Natural Resources. Forestry Bill 2000 proposes creation of semi-autonomous KENYA FOREST SERVICE .
ERITREA	FORESTRY DEPARTMENT in Ministry of Agriculture
ETHIOPIA	NATURAL RESOURCES DEPARTMENT in Ministry of Agriculture at Federal level. Strong regionalisation programme to National Regional States designed to give powers to regional governments in this and other sectors but in practice federal policies and laws dominate. No plans to agentise NRD
MALAWI	FORESTRY DEPARTMENT in Ministry of Natural Resources
ZIMBABWE	FORESTRY COMMISSION , a parastatal, established in 1954.
ZAMBIA	Currently Forestry Department, Ministry of Environment and Natural Resources. The Forests Act 1999 provides for semi-autonomous and self-financing FORESTRY COMMISSION
BOTSWANA	Ministry of Agriculture.
NAMIBIA	DIRECTORATE OF FORESTRY , Ministry of Environment & Tourism
SOUTH AFRICA	DEPARTMENT OF WATER AFFAIRS & FORESTRY (DWAF) A parastatal owns national plantations
MOZAMBIQUE	FORESTRY & WILDLIFE DEPARTMENT under the Ministry of Agriculture.
SWAZILAND	FORESTRY SECTION in Ministry of Agriculture and Co-operatives, plan to change location either to Ministry of Natural Resources & Energy or to Ministry of Tourism, Environment & Communications
LESOTHO	FORESTRY DEPARTMENT with intention to evolve into a small unit, focusing only on policy development and to act as a technical service provider, at cost, to forest owners (mainly to be communities and households)

TABLE 1.5: WIDENING THE INSTITUTIONAL BASIS OF DECISION-MAKING

COUNTRY	CENTRAL LEVEL	LOCAL LEVEL
UGANDA	Small BOARD intended for new Forest Management Authority. Advisory Committees may be established for different subjects and general Council planned which will include public representation	New Authority will operate through decentralised offices. District Councils will control Local Forests. No plans for district decision-making outside Local Forests or unreserved forests.
TANZANIA	Forest Bill creates a NATIONAL FORESTRY ADVISORY COUNCIL to include <i>persons with expertise, qualifications and interest in all forest matters, including marketing of produce, ensure a fair gender balance, and include persons who are not in the public service.</i>	Each Village, Ward, District now has an environmental committee. Local Government exists as Village Councils supported by District Councils and in whom main authority over forests vested. Devolution is a main objective of draft Forest Bill, including to VILLAGE FOREST MANAGEMENT COMMITTEES .
ZANZIBAR	No provision made for consultative bodies	No provision made for local level bodies
KENYA	Forests Bill proposes MANAGEMENT BOARD for Forest Service , to include 10 ex-officio members from Government, and 9 from outside, only 1-2 potentially from local communities.	Forestry Bill 2000 proposes FOREST CONSERVATION COMMITTEES for each conservancy area (undefined by likely to be district level). Will include non-government or local government representatives. Provincial and District Forest Officers directly responsible to Director. County Councils have minor/no forest staff.
MALAWI	Forestry Act, 1997 provides for FORESTRY MANAGEMENT BOARD of 13 ex-officio Government officers, one university, one private sector, 3-5 from general public .	VILLAGE NATURAL RESOURCE MANAGEMENT COMMITTEES prominent part of new law.
ZIMBABWE	None other than Mining Timber Board and Natural Resources Board	Rural District Councils have some authority over forests in communal lands (unreserved estates).
ZAMBIA	Forests Act, 1999 creates a FORESTRY COMMISSION to comprise minimum ten officials, one from private sector, one from farming community .	Minimal decentralisation or devolution to local authorities of forest powers. JOINT FOREST MANAGEMENT COMMITTEES may be created but include minor local representation
NAMIBIA	Draft Forest Bill creates a FORESTRY COUNCIL to comprise four officials, one from chiefs, six from public associations, only one obviously local level .	MANAGEMENT AUTHORITIES to be appointed in respect of each State and Community Forest

SOUTH AFRICA	National Forests Act 1998 creates a NATIONAL FORESTS ADVISORY COUNCIL to consist of maximum of 20 members, only six of whom will be officials. In appointing 14 others Minister must take account of interests of persons such as disadvantaged by unfair discrimination; are in communities involved in community forestry ; involved in small-scale processing etc.. Minister must publicly invite nominations in 2 nationally distributed newspapers	DWAF has provincial offices. Devolution of powers to emerging new local governments not defined in respect of reserved estates
MOZAMBIQUE	None specified in Forest & Wildlife Act 1999.	LOCAL RESOURCES MANAGEMENT COUNCILS including representation from public, private and government sector. Left open as to exact level
ETHIOPIA	None specified in Forestry Proclamation, 1994 or Draft Federal Policy 1998	Peasant Associations may manage local forests
LESOTHO	None specified in Forestry Act 1999.	Act aims to divest Reserves to local level. Local government being put in place at village level and will have potential to play roles

TABLE 1.6: COMMITMENT TO PRIVATISATION IN FOREST LAWS

COUNTRY	STRENGTH OF INTEREST TO PRIVATISE FORESTS IN NEW OR DRAFT FOREST LAWS & POLICIES
UGANDA	HIGH. To develop a forest-based production and processing industry is a major thrust of draft Policy. Wood-base industry operators identified as a major stakeholder. Plan is to permit lease of Central Forests for plantation development.
TANZANIA	HIGH. Draft Forestry Bill allows all forest owners (state, local government, village) to lease out part or all of their estates including for commercial purposes. Forests to be leased by district or villages which exceed 200 ha to be approved by Minister. Leases may be effected through auction, tendering or individual application. Emphasis upon right of owner to place conditions.
KENYA	MEDIUM. Draft Forests Bill provides for Reserves to be leased for up to 66 years, renewable. Clause emphasises that no ownership rights implied in leases.
SOUTH AFRICA	HIGH. Plantations represent 1.45 million ha and 77% already in private hands. Government-owned company (SAFCOL) established to hold/manage 18%. National Forests Act 1998 provides for direct leasing of any State Forest (not just plantations) (s. 28) and for any purpose, hunting fishing, recreation, timber, etc. (s.23)
SWAZILAND	HIGH. Most forests are plantations and most privately established. Private Forests Act 1961 regulates access and role of Foresters.
ZIMBABWE	HIGH. Forest Act allows Forestry Commission to lease out any Demarcated Forest (reserves).
ZAMBIA	HIGH. A main objective of Policy is to facilitate private sector participation in plantation forestry (1998). Forests Act 1999 establishes ground for sale/long lease interests, applicable to State and Local Forests, planted and natural (s.15 (1), s. 23).
MOZAMBIQUE	HIGH. Forest and Wildlife Act 1999 provides for issue of simple permits and concessions up to 50 years in all forest areas excepting National Parks. National Reserves may be used under licence.
LESOTHO	LOW. Forestry Act 1999 gives no attention to commercial private sector involvement given intent of law to devolve all reserves to local level and to promote new community and household forests
BOTSWANA	LOW. No provision in Forest Act 1968. No significant plantation estate.
NAMIBIA	LOW. No provision in draft Forest Bill (version 1998) No significant plantations
ETHIOPIA	HIGH. A main intention of draft Policy is towards privatisation of commercial estates and promotion of Private Forests.
MALAWI	LOW. No provision in Forestry Act 1997. Emphasis is upon involving communities, not private sector in forest management (s. 25)

II CURRENT COMMUNITY INVOLVEMENT IN FOREST MANAGEMENT

1 FOREST-LOCAL COMMUNITY

This refers to people who live in or next to forests and woodlands in the region who obviously number in the millions. Most are rural citizens, living by agriculture or agro-pastoralism, and fall broadly within the economically poorer and institutionally weaker sectors of society. They are distinguished from the rest of rural society simply by the fact that forests or woodlands fall within their socio-spatial and socio-economic sphere, and the future of their livelihood is closely linked to the fate of these resources. Whilst these estates are usually integral to traditional frameworks of tenure and custodianship, they are rarely formally tenured to local inhabitants and may be in fact be designated the property of the state as reserves of one kind or another.

2 DIVERSE PARTICIPATION

TABLE 1.7 provides examples of CIFM initiatives in Eastern and Southern Africa. At once it will be seen that development is uneven with some countries having high levels of community involvement and others virtually none. Comparable unevenness exists elsewhere on the continent. In West Africa, for example, The Gambia and Cameroon are well-advanced in bringing local people into forest management (although in very different ways), initiatives are underway in Senegal, Ghana, Burkina Faso and Niger, and there is little to no development in the remaining states of that region.³⁷

Action to involve forest-local communities in forest management is occurring generally later in sub-Saharan Africa than in Asia, and especially South Asia, where the first steps towards this were launched in the 1970s in India and then in Nepal in the 1980s.³⁸ This does not necessarily mean that African states are merely following a trend or borrowing approaches. Developments in Africa are demonstrably home-grown, and in some cases adopt approaches from which the pivotal (but now possibly stagnating) cases of South Asia could usefully learn.³⁹ This is especially so in respect of power-sharing and tenure interests, elaborated below.

37 FAO 2000 passim, Ribot 1999, Hesse & Trench 2000, Alden Wily forthcoming.

38 Documentation on joint forest management in South Asia is immense. For overviews, refer Arnold 1992, 1999.

39 See for example Sarin 1995, Lynch 1992, 1998, Arnold 1999, Shrestha R. 1999, Shrestha, N. 2000, Kumar 2000.

TABLE 1.7: EXAMPLES OF COMMUNITY INVOLVEMENT IN MID 2000

COUNTRY	INITIATIVES IDENTIFIED	OVERVIEW OF CIFM
UGANDA	Mount Elgon Forest Park Bwindi Forest Park Kibale Forest Park FD pilot: Namatale Forest Reserve FD pilot: Tororo Forest Reserve 5 other FD pilots planned	Began 1993 Bwindi like Kibale, does not directly involve communities in management, only as beneficiaries/reporters of illegal activity. Forest Dept (FD) pilots involve significant community role in mgt. All cases in demarcated Central Forests or Parks.
TANZANIA	594 Village Land Forest Reserves 26 Community Forest Reserves 881 Private Forests (households) 26 Village Forest Management Areas in 9 National Forest Reserves (NFR)	Began 1994 All community-based and operated except in National Forest Reserves (NFR) where communities co-manage with state, or are designated the Manager of the Village Forest Management Area (VFMA)
KENYA	Arabuko-Sokoke Forest Reserve Golini-Malungani Reserve Kaya Forests Loita Trust Land Forest	Began 1993 Loita and Kaya involve community-based management. Arabuko is buffer zone project and Golini is revenue-sharing.
ZAMBIA	Chinyunyu Forest Muzama in NW Province Chiulukile	Began 1990. All in unreserved forests and minor community role in decision-making. Muzama is a unique licensing development embracing nearly one million hectares. Chiulukile aims to follow model.
MOZAMBIQUE	Tchuma-Tchato Daque Project Mozambique-Blanchard Concession Mecula Reserve. Gorongosa Reserve. Licuati Project Inhassoro Project Zambezi River Delta Project. Tanga Community Mgt. Project Community For. & Wildlife Project (CFWP) Chipanje Chetu	Began 1994 More than 40 CBNRM projects underway, 18 are forest-centred. Two deal with fire control, six with charcoal/fuelwood production, seven with reforestation. Six involve communities to some degree in Forest Reserve management, five in unreserved forests. One is a buffer zone project. Two share revenue. Of the main 11 projects listed, only newest projects (CFWP & Chipanje Chetu) directly promote local forest guardianship.
ZIMBABWE	Mafungabusi Forest Reserve Pumula Block Forest CAMPFIRE Programme CBNRM initiatives in the communal lands of Ntabazinduna, Chihota, Seke, Chamatamba.	Began 1980s Mafungabusi is a state-community co-management pilot but not replicated. CAMPFIRE wildlife benefit-sharing programme in woodland habitat. CBNRM initiatives often community-initiated, usually towards sustaining grazing rather than woodland potentials

MALAWI	Chimaliro Forest Reserve Mwanza East Project Compass Programme	Began 1996 Chimaliro licenses local communities on informal basis. Mwanza prompts creation of Village Forest Areas. Compass is a new institutional support programme for CBNRM
NAMIBIA	Onkani Community Forest Ontanda Community Forest Okongo Community Forest Oskani Community Woodlot	Began 1997 With mainly Finnish aid, using areas which were previously demarcated for State Forests
SOUTH AFRICA	Joint Forest Management Pilots in planning stage in six State Forests.	Began 1998 Related to restitution of land to communities
ETHIOPIA	Menagesha-Suba State Forest Adaba-Dordola FPA Borana FMP Bale Mountains NP & Harenna Forest Kafa-Sheka Project Chilimo State Forest Farm-Africa LUFFP	Began 1990 Main support from Farm-Africa (last 3 listed) and their projects more community-based than others which tend to involve communities as user groups following extraction plans, or through integrated conservation & development initiatives with on-farm developments to reduce forest interests.

3 COUNTRY OVERVIEWS

Below developments are cursorily surveyed. ANNEX B provides more information.

The context within which community involvement occurs in the region is diverse. In southern Africa developments tend to arise within the context of either wildlife or woodland-pasture centred programmes, or where all resources within an inhabited area are addressed. The latter tend to be referred to as *Community Based Natural Resource Management (CBNRM)*.

Zimbabwe

A number of such developments exist in Zimbabwe. Many are wildlife habitat-centred, and none more so that the early CAMPFIRE programme now operating in some 25 districts in the country and one of the most influential natural resource-related programmes in the region.⁴⁰ CAMPFIRE operates as a revenue-sharing programme, with rights to control and issue hunting rights, set quotas, organize anti-poaching activities and collect and disburse revenue, lodged in rural district councils, who then share a percentage of the profit with co-operating communities.

Whilst revenue-sharing has been successful in many areas, the strongest emerging concern of the programme is to devolve at least some management responsibilities and powers to beneficiary communities. This confronts constraints as to if and how communities may secure rights over wildlife and

40 For details on Campfire see Maveneke 1996, Vudzijena 1998, Campbell et al. 1996, 1999, Matose & Wily 1996, Metcalfe 1999, Chinhoyi 1999.

over the woodland habitat in particular; these are issues which remain unresolved in the absence of clear democratisation of land rights in communal areas (see later). Weak local level institutional capacity and powers below the district level are also proving problematic. A further main interest emerging at this time is to find ways to bring the lessons of CAMPFIRE directly into woodland management, irrespective of whether woodlands contain wildlife of commercial value or not.

A handful of such woodland management initiatives do exist in Zimbabwe, one or two notable for having been initiated by communities themselves. **Ntabazinduna** is the most commonly-cited case. This began in 1984 as an initiative to protect local thorn scrub for village grazing. The protected area was expanded annually and greatly increased during the drought of 1991/92 when eleven communities were able to secure relief food-for-work for undertaking pruning and thinning operations in the areas.⁴¹ This developed into a locally-based permit regime, through which villagers obtain fuelwood and brush fencing materials from thinning and pruning, directed by local grazing committees.

Developments in **Chihota**, **Seke** and **Chamatamba** share a similar grazing management objective.⁴² In most of these and other initiatives the main constraint relates to the limited regulatory capacities of communities, making it difficult for actors to enforce rules or exclude outsiders. IUCN notes that local communities in Zimbabwe do not always feel confident regulating woodland resource access themselves, sometimes preferring central and local state agencies to act to both regulate and enforce upon their behalf (1998a, 1998b). Katerere et al. (1999) observe increasing enclosure and privatisation of communal resources as a direct result of weak community tenure security and related jurisdiction. The issue of community identity and institutional capacity will reoccur time and again in this review.

Limited development towards community involvement exists in the state forestry sector. In the 1970s the Commission handed over four forest blocks for management by Rural District Councils. One was **Pumula Block Forest** near Tsholotsho, where the forest-local community is now permitted to harvest certain products by agreement and to supervise and retain the revenue from fees.⁴³ A community bank account has been established for the management of funds.

The above relates to the most developed example of community involvement in the reserved sector. This is the **Mafungabusi Resource Sharing Project**. Again, the Forestry Commission permits forest-local communities to use defined parts of Mafungabusi Forest Reserve for certain uses through regimes which the communities themselves regulate (BOX ONE in ANNEX B). The programme arose as a direct result of unresolved tenure conflict between the Commission and community, conflicts that exist in at least fifteen of the Commission's plantation and natural forest reserves. In-forest habitation and cultivation of un-forested areas is especially common. Of note is the limited replication of the

41 Clarke et al. 1996.

42 Refer Cousins 1993, Clarke et al. op cit., Bradley & McNamara (eds.) op cit., Katerere et al. op cit., Francis 1996, IUCN 1998b.

43 Pers. comm. Ramachela June 2000.

Mafungabusi project, proving expensive to supervise. Also of note is recorded growing local frustration with the limitations of their rights to the forest resource and to their role in management.⁴⁴

Malawi

There are a number of small local initiatives towards community-based forest management in Malawi, especially since the promulgation of new forest law in 1997. One of larger projects is the SADC-funded **Sustainable Management of Indigenous Forest Project** (BOX TWO in ANNEX B). The project aims to reduce deforestation by helping five communities identify Village and Individual Forest Areas, supplemented by income-generating developments.⁴⁵ An emerging critical aspect of the development is the devising of forest use rules, which according to new law, have to be approved by the Minister. It has taken these communities three years to achieve this.⁴⁶ In 1999, USAID launched a CBNRM support programme, known as COMPASS, to enhance Government and NGO capacity to support CBNRM, and plans to work in nine of Malawi's 27 districts.⁴⁷

Only one initiative appears to exist in the Forest Reserve sector, and this involves the apportioning of minor forest product access to several local communities in Chimaliro Forest.⁴⁸ Their access is restricted to several peripheral block of the forest. No formal agreement has been signed and early drafts of National Land Policy advocate that no local use of at all be allowed in Forest Reserves.⁴⁹

Mozambique

Early initiatives in Mozambique were founded upon Zimbabwe's CAMPFIRE programme. BOX THREE in ANNEX B outlines these and several of the larger, early initiatives. In 2000, there are more than forty CBNRM projects, almost all donor or local NGO-funded. Less than half involve forest resources directly and less than half again directly involve communities in matters of management.⁵⁰

The early flagship CBNRM project, **Tchuma-Tchato** covers 200,000 ha of mainly mopane forest, an area given out to safari operators as a concession in 1993. Local involvement arose as a direct result of conflicts among the private operator, government and the local community, and was resolved in an agreement to share tax revenue with the community. Filimao et. al. remark the creation of Community Natural Resource Management Committees as the most important development in the programme (2000). These receive and allocate the share to community projects, including the funding of community scouts, who keep watch upon the safari developments.

The project has since been extended into the 600,000 ha Daque area further south in the Zambezi Basin (1999) and where fishing rights are more central to

44 Mamamine 2000.

45 Mauambeta op cit.

46 Dubois & Luwore 2000.

47 Commons Southern Africa 2000.

48 Dubois & Luwore op cit.

49 GoM 2000: 17.2.3.

50 Mushove 2000.

the programme.⁵¹ Clear issues of sustainability exist, both as to the stability of tourist-based revenue and in the maintenance of the provincial support unit established to run the programme.⁵²

Only three of eleven main developments listed in TABLE 1.7 do not depend upon tourists as the source of benefit generated in the project area, or involve communities in management to any significant degree. These are all newer projects. One is an African Development Bank-funded buffer zone development around Gorongosa Reserve. Another is a FAO/Netherlands Project in Nampula Province and the third a smaller project in the far north of the country, known as Chipanje Chetu (see below).

For the most part, CIFM in Mozambique operates outside Forest Reserves.⁵³ An exception is the above-mentioned FAO/Netherlands-funded project which intends to lay the foundation for state-people co-management of the vast **Mecuburi Forest Reserve** (BOX FOUR in ANNEX B), a mountainous humid *miombo* woodland in Nampula Province. The same project plans to launch collaborative management of the unreserved **Narini** woodlands (BOX FIVE in ANNEX B).

In these tasks the project faces constraints being experienced by other initiatives in Mozambique; namely, largely as a consequence of war and compounded by non-existent development of local government machinery; minimal social cohesion within many rural communities; overlapping and often conflicting rights among populations which have settled at different times in the area; and the recurrent constraint of having to deal with the fact that many forest rights (and timber harvesting in particular) have been allocated to private enterprise over the last decade, in a bid to secure foreign investment and income. These are issues that will arise in following chapters.

The remoteness of the four communities being assisted by the **Chipanje Chetu Project** in Sanga District and the lack of concessionairing has facilitated community-based woodland and fish resource management in that area. This makes this IUCN-supported project arguably the most advanced in securing meaningful community-based management in Mozambique (BOX SIX in ANNEX B). The model being adopted borrows from community-based forest management in Tanzania described later. It lacks however the clear socio-institutional foundation at the grassroots available in Tanzania, upon which to entrench significant community powers to regulate and enforce management.

Zambia

Interest in participatory approaches characterised policy development in Zambia and several initiatives have been begun. One is the **Chinyunyu Community Forestry Project**, which involves communities as patrolmen against illegal immigrants and charcoal burners, and otherwise focuses upon local on-farm tree planting (BOX SEVEN in ANNEX B). The Forestry Department handles offences.

This development broadly mirrors other minor local level initiatives.⁵⁴ Two aspects are of note; first, that local level decision-making is limited, and second,

51 As described by Filimao et al. 2000, Foloma, 2000.

52 Filimao et al. op cit., Negrao, 1998.

53 Forest Reserves where developments are getting underway include Moribane in Manica Province, Licuato in Maputo Province, Ribawe and Mecuburi in Nampula Province and Mecula in Niassa Province (Mushove op cit.).

54 Pers. comm., B. Lukama 1999.

that traditional leaders rather than community members tend to be prominent at the local level. These features have been brought directly into the new law, where CIFM is posed as participation in state-dominated management, rather than the promotion of autonomous community-based management (see Chapter Four).

A very different initiative operates over a one million ha area of woodland in North Western Zambia, which may be broadly referred to as **Muzama** after the name of the fair-trading company established to support the development (BOX EIGHT in ANNEX B). This programme helps nearly 70 groups of beekeepers and pitsawyers market forest products, harvested under licence from the Forest Department. In 1999 permits to harvest timber were withdrawn by the Department and in 2000, many of the same areas were advertised as available for commercial logging. The forest has lost its international forest stewardship certification. The future of this highly organised regime of local forest use is the subject of consideration contention at this time in Zambia, cumulating in an international press release on the issue on June 19, 2000.⁵⁵

Although describing itself as community forest management, the extent to which communities or even the local licensees are involved in management, is limited to the harvesters following agreed extraction rates.⁵⁶

Heemans reports upon a newer and smaller project in Eastern Province supported by an American NGO, the Co-operative League.⁵⁷ Again this a product-centred project which seeks to help communities establish frameworks for accessing inputs and marketing products. The project also aims to secure international certification of forests to support international marketing. Participatory mapping of **Chiulukile** (12,000ha) has begun upon which coupes and off-take will be defined. The proposed licensing foundation of the development is being reconsidered following the demise of Muzama.

South Africa

A handful of state-people collaborative developments in natural resource management are emerging in South Africa. Those already operating are mainly in the wildlife sector. A prominent example involves the **Richtersveld National Park**. This is outlined in BOX NINE in ANNEX B because it suggests the kind of strategy which the Forestry Department (DWAF) may also adopt in respect of plantations and natural forests under its jurisdiction. Many of these are now subject to land claims under the restitution programme as described in later chapters.

A case in point is the **Dwesa/Cwebe Forest Reserve** in Eastern Cape Province. As described by Grundy in BOX TEN in ANNEX B, the original intention to involve communities in forest use regimes has shifted as it becomes clear that communities will succeed in their claim to own this forest land. Partnership management is now being developed. Five other initiatives are underway on a trial basis, all facing difficulties in implementation. Constraints have two common sources; first, the fact that critical tenure reform issues have not yet

55 Craftsman and Womens Development Organization 2000, Uchi Makula Trust 2000a, 2000b.

56 Pers. comm. J. Mellenthin, Muzama Crafts Ltd, 5 June 2000.

57 Pers. comm., J. Heemans, Clusa Chipata Project, May 31, 2000.

been fully resolved, and second, that local community in modern South Africa, like Mozambique, tends to lack the level of socio-political cohesion needed to support devolutionary approaches to the extent needed to root community-based forest management in workable ways. This affects even those forest/woodland resources that are acknowledged as common lands, outside government reserves – areas which possibly account for one quarter of the total forest estate.

Conflicts between still-inchoate local governments and tribal authorities exacerbate the problem, and such provision as the former make for local regulation, are not well-developed at the community level.⁵⁸ A weak history of community-based development strategies in South Africa tends to exaggerate the case and give possibly less account of community potentials to organise and manage than may in reality still exist.⁵⁹

Of all CIFM developments in the region at this time, those of South Africa are most in flux, and most immediately dependent upon matters of land rights, likely to see crystallisation in the current decade. In the interim the stated focus of new national forest policy is towards partnership with communities with acknowledgement that some may well become owner-managers in their own right (Chapters Three & Four).

Namibia

As routinely cited as the most arid country south of the Sahara, forest in Namibia is more accurately dry, open bush and scrub land, dominated by the nonetheless highly useful *mopane* species.

Again, pursuant to the influential Campfire model, community involvement has been dominated by wildlife utilisation and revenue-sharing paradigms. The resulting institutional construct is considerably more developed, in the form of conservancies, for which there is now formal policy (1997).⁶⁰ By mid-1999 eight conservancies had been gazetted and eleven other communities were in the process of forming conservancies.⁶¹ Wages from labour on mainly privately-run management schemes represent a prominent benefit for local people. Several conservancies involve !Kung hunter-gatherers, and are significant in that they are designed not just to ensure revenue from safari operations is shared with the local population, but as a route through which local tenure may be enhanced.⁶²

Spurred on by the conservancy initiative, new forest policy encourages the creation of *Community Forests* out of communal lands. Four vast *mopane* woodland areas in the northern communal lands which were originally surveyed and demarcated to become State Forest Reserves are now being turned into Community Forests.⁶³ With Finnish aid, implementation has begun in Uukwaluudhi woodland where **Ontanda Village** and more recently, **Onkani Village** are beginning to manage parts of the forest. With GTZ assistance work

58 Ntsebeza 1999, DLA 1999, Cousins 2000, McDonald 2000, Claassens 2000.

59 Levin & Weiner (eds.) 1996.

60 Nature Conservation Amendment Act 1996.

61 Jones 1999, Corbett & Jones 2000.

62 Brormann 1998, 1999, Thoma 1996.

63 Uukwaluudhi (50,300 ha), Ongandjera (128,200 ha), Uukolonkadhi (111,700 ha), Okongo (75,000 ha).

has also begun in **Okongo Forest** in Oshana Region and where a community woodlot is also being developed.⁶⁴

The extent to which communities will actually manage is unclear. Not only is a great deal of technical assistance advanced from donors and government, the authority to regulate is vested in a designated Honorary Forester, not the community committee which appears to play the role of organising environmental action support such as on-farm planting.⁶⁵

Botswana

CBNRM has advanced steadily in Botswana with a number of generally very small projects which are wildlife or other product-centred, and geared mainly to raising revenue from the resource, and sharing this among state, private sector and community partners.⁶⁶ The Sanyuku Community Project, the Tswapong Hills Community Project and the Gweta Project were early initiatives. Real authority over the resource or ownership of the land is not directly tackled. Government itself has taken the lead with the support of USAID, significantly, located in the Department of Wildlife and National Parks. No Forest Department exists, with forestry handled by the Ministry of Agriculture and mainly geared to on-farm planting. A non-government Forest Association is however active.

Botswana possesses only three Forest Reserves and these are located in the northern Chobe Enclave. This is land vested in the Chobe Land Board. For several years there have been intentions to involve communities in their management, but progress on the ground appears to be slight.⁶⁷

Madagascar

A note may be made concerning Madagascar, not otherwise covered in this volume. Madagascar possesses a major forest resource but estimates a decline in area of around half since 1950. Under mainly international NGO auspices, several state-community forest management initiatives have begun. One is located in the **Marojejy and Anjanaharibe-Sud Mountains**, and involves 2,000 people as partners in a protection contract (*Gelose*), an agreement for collaboration for a short term period.⁶⁸ Although the focus area is tiny (100 ha), a basis for replication has been laid. Schachenmann (1999), reports on a different development in the **Andringitra National Park**, where the main task has been to come to agreement with forest-local communities over the use of the area for depasturing stock.

Ethiopia

Buffer zone development and licensing local access to forests characterise main CIFM projects in Ethiopia. With GTZ support, a management plan is being made for the only forest remaining under federal control in Ethiopia. This aims to invest part of the small income from plantations in forest-local community

64 Shiweda 2000.

65 Ontanda Village Plan 2000.

66 White op cit., ZERO 1998.

67 Pers comm. C. Sharp Gaborone, June 2000.

68 Manantsara and Garreau 2000.

developments (**Menegsha-Suba State Forest**).⁶⁹ Regulated access to blocks of **Adaba-Dordola State Forest** in Oromiya Region is also being developed with GTZ support. The licensing of local user groups similarly characterised Farm-Africa/Ethiopia efforts in **Chilimo State Forest** in the same region.⁷⁰ WWF supports a conservation project in the **Bale Mountains National Park** and **Hareenna Forest**, which includes access to defined areas for certain uses and investment in on-farm developments.

Outside reserved areas, a variety of self-help, donor and NGO supported programmes facilitate community-based management of usually degraded local forest resources, through land use planning and community agreements, sometimes with and sometimes without the support of government foresters. SOS-Sahel support such a development in Oromiya Region,⁷¹ and the Relief Society of Tigray supports another in Tigray.⁷² Chisholm describes self-help developments in another part of Tigray (2000).

Kenya

Least CIFM progress in East Africa has been made in **Kenya** – despite the fact that it was in Kenya that the earliest intention towards co-management of Forest Reserves was developed.⁷³ Approval of new policy in 1999 and especially the terms of proposed new law as described in Chapter Four, suggest renewed interest in this objective.

Action in one of the first targeted forests has in the interim been implemented in a modest way. This is **Arabuko-Sokoke Forest**, where an international NGO (Birdlife International) assists some adjacent communities access income opportunities,⁷⁴ and is now helping representatives form an association (ASFADA) to channel their forest-related interests. The association may eventually be represented on the forest's management team, a team more distinctive for the participation of agencies beyond the Forestry Department – that is, the Kenya Wildlife Services and the Kenya Forestry Research Institute – than local communities, who play no role in decision-making or management tasks.

The case of **Kaya** forests on the Kenyan coast should also be recorded.⁷⁵ Kaya are tiny residual forests of sometimes no more than one or two hectares, maintained for socio-ritual use, but fast disappearing through reallocation to private persons, an action not always in the hands of communities to control. Through the support of conservation NGOs, some of the more intact Kaya are gaining protection as National Monuments and others are earmarked to

69 Kafa-Sheka Forest Project 1999.

70 Ibid.

71 Hesse & Trench et al. 2000.

72 Wisborg et al. 2000.

73 Under the auspices of a British-funded KIFCON project, plans were developed in 1990-1992 to involve forest-adjacent communities in the management of three of Kenya's most important National Forest Reserves, Arabuko-Sokoke, South West Mau and Kakamega, not in the event implemented (KIFCON, 1994).

74 The Kipepeo Butterfly Project, supported by the East African Natural History Society, and exporting pupae internationally, generating income for participants. A more recent initiative seeks to provide 400 subsidised beehives to forest adjacent dwellers which may be used in the forest; pers. comm. J. Fanshawe, Birdlife International, May 2000.

75 Refer BOX TWO in Chapter Three for more details.

become Forest Reserves.⁷⁶ So far, this has not in itself proved a solution; gazettelement does not revoke title deeds which may have been issued over these monuments.

A rather different project known as **Golini-Malunganji**, is also found in the coastal zone of Kenya (BOX ELEVEN in ANNEX B). This involves local people in ways reminiscent of the conservancy model in especially Namibia where communities may surrender their rights in service of conservation and in return gain a share of conservation-related income; and where the community is more beneficiary than management actor.

In Golini-Malunganji 162 households surrendered rights to a forest area to allow elephant movement from a National Reserve but to a limited company of which they are also shareholders.⁷⁷ The company promotes tourism in the area. With tourism on the decline in Kenya since 1997, returns have so far been meagre.

The only community-based forest management initiative identified in Kenya relates to **Loita Forest** in Maasailand. Loita is a valuable montane forest of some 60,000 ha held customarily. It is under claim by the County Council which as trustee landowner, aims to lease the forest to safari operations to raise revenue for the Council. This has met fierce resistance from local Maasai who sought and won an injunction against the development, whilst a three-judge constitutional court debates the respective rights of the parties. The case has important tenurial implications as explored in Chapter Three (BOX THREE).

Encouraged by the terms of the new forest law, one or two NGOs in Kenya are making plans to help forest-local communities create Forest Associations through which they might in future be permitted to manage or co-manage forests as described in Chapter Four. One such group is the Salama Marmamet Wildlife Forum which seeks to involve communities in the management of Rumuruti Forest Reserve with the assistance of the Kenya Forest Working Group.⁷⁸

Uganda

In Uganda, more direct instances of state-people collaboration are underway. This has not been without false starts. At least one project embarked upon in the **Ruwenzori National Forest Park** was abandoned, partly because of unrest in the area but also because the Uganda Wildlife Authority was reluctant to agree to the arrangement of benefit-sharing proposed.⁷⁹ Another development proposed for **Buto-Buvuma Forest Reserve** lapsed mainly from the failure of the research group to devise a workable arrangement with the forest-local community.⁸⁰

BOX TWELVE in ANNEX B describes an early project in **Bwindi Impenetrable National Park** in south-western Uganda. Although termed collaborative forest

76 Kamuro 1998.

77 Kiiro 1996.

78 KFWG 2000.

79 This was a development supported by WWF; pers. comm. P. Scott, December, 1999.

80 The project is described by Gombya-Ssembajjwe & Banana, 2000.

management, communities are not involved in management other than as co-operands to the policing regimes of the Uganda Wildlife Authority (UWA). In return they gain legal access to a limited number of products, in designated peripheral areas of the forest park, at certain times, and under the supervision of UWA Rangers.⁸¹

In the early nineties, buffer zone development was launched around Uganda's largest Forest Park, **Mount Elgon**, by IUCN and the Government of Uganda with Norwegian aid. Reconstructed, the project has sought involve communities in the park's management since 1997 as described by Hinchley in BOX THIRTEEN of ANNEX B. Agreements are in the process of being reached with several of the 72 adjacent parishes as to the use and regulation of mainly minor forest products, but including the important bamboo resource.⁸² At the same time and in contradiction, plans are well advanced to remove the last 500 Benet hunter-gatherer households from the forest which has been their home for centuries.⁸³

IUCN is also supporting collaborative forest management in **Kibale** and **Semuliki** Forests in the west of Uganda. *Memoranda of Understanding* have been signed with four pilot parishes on the edge of Kibale Forest, setting out which resources may be accessed by user groups, the access to be monitored by elected committees.⁸⁴ All three projects fall under the auspices of the Uganda Wildlife Authority, an agency whose policies permit local involvement only in respect of organised resource-sharing, not management.⁸⁵

Of main interest in Uganda is the Forest Department's pilot efforts in two very small Reserves, **Namatale and Tororo Central**. So far, only a handful of communities on their periphery have been involved. Plans to expand the development to five other selected small Forest Reserves are being developed.⁸⁶ The approach evolving in the two working cases marks an important departure from above developments; Joint Management Agreements embed the role of local committees as more equal managers with foresters of areas placed under their care. Whilst very small, the practice from these developments is significantly shaping the constructs of new policy and law. Scott in BOX FOURTEEN in ANNEX B describes the development.

81 Wild & Mutebi 1996,

82 Hinchley et al. 2000.

83 UWA, 1998. Resettlement was first undertaken in 1983.

84 Pers. Comm., P. Kidyia, January 2000, Manager of Kibale Semuliki Community Development Project, Fort Portal, Uganda.

85 GoU 1997a.

86 Scott 2000.

Tanzania

It is in Tanzania where community involvement in forest management is most advanced in the region and more space is therefore given here to its description. Whilst new (1994), the approach is under implementation in some twenty districts.

Like many cases in the region, participation began in the field, and has since instructed new policy (1998) and now proposed law (2000) to an unusual degree. Notably, the institutional basis for supporting community involvement is already decentralised from central state to local governments (District Councils). Thus, whilst the central government Forestry Division (FBD) plays an important facilitating role, District Councils are required to develop their own programmes for community involvement. BOX FIFTEEN in ANNEX B is a summary of the first such district plan, now well into implementation. Similarly, it has been mainly district foresters who have devised government's first formal Guideline for Community-Based Forest Management, to be issued by FBD.⁸⁷

In Tanzania, community involvement is termed *community-based forest management* (CBFM), reflecting the focus upon forest-local communities as the main actor, assisted by foresters, rather than foresters being assisted by communities.

Progress towards this has been swift with more than 500 different communities already involved.⁸⁸ For the most part these communities act in their village context and manage woodlands which exist within or adjacent to their declared village areas. The arrangements fall broadly into four types: village-based owner-management; group owner-management; private forests on customary lands; and partnership management in government reserves (TABLE 1.8).

Community based forest management of unreserved forests

CBFM got its main start in respect of a 9,000 ha hilly woodland known as **Duru-Haitemba**, which the Forestry Division had earmarked to become a Forest Reserve.⁸⁹ It was in response to this challenge, that the eight village communities surrounding the forest, coerced the abandonment of this proposal by demonstrating that they could protect and manage the forest more successfully than the Forest Guards posted there. This they achieved with some effect, with the growing support of the District Forester and District Council and eventually central government (BOX SIXTEEN in ANNEX B).

Although not initiated on this basis, an increasingly important factor in the acceptance of the development was recognition that the forest fell within what were then only loosely designated boundaries of the eight Village Areas. This was to enhance local claims considerably and to lay a precedent for other village communities to create comparable 'village forest reserves' as they quickly became known.

87 FBD 2000.

88 Alden Wily 2000a.

89 A great deal of documentation exists on this case including by this author who was directly involved; Sjöholm & Wily 1995, Wily with Haule 1995, Berglund 1997, Kajembe & Mgoo 1999, Alden Wily 1994b, 1994c, 1997d, Rwiza 1999.

The Duru-Haitemba approach was adopted by the Forestry Division (FBD) in respect of a larger miombo woodland in Singida District (**Mgori**, 40,000 ha), similarly surveyed and gazetted to become a Forest Reserve. Instead, Mgori is managed today as five Village Forest Reserves (BOX SEVENTEEN in ANNEX B).⁹⁰ Tenure issues were again critical to embedding this devolution of control, but in this case, villages succeeding in expanding provisional village area boundaries to include respectively adjacent parts of Mgori Forest.

Local declaration of Village Land Forest Reserves has become the main and now formal route through which community-based forest management is structured and exercised. They have been declared in eighteen districts with local government approval. Only one has been gazetted, resulting in the proposed new forest act providing for a decentralised route for formalization at the district council level.

Co-management of government forests

From 1997, community-based forest management extended into National Forest Reserves, with the launching of pilots in five districts (TABLE 1.8). The pattern of participation varies from co-management to more recent cases where adjacent communities are formally designated as the Managers of agreed parts of those reserves. ANNEX B describes examples of both models, respectively the Ufiome and Gologolo initiatives (BOXES EIGHTEEN and NINETEEN).

Private reserve development

Meanwhile much smaller group and household forest reserves are being established in ten districts in the north-west of the country, where forest is depleted, and where the objective has often been the retrieval of woodlands. Borrowing from traditional practices which set aside land for emergency grazing in drought periods, foresters have assisted some 880 farmers to set aside, protect and manage these residual forest patches.⁹¹ Following the early experiences of Duru-Haitemba, this expanded to include larger forests owned by sub-groups of the community or by the village community as a whole. This resulted in some 500 new Group and Village Reserves. The *ngitiri* initiative, as it was initially termed, is outlined in BOX TWENTY in ANNEX B.

90 On Mgori, refer Alden Wily, 1996, 1997d, Massawe, 2000a, 2000b, Omari, 1999.

91 Alden Wily & Monela 1999.

TABLE 1.8: SUMMARY OF FORESTS UNDER CBFM IN TANZANIA 2000

FOREST MANAGED BY CITIZENS	NO. Declared	TOTAL HA	MEAN SIZE	LOCATION
Village Land Forest Reserves (VLFR) (<i>whole village community</i>)	594	276,554	465 ha	59 in 4 Districts of Arusha Region 9 in 1 District of Singida Region 432 in 7 Districts of Mwanza Region 76 in 3 Districts of Tabora Region 10 in 1 District of Morogoro Region 8 in 2 Districts of Tanga Region
Community Forest Reserves (<i>groups of villagers</i>)	26	1,000	38 ha	26 in 7 Districts of Mwanza Region
Private Forests 'Ngitiri' (<i>households in Village Land</i>)	881	2,394	2.7 ha	850 in 7 Districts of Mwanza Region 31 in 4 Districts of Tabora Region
Village Forest Management Areas (VFMA) in Government Forest Reserves (<i>villages designated as managers or co-managers with government</i>)	26	28, 255 (est.)	1,087 ha	8 in Ufiome FR, Arusha Region 6 in Urumwa FR, Tabora Region 1 in Shume-Magamba FR, 1 in Baga FR, 2 in Shagayo FR, 1 in Ndelemai FR, 1 in Kisimangonja FR in Lushoto Region 2 in Kitulanghalo FR, Morogoro Region 4 in Numbe Valley FR, Iringa Region
Total cases of CBFM	1,527	308,203 ha	202 ha	21 Districts of total of 115 Districts (18%)

(Source: Alden Wily et al. 2000)

4 INDICATORS FROM THE TANZANIAN EXPERIENCE

Enough progress has been made in community-based forest management in Tanzania, to have begun to allow its critique and the drawing of some early lessons.⁹² These have ranged from the need to define where thinning, pruning and replanting actions are cost-effectively applied to the development of locally-based monitoring systems for changes in the forest, to understanding of what makes CBFM in Tanzania work, and not work.

In many of these critiques, the effect that CBFM has upon empowering local communities and thereby causing shifts in relations between villagers and their leaders is observed. So also is the spread effect of this empowerment into other sectors; it is often communities which have embarked upon CBFM which has since tackled pasture, swamp and even local lake management, adopting the same regimes.⁹³ Another common finding is the importance for assisting Foresters to help communities closely define the systems they will adopt for keeping records, especially where revenue is generated through the issue of permits and collection of fines from apprehended offenders.⁹⁴

92 Iddi, 2000, Alden Wily & Monela, op cit., Omari, op cit., Kajembe & Mgoo, op cit., Berglund, op cit., CFMU 1999, Alden Wily et al. op cit., Alden Wily 1996, 1997d, 1999c, 2000a, Massawe passim, NRBZ 1999.

93 Berglund, op cit., Kajembe & Mgoo, op cit., Alden Wily et al. op cit.

94 Hozza 1999a, 1999b, Iddi op cit., Massawe 2000a, NRBZ op cit.

Most CIFM developments in the region begin under donor-funded project auspices which may establish unsustainable levels of support. Problems that may be experienced as these move into wider programming realms are being felt even in Tanzania, despite being an approach which from the outset has rigorously eschewed the delivery of other than technical advisory inputs and focuses upon community empowerment to undertake, organise and sustain all functions of forest management.⁹⁵ Still, in resource-poor Tanzania, foresters lack the transport to get to the villages in the first place, to offer their services as facilitators, let alone support the kind of cross-village study tours and back-up workshop training, those already supporting CBFM have found so useful.

Devising enforceable management

For our discussion here, several more fundamental attributes and lessons need singling out. The first relates to the need for community forest managers to be able to make plans and rules relating to the forest, and for these rules to be able to be enforced. A key marker of the latter is simply whether or not local courts will uphold their rules.

Promotion of community capacity to make forest management and use rules was an early part of Tanzanian CBFM in the form of Village Forest Management Plans.⁹⁶ However the need to make these legally-binding arose early, through direct challenge to the authority of Village Forest Committees in the above-mentioned Duru-Haitemba Forest case.

Within weeks of establishing use zoning and access regimes, two of eight villages involved found their eviction of timber harvesters and cattle-keepers from their forests reversed in the local magistrate's court.⁹⁷ The former group comprised outsiders who had enjoyed the freedom of the forest whilst it was 'protected' by government Forest Guards. The latter were large cattle-keepers from the forest-managing community, disgruntled by the seasonal and stock number restrictions being placed upon grazing in the forest. From which law, both groups of complainants asked the District Magistrate, have these Committees attained the right to decide who may and who may not use the forest? They won their cases.

This prompted the search for ways to embed village forest rules in law. Fortuitously in Tanzania, the opportunity to do this exists. This arises through the fact that village government may promulgate and enforce local laws, in this case, *Village By-Laws*. The formulation of these laws requires majority approval of the community (Village Assembly) and the ultimate endorsement of a full meeting of the District Council. Whilst this opportunity has existed since 1982, only a handful of villages had made use of it prior to 1995.⁹⁸

Two standard steps thereafter emerged in facilitating Tanzanian CBFM: first, a requirement that the Village Council approve the membership of the Village Forest Committee and endow it with certain of its own powers so that will be able to manage and regulate forest use in legal ways. Second, that the regime of forest management devised by the community is lodged not only in a Management Plan but in a Village By-Law. This converts community rules into

⁹⁵ Alden Wily, 1999c.

⁹⁶ Alden Wily, 1994b, 1997a.

⁹⁷ Alden Wily with Haule op cit., Alden Wily 1996.

⁹⁸ This is not to say village by-laws have not been numerous but these have rarely derived from the villages themselves, but as prototype by-laws presented to them by the Minister of District Council (Alden Wily 1997a, 1997b, 1999b).

justiciable law. The need to ensure that these do not contradict higher national law, and most importantly, the Forest Ordinance, is now part of simple guidance routinely given to village communities who want to set aside local forests for protection and management.⁹⁹

The right to exclude

As state law, albeit subsidiary law promulgated under a main local government act,¹⁰⁰ Village By-Laws in Tanzania have force beyond the immediate membership. This overcomes a constraint being widely felt elsewhere in the region by communities which are willing to adhere to rules themselves, but have no way of ensuring that outsiders do the same. Cases in Zambia, Mozambique and Malawi have been indicated.

A binding commitment to retain and sustain the forest

Just as important a Tanzanian Village By-Law is binding upon the community members themselves: by declaring an area reserved for forestry, the community is committing itself to this decision in law. This constrains conversion of the set aside area to farming or settlement, at least not until the Village By-Law is amended, which again requires approval by a full meeting of the District Council. There have been occasions where villagers have not kept well to the commitments set out in the by-laws they have promulgated. Whilst no forester or other person has yet taken the community or its elected government to court for this breach, the possibility that this could occur, is very real.¹⁰¹

The limits of co-management

The centrality of empowering local management in meaningful ways, is well illustrated in the problems which typically arise in *co-management* arrangements. Joint management agreements classically divide rights and responsibilities but in ways which more often than not retain decision-making powers in the hands of the forest owner and ultimate jurisdictional authority, government. The community gains such portion of access rights and products as the state is willing to concede, usually in return for taking on responsibility for keeping the forest clear of unregistered or illegal users.

This was the model arrived at in respect of **Urumwa Forest Reserve** where communities were offered demarcated coupes to harvest, as more or less licensees, and told to report intruders to the foresters (1997).¹⁰² It was less so the case in respect of Shume-Magamba Forest Reserve (1997), where co-management over **Gologolo Area** was expressed through a Joint Forest Management Committee. This meets monthly to make decisions.¹⁰³ In practice, the village partner has found its proposals subject to the authority of the state partner.¹⁰⁴

99 Alden Wily, 1999b.

100 Local Government (District Councils) Act 1982, significantly amended in 1992 and 1999.

101 Alden Wily et al. op cit.

102 Alden Wily and Monela, op cit.

103 Iddi op cit., Alden Wily 1998f.

104 NRBZ op cit., Hozza passim.

Downgrading custodianship to access rights

In both case two trends emerged; first, the partner communities began to sense that their loss was possibly greater than their gain through their participation in forest management. They had gained the legalisation of certain (generally minor) forest uses, and had gained a great deal of responsibility for protecting the forest. They were also either consulted (Urumwa) or participated (Gologolo) in certain decision-making about the forest.

On the other hand, this has been at the cost of tacitly accepting the state as sole owner and ultimate authority over the forest. Resentment has slowly begun to surface that the informal but rooted sense of local custodianship has in effect been downgraded to a mere right to use the forest. For whilst both forests had been government reserves for many years, local people had persisted in regarding these resources as in some sense their own, given that they existed within their local socio-spatial sphere and had been customarily their property.

With access rights and benefits made the centre-ground and only ground of the state-people relationship, a tug of war over shares has slowly evolved in both cases; the co-operating communities demanding a greater share of products and the government partner becoming increasingly resistant.¹⁰⁵ This has reinforced what is now perceived as a fundamental inequity in the relationship; wherein the state owns and controls and the community undertakes management tasks. Complaints that “we are doing government’s job for it” have accordingly arisen.

In the case of Urumwa, promise of a turning point has come with the decision that each adjacent community will be made the manager of a respective sphere of the forest, and will itself determine and regulate access, albeit in a set of rules approved by the forester.¹⁰⁶ Significantly, timber harvesting has fallen away in the villages’ own proposals, claiming this to have been an interest of only a small section of their communities.¹⁰⁷

In the case of Gologolo, such movement towards a more community-based approach to management has been proscribed by the existence of 1,000 ha of commercial plantation within the Village Forest Management Area, requiring, the Forest Division argues, continued need for a full complement of government staff and decision-making.¹⁰⁸

Newer initiatives, such as **Ufiome** described in ANNEX B, have gained from such experiences and seek from the outset to enhance rather than undermine local sense of custodianship over forest areas which remain nonetheless National Forest Reserves.¹⁰⁹

In this perspective, such reserves are located more in the vein of being nationally-important, than Government-owned per se. This represents a subtle but crucial shift in meaning away from a notion of Government Lands (including Forest Reserves) as the private estates of government towards a notion of these as but lands held in trust for the nation. As explored in Chapter Four, these shifts are beginning to find reflection in re-framed notions of public trust in new law, and not only in Tanzania.

105 Hozza 1999b, Alden Wily & Monela op cit.

106 Alden Wily & Monela op cit.

107 Pers. comm. H. Haulle Tabora Dec. 1999.

108 Hozza 1999a, NRBZ op cit., Iddi op cit.

109 Ringo & Rwiza 1999.

It is of note, that the forthcoming draft forest law in Tanzania has taken these findings on board, making legal provision not just for communities to create and own their own Forest Reserves but to be designated as autonomous managers of government forests, constrained by one fundamental condition, that the forest remain intact. In this arrangement, forest guards withdraw entirely from the forest and foresters serve as visiting technical advisers to the communities. They also fulfil an environmental management watchdog function, keeping track of problems and progress and stepping in the event of severe failure.

5 USERS OR MANAGERS, BENEFICIARIES OR ACTORS?

It will clear from the above that the Tanzanian case, perhaps more than others in the region, is founded upon *power-sharing*, not *benefit-sharing*, and in this way stands apart from the mainstream initiatives.

This is not to say that benefits, or forest access rights are not important in the approach. On the contrary, they are considered so important, that the attempt is made to relocate local livelihood interests in a longer-term perspective, and which local communities themselves are able to control. Through this both the locus of authority over forest future is devolved, and the regime of forest management itself transformed.¹¹⁰

Such transformation does not occur to the same extent, if at all, in those approaches that involve communities as but *co-operating users* or deserving *beneficiaries*. This is not to say that many benefit-sharing projects in the region are not highly beneficial to forest-local communities. Through the introduction of tourists, hunters or timber concessions in the area, local incomes may rise when communities are given a share in the profits.¹¹¹ What is occurring in these cases however, is not necessarily participation in *forest management* but participation *in forest benefit*.

Other concerns beginning to emerge in benefit-sharing models include awareness that real costs to government management may rise as foresters gain a new task, the supervision of local product use and benefit-sharing.¹¹² The project itself may be costly to initiate.¹¹³ The sustainability of the source of benefit-sharing is also proving less stable than anticipated, being largely dependent upon factors external to the local area, such as tourism.¹¹⁴ In many cases, the tangible return to the community is less than anticipated, further undermining commitment to collaborate with the investment partner.¹¹⁵ This has also begun to be observed in critiques of the catalytic CAMPFIRE programme of Zimbabwe.¹¹⁶ For as long as participation is premised only upon direct benefits, and benefits which are not within the power of communities to generate or control themselves, then participation will be unstable.

110 Alden Wily forthcoming.

111 Campbell et al. 1996, Jones 1999, Brormann 1999, White op cit.

112 Filimao et al. op cit.

113 Foloma et al. op cit.

114 Negrao 1998, Kiiru op cit.

115 Hinchley et al. op cit.

116 'In Zimbabwe, where 25 of the 50 districts of the communal areas applied this model through the Campfire scheme, the average annual income of 50% of the families involved did not reach more than ten us dollars and the maximum was \$150 despite an investment by USAID of 7.6 million dollars' (Negrao, 1999a). Also see Campbell et al. 1996, 1999, Chinhoyi op cit.

The recent experiences of the user-centred Muzama initiative described in BOX EIGHT in ANNEX B illustrates another source of instability. Where access rights are in reality no more than a more sophisticated form of local licensing, then this renders the community vulnerable to their issue and renewable. Had the Muzama initiative been founded upon agreement *to manage* rather than agreement *to use*, and embedded in a longer term framework than local licences, then the dramatic loss of livelihoods would have been less likely to occur. Had the licensees entered formal agreement as a legal person (such as through their supporting Uchi Makula Trust), then they could have sued the state for breach of contract. Without this, as indicated earlier, they are powerless and reduced to pleading publicly with politicians to restore their licences.

Where access rights are the foundation of the agreement, pressure to increase levels commonly arises, as illustrated above in two of the earlier co-management initiatives in Tanzania. Over-use of the resource to meet the needs or demands of the local partner may also threaten sustainability of both the arrangement and the forest.

And of course, where use rights or use-centred benefits are the *modus operandi*, CIFM is not readily applicable to that possibly majority of forests in the region which are considered either too degraded or too valuable in biodiversity or catchment function to sustain more than token local use. This deprives those forests in most need of the kind of sustained and effective protection which community-based management may avail.

A benefit-centred paradigm

To conclude, two distinct approaches to community participation are evident in the region at this time. The first operates through benefit-sharing or access-sharing. Collaboration is negotiated, centred and measured in terms of the level of benefit or access granted. Decision-making on the part of the community in management may be low, and always subsidiary to the decisions and plans of the economically stronger partner.

A management-centred paradigm

In contrast, the second is primarily concerned with transforming the way the forest is managed and seeks to achieve this through a transfer of responsibility with authority to the forest-local community. This is a power-sharing rather than product-sharing process. The medium and measure of exchange is not products or benefits, but jurisdiction or custodianship. The possession of the forest by the community, or at least, possession of jurisdiction over it, is the platform from whence the management regime itself is defined – including how the forest will be used. This may include making agreements with outside interests, but who operate on the terms of the local custodian, the community. Sometimes those interests may be commercial in nature. Where substantial returns are availed, the community may be obliged to submit a share of the revenue to the local and/or central government, as royalties or taxes.¹¹⁷

117 Such a case of people to state revenue-sharing is being developed in Kiteto District, Tanzania in respect of the harvesting of Dalbergia, an invaluable carving species; pers. comm. Sida/Tanzania Land Management Programme, March 2000.

Decision-making powers as the indicator

A simple indicator as to approach is the level of local decision-making authority over the forest. TABLE 1.9 provides broad assessment of examples given earlier.

The locus of forest ownership is expectedly a key factor. It may be safely assumed that the greater the tenurial control over the forest, the greater the potential for community-based management authority. This is certainly the case in eastern Africa. Circumstances do arise however where the opposite may occur. An example has been given in respect of Richtersveld National Park in South Africa, where an agency leases the area from the community and in so doing, essentially excludes them from management decision-making and operations. DWAF may adopt the same approach in respect of those State Forests it is by law required to return to local tenure, advising those communities to re-lease the forest back to DWAF for management.

An opposite case is found in Mozambique. Where concessions over local land have been made by the state, the community is in a real sense re-located in a tenant-like position. Use by the community of its customary land, is constrained in favour of the objectives of the concessionaire. Involvement of the local communities proceeds from this point, not from the promotion of an arrangement which defines the local community as owner or as legitimate authority.

Indeed, so-called community involvement in some cases at this time has less to do with resource *rights* than with achieving social co-operation, and achieving this through actually weakening the sense of local ownership in favour of product benefits. Arguably this underpins the early CAMPFIRE programme and projects subsequently modelled upon it. Here the focus is upon the product of the woodland – wildlife – and upon the monetary share which can be obtained through compliance with state/local government plans. Implementation is sustained through a high level of inputs and training, provided by the stronger (Government) partners.¹¹⁸ As such initiatives mature, projects feel compelled to search for ways to re-locate the project on a more secure, community-based footing, in which real authority, rather than just benefit, is shared.

Changing parameter and paradigms

Benefit-sharing and access-centred approaches over the last decade have proved useful in interesting local people in forest management concerns. As the new century opens, there is evident movement away from such foundations to those which look to communities less as co-operating users than as potential forest managers. We have seen this above in the changing orientation of projects in Uganda, Mozambique and Namibia. This shift is mirrored in the more liberal terms of each new draft forest law that emerges in the region - the subject of Chapter Four.

118 Campbell et al. 1996, Chinhoyi op cit.

TABLE 1.9: COMMUNITIES AS BENEFICIARIES OF MANAGEMENT OR DECISION-MAKERS OF MANAGEMENT

COUNTRY	COMMUNITY AS BENEFICIARY OF MANAGEMENT Through access rights, product-sharing, benefit sharing, or buffer zone projects			COMMUNITY AS ACTOR IN MANAGEMENT Has significant input into decision-making as to status, use and management of forest		
	Community gains jobs, help with farming or other economic opportunities	Community is beneficiary of income-sharing cash arrangement	Certain areas or uses opened to community on regulated basis because co-operating	Co-manages forest as Partner with State or other Agency	Designated the Manager of the forest	Owns and manages the forest or owns and hires manager
KENYA	Arabuko-Sokoke FR	Golini-Malungani CR		Kaya		Loita (pending)
UGANDA			Mt. Elgon NFP Kibaale NFP Bwindi NFP	Namatale FR Tororo FR		
TANZANIA				Shume-Magamba NFR Kitulanghalo NFR Numbe Valley NFR Shagayo NFR Urumwa NFR	Ufiome NFR Baga NFR Ndelemai NFR	594 Village Land Forest Reserves 26 Community Forest Reserves 881 Private Forests
ETHIOPIA	Menagesha-Suba Forest Bale/Haremma Forest		Adaba-Dordola Forest Bale/Haremma Forest Chilimo Forest	Kafa-Sheka Farm-Africa Project	Oromiya land use planning SOS-Sahel	
MALAWI			Chimaliro FR			Mwanza Project Village Forest Areas
ZAMBIA	Muzama Chiulukile Forest		Chinyunyu			
MOZAMBIQUE	Gorongosa Reserve Licuato	Tchuma-Tchato Mecula Zambezi Delta Project Elephant Reserve	(Objective of) Mecuburi FR	(Objective of) Narini		(Objective of) Chipanje Chetu
MADAGASCAR			Marojejy Andringitra			
SOUTH AFRICA						Dwesa-Cwebe Reserves
ZIMBABWE			Mafungabusi Pumula Forest Block			Ntabazinduna
NAMIBIA						Community Forests

Chapter Two: THE TENURE ENVIRONMENT

I LAND RIGHTS AND THE LAW

1 THE CHANGING CONTEXT OF LAND RIGHTS

As agrarian society has changed, so have the regimes and the rules through which rights in land are organised, exercised and upheld. At risk of oversimplification, four inter-related trends have marked the passage over the last century:

first, there has been a strong shift in the locus of authority over land holding from community to state, from periphery to centre. This has been integral to nation-making and the establishment of national governance regimes, and the centralised command and control strategies of governance this last century;

second, as a direct result of the penetration of capital into African society, land has become a commodity detachable from inhabitant or tiller, and even tradable in the marketplace, altering the meaning of tenure considerably;

third, through the same processes of social transformation, distribution of land, and rights in land, have become profoundly less even, and generating a generally new experience in Africa, enlarging spheres of outright landlessness and land shortage;

fourth, there has been just as dramatic a shift in the balance of rights in land within the African household, a shift marked by concentration in the household head and a decline in land-related responsibilities to household members. The rights of women have been obfuscated and demeaned in particular, so that even where women are the real and nominal heads of household, as if so often the case in Africa, they do not automatically assume or achieve land rights.

These are all matters which political and social economists have dwelt upon at length and need no replay here.¹¹⁹ To a large extent they are expected outcomes of the capitalisation of pre-industrial or peasant society this last 150 years. Whilst not easily escapable, a great deal of land law and policy has in fact been devoted towards limiting the worst effects of this social change. Conditionality to landholding, for example, making possession dependent upon active use of the land, plays a special role in African tenure management, seeking, if not succeeding, to limit land hoarding and speculation.

Nonetheless, eastern and southern Africa countries in 2000 endure almost without exception the following: increasingly uneven distribution of land, landlessness, insecurity in tenure and the emergence of whole groups in society who occupy land often for decades without a supporting legal context for their rights. The twentieth century phenomenon in Africa of so-called urban 'squatters', farm 'squatters' and forest 'squatters' are such groups. Women, the urban poor, and the untitled peasant landholder are the most weakly tenured sectors – but whom together account for the majority of the region's population.

119 The literature on these processes in respect of East Africa particularly is reviewed in Alden Wily 1988. Also see Okoth-Ogendo 1976, Bruce & Migot-Adholla (eds.) op cit., Platteau 2000.

Decline in community jurisdiction

Of special interest here is the fact that *community* itself has in most areas of the region lost its authority in a variety of respects including the determination of the holding of rights in land; authority which is now relocated more distantly from the landholder. Accordingly, the need to define one's right in land and to possess justiciable evidence of that right, has become steadily more urgent.

In amongst all this upheaval is the land itself and comparable changes in perceptions as to how it should be classified and held. Forests, along with rivers, minerals, and wildlife range have all been casualties in this process, lifted out of their local tenurial niches and deposited into classes of national lands.

That ordinary rural citizens, invariably part of the poorer and institutionally weaker sectors of modern society, should find their right to land at the opening of the 21st century to be unclear, unstable, and under threat, is hardly surprising. What this chapter seeks to do, is to lay out the legal and policy framework within which their right to land – including over forest land – is currently premised.

2 THE RIGHT TO LAND

It is as well to set out what is meant by property rights in respect of land. Frequently reference will be made to land ownership but more often to *landholding*; the holding of rights in land. There is an important distinction therein, for as will be shown, most rural people in the region do not in fact own the land itself, but own only *interests* or *rights in* the land.

Land rights possessed by citizens vary greatly, from regimes which denote absolute and exclusive rights (such as in the frequently-adopted English freehold regime) to interests which exist alongside other interests in the same land, held by other persons. Land tenure generally refers to the different socio-legal regimes through which these interests in land are recognised, transferred, regulated and sustained.

Customary tenure and customary law

In eastern and southern Africa interests in land broadly fall into two groups; rights that are held through traditional African systems, and rights that derive from European systems, introduced and maintained through laws enacted by colonial and then national parliaments. The former is loosely known as *customary tenure*, bound through traditional rules (*customary law*). Rarely are these laws written down (although this was a task colonial officers frequently set out to achieve).¹²⁰

Statutory tenure and state law

The latter body of law is referred to as statutory tenure, secured and expressed through national law, laws which are variously termed acts, statutes, ordinances or decrees, depending mainly upon the (colonial) origins of national-level law-making in that state. McAuslan's description of these bodies of laws as respectively people's law and state law is apt (2000).

Of course the situation is less precise than this distinction suggests. For example, some countries recognise customary regimes or customary rights in their national

120 As for example carried out by Cory in Tanganyika between 1945-1955. Codification is still part of some countries tenure reforms; e.g. Niger's Code Rural introduced in 1993 (Lavigne Delville op cit.).

laws if in very different ways. This confusingly may give those laws both a customary and statutory basis. This is clearest in Botswana where an early land law (Tribal Land Act 1968) adopted (some) key principles of customary land tenure into state law, and gave those aspects, statutory form.

It is also the case that customary land tenure systems themselves have departed in important ways from those understood as traditionally in place. Widespread right to sell land is a common new custom. Often such changes render a customary tenure regime more accurately defined by the fact that its regulatory framework is *informal*, rather than traditional. Indeed, as many a writer on tenure over the last seventy years has explored, a singular feature of customary regimes is their capacity to alter according to changing needs.

What does not change however is one crucial characteristic which will emerge as increasingly central to this study. This is its *communal reference*, the fact that the rules gain their legitimacy (acceptability and adherence) from the local community, not from the terms of national laws or the state.

TABLE 2.1 lists main tenure regimes in the region. The fact that they are so few and so similar is of note; mainly regimes of freehold and leasehold, both of which are English forms. Other statutory tenancy regimes, such as mailo in Uganda,¹²¹ farm tenancy in Swaziland,¹²² granted rights in Tanzania, and permit tenure in Zimbabwe,¹²³ are more distinctively local. So too are the lifetime usufructs of Eritrea and Ethiopia, new statutory forms which borrow in part from customary norms.

It has been common to give tenure regimes geographical connotation in respectively public, private and community spheres. In fact, these distinctions do not necessarily coincide with tenure regimes or where ownership is actually vested, as illustrated in TABLE 2.2.

121 Mailo is a tenure form unique to Uganda, or more exactly to Buganda, with its origins in agreements made from 1900 with Buganda kings and chiefs, vesting ownership of tribal land in royal families, thereby rendering local populations their tenants, in the eyes of colonial state law. Under new land law (Land Act, 1998), these tenants were not directly enfranchised (because much of the land had been sold on) but do now hold all the interests in the land with the exception of the land itself. These de jure tenants may sell these rights freely and the mailo landlord may buy these and in fact has right of first refusal. Tenancy is now due a symbolical rent of less than one US dollar a year. The issue of how mailo should be handled provoked more public dispute than any other aspect of the law's development. Refer McAuslan, 1998a, 1998c, Nsamba-Gaiiya, 1999.

122 Operating under the Swaziland Farm Dwellers Act (1982).

123 Permit tenure refers to the issue of permits by the state to persons relocated on resettlement lands or areas and has been a source of contention give the shortfall in land ownership implied (see later).

TABLE 2.1: TENURE REGIMES RECOGNISED BY NATIONAL TENURE LAWS

COUNTRY	CUSTOMARY	LIFETIME USUFRUCT	LEASEHOLD	FREEHOLD	OTHER
ERITREA		X	X		
ETHIOPIA		X	X		
DJIBOUTI	X		X		
KENYA	X		X	X	
TANZANIA	X		X		Right of Occupancy
ZANIZIBAR			X		Right of Occupancy
UGANDA	X		X	X	Mailo
RWANDA	X		X		
MALAWI	X		X	X	
ZAMBIA	X		X		
ZIMBABWE	X		X	X	Permit tenure
MOZAMBIQ.	X		X		
STH AFRICA	X		X	X	
BOTSWANA	X		X	X	
SWAZILAND	X		X	X	Statutory tenancy
LESOTHO	X		X		Share tenancy
NAMIBIA	X		X	X	

TABLE 2.2: LAND CLASSES

COUNTRY	PUBLIC	PRIVATE	COMMUNITY
UGANDA	GOVERNMENT LAND	FREEHOLD, MAILO, LEASEHOLD, CUSTOMARY	CUSTOMARY
TANZANIA	GENERAL LAND RESERVED LAND	GRANTED RIGHTS (in General and Reserved Lands) CUSTOMARY RIGHTS (in Reserved or Village Lands)	VILLAGE LANDS (may be held in Village Land and in Reserved Land as Commonhold)
ZANZIBAR	PUBLIC LAND	RIGHT OF OCCUPANCY	WAKF LAND
KENYA	GOVERNMENT LAND 13.3%	FREEHOLD 1.5% LEASEHOLD (Long Term) (11.4%)	TRUST LANDS 73.8%
RWANDA	GOVERNMENT LAND 3%	REGISTERED LAND 5%	UNREGISTERED LAND 92%
ERITREA	GOVERNMENT LAND	STATE LEASEHOLD LIFETIME USUFRUCTS	
ZAMBIA	STATE LAND	LEASEHOLD	CUSTOMARY LANDS
ZIMBABWE	STATE LAND 26%	FREEHOLD & LEASEHOLD	COMMUNAL LANDS 42%
SOUTH AFRICA	STATE LAND	FREEHOLD	EX-HOMELANDS 13%
BOTSWANA	STATE LAND 24.9%	FREEHOLD LAND 4.2% TRIBAL LAND (through granted and leased rights)	TRIBAL LAND 70.9% (incl. Private & communal tenure)
NAMIBIA	STATE LAND 13%	FREEHOLD 44%	COMMUNAL LAND 43%
MALAWI	PUBLIC LAND 21%	FREEHOLD & LEASEHOLD	CUSTOMARY LANDS 65%
SWAZILAND	King owns SWAZI NATIONAL LAND 74% & CROWN LAND 0.4%	FREEHOLD & LEASEHOLD 31%	CUSTOMARY (in Swazi National Lands)(42%)

3 THE LEGAL FRAMEWORK

What national (state) law says about rights in land is clearly the most informed and powerful source, for even the legal existence of customary land law depends upon this. Two sets of legislation will be examined; constitutions, where the nature of the right to land is established, and land laws, which lay out the parameters, regimes and instruments for exercising tenure.

3.1 THE CONSTITUTIONAL CONTEXT

National constitutions have multiple bearing upon the way in which people may access, own and use land. This ranges from the manner of governance that is provided for to whether or not principles of land ownership are made a constitutional matter, and with what intent.

Differences in Constitutions in the region accord well with differences in the socio-political nature of those states.¹²⁴ The Constitutions of Kenya, Namibia and Zambia, for example, do not offer the right of every person to own property as a human right, as do the Tanzanian, Zanzibari, Ugandan and Ethiopian Constitutions.¹²⁵

The understanding of what constitutes property is first suggested in Constitutions. For example, as Bhalla observes, Kenya's Constitution appears to consider land property only so far as it may be bought and sold and traded (1993). In contrast, the Tanzania Constitution includes the protection of 'the property of the state authority and 'all property collectively owned by the people' (Article 27). ANNEX C summarises property provisions in Constitutions.

Constitutions and land rights

Generally, land rights are constitutionally expressed within articles protecting private property.¹²⁶ What then becomes a routine constitutional right to hold property as a private person or entity is just as routinely counterbalanced with provisions that permit the state to appropriate that land for certain (usually public) purposes, with effects discussed in Chapter Three.

Whilst this privilege of *eminent domain* is routine in most laws around the world, it has gained more weighty implication in Africa by the possessory relationship over land which national governments have secured themselves. This arises in the reconstruction of a peculiarly English notion of separating ownership of land from ownership of rights or interests in the land.¹²⁷ Whilst latent in its exercise, this notion still pertains in English law and renders the Queen, for example, the real owner of all land in Britain, and others, only owners of *interests* in land. Freehold tenure for example, denotes maximum or absolute *interests* or *rights* in the land, not ownership of the land itself.

Radical title and subsidiary interests in land

124 Even to contextual subtleties such as seen in the fact that the Tanzanian Constitution refers to Basic Rights and Duties (Part III), the Ugandan Constitution refers to Protection and Promotion of Fundamental and Other Human Rights and Freedoms (Chapter Four) and the Kenyan Constitution to Protection of Fundamental Rights and Freedoms of the Individual (Chapter V) (our emphases).

125 Respectively, Article 24, Article 26 and Article 40.

126 But notably absent in the Constitution of Eritrea, 1996, Article 23.

127 The principle of divided rights which characterises English land law has its origins in the determination of land-owning classes in England to keep land in the family (McAuslan, 2000). Over time it has evolved into a complicated range of estates in land, not just those of freehold or leasehold but 'future estates', 'estates for a life or lives', and a range of estates denoting that they are held in trust.

This notion was put to active effect in Africa, used to establish that the colonial state, not local Africans, owned the lands which metropolitan states had conquered. In short, political and territorial jurisdiction (sovereignty) was conjoined with material ownership of the land.

It is of note that this was not an arrangement which any modern government quickly disposed of on attaining Independence. Instead new administrations took on these powers of their colonial predecessors with alacrity.¹²⁸ Yet further entrenchment of the principle has occurred. TABLE 2.3 provides an overview of where radical title in land (ownership of the soil) is located today in each state in the region.

In part, the locus of radical title matters not at all, for all persons and parties are equally affected. In South Africa, Botswana and Namibia it is popularly understood that freehold and other types of absolute rights in land represents ownership of the soil itself. With the current exception of Zimbabwe, governments in the southern region behave largely as if this were so.

In contrast, East African states have tended to use radical or primary title as if they were landlords, possessing tangible and tradable *interests* in all land. As a consequence attention has increasingly focused upon the issue of just where this radical title is lodged, should be lodged, and what it implies. This has vexed reformist considerations in Uganda, Tanzania, Ethiopia and now Malawi, and may become an issue of Zimbabwe, Kenya, Rwanda and South Africa. Sometimes constitutions and land laws are contradictory on the matter, seeming to vest radical title variously in the state or president (Malawi) or in the state and the king (Lesotho). Subtle but real differences may accrue; in Kenya, for example, the President holds land in trust, but not for the people but for the government, generating quite different considerations and powers.

Democratising ownership

Uncertainties surrounding the issue have generated a demand for the democratisation of root ownership. Achievement has been limited. The main trend so far has not been to release this tenure but to restate it as trusteeship.

This is defended in part on the basis of traditional notions of *community in land*, by which it is argued, as Nyerere did most influentially in 1966, that land belongs ultimately to all and is appropriately subjected to limitations accordingly.¹²⁹ This is how reconfirmation and entrenchment of state ownership of all land in **Tanzania** and **Mozambique** is publicly justified. In **Ethiopia**, the state applied the notion as a mechanism to remove any idea from society that a single king, head of state or emperor could make tenants of the population. **Eritrea** has followed this lead. The power-seeking inclinations of national governments are nonetheless all too clearly evident in the terms of subsequent land laws: the line between the state as guardian and rent-seeking landlord is extremely thin.

¹²⁸ To be fair, it was normal for new states to take on the whole body of colonial law as an interim measure at least. In addition, most of the notions arising out of colonial land law were well entrenched by that point in these states.

¹²⁹ Nyerere 1966.

So far democratisation has only been achieved in **Uganda**, where it was decided to do away altogether with the separation of primary title from ownership of interests in land, in what as a consequence proves to be a most dramatic democratisation of land relations. This single act, put into the 1995 Uganda Constitution, perhaps more than any other new provision in the wave of land reform described later, centres the core issues of tenure at stake on the continent, and against which actions by other states are beginning to be measured.

There is a possibility that **South Africa** may eventually follow suit, given growing contention (and indecision) as to whether radical title in the ex-homelands should be vested in occupants, in tribal authorities, land boards, or retained as it currently is, in the central state.

Brief political and government interest in the matter in **Zimbabwe** seems to have faltered. In 1998/99 proposals were being considered which advised that radical title in communal lands be vested in village assemblies and radical title in other lands in an autonomous national land commission.¹³⁰ This was a proposal originally also made by the Tanzanian Land Commission but not accepted into National Land Policy 1995.¹³¹ Amendment to the Zimbabwe Constitution in mid-2000 placing yet greater control over landholding in the hands of the President, put at least a temporary end to such considerations.

Currently, the **Malawi** Commission of Inquiry into Land Policy has also recommended but with seemingly more political support and deliberation, that radical title be vested in the citizens of Malawi.¹³² It has also advocated that it be clearly stated in the Constitution that public land be *held, not owned* by the government expressly defined as in trust for citizens. It also recommends that customary land be defined territorially and also be *held, not owned* by traditional authorities, in this instance, in trust for members of local communities.

130 GoZ 1998b, 1999b.

131 GoT 1994, 1995.

132 GoM 1999, 2000.

TABLE 2.3: THE CURRENT LOCUS OF RADICAL TITLE IN LAND

STATE	RADICAL TITLE OVER LAND DECLARED AS VESTED IN
UGANDA	CITIZENS: Citizens through various tenure regimes (customary, freehold, mailo) (Article 237 of 1995 Constitution).
TANZANIA	PRESIDENT AS TRUSTEE: All land in Tanzania is known as public land and vested in the President as trustee for and on behalf of all the citizens of Tanzania (s.4 of 1999 Land Act). All other rights (to occupy and use in perpetuity) available to citizens.
ZANZIBAR	PRESIDENT AS TRUSTEE: All land 'to be vested in, and at the disposition of the President, to be held by him, for the use and common benefit, direct or indirect, of the people of Zanzibar (s.3 (3) Land Tenure Act, 1992)
KENYA	STATE NOT AS TRUSTEE: Transfer of Property Act, 1882 & Government Lands Act, Cap. 280. President is executor on behalf of the state NOT citizens.
ERITREA	STATE : Not defined as custodian in Article 3 (1) Land Proclamation No. 58 of 1994 but implied in definitions of the state.
ETHIOPIA	STATE AS TRUSTEE: Vested in state as trustee for the collective ownership of the people (Articles 40 of Federal Constitution, 1995). Land law of 1997 refers to land as 'a common property' of Ethiopians (s.4).
MALAWI	STATE/PRESIDENT : Land Act, 1965 (s.8, s. 25), vests radical title in the President as custodian. Confusingly, Constitution (1994, s. 207) vests land in 'the Republic', safeguards existing rights (Article 209) and gives government all title in Government Lands (Article 208). Change planned.
ZAMBIA	PRESIDENT AS TRUSTEE: For and on behalf of the people of Zambia, Section 3 (1), Lands Act, 1995.
ZIMBABWE	PRESIDENT: Communal land directly vested in the President Section 1(4), Communal Land Act, 1982, with no trusteeship function specified.
MOZAMBIQUE	STATE: Constitution, 1990 (Articles 35, 46) with no trusteeship function stated but with provision for land as the means for creation of wealth and social well-being being the right of all Mozambicans (Article 46.3). Also Article 3 of Land Law, No. 19 of 1997
BOTSWANA	STATE, LAND BOARDS, PRIVATE: Not covered by Constitution 1966. Tribal Land is vested in Land Boards as trustees (for tribesmen of area until 1993, now for all citizens, Tribal Land Act, s.10). Primary title over freehold land not stated. Caps 32:06, 32:05 suggest primary title of certain of these lands located in British South Africa Company (1905) and Tati Concessions Ltd (1911).
NAMIBIA	STATE, PRIVATE: Constitution (Schedule 5(1)) vests all but untitled land in the state, restated in National Land Policy, 1998, s.3.1. Root title of titled land (freehold) not stated.
SOUTH AFRICA	STATE, PRIVATE: Definitely only ex-homeland and trust lands vested in state.
LESOTHO	THE NATION: Constitution, 1993, (Section 107) vests all land in Lesotho in the Basotho Nation.
SWAZILAND	THE KING, PRIVATE: Sections 93 and 94 of the Constitutional Act (1968) vests land in His Majesty the King; either in his capacity as Head of State or as Ngwenyama in trust for the Swazi Nation. Crown Land, which was vested in the King in 1973. Root title of freehold not stated.

Constitutions and the distribution of land rights

At this point issues of restitution focus matters of distribution and find direct expression in national constitutions. The issue obviously has most importance in the states of Zimbabwe, Namibia and South Africa where entrenched white settlement has been a source of socio-political contention and its removal a main prompt for wars of independence.

The **South African Constitution** makes land reform towards more equitable access one of the founding principles of its bill of rights (s.25 (4) (a)). Persons or communities whose tenure of land is *insecure as a result of past racially discriminatory laws or practice* are given the right to seek redress, and Parliament is ordered to enact necessary legislation to redress the results of racial discrimination (s.25). This has begun to be achieved through the Restitution of Land Rights Act, 1994.¹³³

In contrast, the absence of a chapter on tenure in the **Constitution of Namibia, 1990**, correctly suggests the government's reluctance to embark upon a serious programme of land restitution,¹³⁴ an objective finally dropped in the new *National Land Policy, 1998* (Article 3.2), but since revived in direct consequence of the recent settler lands issues in Zimbabwe. Now as 2000 nears end, considerations by the government and parliament strongly suggest the relaunch of a restitution programme, this time depending not upon a willing-buyer-willing seller approach but upon the generosity of the international aid community.¹³⁵ For our purposes here, just as significant was the wholesale transfer of communal lands into the hands of state, casually provided for in a Schedule to the first Constitution (5.1) – a development which has in contrast seen no alteration.

The much-amended **Zimbabwe Constitution, 1981**, provided an important foundation for restitution of settler lands in its section 16. This was provided for within the above-mentioned conjunction in which private property is protected on the one hand and the right of the state to appropriate property is asserted, on the other. ANNEX C provides an overview of constitutional changes towards greater and greater empowerment of the President to appropriate land at will, including that of white settlers. For this discussion, what is most significant about this trend, is that the legal provisions entered into the Constitution, have the legal effect of de-securing the rights not only of settlers

133 Restitution is not covered in this review. As footnote, some 245,000 ha have been transferred (DLA, 1999). Restitution is based upon application and by the closing date of 1998, more than 60,000 claims had been lodged, most of which were urban based, arising out of evictions because of the notorious Group Areas Act. Restoration may be in the form of money or priority access to land and housing schemes. Results have been slow, not least because the process has been judicially-conducted. By March 2000, 1,450 claims (mostly in urban areas) had been settled; see BOX FOUR in ANNEX D. Restitution has gained emphasis in 2000, as per the statements of the Minister (DLA, 2000) with a plan to redistribute 30% of farm land over the next five years. Recognition that state land is not adequate to meet this need, and shortage of state funds, appear to be driving DLA towards a Zimbabwe type position of considering the abandonment of the willing-seller, willing buyer foundation towards coerced sales of white farmer lands at ambiguously-described equitable prices (Business Day 2000b), a strategy which is also suggested by the failure of the Mbeki Administration to increase the small budget for restitution in 2000 (Business Day 2000c).

134 GoN, 1991, Adams & Devitt, 1992, and for an earlier review of land issues at the time, Fiona Adams et al. 1990.

135 By 2000 only 92 farms embracing half a million hectares had been purchased since 1990 benefiting only 3,400 families. The Namibian newspaper has variously reported during October-December 2000 upon new intentions to seek more than a billion Namibian dollars from the international community to directly purchase some 9.5 million ha of the 30.5 ha still owned by white commercial farmers, 2.9 million ha of which is owned by foreigners.

(to whom they were undoubtedly targeted) but the land rights of all persons agricultural land – the majority.

Constitutions in 2000

The complete re-drafting of constitutions accompanies marked change in the political state of a nation, and in state-people relations as to governance and rights.

The fact that so many countries have new Constitutions to hand illustrates the extent of current socio-political transition in the region. These states have adopted entirely new Constitutions: **Namibia, 1990, Mozambique, 1990, Zambia, 1991, Ethiopia, 1992, Lesotho, 1993, Malawi, 1994, Uganda, 1995, Zanzibar, 1992,**¹³⁶ **South Africa and Eritrea, 1996.** The Constitutions of **Tanzania (1977)** and **Kenya (1969)** are now under formal review. **Rwanda** and **Swaziland** have suspended their constitutions pending the drafting of new constitutions.¹³⁷

Property relations will in all cases be altered through this. One trend is towards ensuring that land tenure policy itself become a constitutional matter. This was a central demand of the Tanzania Land Commission, in the event not met.¹³⁸ This is the case in the 1995 Uganda Constitution which sets out critical tenure decisions in nine precise articles. It was also by Constitutional remit that Parliament was instructed to enact a new land law within two years after the first sitting of the post-Constitutional Parliament. This was realised in the Land Act, 1998.¹³⁹

3.2 LAND LAWS

The body of law directing land tenure may be broadly divided into: primary legal instruments and other land laws. Our concern is with the first.

A fairly consistent legislative pattern emerges throughout the study area. Primary land laws cover similar subjects; such as establishing which regimes of tenure are legal, where and how property matters will be administered, the controlling mechanisms to regulate landholding, and how disputes over land ownership are to be resolved (TABLE 2.4). These laws are usually supported by other land laws, addressing specific aspects of landholding; mainly laws of registration and entitlement procedure, survey laws and town and country planning laws. Land acquisition acts set out the procedure for the state to acquire private property (TABLE 2.5).

Further direction is delivered through land use management laws which are generally sector-specific; agricultural laws, forest laws and acts governing access to wildlife, minerals, water, and increasingly laws relating to the environment as a whole. Public administration laws also play a role,

¹³⁶ Actually an amendment to the 1984 Constitution but one of immense significance.

¹³⁷ In the case of Swaziland, three key clauses on property were in fact retained: refer ANNEX C.

¹³⁸ As per its absence in the White Paper on Constitutional Change, No. 1 of 1998. Refer GoT 1994, Shivji 1996b, 1999b. The Draft National Land Policy of Zimbabwe argues that tenure policy needs to be put in a new Constitution (GoZ, 1998b), and this has been done in respect of white settler rights if negatively so, as does the Final Report of the Commission of Inquiry into Land Policy of Malawi (GoM, 1999). The legal commitment to amend the Kenya Constitution (No. 13 of 1997) specifically requires that land rights be addressed (s.10 (d) (vii)).

¹³⁹ More exactly the Constitution did not demand a completely new land law, but a law to regulate the relationship between landlords and tenants in the mailo category of tenure (Article 237 (9)).

particularly those which create locally-elected governments which may be given powers relating to tenure administration (Local Government Acts).

A pronounced colonial flavour

Several features of tenure laws deserve note; *first*, the majority had up until very recently pronounced colonial origins, and many still do.¹⁴⁰

In the region these variously derive from the land laws of England, Netherlands, Belgium, France, Portugal and Italy, and from laws which may not have been operational in those countries for many years. For example, the founding land law in Kenya today derives from an 1882 law devised for the Indian colony and brought thence into Kenya colony law in 1897.¹⁴¹ Up until 1999, the 1923 Land Ordinance regulated land relations in Tanzania, a law founded upon English law at the time and missing the important reforms to English land law which occurred two years later (1925).

Second, Independence did not see these colonial origins disposed of. On the contrary one of the first actions of most states was to confirm the colonial body of law as the national law of the new state.¹⁴² This was partly for continuity and short-term expediency. It was also sometimes a condition of independence, particularly where colonial administrations felt established settler land rights might be threatened (Kenya, Zimbabwe).

It was also the case that the principles which these colonial laws embodied were entrenched and/or supported by the main group which led the party into Independence.¹⁴³ This probably explains more than other factors the lack of tenure reform in most countries until recently.

These principles included two central tenets widely supported by new Governments; the positioning of the state as the supreme authority over the disposition of property, and the orientation of the law towards the transformation of African land relations into those constructed under European-derived law. Colonial land laws also assumed and encouraged a market in land; this was a principle less widely adopted by newly independent Governments, at least in respect of customary landholding, where land sales were widely discouraged and sometimes disallowed.

140 Refer McAuslan 2000 for analysis of the 'Diaspora' of European law in Africa and its handling since.

141 The Transfer of Property Act, 1882 of India, revised edition 1962.

142 This was most recently the case in Eritrea; 'in the wake of total liberation of Eritrea it was only natural and practical for the then Provisional Government of Eritrea to adopt the Ethiopian codes with some necessary amendments' (Gebremedhin, 1996).

143 In Kenya for example, there were marked differences in approach to land rights between the two nationalist groups, KANU and KADU. The latter which lost dominance proposed federalism (majimbo) with regional assemblies which could control territorial spheres and prevent outsiders from acquiring land. In light of inter-tribal land clashes majimbo-ism has revived but is firmly crushed by the (KANU) administration.

Legal form and presentation

English-derived land laws in particular shared antiquated legal form and terminology at the end of the 20th century. This was partly because of the above and partly because these laws were drafted not for the client landholder, but for those who mediate in such matters, lawyers, courts and administrators. New tenure laws remedy this to an extent. They also require translation into local languages, the issue of simplified versions or conduct of explanatory dissemination campaigns.¹⁴⁴ Nonetheless, the question does arise as to the extent to which new law is being appropriately modernised towards 21st century client demand and accessibility.

A related aspect of legal form is its specificity. Two traditions appear. Laws which are rooted in English and Roman-Dutch law aim to leave less rather than more to subsidiary regulation and to limit diverse interpretation. Roman-Dutch law is especially detailed. In contrast, laws which derive from Italian and Portuguese traditions tend towards the declamatory principle, relying upon the development of subsequent legal instruments and administrative directives to elaborate the broad intent of the act.¹⁴⁵

In Ethiopia, but most recently Eritrea and Mozambique, new land laws have been short lists of articles.¹⁴⁶ Despite their brevity they are sometimes ambiguous and have ancillary socio-legal development in order for their objectives to be delivered.¹⁴⁷ In the process, intentions of the main law may alter. This is arguably the case with the 1997 Land Law of Mozambique.¹⁴⁸ What amounts to 'significant refinement' has since been made through Regulations under the law in 1998 and late 1999.

In contrast, one may examine the exactitude of land laws being drafted in South Africa and the comprehensiveness of the two new tenure laws of **Tanzania** (1999). The last cover almost all matters relating to tenure. Moreover, they include a great amount of prescriptive direction as to how the law should be used and implemented, which some critics would have preferred lodged in subsidiary regulation or not put into law at all.¹⁴⁹ On their part, the drafters argue that detail is necessary to limit misuse of the law by tenure administrators who have been demonstrably wayward in the past.¹⁵⁰ One effect has been the breach of conventional boundaries of private and public law, or between property and administrative law. Despite this important development, the presentation of the Tanzanian land laws remains in parts indecipherably legalistic for the client landholder.

Towards a Basic Land Act

144 The Tanzania Land Act 1999 requires translation and gazettelement of the law in Kiswahili as well as English (Land Act, 1999, s. 185). That law also makes accessibility of information a fundamental principle to be observed (s. 3 (I)). A dissemination campaign is planned. Refer Quadros 1999 and especially Negrao 1999b for account of the most comprehensive education programme underway, the Mozambique ('Land Campaign'). South Africa and Uganda have also implemented campaigns (DLA, 1999, GoU 1999b).

145 Garvey undated.

146 Often referred to as framework laws correctly suggesting that they are to be elaborated. See Garvey op cit., Gebremedhin, op cit.

147 In the case of Eritrea, for example, the main declaratory law does not include details on registration, provided in a subsequent Proclamation No. 95 of 1997 and Legal Notice No. 31 of 1997.

148 Kloock-Jenson 1997, Negrao 1999a.

149 Shivji 1998, Shivji & Kapinga 1997a.

150 See McAuslan 1998b.

The attempt to move more towards a single basic land law is widespread in the region and a stated objective of policy proposals in Zimbabwe and Malawi.¹⁵¹ The Commission of Inquiry into Land Law in **Kenya** makes harmonisation of its innumerable laws an objective with the implication that this could be delivered in a single act.¹⁵² This must be a main target in a country where from six to nine different laws determine how an ordinary citizen may acquire, own and transfer land.¹⁵³ The plethora stems from the practice since the 1900s of making distinct laws for distinct tenure matters and for different parts of the country, exaggerated by apparent preference to amend rather than repeal and rewrite outdated laws.¹⁵⁴

The plurality of new tenure laws in **South Africa** has a different origin, in the deliberately incremental approach towards land reform as the country moved from an apartheid environment to democratic rule, as set out in the National Land Policy 1997. Different laws have been made since 1994 for different aspects of the reform: restitution, redistribution and tenure. The reform process is still far from incomplete.

Elsewhere a basic land act has been difficult to achieve. This is partly consequent upon the difficulty experienced in making real the common objective to release new land law from the multitude of often useful if outdated legislation provided in metropolitan land laws, and to which national land laws are routinely tied (TABLE 2.6).

In **Uganda**, for example, the important new Land Act 1998, still leaves an unmodified Registration of Titles Act in place, and retains English common law and doctrines of equity as its residual law. The above-mentioned new land law of **Tanzania** (drafted as one law but divided into two for reasons of bulk only) is so far the only new tenure legislation which succeeds fully in removing old English laws from its books (Land Act 1999, s. 180 (2)). That law also makes it clear that English common law and doctrines of equity need only be applied when they appear to the courts to be relevant to the circumstances of Tanzania (s. 180 (1)).

151 GoZ, 1998b, 1999b, GoM, 1999, 2000.

152 GoK, 1999b.

153 For example in reference to Trust Land, the Trust Land Act Cap 288 entrusts the land to the local authority (County Council) to own on behalf of the residents; the Land Adjudication Act (Cap. 284), provides for rights to be adjudicated to determine ownership of each parcel. The Land (Group Representatives) Act (Cap. 287) provides a certain version of ownership and the Registered Land Act (Cap. 300) dictates how those rights may be recorded and titled. Should a holder of a title deed want to sell the land, his action is subject to procedures under the Land Control Act (Cap. 302), and should there be a dispute, the Land Tribunals Act, 1990.

154 For example in Kenya procedures for registration of documents are given in the Registration of Documents Act (Cap. 285), Land Titles Act (Cap. 282) and the Government Lands Act (Cap. 280). Registration of title is covered by these plus the Registration of Titles Ordinance (Cap. 281) and the Registration of Titles Act (Cap. 300). Refer Jackson 1988, Wanjala 1990 and Onalo 1986 reviews. For less legal considerations see Juma & Ojwang (eds.) 1996.

TABLE 2.4: TENURE LAWS AND THEIR STATUS IN 2000

COUNTRY	MAIN TENURE LAWS	STATUS MID-2000
UGANDA	1. Land Act No. 16 1998	<i>New national land law</i> replacing four laws. Passed June 1998, assented July 1998, commenced 2 July 1998. Under slow implementation and hesitant political will and central Government capacity evident. Commitment to create the devolved frameworks for tenure administration and dispute resolution set out especially in doubt. Major amendments drafted in 1999 to facilitate this but not tabled by late 2000.
TANZANIA	1. Land Act No 4 1999 2. Village Land Act No 5 1999	<i>New basic laws</i> passed February 1999 and assented May 1999 replacing ten laws. Commencement date not yet set in late 2000. Regulations under both acts have been drafted.
ZANZIBAR	1. Land Tenure Act, 1992 2. Land Adjudication Act, 1990 3. Registered Land Act, 1990 4. Land Transfer Act, 1994 5. Land Tribunal Act, 1994 6. Commission of Land and Environment Act, 1989	<i>New tenure law.</i> Tenure matters critical to Independence movement and rigorously maintained since as a non-union matter (i.e. outside purview of United Republic of Tanzania).
KENYA	1. Transfer of Property Act of India, 1882 2. Registered Land Act, 1963 (Cap. 300) 3. Government Lands Act (Cap 280) 4. Trust Land Act (Cap 288) 5. Land Adjudication Act (Cap 284) (1968) 6. Land (Group Representatives) Act (Cap 287) (1968) 7. Land Titles Act (Cap 282) 8. Land Control Act (Cap 302) 9. Land Disputes Tribunals Act No 18 of 1990 10. Registration of Titles Ordinance (Cap 281) 11. Registration of Documents Act (Cap. 285) 12. Land Consolidation Act (Cap. 283).	<i>Different laws for different subjects and geographical areas, with overlap and contradiction.</i> The first two most specific to tenure. Little change since 1950s and 1960s and even recent amending bills (<i>Government Lands (Amendment) Bill 1994</i>) and the <i>Land Adjudication (Amendment) Bill 1999</i>) failed to be tabled in Parliament. The need for legal harmonisation accepted by Government since mid 1980s but inaction until gazettelement of <i>Commission of Inquiry into the Land Law System in Kenya</i> , November, 1999. Its report due in 2001, following widespread meetings in different parts of the country during 2000.
RWANDA	1. Land Decrees: 1960, 1961, 1975, 1975, 1976 2. 1997 Directive on <i>Imidigudu</i> (Villagisation).	<i>Inactive.</i> For all intents & purposes, statutes, decrees and customary law suspended following 1994 war & genocide, pending approval of new National Land Policy and Land Bill, to be enacted by end 2001, as committed in Economic and Structural Adjustment Facility Agreement.

ERITREA	<ol style="list-style-type: none"> 1. Land Proclamation No. 58 of 1994 2. Registration Act, No. 95 of 1997 3. Regulation on Allocation Legal Notice No. 31 of 1997 	<p><i>New law.</i> Under slow implementation; mainly education campaigns (1994), research and pilot trials (1996). Founding framework law invalidates customary rights and introduces a new tenure regime based on issue of lifetime usufructs and leases issued by the state which assumes complete control over all land matters. Critical Local Administration Bodies to implement not yet established so all rights in legal limbo.</p>
ETHIOPIA	<ol style="list-style-type: none"> 1. Land Proclamation, 1975 2. Federal Rural Land Administration Proclamation No. 89/1997 	<p><i>Post-revolution law.</i> New land policy and laws promised in new Constitution (1992) delivered in 1997 law which will be basis through which each Region enacts its own land law.</p>
MALAWI	<ol style="list-style-type: none"> 1. Land Act, 1965 Cap.57:01 2. Deeds Registration Act, Cap. 58.02 3. Registered Land Act, 1967 4. Customary Land (Development) Act, Cap. 59.01 5. Local Land Boards Act, Cap. 59.02 6. Land Use and Management Bill, 1998 	<p><i>Under review since 1996</i> by Commission of Inquiry on Land Policy Reform, final report March 1999 with Draft Policy 2000.</p> <p>Use of Customary Land Act stopped in 1996 to reduce loss of land from customary sector (through both leasing and freeholds). Land Use Bill spilled into tenure matters, on hold, pending approval of new Policy and new land act, to be drafted in 2001.</p>
ZAMBIA	<ol style="list-style-type: none"> 1. Lands Act, No 29 of 1995 2. Common Leaseholds Schemes Act, No 39 of 1994 	<p><i>New law.</i> Operational, builds on a 1985 Land Act. Land Act 1995 mainly concerns right of President to alienate land, recognised customary tenure but with strong encouragement to convert to leaseholds.</p>
ZIMBABWE	<ol style="list-style-type: none"> 1. Land Acquisition Act, Act No. 3, 1992 revised 1996 2. Communal Land Act, No. 20, 1982 3. Rural Land Act, Cap. 20:18 4. Regional Town and Country Planning Act, 1976 5. Agricultural Land Settlement Act, Cap. 20. 6. Traditional Leaders Act, 1998. 7. Land Tax Bill 2000. 	<p><i>New laws.</i> Acquisition Act has unusual importance in Zimbabwe as so actively used since 1992 to acquire settler estates for the Land Reform Programme (redistribution).</p> <p>Communal Land Act vests customary land areas in the President; gives inhabitants usufruct rights only and permits state re-allocation. Traditional Leaders Act 1998, designed to re-introduce leaders into local level tenure and other administrative procedures. Land Tax Bill to tax farms above specified sizes for each agro-economic zone.</p>
MOZAMBIQUE	<p>(Reform) Land Law No. 19 of 1997 Regulations, 16/87 of 1998 Technical Annex to Regulations, 1999</p>	<p><i>New law.</i> A framework law, with more detail in Regulations 1998, 1999. In force. Characterised by higher than usual level of public influence on content. Regulations do not resolve all issues. Dynamic Land Campaign to educate people on their rights underway.</p>

BOTSWANA	<ol style="list-style-type: none"> 1. Tribal Land Act, 1968, (significantly amended in 1993) 2. State Land Act, 1966 3. Tati Concession Land, Cap. 32:05 4. Land Control Act, Cap. 32:11 5. Tribal Territories Act, Cap. 32:03 6. British South Africa Company Act, Cap. 32:06. 	<p><i>Post-independence law.</i> Implementation well developed over 30 years; provides for Tribal Land Boards as responsible for administration of most land in the country (excluding freehold and state) and in which title to tribal land is vested. Autonomy of Land Boards in reality tempered by strong ministerial direction, and powers to regulate membership and decisions. 1993 Amendment increased central powers, provided more opportunities for converting customary rights to leasehold forms and opened tribal land to any citizen. State Land Act renders occupants tenants at will, affecting mainly minority groups resident in expansive game reserves. Plans to formulate new National Land Policy in 1999 shelved, pending new rural development policy development in 2001.</p>
SOUTH AFRICA	<p><i>Redistribution laws:</i></p> <ol style="list-style-type: none"> 1. Provision of Land and Assistance Act, 1993 2. Development Facilitation Act, 1995 <p><i>Restitution laws:</i></p> <ol style="list-style-type: none"> 3. Restitution of Land Rights Act, 1994 <p><i>Tenure laws:</i></p> <ol style="list-style-type: none"> 4. Upgrading of Land Tenure Rights Act, 1991 5. Interim Protection of Informal Land Rights Act, 1996 6. Land Reform (Labour Tenants) Act, 1996 7. Communal Property Associations Act, 1996 8. Extension of Security of Tenure Act, 1997 9. Transformation of Certain Rural Areas Act, 1998 10. (Land Rights Bill 1999) 	<p><i>New laws, following end of apartheid, founded in new policies in Reconstruction and Development Programme 1994, new Constitution 1996, and White Paper on South African Land Policy 1997.</i> Programme in three thrusts: <i>redistribution</i> aims to redistribute land to the landless poor, labour tenants, farm workers, and emerging farmers for residential and productive use; <i>restitution</i> aims to restore land to those who lost land since 1913 through racially-discriminatory laws; <i>tenure reform</i> aims to remove insecurity, overlapping and disputed rights.</p> <p>Critical <i>Land Rights Bill</i> drafted to overhaul tenure in ex-homelands abandoned in mid 1999, still not revived by late 2000. Visible decline in decision-making on land reform matters with Mbeki Administration with new minister who then changed most key personnel in the new Dept. of Land Affairs.</p>
NAMIBIA	<ol style="list-style-type: none"> 1. Agricultural (Commercial) Land Reform Act 1995 2. (The Communal Lands Reform Bill, 2000: rejected) 	<p><i>New tenure law for mainly white-owned commercial farms.</i> Limits size of holdings, allows state to compulsorily purchase 'excessive' holdings, stipulates Government as having first refusal on all sales of commercial farming land. Plethora of other pre-Independence laws still in place. Communal Lands Reform Bill passed by National Assembly but rejected by National Council May 2000 on grounds that it would encourage enclosure of communal grazing lands. Under redraft, with expectation of new reading in 2001.</p>
LESOTHO	<ol style="list-style-type: none"> 1. Land Act No. 17 1979 2. Deed Registry Act, 1967 3. Land (Agricultural Lease) Regulations, 1992 4. Native Administration Proclamation, 1938 (Cap. 54) 	<p><i>Post-Independence law.</i> Provides for the conversion of customary rights to registrable agricultural leases and declares land in Lesotho inalienable, vested in Nation, contradicted by Cap 54 which vests allocation authority in chiefs and established Land Committees. Changes recommended by 1987 <i>Land Review Commission</i> never implemented. New Commission to be put in place 2000 to draft new National Land Policy.</p>

SWAZILAND	<ol style="list-style-type: none"> 1. Concession Partition Act, No 28 of 1907 2. Land Concession Order, No. 15 of 1973 3. Vesting of land in the King Order, No. 45 of 1973 4. Crown Lands (Temporary Occupations) Act, No. 22 of 1964 5. Farm Dwellers Control Act, No 12 of 1982. 6. Sectional Titles Act, 1999 7. Safeguarding of Swazi Areas Act, No 39 of 1910 8. Swazi Administration Order 1998 	<p>Mixture of one or two new and many very old land laws (more than seventy).</p> <p>Government keen to reform, support from Crown appears slim. Swazi Administration Order 1998 gives royal bodies and chiefs unusually high powers to interfere in land and more or less all other matters, even to the extent of being able to prevent a subject to use a lawyer in court.</p>
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TABLE 2.5: EXAMPLES OF OTHER LAWS AFFECTING TENURE

COUNTRY	OTHER LAND LAWS	LAND USE MANAGEMENT & ADMINISTRATION LAWS
TANZANIA	LAND ACQUISITION ACT, 1967 THE TANZANIA INVESTMENT ACT, 1997 LAND REGISTRATION ORDINANCE CAP 334 REGISTRATION OF DOCUMENTS ORDINANCE CAP 117 TOWN AND COUNTRY PLANNING ORDINANCE CAP 378 PUBLIC LAND (PRESERVED AREAS) ORDINANCE CAP 338 LAW OF MARRIAGE ACT, 1971 TRUSTEES INCORPORATION ORDINANCE CAP 375 NYARUBANJA TENURE (ENFRANCHISEMENT) ACT, 1965 CUSTOMARY LEASEHOLDS (ENFRANCHISEMENT) ACT, 1968 MAGISTRATES' COURT ACT, C.10 RENT RESTRICTION ACT	FORESTS ORDINANCE, CAP 389 NATIONAL PARKS ORDINANCE, CAP 412 NGORONGORO CONSERVATION AREA ORDINANCE, CAP 413 WILDLIFE CONSERVATION ACT, 1974 THE MARINE PARKS AND RESERVES ACT, 1994 HIGHWAY ORDINANCE, CAP 167 PUBLIC RECREATION GROUNDS ORDINANCE, CAP 320 MINING ACT, No. 17 of 1979
KENYA	LAND ACQUISITION ACT, CAP. 293 TRUSTS OF LAND ACT, CAP 290 LAND PLANNING ACT, CAP 303 TOWN AND COUNTRY PLANNING ACT, CAP 134 SURVEY ACT, CAP 299 PUBLIC TRUSTEE ACT, CAP 168 THE EQUITABLE MORTGAGES ACT, CAP 291 INDUSTRIAL PROPERTY ACT, CAP 509 HOUSING ACT, CAP 117	WATER ACT, CAP 372 FORESTS ACT, CAP 385 LAKES AND RIVERS ACT, CAP 409 WILDLIFE CONSERVATION AND MANAGEMENT ACT, CAP 376 ENVIRONMENTAL COORDINATION AND MANAGEMENT ACT, 1999 MINING ACT, CAP. 306
ZIMBABWE	LAND ACQUISITION ACT, 1992 TOWN AND COUNTRY PLANNING ACT, 1996	WATER ACT, 1976 NATURAL RESOURCES ACT, 1996 NATION PARKS AND WILDLIFE ACT, 1975 (AMENDED IN 1982) MINES AND MINERALS ACT, 1996 TRADITIONAL LEADERS ACT, 1998 RURAL DISTRICT COUNCILS ACT, 1988
MALAWI	CUSTOMARY LAND DEVELOPMENT ACT (CAP. 59.01) CONVEYANCING ACT (CAP. 58:03) LAND SURVEY ACT WILLS AND INHERITANCE ACT (CAP. 10:02) MALAWI HOUSING CORPORATION ACT (CAP 32.02) PLANNING (SUBDIVISION CONTROL) ACT (CAP 59.04) TOWN AND COUNTRY PLANNING (CAP 23.01)	CHIEFS ACT (CAP. 22.03) COTTON ACT (CAP. 65.04) ENVIRONMENT MANAGEMENT ACT (CAP 110.23 Y 1996) FISHERIES ACT (CAP 66.05) FORESTS ACT (CAP. 63.01) GAME ACT (CAP 66.03) MINES AND MINERALS ACT (CAP 61.01) NATIONAL PARKS ACT (CAP. 66.07) NOXIOUS WEEDS ACT (CAP 64.02) PETROLEUM (EXPLORATION AND PRODUCTION) ACT (CAP 61.02) WATER RESOURCES ACT (CAP 72.03) PLANT PROTECTION ACT (CAP 64.01) PUBLIC HEALTH ACT (CAP 34.01) SPECIAL CROPS ACT (CAP 65.01) TOBACCO ACT (CAP 65.02)

TABLE 2.6: DERIVATION OF CURRENT TENURE STATUTES

COUNTRY	DERIVATION OF MODERN NATIONAL LAND LAWS (excludes traditional customary law)	EXTENT TO WHICH CURRENT TENURE LAWS INCLUDE COLONIAL LAW
UGANDA	English law, received in 1902	Most modified by Land Act, 1998
TANZANIA	English law, received in 1922	Largely replaced, by Land Act, 1999
KENYA	English law, received in 1897	Not changed
RWANDA	Belgian Decrees	Not changed
SOMALIA	Italian	Modified
ERITREA	Italian	Modified
ETHIOPIA	Italian	Modified.
SUDAN	English	Not changed
SOUTH AFRICA	Roman-Dutch law received in 1652	Modified mainly by laws since 1993
NAMIBIA	Roman-Dutch law received in 1920	Not changed
ZAMBIA	English law received in 1911	Modified by laws of 1985, 1995
SWAZILAND	English law received in 1904	Not changed
LESOTHO	Roman-Dutch law received in 1884	Modified
ZIMBABWE	Roman-Dutch law received in 1891	Modified

Main source of information: McAuslan, 2000.

TABLE 2.7: STATUS OF LAND REFORM IN EASTERN & SOUTHERN AFRICA

STATE	STATUS OF IMPLEMENTATION IN LATE 2000
UGANDA	Began 1988. IN IMPLEMENTATION Reform through Constitution 1995 and new land law 1998 but the institutional development to carry the new law is not yet in place, and require passage of amendments. Meanwhile, individuals, including women, are using certain provisions of the new law periodically. Dissemination campaign undertaken in 1999-2000.
TANZANIA	Began 1989. YET TO COMMENCE National Land Policy 1995, then new laws, Land Act, 1999 & Village Land Act, 1999. Implementation unlikely before 2001 following drafting of regulations, national dissemination of the new laws, training of the 9,225 new land managers (Village Land Councils). Adoption of pilot approach likely.
ZANZIBAR	Began 1989. IMPLEMENTED Although not referred to as reform, 1989 Commission for Lands and Environment Act began reform process. Important statutes in early 1990s, mainly Land Tenure Act, 1992. Reshaped tenure as a matter of ensuring every Zanzibari can use land for farming and as more definitively dependent upon occupation and use, and subject to reallocation on failure.
ERITREA	Began 1992 IN IMPLEMENTATION Land Commission 1992 led to Land Proclamation, 1994 and subsequent 1997 enactments. Mainly because of highly centralised nature of law, implementation proving difficult.
ETHIOPIA	Began 1975. IN IMPLEMENTATION Land Proclamation, 1975, reinforced by 1991 Constitution, then 1995 Federal Constitution and Rural Land Administration Proclamation 1997. Federal law directs Regional laws. Tenure matters contentious and issue of state ownership in particular. Past redistribution programmes largely abandoned.
KENYA	Began 1999. IN PLANNING STAGE 1955 Land Reform Programme to individualise and title land still underway, now expected to take until 2050. Progress: 16% of land until individual title after 45 years, includes nearly all medium/high potential land and some pastoral lands. Mainly arid and semi-arid lands still under customary tenure with land vested in County Councils (Trust Land) and two coastal districts. Token recognition of need for change from 1986 became stronger with land wars during 1991-1994, still under inquiry in 2000. November 1999 saw creation of Commission into Inquiry into Land Law; expected to advise revocation of questionable allocations by Commissioner or Lands & County Councils but with little confidence in country that recommendations will be implemented. Constitutional Review includes review of tenure, but this has not begun after nearly 3 years. NGOs formed Land Alliance to lobby for change, September 1999 but inactive.
RWANDA	Began 1998 IN PLANNING STAGE Delays in producing draft new Land Policy and Land Bill both originally to be presented in 1999, and still not disseminated by late 2000.
MOZAMBIQUE	Began 1990. IN IMPLEMENTATION Implementation after Land Act 1997 in form of education (Land Campaign) and actions by projects to secure customary rights now available under the law.

ZIMBABWE	<p>Began 1980 IN IMPLEMENTATION</p> <p>Land Reform Programme focused upon restitution and redistribution of lands, 1980-1999 in two Phases. There have been important changes in target groups and type of tenure which allocatees may obtain. Nearly 9 million ha has been purchased and 90,100 families have gained land. Increasing allocation to ZANU-PF persons has raised ire, especially as they pay 'trifling rents'. Significant new Land Policy drafted (1998), discussed (1999), with many elements similar to those of Tanzania's NLP 1995, but has dropped out of sight since. If Policy had been approved, it would have widened concerns to unattended matter of status of communal lands. Real reform affecting the majority is unlikely until leadership issues resolved.</p>
LESOTHO	<p>Began 1987 NO IMPLEMENTATION</p> <p>Process began with a land policy review commission in 1987. Not acted upon, further reports and recommendations including critical report on failures in compulsory acquisition processes, 1996, further critical study on land policy in 1999, but with no new Policy in place by mid-2000 and new Commission to draft new land policy still not in place. A main constraint has been continuing conflict between state and traditional machinery for land allocation administration.</p>
SOUTH AFRICA	<p>Began 1994. IN IMPLEMENTATION</p> <p>In progress, through new policies and new laws but with clear slide in commitment since Mbeki became President. Meanwhile issues of restitution, redistribution and the future of occupancy in ex-homelands remain unresolved..</p>
ZAMBIA	<p>Began 1993 NEW PLANNING STAGE</p> <p>New law 1995 but implementation beset with delays and promises of new Policy, started in 1998, still in draft.</p>
SWAZILAND	<p>Began 1998 IN PLANNING STAGE</p> <p>Draft National Land Policy 1999 proposing new law, but not approved partly because of slow drafting of new constitution, conflict between government and royalty and its enthusiasm for real reforms. Twelve sectoral policies (including forestry) being developed to ensure final National Land Policy comprehensive and together form an integrated new national development strategy.</p>
NAMIBIA	<p>Began 1990 IN IMPLEMENTATION</p> <p>Slow implementation, with one new law affecting freeholders. Redistribution of non-local lands has been slow (only 16,000 resettled). Attention has eventually turned to the Communal Lands but draft bill weakly conceived and thrown out. New National Land Policy finally approved in 1998.</p>
MALAWI	<p>Began 1996 IN PLANNING STAGE</p> <p>Final report of the Presidential Inquiry on Land Policy Reform (1996-1999) set out recommended content of a new basic land act, not yet drafted in late 2000. New National Land Policy is under advanced draft.</p>

II LAND REFORM

It will be clear by now just how far matters of land are under change in the region. In fact, it is only Angola, Burundi and DRC which have *not* embarked upon a land reform of some sort – all countries in civil war.

TABLE 2.7 summarises the status of reform in each country. The majority have only just begun the process. In every state land reform is proving more complicated, time-consuming and contentious than early proposals imagined. A great deal of interest and commentary surrounds these important developments, but mainly on a country basis, and the pace of change is such that even these are quickly out-dated.¹⁵⁵

ANNEX D provides an overview of the land reform process in Uganda, Tanzania, Zimbabwe, South Africa, Zambia, Namibia and Mozambique. Aspects of reform of direct import to the status of forest-local rights will be covered in Chapter Three. Here an overview of the gist of the reform process is provided.

1 PROMPTS TO REFORM

Whilst more immediate drivers may be identified, there may be no doubt that the changing political face of the region over the last decade or so has been the underlying impetus.

This changing political face is clearest where there has been a new wave of independence in the last decade or dramatically new regimes (Eritrea, Ethiopia, South Africa, Namibia, Mozambique, Rwanda, Uganda, Malawi, Zambia). It is more widely apparent in a general democratisation of relations. This may be seen in economic liberalisation, increase in participatory approaches to development, and in more formal actions to decentralise or devolve decision-making and representational powers.¹⁵⁶

At the same time, typical of such transitions, there are contradictory forces, entrenching certain powers of state, resulting in polarisation of authority at the centre and periphery as will be illustrated shortly in such matters as where power over land allocation is being located, and under what conditions may the state appropriate private property.

Immediate prompts or declared objectives for land reform are set out in Table One in ANNEX E. These range from the expected commitment in southern Africa to reclaim and redistribute lands held by white minorities to frustrations with out-of-date laws, near-inoperative and corrupted registries, and the need to halt what Okoth-Ogendo, writing on Kenya, calls 'wanton abuse and manipulation' of the law (1999b). This has also forced reform in Tanzania, Uganda, Malawi and Lesotho.¹⁵⁷

A keen interest to make land more freely available in the market place is another driver, and one encouraged by the international lending community,

155 For general reviews of southern Africa refer Quan 1998, Adams, Sibanda & Turner 1999, Mutefpa et al. 1998, ZERO 1998. For eastern and north-eastern Africa, refer Okoth-Ogendo 1998 and OSS 1997 (passim). For more recent Africa-wide reviews refer Toulmin & Quan (eds.) 2000. Palmer, 1997 provides a useful literature review on land tenure up until mid-1997.

156 Alden Wily 2000b.

157 Kasanga, 1999 details the ills of the current situation in Lesotho where land speculation and corruption is widespread, clear and avoidable legal contradictions exist, institutions and management of land matters are in chaos, and where there is 'a complete vacuum of guiding policy'.

concerned to see foreign investment operate in a more 'friendly' environment.¹⁵⁸ Accordingly, as outlined shortly, a good deal of attention is paid in emerging new land legislation to the sometimes tricky matter as to how far non-nationals should be able to access rights in land.

Through all this the nature of land rights is affected, and placing land *tenure* reform central to the movement. This contrasts with the main thrust of land reform movements last century, where matters of redistribution drove change, with enfranchisement of tenancy paramount.¹⁵⁹ Redistribution is on the agenda in the region but largely in a racial context. In Rwanda, redistribution towards ethnic stability is likely to feature in new legislation. A more typical position is expressed in Zanzibar's reform which was founded upon a view of land rights being due every citizen and their provision the responsibility of Government.¹⁶⁰ This is a position apparent also in Tanzania and Eritrea and less stridently so in Namibia and Malawi.

2 THE PROCESS OF REFORM

Shifting ground

No matter where the intention to reform has begun, and with what modest objective, its scope rapidly widens and become more complicated.¹⁶¹ ANNEX E (Table One) illustrates changing objectives. Moreover, this everywhere spills beyond land into issues of governance, democratisation and state-people relations in general, illustrating the centrality of property rights to modern agrarian society. Even family laws are being directly affected (see below).

Inevitably, the character of the reform begins to change. To example if oversimply, **Eritrea** and **Ethiopia** thus began with rigorous intentions towards equity but in practice devote a significant proportion of legal provision to procedures for leasing land to foreigners.¹⁶² Contrarily, **Tanzania** began with an intention to free up land for foreign investment but in the new laws, severely limits foreign access to most rural lands.¹⁶³ **Uganda** began with a plan to create a single, uniform regime of tenure, but finally recognised four quite distinct regimes as legal, including the very one (customary) it was originally determined to eliminate.¹⁶⁴ **Malawi** also planned to hasten the conversion of customary lands but is now planning to recognise customary tenure¹⁶⁵ SWAPO achieves Independence in **Namibia** on the back of intended restitution of settler-held estates but moves towards a position in which only surplus, unwanted properties are acquired with virtually no change in the status-quo ten years later.¹⁶⁶ **Kenya** talks for 20 years of the need to make more land

158 The IMF and World Bank acknowledge imposition of requirements to reform tenure conditions towards increasing a free market in land in Uganda, Tanzania, Mozambique, Malawi, Rwanda and Zambia. In the last case for example, the 1995 law was pushed through parliament even in the face of widespread resentment of its terms (Kahokola undated, Hasungule 1998). Reform in property relations remains a normal part of conditionality to loans but is more nuanced and sympathetic to customary issues in particular; see Platteau 1992, 1995 and Deininger & Binswanger 1999.

159 Adams 1995.

160 C. Jones 1996, Lindsay 1996.

161 Palmer 2000, Toulmin & Quan (eds.), passim, Alden Wily 2000b.

162 Tesfai 1997, Dessalegn 1997, Amadi 1997.

163 Alden Wily 1998e.

164 GoU 1993.

165 GoM 2000, Harawa 1999.

166 Werner 1997.

available for commercial and industrial investment but ultimately fields a commission mandated to find a more 'socially equitable tenure system'; should this indeed eventuate, would dramatically alter the status quo. Perhaps most widely of all, fundamental strategies shift as to how far (if indeed at all) should land reform be market-driven and market-assisted, an important consideration given increasing evidence of broad failure of this context over the last century and seeming inevitable return towards compulsory redistribution programmes.¹⁶⁷

Hesitant political will

Shifts in focus or resolution are by no means always made official. Most commonly, they are signalled in periods of dwindling political will for land reform and inaction. This is most pronouncedly the case in 2000 in **South Africa**. It is also apparent in **Swaziland, Zambia** and **Lesotho**; in all these states critical new policies and laws are not seeing development or the (public) light of day. It was also the case until mid-2000 in **Rwanda** where the public was kept deliberately uninformed on policy directions being formed.

It may also appear in other forms. A nervous government may enact important new laws but fail to set a commencement date (**Tanzania**). A reluctant government may delay for years and then try to enact token or hurried legislation immediately before an election (**Namibia**). Critical revisions to enable an inadequate law to operate may be significantly delayed (**Uganda, Eritrea**). Important new policy recommendations may remain un-approved for several years (**Malawi, Zimbabwe, Swaziland**). Promises to reform may be reneged upon (**Botswana**). Steady progress may be made in the occasional state, but largely only through the forcefulness of NGOs in a climate of weak governance (**Mozambique**).

Less delivery than promise

Ultimately the extent of alteration to the standing body of land law is less than originally proposed by the ubiquitous Land Commissions set up to mastermind the plan,¹⁶⁸ or as appear in the declarations of National Land Policies which generally precede law reform and which are by their nature usually general in content and not legally binding (TABLE 2.8).

Still, at the end of the day, once embarked upon, and once citizens are awakened to the possibility of increasing their control over their land, land reform is proving difficult to halt altogether. Sooner or later, and whether consultation has been part of the design process or not, public interest, opinion and demand plays a growing role.

Public participation

The extent of public participation in the making of land reform is itself a matter of growing commentary and concern.¹⁶⁹ Table Two in ANNEX E records both

¹⁶⁷ This issue, not explored further in this paper, nonetheless deservedly those states in the region which make redistribution of land a central objective of land reform (and South Africa in particular at this point). It also preoccupies international lending agencies and bilateral donors routinely called upon to fund land acquisition programmes.

¹⁶⁸ Presidential-appointed Commissions of Inquiry have investigated and recommended on reform in Lesotho (1987, 1999), Tanzania (1991-93), Eritrea (1992), Mozambique (1990-91), Zimbabwe (1994), Malawi (1996-99), and now Kenya (2000). Elsewhere formulation has been spearheaded by civil servants in land or agricultural ministries (Uganda, Rwanda, Ethiopia, Swaziland, Namibia, South Africa).

¹⁶⁹ Palmer 2000, Alden Wily 1997c, 1998e, 2000b, Kapinga et al. 1997, Negrao 1999a, Odhiambo & Adhoch 1999, Quadros op cit., Shivji 1996a, Shivji & Kapinga, 1997a, Harawa op cit., GoM, 1999 – among many others.

milestones in the process thus far in each state, and assesses the extent of civil society involvement.

A common feature has been the development of new policy by the central state. This is not an area of social change where devolved, 'bottom-up' or participatory approaches are favoured. The reasons may be easily guessed at; recognition of the controversial nature of tenure reform and fear that demands may get out of hand or unrest be provoked; the standing conventions of command development approaches; and pervasive assumption that change must be national, and nationally-directed, uniform and uniformly-regulated.

Underlying this is recurrent evidence of a view that ordinary citizens, whilst of necessity having their views heard at some point, are not in a position to grasp the whole picture or know what is best for them in the complex modern world. With their parochial concerns, they may 'delay and muddle' progress, and may subvert national cohesion by asserting a diversity of locally-based and therefore untidy solutions (ANNEXES D & E).

In countries like South Africa, there is less fear of citizens themselves than the response that might be provoked for altogether less pliant tribal authorities or new local governments.¹⁷⁰

170 Levin & Weiner (eds.) op cit., Ntsebeza op cit., Cousins 2000, McDonald op cit., Adams, Sibanda & Turner op cit.

TABLE 2.8: NEW NATIONAL LAND POLICIES

COUNTRY	NATIONAL LAND POLICY	STATUS LATE 2000
UGANDA	NONE	1995 Constitution, Chapter 15 provides basic principles.
TANZANIA	NATIONAL LAND POLICY, 1995	Active, drove drafting of new Land Acts 1999
ZANZIBAR	NONE	No formal policy but stated in 'Land tenure in Zanzibar: a Review of the Land Tenure Act 1992' by Dept Lands.
KENYA	NONE	Standing policy is still the 1955 Swynnerton Plan for Agricultural Development to bring all country under individualised, titled tenure, still in implementation. Intention to make new <i>National Land Policy</i> part of TOR of Commission set up Nov. 1999.
RWANDA	Draft NATIONAL LAND POLICY, 2000	Not available to the public and status unclear. In the interim the village-making <i>Imidugudu</i> programme and especially the January 1997 <i>Villagisation Policy</i> redefines land use and social change as a single process.
ERITREA	NONE	1994 Land Proclamation held to embody policy.
ETHIOPIA	NONE	Constitution and land laws held to embody policy. Partly the case in Proclamation No. 89/97.
MALAWI	Draft NATIONAL LAND POLICY, 2000	<i>Commission of Inquiry on Land Policy Reform</i> presented final report to the President in November 1999 including a precise framework for a new Policy, in unofficial draft in late 2000.
ZAMBIA	Draft NATIONAL LAND POLICY, 1998	New law passed in 1995 without new policy, Draft National Land Policy still in uncertain formulation in 2000; loss of interest apparent.
ZIMBABWE	Draft NATIONAL LAND POLICY, 1998/99	Drafted 1998, made public in 1999 and discussed in workshops, no decision since.
MOZAMBIQUE	NATIONAL LAND POLICY, 1995	Policy led to <i>Land Act, 1997</i> . Now proposals to develop a strategy for implementation and to detail principles which could amount to a new National Land Policy.
BOTSWANA	Tribal Land Grazing Policy, 1975 White Paper 1982 New Agricultural Policy, 1991	1975 Policy divided Tribal Land into reserved, commercial and communal management zones to prompt commercialisation of cattle-keeping and to relieve pressure in communal lands, with little effect. <i>Presidential Commission on Land Tenure Report</i> and <i>White Paper, 1982</i> resulted in amendments to Tribal Land Act. Agricultural Policy permits enclosure of rural common lands with further polarisation.

SOUTH AFRICA	WHITE PAPER ON SOUTH AFRICAN LAND POLICY, 1997	Preceded by the ANC, 1994 <i>Reconstruction and Development Programme</i> policy framework, Land Policy Framework Document, 1995, Green Paper, 1996. Policy most detailed on continent.
NAMIBIA	Draft NATIONAL LAND POLICY, 1998	Recently finalised (2000) with changes.
LESOTHO	NONE	The need for a national policy repeatedly observed by different studies & reports within and outside Government (1987, 1996,1990) but no policy by mid 2000.
SWAZILAND	Draft NATIONAL LAND POLICY, 1999	A comprehensive work completed in 1999 but which has since seen no action.

Hence, participation has been mainly in the mould of consultation, generally belated and almost always distant from the genuinely participatory approaches these same Governments espouse (and allow) for development in other areas. In this way the fundamental requirements for successful change tend to slip by this important field of reform. Populations have tended to be presented with plans which do not resonate with their own experience or wishes, and therefore lack the level of social legitimacy to be readily adopted. Through the same ill-placed centralism, the opportunity is being repeatedly lost to devise genuinely workable and cost-effective machinery for change such as might be availed through participatory processes. The end result is frequently un-implementable law (**Zambia, Uganda, Eritrea**).

On the whole even consultation has been erratic and frequently withheld when it is adjudged as likely to upset the direction set (**Rwanda, South Africa, Eritrea, Tanzania**).¹⁷¹ What is really ex-post dissemination of what has been decided or legislated for, is frequently touted as consultation and genuine consultation (**South Africa**) as participation, irrespective of who is involved and their impact upon the content.

There have been exceptions, and the public debate which immediately preceded the parliamentary debate on the Land Bill in **Uganda** in 1998 and the formulation of **Mozambique's** new land law during 1996-97, main among them. Civil society was directly involved in the final drafting of the latter law.¹⁷² Those who participated were however not landholders themselves but representing NGOs, political parties and interest groups. The surest evidence that even there, land policy and new law has *not* been developed through client participatory processes is in the current national campaign to 'inform and educate people as to what the law says'.¹⁷³

171 The first consultation on the Uganda land law was presented mainly to public officials and politicians and their responses to set questions allegedly manipulated to support the desired answers; Alden Wily 1997c. Consultations were more effective in 1998; see GoU 1998b.

172 Negrao, 1998, 1999a, Quadros, op cit., Kloock-Jenson, 1997, Kloock-Jenson et al. 1998.

173 Nhantumbo 1999.

As implementation of land reforms get underway, lack of real popular participation in their design begins to represent real constraints. As some states have already found to their cost, the lack may in effect cripple implementation. Namibia, Zambia and Eritrea are all having to return important new legislation to the drafting table, as the implications of their terms reached the public domain.¹⁷⁴ And, as implementers are woefully aware, had the plan for tenure administration in Uganda's new land law been devised at the local level, the extent of new thinking and legal amendment now needed to get the land reform underway, would almost certainly have been less.¹⁷⁵

Rising demand for involvement

Sooner or later, the proposals or decisions of the central state have to enter the public domain. Lobbyist groups have used the demand for consultation as the route through which poorly-thought through strategies may be re-thought and revised.¹⁷⁶ Donors have used the same route, encouraging national governments to consult, and hoping that changes they would like to see, are realised through this process of consultation. This has been most clearly the case in the formulation of Uganda's new land law (1998).¹⁷⁷ It may also be a factor in the reluctance with which central government now advances implementation.¹⁷⁸

Moving from participation into community-based approaches to reform

The Uganda case focuses the real issue at stake here; not just how far the populace participates in the formulation of land reform as opinion-makers, but how far the actual paradigms of reform are permitted to be locally-derived, locally-driven and in their implementation, locally-based.

Whilst there is widening acknowledgement of the need for popular input into land reform-making, nowhere does this extend to willingness for matters of land rights to be debated and decided at the local level, in a manner of cumulative district-based plans of action. It is therefore ironical that, in practice, precisely this may occur in future years through the devolved approaches to tenure *administration* which are increasingly being devised in several countries in the region as outlined shortly.

174 Eritrea passed a law in 1999 dealing with urban lands that was rejected by the populace and withdrawn (pers. comm. P. Dewees, February 2000). See ANNEX C on the case of the Namibian Communal Land Reform Bill, 2000. The 1995 Land Act of Zambia is planned for redraft; see ANNEX C for details of how it was promulgated.

175 GoU, 1999b.

176 This has been the fundamental strategy of the three non-government lobby groups established in East Africa; the Land Alliance of Uganda, Hakiardhi in Tanzania, and the still-emerging Land Alliance of Kenya.

177 Arguably donor pressure coerced the introduction of the Uganda Land Bill to the public in September 1997 through a donor-sponsored public meeting for parliamentarians on the proposed new land law, not then public. A similar approach was used a year later in respect of the revised version of the law. British DFID organised a parliamentarians workshop, which as hoped, led to a plethora of new recommendations and eventually amendments channelled through the Parliamentary Sessional Committee and also saw a national consultation exercise hurriedly launched (Alden Wily 1998b, 1998c, 1998h, Adoko, 1998a, 1998b, McAuslan, 1998c, Gariyo 1998, Nangiro & Abura, 1998, Oloya, 1998, Mwebaza 1998, Uganda Association of Women Lawyers, 1998, Uganda Womens Network, 1997,1998, GoU 1998b).

178 McAuslan 1999a, 1999b.

3 THE CHANGING SUBSTANCE OF LAND RIGHTS

Commonality

A striking feature of the wave of land reform current in the region is the commonality of tenure concerns that come to attention (TABLE 2.8).

Some of these have been mentioned above; such how far land should be freely available in the market place; how far the state should be able to intervene in private property matters; how tenure should be administered and with what degree of autonomy from government; how far is it desirable that reforms are market-assisted; how may the plethora of land disputes be more swiftly and fairly disposed with; how may the recording of land interests be brought into a simple and firmly evidential system; and how far should customary rights in land be secured in national law and to what purpose.

The last tends to be the most problematic. Governments are having to deal with the fact that customary tenure has continued into the 21st century. On the whole the sporadic efforts to use customary mechanisms for modern tenure have been broadly a failure, at least partly because of ambivalent political and administrative support for this. Now, at the new century opens decision has to be made whether to ignore, abolish, recognise, transform or convert these rights, and with what measure of legal support. For the majority of citizens in the region, this is the element of tenure reform that most directly affects them, and the central sphere of later discussion.

Equally, all states are being forced to deal with a new set of issues arising from social transformation over the 20th century. These include rights of women in land, as both equal members of society and now primary rural producers, in desperate need of securing a share in the ownership of their means of production; the millions of untenured settlers in urban areas whom current laws designate as squatters, and farm-workers and tenants of long-standing. Where hunter-gatherers and particularly pastoralists live, reform-making processes are having to take account of land rights which accrue in ways not previously recognised.

These concerns reflect a more general need to provide greater and fairer protection for existing but *unregistered rights in land*, which in turn re-introduces the time-old concerns of entitlement.

Re-thinking the meaning of private property

Underlying the decision as to the way forward is corollary reconsideration of the fundamental premise of most standing land legislation which locates privatisation of land into individually-held and titled rights as its corner-stone and objective.

As a whole, there is a good deal less surety today than in decades past, that individualisation is as essential to agro-economic growth as assumed, or that it need be realised through the conventional forms of registration and titling.

The arguments need only cursory note here.¹⁷⁹ To summarise, reiterated ‘facts’ are that title has *not* generated available credit to smallholders, titled smallholdings are *not* generally accepted as loan collateral, and the level of inputs and improvements to farms do *not* correlate with the type of ownership (registered and documented in title deeds, or unregistered, customary rights). The promised reduction in land disputes through titling has also not materialised; on the contrary dispute over ownership has multiplied and become a good deal more complicated and expensive to resolve. The cost-efficiency of the titling process has also been thoroughly disputed. The final nail in the coffin of individualisation-driven entitlement according to critics, is that the holding of land by customary means does *not* in itself inhibit market transactions.

What these arguments correctly do is to put the titling process under review. Where once inseparable as ‘individualisation, titling and registration’, the first is now being separated in a growing number of land laws. Over all there is no loss in the conviction that recordation of rights and their certification is essential (titling and registration). Privatisation of rights itself remains impregnable as the core strategy of reform throughout the sub-continent – but with a new face.

Two trends are observable; *first*, steps to simplify and decentralise the process of recording and certifying rights in land, and *second*, steps to expand the meaning of ‘private’ beyond the individual, to allow for spousal, family, clan and other group forms of private ownership.¹⁸⁰

The importance of both to forest-local tenure is immeasurable as explored in the next chapters. For the moment, the change is tangible in the growing provision in new tenure legislation for customary title deeds, as set out in Table Three of ANNEX E.

Reinforcing conditionality

Conditionality has long been a feature of land holding in Africa, both customarily and in state laws. Despite not a great deal of evidence that formal conditions are routinely met, changes in laws suggest that the desire to regulate landholding are strengthening rather than diminishing objectives. The rationale is that these steps will inhibit absentee landlordism, speculation and hoarding and encourage occupancy of vacant and under-utilised lands; problems in most states in the region to one degree or another.

As in the past, the commonest limitation being imposed or confirmed is the requirement to occupy and use lands, an attribute which derives a good deal of legitimacy from customary tenure regimes. The new land laws of **Tanzania, Zanzibar, Mozambique, Botswana, Eritrea, Ethiopia, Namibia** and the traditional laws of **Lesotho** lay down such requirements (Table One, ANNEX F). Proposed land policy in **Malawi** is as emphatic that both customary and freehold rights should depend ‘not upon title, but upon actual use’.¹⁸¹ Perhaps

179 Much of the ‘evidence’ is in fact secondary, authors citing a limited number of empirical studies, such as papers by Migot-Adholla et al. 1994, Carter et al. 1994. The general case is argued in Shipton 1989, Bruce & Migot-Adholla 1994, Barrows & Barrows 1990, Platteau passim and Deininger & Binswanger op cit.

180 There are exceptions with Eritrea and Zanzibar perhaps most marked in the centralisation of authority over land relations and land allocation.

181 GoM 1999; 8.3.3.

the most extreme example of conditionality is provided by the *Land Tenure Act 1992* of **Zanzibar** which puts occupants on probation for three years before registering the right as existing in perpetuity (s.11). Within that period the occupant must use and develop the land. Even after the probation period is over, the tenant is directly vulnerable to confiscation of the land if s/he fails to develop it within 18 months.

Ceilings on landholding

A ceiling on landholding is also imposed in the laws of **Tanzania, Somalia, Eritrea, Ethiopia, Zambia Botswana, Namibia Lesotho** and **Zimbabwe** (Table Two, ANNEX F). Equity in landholding sizes is a stated objective in the laws of **Eritrea**. Even **Kenya**, famous for the strength of its commitment to the unbridled right to acquire land freely, has announced that a tax on vacant or under-utilised lands is likely to be one of the first reforms to be introduced in the new millennium.¹⁸²

Imposition of taxes and stringent planning regulations affect freeholders in **South Africa, Zimbabwe** and **Swaziland** in increasingly, rather than decreasing degree. In **Eritrea**, rent-seeking on the part of the state has reached new heights with the declaration that land is only available through state allocation, and allocation of agricultural holdings is subject to a tax.

¹⁸² President Moi announced this on Jamhuri Day, December 12, 1999, Daily Nation 13 December 1999.

TABLE 2.9: AREAS DIRECTLY ADDRESSED IN NEW TENURE LAWS

AREA AFFECTED	UGA 1998	ERIT 1994, 1997	TZA 1999	ZANZ 1989-1994	ETH 1997	MOZ 1997	ZAM 1995	SA 1993-97
Primary ownership of land	X	X	X	X	X	X	X	
State powers to acquire property	X	X	X	X	X		X	X
Legal status of diverse regimes	X	X	X	X	X	X	X	X
Role of registration & titling	X	X	X	X		X	X	X
Lands survey procedures		X		X			X	X
Land use planning		X	X					X
Tenure Administration	X	X	X	X	X	X	X	X
Dispute resolution	X		X	X		X		X
Status of customary tenure	X		X		X	X	X	X
Status of common property rights	X		X			X	X	X
Rights of settler populations							X	X
Farm squatter rights								X
Urban squatter rights			X					
Status unregistered rights			X	X		X	X	X
Inter-tribal tenure relations			X			X	X	
Pastoral rights in land			X		X			
Family & gender land relations	X	X	X		X	X		X
Conditions to landholding		X	X	X	X	X		X
Land rights of non-citizens	X	X	X	X	X	X	X	
Regulation of land mortgaging		X	X	X				
Regulation of tenancy	X	X	X	X				X
Status of reserved resource estates	X		X			X		
Rights to minerals								
Land taxation		X						
Resettlement								X
Distribution of land		X	X	X	X			X
Legality of sales of land/rights		X	X	X	X	X		

Regulating the market in land

A similar regulatory emphasis is emerging in the handling of the right to sell property.

Legalising sales

The steady commoditisation of property in Africa has been remarked. Debate has continued for decades in countries like Tanzania and Mozambique as to how far the state should support this trend by legalising and indeed, encouraging sales.

Another common focus has been whether value should reflect the land itself or improvements and developments upon the land. In Zimbabwe this matter reached a climax in 1999-2000 in President Mugabe's handling of settler estates, and final determination by constitutional amendment that payment for even improvements is not necessarily required.¹⁸³ Irrespective of policy and views on this matter, a market in land grows throughout the region and one which draws less distinction as to what exactly is being sold.

States which locate ownership in the state, disallow land sales but permit sale of rights in land (**Zambia, Mozambique, Lesotho, Lesotho, Eritrea, Ethiopia, Tanzania**). In Tanzania the ambivalence in the positions adopted is most clear with an outright policy declaration that 'land has value' (Policy 4.2.12) followed by clear instructions that only improvements in land may be sold (Table Three in ANNEX F).

Regulating sales

The matter of regulation also routinely arises. Intentions towards deregulation and an entirely free in market in land founder upon the reality that no such thing exists.¹⁸⁴ **Kenya** is a case in point; it boasts and provides for an entirely free market in principle.¹⁸⁵ In practice sales are constrained; *Land Control Boards* have long been operational, established precisely for the purpose of regulating sales in agricultural land, which they actively undertake.

New law in neighbouring **Tanzania** mirrors the trend towards more, not less limitation upon sales. Whilst the new law makes both land granted by the state and customary rights capable of being sold, this is subject to authorisation by the land management authority which may make conditions to that sale or to sales in general. In Village Land, wherein the vast majority of Tanzanians live, there is multiple restriction as to whom the land may be transferred. This is devised to inhibit landlessness, especially of women and dependants, and to inhibit land hoarding in the peasant sector. **Rwanda, Zimbabwe, Namibia, Eritrea** and **Ethiopia** also place special constraint upon land sales in the customary land sector (Table Three, ANNEX F).

Limiting non-citizen access

A telling indicator of freedom in the land market is the position on access by foreigners.

¹⁸³ As detailed in ANNEX C.

¹⁸⁴ McAuslan makes the point that it is only in the febrile imaginings of some old style international lending agency consultants that the only permissible kind of land market is one that is completely free of all regulation (pers comm. March 2000).

¹⁸⁵ Registered Land Act, Cap 300, s. 27.

In no state is foreign ownership of land entirely unrestricted. Even where it is permitted, such as in **South Africa** and **Botswana**, special procedures, limitations or approvals apply, or there are restrictions as to which categories of land are accessible to them (Table Four, ANNEX F). In **Tanzania**, a non-citizen may only purchase (occupancy rights in) land for the purposes of investment¹⁸⁶ and may not acquire 'village land' at all.¹⁸⁷ Land policy proposals in **Malawi** advise that non-citizens should not be able to acquire freehold title.¹⁸⁸

In **Uganda**, where the market in land is otherwise unfettered through the new Land Act, a non-citizen may only lease land, if indeed for probably renewable periods of up to 99 years.¹⁸⁹ This is similarly the case of **Zanzibar** where leases are limited to 49-year periods, but renewable.

None of the restrictions indicated necessarily ease the competition faced by many peasant landholders for land. No where is this better illustrated than in **Mozambique** where foreign access to land has so greatly multiplied since the 1980s and through mechanisms of such gross unaccountability or respect for existing local occupancy, that possibly millions of peasant landholders have in effect 'lost' their land to outsiders.¹⁹⁰ Constraint upon allocation to foreigners in the new land law is mainly in terms of the provisional term (two years), after which point, title may be issued with the implication that this will be in perpetuity.¹⁹¹ A similar effect results from the issue of concessions and licences over sometimes vast areas of land for the use of wildlife, timber or other products.¹⁹² Whilst these do not amount to local dispossession of occupants per se, their term (up to 50 years) and the impact upon local land rights is severe as outlined later.

Re-thinking the rights of women to land

Whilst few laws have denied the right of women to land for some time (Lesotho and Swaziland being exceptions), there is now a demand that this be affirmatively expressed in new Constitutions, land policies and land laws. On the whole, this is occurring.¹⁹³

As the wave of land reform gets under way, three more catalytic demands have begun to appear; *first*, that female children are guaranteed equity in land inheritance with their brothers, *second*, that sale of household land is subject to the consent of both/all spouses, and *third* and most powerful in its implications, that statutes make primary household property the subject of co-ownership by spouses. Primary in this context is the residence where the family resides and any land of immediate productive importance to its survival.

The matter of co-ownership is potentially transformatory not only to domestic land relations but to often stagnant smallholder agriculture. That this could be so is suggested most strongly in the findings of a recent assessment in **Uganda** of gender-related constraints upon smallholder production; the assessment

186 Land Act 1999, s. 20.

187 Village Land Act 1999, s.30 (4) (a).

188 GoM, 1999, 8.8.3.

189 No indication is given in the law that these are not renewable.

190 Kloock-Jenson et al. op cit., McGregor, 1997.

191 Article 8 of Land Act 1997 and Articles 32 & 33 of Land Law Regulations 1998, all of which avoid statement of term but do refer to 'permanent authorisation'.

192 As set out in the new Forest & Wildlife Act 1999.

193 The provision of new rights for women explored thoroughly for Eastern and Southern African states in Alden Wily 2000e.

found that most of these derive directly or indirectly from the fact that most Ugandan women have no legal share in the ownership of the farm they till for their husbands.¹⁹⁴ This negatively influences all manner of farm-related decision-making from choice of crops, extent and timing of labour input, to level of investment in the farm. The findings were so striking that researchers concluded that modernisation of Ugandan agriculture and therefore the economy as a whole, simply could not occur until women, as the main productive force in the nation, were made legal co-owners of primary household land.

Should land ownership be restructured by new tenure laws in this manner, it could well be the case that readjustment of *domestic tenure relations* represents the single most radical departure in patterns of land ownership into the 21st century.

The path towards spousal co-ownership is proving rocky in **Mozambique** and **Uganda**. In the latter, it has been a source of contention since the passage of the Land Act 1998, which failed to include a hotly debated irrebuttable presumption of spousal co-ownership of land.¹⁹⁵ The matter reached widespread public contention in early 2000. The political response was to claim that the matter would be addressed in a Domestic Relations Bill which has been in draft for more than a decade and unlikely to be enacted in the near future. This decision fuelled debate further but remains unresolved.¹⁹⁶

In **Tanzania**, new land law already deems women to be co-owners, if not in ways that are irrefutable (BOX ONE). In **Ethiopia** and **Eritrea**, the law promotes the holding of land by husbands and wives independently, a strategy only possible given the *tabula rasa* approach which invalidates current allocations until confirmed. In **Namibia**, **Zimbabwe**, **Swaziland** and **Malawi**, policy proposals declare the intention to recognise at least customarily-owned properties as jointly owned by male and female spouses.

How far these good intentions are delivered into law remains to be seen. The trend has been for National Land Policies to be generous in their declarations; for example, **South Africa's** Land Policy 1997 made gender equality one of its eight fundamental principles, and the **Namibia's** Land Policy has assured widows the right to remain on their husband's property for the duration of their lifetime (section 1.5).

There has been much less delivery in law. Whilst the **Zanzibar Land Tenure Act 1992** stands almost alone for failing to address gender land relations, new laws provide fewer opportunities than policies promise; even in matters such as female representation on decision-making bodies.

In **Mozambique**, the National Land Policy 1996 had been quite clear as to the importance of women's rights in land, but by the time the Land Act entered law in 1997, the main concern, widow-eviction, remained possible through failure to adopt the advised rule that spouses be first in line to inherit.¹⁹⁷ Regulations since drafted have gone somewhat further than the terms of law, providing that

194 Ovonji-Odida et al. 2000.

195 Ovonji-Odida et al. op cit., Alden Wily 2000e.

196 New Vision June 27 2000.

197 Quadros op cit.

where co-titleholders are spouses, in the event of death the surviving spouse shall remain a co-titleholder along with the inheritor (Article 8 (1)).

**BOX ONE
PROVIDING FOR WOMEN'S INTERESTS IN LAND
IN LAND LAWS**

**Tanzania
Land Act 1999 (LA) and Village Land Act 1999 (VLA)**

Principles:

- The equal right of women and men to hold and deal with land (LA s.3 (2)).
- Customary rules void if deny women access to ownership, occupation or use of land (LA s.20).
- The law presumes co-ownership among spouses. LA s. 161 presumes that unless the certificate explicitly states that only one spouse is owner, then both or all spouses will be registered as joint occupiers. Even when the land is the name of one spouse only, if the other spouse or spouses contribute by their labour to the productivity & upkeep of the land, they shall be deemed to be joint occupiers (s. 161 (2)).
- Purchasers or even mortgagors of land are obliged by law to enquire if the consent of the spouses has been given and if they have been misled, the disposition will be void (LA s.193 (3)).

Procedures:

- When determining whether to grant a customary right, the Village Land Manager (Village Council) is required to 'treat an application from a woman, or a group of women not less favourably' than those of men, and are ordered to adopt or apply 'no adverse or discriminatory practices or attitudes towards any woman who has applied' (VLA s.23 (1) (c)).
- Forbids the Village Land Manager to allow assignments that would operate to defeat a right of a woman to occupy land under a customary right of occupancy (VLA s. 30 (4) (b)).
- During adjudication requires the Village Adjudication Committee to 'safeguard the interests of women, absent persons, minors and persons under a disability' (VLA s. 53 (3) (e)).
- Consent of spouses needed prior to lease, mortgage, sale of matrimonial property (LA s.112 (3)). (

Representation:

- National Land Advisory Council shall have regard for 'a fair balance of men and women' (LA s. 17)
- On Village Adjudication Committee, women are to be not less than half of members (VLA s.53 (2,5))
- Participation of women in dispute settlement to be ensured (VLA s. 60 (2)).

**Uganda
Land Act 1998**

Principles:

- Section 28 provides for decisions to be in accordance with customs, decisions, practices 'except that a decision which denies women or children or persons with disability access to ownership, occupation or use of any land or imposed conditions which violate articles 33,34 and 35... will be null and void'.

Procedures:

- Section 40 (1) prohibits family members selling, leasing or giving away land without the consent of the residential spouse or children of majority age given to the appropriate Land Committee in person (s. 40 (2)). Spouses and children of majority age may also lodge a caveat on the land title indicating that their consent is required in any land transaction (s. 40 (7)). However, 'consent shall not be unreasonably withheld' (s.40 (5)).

Representation:

- One woman at least to be on key administration bodies: Uganda Land Commission (s.48 (4)), District Land Boards (s. 58 (4)) and Parish Land Committees (s. 66(2)).

**Eritrea
Land Proclamation Act 1994**

Article 15 allows wives to acquire housing land in her home village, as may a husband in his own village. In addition both may obtain farming usufruct rights in their place of residency. Article 16 provides for divorcees to retain rights.

4 DEMOCRATISING TENURE ADMINISTRATION

Over-centralised, poor or corrupt tenure administration systems demonstrably affects security in a number of states (Kenya, Tanzania, Zambia, Uganda, Malawi). Accessibility is poor, and registers unreliable. Landholders, and particularly the remote rural poor, are at most disadvantage.

Throughout the continent, reform in tenure *administration* is occurring as an integral part of wider land reform. The main trend is to decentralise and sometimes to devolve controlling authority. In theory, this should improve local rights by making control more accessible, and giving clients opportunity to have their views heard, and to be party to decision-making. Procedural accountability, speed and efficiency should all be enhanced.¹⁹⁸

At this point, only two countries have democratic tenure administration regimes in place in the sense of it being located outside government or local governments (**Botswana, Uganda**). Both use the instrument of district land boards. In Botswana district land boards are both the (trustee) owners of the land and its administrators. In Uganda, the boards will act only as administrators.

In law and in practice Tribal Land Boards in Botswana are somewhat less autonomous of either the Minister of Local Government & Lands or District Councils than generally proclaimed. This is particularly so since the Minister appoints the Secretary to each board, the major operational position.¹⁹⁹

In Uganda, the terms of the Land Act 1998 are suggestive of profound autonomy constrained only by the need to observe national and district land policies. In practice, their financial dependence upon government may render them less autonomous, as has proven the case in Botswana. The greater concern in respect of Land Boards in Uganda however is the difficulty being experienced in putting them in place, along with the supporting agencies of Parish Land Committees (4517 bodies) and Sub-County Recorders (962). Planned with minimal local level input, this objective is proving un-supported and financially un-implementable and now subject to amendment.²⁰⁰

A more polarised regime is proposed in **Tanzania**, but one, which for the fact that the core institutions are already in place, should have a better than average change of becoming reality. Whilst the Land Act 1999 retains ultimate authority in Government's Commissioner of Lands, a good deal of real power is divested to the village level, covering village lands. These represent the greater proportion of the rural area, in a composite of 9,225 registered villages, each with its own elected government. The Village Land Act 1999 designates these Village Councils the Land Managers, charged with adjudicating registering and titling all landholding within their respective Village Areas. This includes private, clan and common landholding.²⁰¹

198 Refer Alden Wily 2000f for details as to intended tenure administration in twelve states.

199 As per section 8 of an important amendment to the Tribal Land Act (1968) in 1993. Also see White op cit., Mathuba 1999, Dickson 1990 and Le Brun 1984 on Botswana Land Boards.

200 McAuslan 1999a, 1999b, GoU 1999b.

201 Alden Wily 1998g.

Zimbabwe, Malawi and Swaziland take note of the east African models in their still-to-be-approved National Land Policies. Zimbabwe's borrows significantly from the Tanzania model developing village-based regimes and institutions.²⁰² Malawi proposes a regime channelled through tribal authorities whose authority to control allocation of land 'will be fully restored and protected by statute' but which will occur through Village Land Committees and able to allocated registrable 'Customary Estates'.²⁰³ Swaziland looks to the creation of similar Community Development Councils.²⁰⁴ Like Uganda, these involve the creation of new agencies at the local level, which will impede rapid implementation even should these proposals find their way into law.

Almost complete absence of identifiable grassroot institutions exaggerate the difficulties in South Africa and Mozambique of determining workable ways forward for devolved tenure administration. As observed in Chapter One, these are states where policies and war have served to dislocate populations, undermine the social and tenorial basis of community and suborn rural populations to contradictory and often unwanted tribal, political or administrative actors.²⁰⁵ The Land Rights Bill of **South Africa** proposed to go the district land board route in ex-homeland areas, leaving their composition up to local populations to determine (s. 54).²⁰⁶ Local government machinery is gradually being put in place in that country but not below the district level.²⁰⁷

In **Mozambique**, where local government is yet to be introduced outside the urban areas, institutional frameworks upon which to build are also lacking. In an attempt to remedy this, Regulations drafted under the Land Act have set out procedures through which communities may be involved in delimiting their own properties.²⁰⁸ This is to be community-implemented with technical assistance from the centre especially for mapping (Article 6). The process culminates with registration of the mapped areas with the National Land Cadastre.

Eritrea's Land Proclamation 1994 makes the central Land Commission planner, policy-maker, researcher, director and supreme authority on all matters pertaining to land (Article 57). Day to day administration is assigned to Land Administration Bodies, directed to allocate residential and agricultural usufructs and to create land registries (Articles 9-10). These are to be headed by members of the Commission. None are yet in place in 2000.²⁰⁹ It remains unclear whether these bodies will be located at the regional, sub-regional, administrative area or village levels of the new administrative regime declared in 1996.²¹⁰

TABLE 2.10: LOCUS OF POWER OVER LAND
ALLOCATION & TRANSFERS IN CURRENT/NEW LAND LAWS

202 GoZ 1998b, 1999b.

203 GoM 2000: 7.2.

204 GoS 1999: 4.1.1.3. CDC will be defined on traditional boundaries but involve all inhabitants in the area, and combine land use planning and allocation functions. Each will be able to determine its own methods of land transfers within the area and able to make and enforce by-laws towards adherence. In most respects these resemble the construct of village councils in Tanzania and as proposed in part in Zimbabwe.

205 For Mozambique refer Kloock-Jenson, *passim*, McGregor *op cit.*, de Wit, 1999. For South Africa, refer Claassens *op cit.*, McDonald *op cit.*, Ntsebeza *op cit.*, and Adams, Sibanda & Thomas 1999.

206 Aside from the incomplete Draft Land Rights Bill itself, refer DLA 1999, Claassens *op cit.*, McAuslan 1999d, Adams 1999.

207 Ntsebeza *op cit.*

208 Chapter II Technical Annex 1999.

209 Lindsay 1997.

210 Proclamation for the Establishment of Regional Administration No. 86 of 1996.

COUNTRY	CENTRAL GOVERNMENT		LOCAL GOVERNMENT		BODIES OUTSIDE CENTRAL OR LOCAL GOVERNMENT	
	Centre	Some functions decentralised	District/ Municipal / County Councils	Village	Chiefs	Other
UGANDA						X
TANZANIA	X	X		X		
ZANZIBAR	X	X				
KENYA	X	X	X			
RWANDA	X		X			
ETHIOPIA	X	X		X		
ERITREA	X	X				
ZAMBIA	X	X			X	
MALAWI	X				X	
ZIMBABWE	X		X			
MOZAMBIQUE	X	X				
SWAZILAND	X				X	
LESOTHO	X		X	X	X	
SOUTH AFRICA	X	X	X			
NAMIBIA	X	X				
BOTSWANA	X	X				X

5 DEMOCRATISING LAND DISPUTE RESOLUTION

Two experiences throughout the region have generated frustration as to the handling of land disputes.

First is the extraordinary level of dispute and litigation in matters of land. This is not surprising given the transformations in property relations that has been occurring over the last fifty or so years, confusion as to what is lawful and unlawful, and the added complications through directions from both customary and statutory law. Property inheritance matters may generate the greater proportion of the last set of disputes.²¹¹ The speed of changes in state laws may also be confusing.²¹²

Second is the declining ability of formal courts to handle the matters brought to them, resulting in an enormous backlog of cases.

211 This has been a case in many countries, but most commonly in Kenya, where courts have been involved in cases to determine whether customary or statutory law should determine an inheritance matter. Rulings have tended to favour an arrangement whereby the statutory owner must also in effect act as trustee of the land for immediate dependants. The matter is so important that it routinely appears in reviews relating to Kenyan land matters; Wambugu 1999, Kenya Human Rights Commission 1996, 1997, Okoth-Ogendo 1999b, Wanjala op cit., Akech 1999 and even government planning documents (GoK 1994b, 1994c, 1994d, 1996a). The Land Disputes Tribunal Act, 1990 was put in place to limit local jurisdiction, but this does not appear to have resolved the conundrums routinely posed by litigants.

212 In South Africa, The Monitor (June 18 to 24, 1999) cites an example of the confusion resulting from ongoing transformations in property relations. The article reports that magistrates routinely issue court orders for eviction based on the Prevention of Illegal Squatting Act of 1951, a statute repealed about a year earlier.

In **Kenya** for example, government reported an astounding backlog of 117,386 civil and 1,944 criminal cases in the High Court in Nairobi alone.²¹³ Most related to land matters. The *1994-1996 National Development Plan* reported that boundary disputes register at a rate of around 900 per year and with over 7,000 unsettled cases by the end of 1992, as occurring under only one of the several registration acts.²¹⁴

As if the mechanisms for land dispute resolution were not troubled enough, there are concerns as to *accessibility* and *good practice*. Almost by definition, where money may need to pass hands in order to secure a result, poorer rural communities are most disadvantaged. Outright manipulation of informal and formal resolution processes has been rife in one or two countries, including by its own admission, Kenya.²¹⁵

In **Lesotho**, community level land related disputes constitute about 60 percent of cases reaching the civil courts.²¹⁶ Fifteen years ago the *Land Policy Review Commission (1987)* reported upon the enormous number of disputes arising from conflicting allocation powers of government and traditional leaders. Added, have been disputes from failure to secure adequate or timely compensation as guaranteed by the Constitution (if less clearly the 1979 Land Act), for lands appropriated by officials through proper or improper means.²¹⁷ The failure of the one Tribunal established by the 1979 Land Act to hear appeals has furthered opinion that land management is 'corrupt and unfair'.²¹⁸ The provision of an Ombudsman has highlighted but not resolved inconsistencies in the law, reduced the backlog or remedied the inadequacies of machinery provided.

From courts to tribunals

Actions to overcome these kind of problems include the following: *first*, the removal of most or all land dispute resolution outside the court system into an independent tribunal system; *second* promotion of community-based dispute resolution to keep cases out of the courts; *third*, provision of mediation services for the same purpose. Most countries provide for appeal against decisions of administration systems through special appeal boards.

Dedicated tribunals for land dispute resolution are in place or planned in **Uganda, Tanzania, Zanzibar, Kenya, Zambia, Botswana, Lesotho, Swaziland and Malawi**. Some are to be staffed by qualified magistrates, and some not.²¹⁹

213 GoK 1998c.

214 Registration of Titles Act, Cap. 300. There were even more unsettled cases (8,844) under the other main registration act (Land Titles Act), which deals with coastal allocations. Adjudication cases, to be heard in respect of the Land Adjudication, Act, Cap.284, ran at 22,805 at the end of the same year, 1992 (GoK, 1994d).

215 'Rot within the judiciary' is now a matter of public record in Kenya, affecting land (GoK 1998c), the findings of which were confirmed by a subsequent survey of 696 legal professionals including judges (the Kenya Judicial Service Delivery Survey conducted in 1999) which found that seventy-seven percent of advocates and 25 percent of the bench acknowledged that corruption in the courts was 'very common' or 'common' and that 'deliberate misplacement of files' very high (53 percent). Bribery plays a constant role 'in almost all cases'.

216 'The causes range from title declaration to boundaries, eviction/ejection from rental premises, succession and inheritance. 'Even burial arrangements for corpses are said to spark off litigation because the one who buries usually inherits' (Kasanga op. cit.).

217 Documented in a 1996 Review on Land Acquisition cited by Kasanga, op cit.

218 Kasanga op cit.

219 Centralised, and thus far, highly unsatisfactory tribunal regimes exist in Zambia (Lands Act, 1995) and Lesotho (Land Act, 1979). The Land Tribunal Act, 1994 of Zanzibar created a dedicated tribunal to the resolution of cases arising out of land, water, farm and building rights (C. Jones 1996).

The most comprehensive reform so far²²⁰ is to be provided in **Uganda** where the Land Act 1998 requires the creation of 45 District Land Tribunals and 962 Sub-County Land Tribunals, each with an independent Mediator. Disputants may opt to use customary dispute mechanisms. The cost of putting this new machinery in place has proved prohibitive and support for the plan from the judiciary has been slow to arrive.²²¹ The effect has been disastrous. Thousands of disputes remain unresolved, with increasing frustration and even some violence.²²² Magistrates have begun to re-construct civil land disputes as criminal cases, simply to allow them to be heard.²²³ A proposal to amend the Land Act to allow the courts to again hear land disputes, pending implementation of the Tribunal system, has not yet been presented to Parliament, more than two years after it was drafted.

Community-based dispute resolution

Recognition and support for traditional or community-based dispute resolution is well-developed in the (yet un-commenced) tenure law of **Tanzania**, through locally-created Village Tribunals for most cases, with referral or appeal to the same kind of bodies at Ward, and then District level. The **Mozambique** law (1997) promotes community dispute resolution but has been unable to give direction as to how this will be implemented.²²⁴ The rejected Communal Lands Reform Bill of **Namibia** designated traditional authorities as responsible for land dispute resolution and this is likely to remain when the Bill is returned to Parliament with modifications. **Malawi** proposes informal dispute processing by designating headmen as heads of local tribunals, assisted by at least four other members of the community.²²⁵

Mediation

New regimes for mediation, arbitration and claims have been established in **South Africa** where the Department of Land Affairs supports a dispute resolution service.²²⁶ The aborted Land Rights Bill proposed that the Service extend to the ex-homeland areas but with more or less any land-related agency in those areas able to take action to safeguard land interests in their area – a vague proposal at best.²²⁷

220 The least development in new law in this area is in Eritrea where the 1994 Proclamation baldly states that ‘All land disputes among individuals or villages shall be cancelled by this proclamation’ (Article 41) and allows complaints to go to the Land Administration Body, appeals to the Land Commission whose decision will be final (Article 44).

221 After more than a year since the enactment of the new land law, the Chief Justice had still not drafted the Regulations which would govern the independent tribunals, not a single one of which has been formed nearly two years after the land law was enacted. *New Vision* June 27 2000.

222 GoU 1999b.

223 Pers. comm. District Magistrate, Arua District, April 2000.

224 Both the Regulations, 1998 and the Technical Annex to the Regulations, 1999 are silent on dispute resolution.

225 GoM, 1999, Ch.7. Appeals would lie to further tribunals at Traditional Authority and then District level, thence to the High Court. The High Court would have supervisory jurisdiction over all tribunals. Details largely unchanged in Draft Policy GoM 2000: Section 15 passim.

226 The Extension of Security of Tenure Act makes provision for mediation (s.21) and the Labour Tenants Act for arbitration (s. 31). A Land Claims Court regime has been established under the Restitution of Land Rights Act of 1994.

227 Chapter VIII, Land Rights Bill, Draft June 1999.

PART 2: DISCUSSION

A background on tenure, forests, and community is in now place. We may now focus upon the tenure factors that directly affect the way in which ordinary citizens may hold and manage forest resources. This preface poses questions that need to be answered and lists the issues which need to be explored to answer them. They also express the framework of argument in which community involvement in forest future is considered in this volume.

CORE QUESTIONS:

- ◆ *Who owns forests now in eastern and southern Africa? Who could own forests? Where and how are forest-local communities placed in this regard?*
- ◆ *Even if communities may own forests in tenure law, does forest law support this?*
- ◆ *If communities already hold forest resources, how secure is their tenure?*
- ◆ *If communities are not permitted to own forest resource themselves, does forest law allow them to assert management authority over those resources? Who, in short, owns or could own the right to manage the forest?*
- ◆ *And should forest-local communities have the right to own and/or manage forests, what institutional and socio-legal means do they have at their disposal through which to exercise this tenure or jurisdiction?*

THE CORE ISSUES:

The above lead to exploration of the following, each of which has been introduced in Chapters One or Two:

In tenure

- The relative security and insecurity of **customary rights in land**; if these are not given adequate protection in modern law, then forests held under customary arrangements risk loss to the community through legal co-option by others using alternative and statutorily-recognised tenure regimes. All levels of rights to forest may be affected; rights *to the forest land*, rights of *jurisdiction*, and rights of *access* to its resources.
- As part of the above, it will be important to note how the customary tenure regimes of **minorities** are handled in modern tenure law. This is because significant areas of forest in especially East Africa have fallen (and still do in places) under hunter-gatherer or pastoral tenure regimes. Should modern states and tenure laws not recognise these regimes, then the land rights which pertain will have no standing in tenure, forest or other development processes – and no *locus standi* in the courts.

Continued.....

- State-people property relations are central to the issues surrounding community involvement in forest management. A first concern is the extent to which **the state may appropriate property** (titled or otherwise), for what purposes and through what processes. As frequently the last remaining commons, forests and woodlands may be more, not less vulnerable to state appropriation. A second concern is the extent to which modern states regard forest/woodland as **national property**, and the mechanisms through which it holds that property and deals with it.
- And finally, we will need to examine just how far state law makes provision for communities, to hold land **in common** in secure ways, on the grounds that forests are natural commons (as compared to subdivided and individualised) estates.

In forestry

- We need to review the impact of **protection strategies** adopted by governments this past century upon forest and people. The central construct of reservation has been introduced earlier. Now we need to examine what this actually means for community forest rights.
- Similarly, the question of **management strategies** needs to be addressed; do (new) forest laws and policies recognise communities as potential management agents, and if so, with what manner of authority?
- In the process, the structural organization of the forestry sector must be noted. **Devolution of management authority** may be assumed to open opportunities for decision-making at the local level. It will influence how far forest-local populations may have their interests heard and protected in competition with non-local and non-community interests. It will influence how the community is considered in forest management roles.

In governance

- Related, the extent to which governance in general is **devolved** will impact upon the role of local people in forest management. How far administrations regards local people as actors in the running of society is relevant, as is the extent to which the country's governance regime endows local communities with discreet legal and institutional personality and powers which they may use to good purpose as forest guardians and managers.

There is overlap among the above and it will not be possible to address each in a fully discreet manner. Chapter Three will make tenure issues its starting point. Chapter Four will examine how these are realised in the forestry sector. Discussion will be structured around constraints and potentials. Past, present and future perspectives will be offered, in view of the considerable loss of forest land to communities so far, and the fact that both the laws and policies of forests and tenure are in a great deal of flux at the beginning of the 21st century. Chapter Five will bring together main conclusions.

Chapter Three: TENURE CONSTRAINTS & OPPORTUNITIES FOR COMMUNITY INVOLVEMENT IN FOREST MANAGEMENT

I CONSTRAINTS

1 IMBALANCE IN STATE-PEOPLE LAND RELATIONS

This chapter begins with an examination of the tenure relationship between governments and communities and which underwrite virtually all matters pertaining to land rights in the region.

The authority of the state is premised in most cases upon its duty to regulate to the benefit of society. The establishment of a wide range of land use and environmental regulation laws, including forest acts, may be seen in this light. The power to exercise authority in this way (termed 'police powers') is invariably set out in supreme law (national constitutions).

The more important state power is the power to appropriate private property. This, we have seen earlier, gains special force in Africa through the frequent presumption of state ownership of land in the region. To recap, four points on the matter of where this root or radical title is vested were made:

First, that contrary to popular understanding, even the English regime of freehold does not represent ownership of the land itself, but ownership of absolute rights in that piece of land only;

Second, this distinction between ownership of the land itself and rights to inhabit and use land (even in perpetuity) becomes important when states use the former to excessively limit the independence of the latter, behaving more like landlord than trustee or regulator. This has led some states to freely appropriate local lands. It has also been used to legitimise the maintenance of vast areas of land as Government or State lands, and to justify the wilful withholding of land rights in whole spheres of landholding in areas we shall designate later as virtual Government lands;

Third, the dominant trend has been to retain rather than abandon this invasive state tenure, and through this sometimes a constitutionally-endorsed increase in the way in which governments are able to control rights in land. Whilst this is currently most dramatically the case in **Zimbabwe**, it is also evident to one degree or another in **Zambia, Malawi, Mozambique, Tanzania, Lesotho, South Africa, Namibia, Eritrea** and **Ethiopia**. Only **Uganda** so far has democratised tenure by vesting root ownership unambiguously in the hands of landholders.

Achieving new balance

This does not mean that the Ugandan Government itself may not own land, for the new law also provides for it do so, both for investment ends of its own, and for public service purposes. Nor does it mean that government is not designated trustee over some other lands – it is, forests notably among these resources. Nor does it mean that private property may no longer be appropriated for certain public purposes; it may.

Rather, what democratisation of radical title achieves is to draw new distinctions between ownership of land and control and management over land. As shown in the previous chapter, this constitutional action by Uganda (1995) also laid a firmer foundation for the complete removal of tenure control from the executive into autonomous bodies. It also opened the way for customary landholders to be liberated from their position over nearly one hundred years as mere tenants of the state.

2 A HISTORY OF EXAGGERATED RIGHTS TO APPROPRIATE LAND

The instrument for appropriation is generally a Land Acquisition Act.²²⁸ Of concern here are the grounds upon which property may be taken and the accountability of the process, for it may be assumed that rural citizens have less knowledge and access to process and justice and therefore less capacity to prevent or moderate appropriation of their land.

The matter is especially relevant in that forests are a likely target for appropriation, given widespread pressure for land and the prevailing perception of forest and woodland as spare or less important land (than settled or farmed land). Forests and woodlands are also a good deal easier to appropriate, given that they are generally owned in common, and thus weakly tenured in the eyes of state law.

The issue of appropriation is to the forefront in new tenure laws, no matter how neutrally the matter is expressed. Some laws make it an explicit task of new land law.²²⁹

Compensation

ANNEX G overviews the position in the region. In brief, with the exception of Zimbabwe (refer ANNEX C), all states now require payment of compensation for private land appropriated by the state (hence the phrase compulsory acquisition). In some countries (Zanzibar in particular) the term confiscation is freely used in the law, locating appropriation as a punishment for failures to meet conditions of tenure. Confiscated or appropriated property in all cases falls to the state reinforcing its controlling rights over land allocation.

This is so in **Eritrea, Ethiopia, Mozambique, Tanzania** and **Zambia**, all of which we have seen make the vesting of land in the President or state the founding position of their new strategies, to strengthen and certify government's right to control its distribution. In these cases, it is the right or interest in land which is considered private and for which compensation is due should it be removed. Constitutions generally allow expropriation (i.e. without payment) only in times of war or emergency, or more ominously, when the President so orders.

228 e.g. Tanzania Land Acquisition Act, 1967, the Zimbabwe Land Acquisition Act, 1992, the Swaziland Acquisition of Property Act, 1961, the South Africa Expropriation of Land Act, 1975.

229 Note for example the long title of the new Eritrean land law as 'A Proclamation to reform the system of land tenure in Eritrea, to determine the manner of expropriating land for purposes of development and national reconstruction, and to determine the powers and duties of the Land Commission' (No. 58 of 1994).

Complaints centre upon the level of compensation, given that there is limited appeal against the act of appropriation itself (**Mozambique, South Africa, Zimbabwe, Uganda, Eritrea, Ethiopia, Mozambique, Zanzibar**). Provisions may be contradictory. This is the case in **Lesotho** where the Constitution gives a person the right to challenge appropriation of his/her land but the Land Act only provides for appeal on matters of compensation, as well as being restrictive as to what may actually be compensated.²³⁰

The trend in recent tenure reform has been towards improving the level of compensation that may be due a deprived owner. This has been the case in 1993 in **Botswana**,²³¹ in 1998 in **Uganda**,²³² and in a more comprehensive manner in **Tanzania**.²³³ A major concern following the **Mozambique** Land Act 1997, was a lack of information as to how people were to be compensated for loss of land by the hand of the state, met to an extent in subsequent Regulations of 1998.²³⁴ What these moves do is to even more firmly focus appropriation upon amounts of compensation rather than prompting query as to the validity of the action itself.

Grounds

That this is so is seen in limited change to grounds upon which property may be taken. If anything, the scope of 'public interest' or 'public purpose' has been widened rather than narrowed.

This is delivered in two ways: first, public purpose may be reconstructed to include new political definitions of public good. **South Africa** and **Zimbabwe** extend this to include restitution objectives. Since 1990 Zimbabwe has steadily amended law to make appropriation easier, faster, cheaper and now more or less free (ANNEX C). There are signs that the South African administration may make moves in the same direction.²³⁵

A second expansion has been less explicit. This allows states to re-frame public purpose to include those which only indirectly serve the public interest, if indeed at all. Conventional expressions of 'public purpose' include '*the interests of defence, public safety, public order, public morality, public health, and town and country planning*'. The **Botswana** Constitution, like several others, adds the right of the state to acquire property in order to secure the use of that property *for a purpose beneficial to the community* (s. 8 (1)), a provision open to wide interpretation.

In acknowledgement of the problems that have arisen from misuse of terms of public interest, the **Tanzania** National Land Policy 1995, was emphatic that

230 Article 17 (2) of the 1993 Constitution, Part VI of the Land Act, No. 17 of 1979. Kasanga reports that up until 1986 Government scarcely paid compensation at all, and since 1986, usually only compensation for crops and below market value; 'The land per se was excluded from the heads of claim. The injustice in compensation payments and the apparent public anger are said to be major causes of the uncontrolled peri-urban residential sprawl in the country generally' (op cit.).

231 This required Tribal Land Boards to pay for the value of any standing crops, any improvements, the cost of resettlement and the 'loss of right of user of such land' (s.18 Tribal Land (Amendment) Act, 1993, amending s. 33 of Tribal Land Act, 1968). The lack of measures against which to set values remains a cause of complaint (White, op cit.).

232 The new Land Act in Uganda (1998) requires that compensation be paid at 'fair market valuation' and includes 'costs of disturbance' (s.42 (7)).

233 The Tanzania Land Act 1999 lists the following as to be compensated for; transport costs to enable belongings to be moved, compensation for any loss of profits through the appropriation of the land, and repayment by the state of all costs associated with the owner's acquisition of the land (s. 3 (1) (g)).

234 Kloock-Jenson et al. op cit.

235 Statements made by Minister for Land Affairs as reported in Business Day, 22 June, 2000. Examination of the 1996 Constitution (s. 25) suggests this could be effected without amendment.

public purpose would be defined in the new land law. This did not eventuate, at least not in a transparent manner. It is only in the Village Land Act 1999 that it is stated that for the purposes of the sections under which villagers may lose land to the state, that public interest '*shall include investments of national interest*' (s. 4 (2)). This exposes villagers to the threat of losing land for the sake of private investment interests, for the Investment Promotions Act 1997 is quite clear as to the important role of private investment to the national economy.

Protection

Compensation is only due when *private* property is taken. In most states recognition of unregistered and customary interests in land has only ambivalently been held to be private property rights. Because of this, even where customary rights are now recognised, a degree of affirmative support in the law is warranted. This is undertaken by the **Tanzania** Land Act 1999 which states that it shall be a fundamental principle that full, fair and prompt compensation be paid to -

any person whose right of occupancy or recognised long-standing occupation of customary of use of land is revoked or otherwise interfered with to their detriment by the State... (s. 3 (1) (g)).

Similarly, the incomplete draft Land Rights Bill of **South Africa** (June 1999) proposed to enhance the general commitment of the Constitution (s. 25 (3)) towards just and fair compensation. The Minister would be bound to regard the holder of a 'protected right' as *the owner of the right* (s. 97 (4)). Protected rights were posed to more or less cover all customary rights in the ex-homelands. The value of this intention was diminished by the vagueness of planned procedure for securing representations from the owner (s. 97).

Process

Procedures for appropriation vary from minimal (Mozambique, Eritrea, Ethiopia) to highly detailed (Tanzania). The Land Act of **Tanzania** devotes fourteen sub-clauses to procedures for the appropriation of village land to state, including decision by the community itself as to whether it approves or refuses to approve the loss of land in its vicinity.²³⁶ Thus, whilst Tanzanian villagers are indisputably vulnerable to compulsory acquisition for a wide range of purposes including private investment interests, the attempt has been made to balance this with transparent process.²³⁷

236 Tanzania Village Land Act 1999, s.4. Ample opportunity is given to villager or community to protest the proposal given that property even less than 250 ha in extent is subject to formal community discussion and decision whether 'to approve or refuse to approve the proposed transfer' (s.4 (6a)). If the land is greater than 250 ha, no transfer may be made until the Minister has heard the views of the Village Assembly, made through a report from the Village Council and any other representations on the matter (s. 4(6 (b))). The Minister himself is required to attend meeting of the Village Council or Village Assembly to answer any questions (s. 4 (7)). No villager's land or village land may be transferred until 'the type, amount, method and timing of the payment of compensation has been agreed' (s. 4 (8)). Provision for appeal is made and for the President to appoint an inquiry (s. 18 of Land Act, 1999 and s. 4 (12) of Village Land Act, 1999).

237 The Village Council itself is under legal obligation to ensure that every person who has rights in the land which is proposed for acquisition is informed of the proposal in good time, even should they be absent from the community (Village Land Act, 1999 s. 4 (4)).

In contrast, compulsory acquisition in neighbouring **Kenya** moves inexorably forward with no consultation, no reasons necessarily to be provided and conducted in a matter of 30 days.²³⁸ Whilst the Constitution established protection criteria, necessarily retained into the Land Acquisition Act, they are general enough to have allowed misinterpretation of their spirit by administrations over the years.²³⁹ Whilst the all-powerful Commissioner of Lands must publish a day for a hearing of claims for compensation, should owners fail to hear of this, then there is no recourse.²⁴⁰ Determination of compensation is entirely within the Commissioner's ambit, through the same imperfect procedures.²⁴¹ As shown below, where the property is untitled land within trust land (the greater area of the country), the process is even less considerate of rights.

3 SUBORDINATION OF RIGHTS THROUGH THE GOVERNMENT LAND CONSTRUCT

Where the entire land area of a country has been explicitly vested in the state, then this tends to be referred to as 'public land' as if to remind occupants of the primary title of state and that its intentions are for the public good (**Eritrea, Ethiopia, Mozambique, Zambia, and Tanzania**). Even in these countries there are categories of land which are yet more directly held by governments. These are variously known as State or Government Lands, and in Tanzania as General Lands. In these areas, government acts definitively as landlord.

Government Lands usually include lands which the state has never formally allocated or land it has acquired or re-acquired through expropriation or compulsory acquisition. State/Government Lands represents a substantial category on the sub-continent (e.g. nearly 25 percent and 40 percent of the land area of **Botswana** and **Tanzania** respectively). Commercial agricultural estates or settlement schemes also frequently fall within the category of lands directly managed by (and vested in) government; this is the case in **Eritrea, Ethiopia, Somalia, Sudan, Tanzania, Kenya, Zambia** and **Zimbabwe**.

In one or two states and most notably **Botswana**, there has been reduction in the area designated Government Land over the last decades. The most dramatic example however, is **Uganda**: through the inter-related acts of removing radical title from the state and recognising customary rights as legal, the class of 'Public Lands' disappeared.²⁴² In some other countries, whilst the actual hectareage of

²³⁸ Section 13 of Land Acquisition Act (Cap. 295).

²³⁹ The only potentially protective clause is section 75 (1) (b) of the Constitution (reiterated as s. 6 (b) in Cap. 295) to the effect that the necessity to take the land 'is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land'. What is 'reasonable justification' is open to debate, especially as another constitutional clause indicates 'development' of land is of public benefit (s.75 (1) (a)).

²⁴⁰ There is provision for the Commissioner to gazette the notice and to serve notice of those who 'appear to him to be interested in the land' (Cap. 295, s. 6(2)). The scope for failure is considerable; gazettelement does occur, but copies of the Gazette are not necessarily available on the date of stated publication, and certainly not available in the local area.

²⁴¹ Section 9 Cap. 295.

²⁴² To summarise a long legislative history on this: in Uganda, the British Crown through statutes and agreements with different tribes, acquired most land for itself as Crown Land (through Decrees of 1900, 1901, 1912, and 1933). The 1912 Crown Lands (Ascertainment) Ordinance provided that unless recognized by documents (title deeds or agreements), all land in Uganda was vested in the Crown. This continued up until 1995, as each tenure ordinance (1922, 1962, 1969, 1975) confirmed that all untitled land was Crown Land and then in the sixties, was known as Public Land. Throughout, customary landholders were tenants of state. Titled owners also became tenants of state through the conversion of freehold and mailo titles to leaseholds, and the making of the state as landlord, through the Land Decree of 1975 promulgated by Idi Amin. The same Decree confirmed customary owners as not just tenants on public land but as 'tenants as sufferance' and the state no

Government Lands may have not greatly declined, there has been steady allocation of those lands as long leaseholds (e.g. Kenya). In many more the extent of Government Lands has seen minor reduction (**Zimbabwe, Namibia, Tanzania, Eritrea, Ethiopia**).

Rent-seeking is a primary purpose for some classes of state land.²⁴³ Urban areas tend to fall into this category. Municipal Councils often play the role of landlord for central Government and collect substantial revenue. In Uganda the demise of Government Land through the new land law (1998) has deprived city and town councils of this major source of revenue.²⁴⁴

The Land Rights of Residents in Government Land

There are some classes of land which are rendered government property simply because statutory law does not recognise it as owned. This is often consequent upon the state not regarding the regimes of occupancy as amounting to land ownership. *Hunter-gatherers and pastoralists* tend to be most negatively affected.

A case in point is that of San (Bushmen) in **Botswana** whose land was not recognised as a Tribal Area when other tribes had their lands so acknowledged (1968). Instead their vast lands were designated State Lands and their occupancy as but tenants at will. This remained the case up until the late 1970s.²⁴⁵

More broadly, many thousands of inhabitants on Government/State Lands have routinely lost their lands to make way for agricultural settlement or other allocations. This has been the case in almost every country in the region.²⁴⁶

Licensees on Government Land

Conversely, some parties who are not even inhabitants of Government Lands may find themselves awarded access rights which are tantamount to *de facto* tenurial interest. This is the case with licence-holders and concessionaires. Licence holders are frequently non-citizens and rarely customary inhabitants of the area. Safari and hunting operators, miners, loggers and charcoal producers are the commonest licence-holders. They represent a substantial group in **Zimbabwe and Mozambique**, and a noticeable group in other countries including **Tanzania**. In all cases, these rights demean the customary rights of residents within the licensed area. The issue of such rights is probably the most powerful source of emerging tenure conflict in Mozambique.²⁴⁷

longer needed to seek their consent to evict them (No. 3 of 1975:s.3 (1) and (2)). This was finally overturned by the new Constitution, 1995 and new land law, 1998.

243 All government or state land acts make provisions for a person authorised by the act to use the powers of the President to seek rent for government properties; variously described as fees, levies, service charges etc.; e.g. Botswana State Land Act, Cap. 32:01; s. 4-8.

244 GoU, 1999b.

245 Alden Wily 1994a. BaKgalagadi, an agro-pastoral tribe, were also denied a tribal land area.

246 Dessalegn op cit., Gadamu et al. 1999, Kanyinga 1998, Okoth-Ogendo 1997, McGregor op cit.

247 McGregor, op cit. and Kloeck-Jenson et al.

In many states, issue of concessions extends beyond Government Land into untitled communal lands. This is the case in northern **Tanzania**, where creation of Wildlife Hunting/Management Areas and mineral extraction licences has posed a growing constraint to local land interests in village lands. Pastoral lands have been most widely affected.²⁴⁸ Concerns surrounding this trend helped drive the determination of the Tanzania Commission of Inquiry into Land to lodge control over land matters at the village level.²⁴⁹ It has also prompted considerable development in the sphere of community-based forest management, as local communities seek to secure as much local forest as possible under their own jurisdiction, to render it less vulnerable to state designation for wildlife purposes in particular.²⁵⁰ Communities in Tanzania benefit greatly from the formal distinction now drawn in new land law between government and local land in the constructs of General and Village Land (Land Act 1999).

Permit-holders on Government Land

Zimbabwe provides an example of another group in Government Land which has weak tenure. These are the many thousands of permit-holders, who have accessed land through the 1980-1997 programme of redistribution.

Rather than directly reallocating appropriated land to new settlers, the Mugabe administration retained ownership of these estates and provided settlers with relatively limited rights to the land, variously expressed in permits to reside, cultivate and graze livestock.²⁵¹ Predictably, this was not what Zimbabweans themselves had in mind as the output of the redistribution programme, and the shortfall has been a source of resentment since the mid-eighties. This continues, despite a commitment that the new phase of resettlement (1998-2004) will provide 99-year leaseholds, and the right to acquire freehold after ten years.²⁵²

The untenured urban poor

Urban squatters may be cursorily mentioned as another group enduring acute tenure insecurity in Government Lands, and perhaps most visibly so through routine eviction. Although this book is only concerned with rural tenure issues, the fact that urbanisation and resulting informal settlements or squatter developments arguably represent the outstanding transition in tenure patterns this last century, needs record. What is perhaps most surprising therefore is the relative absence of serious alteration in strategies in this sphere, a sphere where new approaches to land relations might have been expected. There are exceptions, some past and some fairly recent,²⁵³ and it is a fact that several current land reforms have been as much initially driven by urban land concerns as by rural concerns.²⁵⁴ Still, the rule has been to address the problem through its removal: evictions have frequently included even those who have been resident on their plots for many decades, or into whose customary lands urban

248 Shivji 1999a.

249 GoT 1994.

250 Alden Wily 2000a.

251 GoZ 1998b, Van den Brink 2000.

252. There has also been contention as to the target groups selected, moving from landless to master farmers; discrimination against women and farm workers, issues of transparency in the selection process, etc. GoZ 1998b.

253 The trial (and now seemingly abandoned) effort in Kenya to provide for community land trusts as a framework for titling urban squatters deserves mention (see Bassett & Jacobs op cit.), allegedly adopted in part in the more recent strategies for informal urban settlement in Namibia and as provided for in the new National Land Policy.

254 Namibia, South Africa and Tanzania: refer Table 2 ANNEX E.

sprawl has encroached. Now, however, change is afoot. New laws in **Tanzania, Uganda** and **South Africa** (and Land Policy in **Namibia**) directly protect all but short-term squatter occupation in urban and peri-urban areas, through a range of not dissimilar strategies.²⁵⁵

Forests as Government Land

Government Land throughout the region also includes estates that government considers itself the logical owner or only suitable guardian thereof. This is seen in the reserving of land against private allocation for direct public access and service – highways, railways, recreation and other public service areas. It is seen in a more pronounced way in the state's retention or co-option of forests and wildlife areas of significant commercial, catchment, biodiversity or tourist value. Most 'good' or 'valuable' forest is retained by the state as Government Land or later co-opted into this category.

In principle, Government is less landlord and more trustee in these instances, but in few laws is this trusteeship role indicated. The **Uganda** Land Act is an exception, going to the extent of forbidding the Government to lease or sell these lands (s.46). How far such trusteeship alters the right of the state to evict residents of reserved lands is an important matter considered in Chapter Four. The San of **Botswana** are again a case in point. As tenants of state, there was no legal impediment to their eviction in 1997 from the Central Kalahari Game Reserve to 'secure wildlife habitat'.²⁵⁶ This was a vast area not included in the above-mentioned creation of tribal lands in the Kalahari. So too have many a group of forest dwellers found themselves vulnerable to legally enforceable eviction as tenants of state, examples of which are given later.

4 YET MORE SUBORDINATION OF RIGHTS IN VIRTUAL GOVERNMENT LANDS

There is another powerful context through which local rights are made secondary to powers of state. This is found in the construct of Trust Lands or Communal Lands. These are lands that governments in the region have vested directly in themselves, or indirectly, in bodies that act for the most part as agencies of state.

These spheres are a carry-over from the ubiquitous Native Area construct of colonial times. At the beginning of the new millennium there is emerging recognition of this construct as oppressive and wrongful and inappropriately retained. As the Malawi Commission of Inquiry into Land Policy opined in March 1999 -

By locating radical title to both public and customary land in the President, the 1965 Land Act effectively converted Malawi's most important community resource into an estate private to the Government' (GoM, 1999, Ch. 8.2).

255 Sections 57-60, Tanzania Land Act, 1999; sections 11-14, Uganda Land Act, 1998; Extension of Security of Tenure Act, 1997. A draft 1997 Bill to amend the town and country planning law in respect of urban and peri-urban development in Lesotho has not yet been enacted.

256 Ng'ong'ola, 1997, Brormann, 1998, 1999, Luling, 1998.

The parity in constrained autonomy of customary rights in these areas to customary tenancy in Government Lands is strong enough to suggest that Communal and Trust lands are virtual Government Lands. All customary rights, including those over property held in common, are rendered profoundly insecure, even where occupancy is permitted. Forest rights have in the process been directly lost. A short account of their handling is in order.

South Africa

In South Africa the National Policy for Reconstruction and Development (1994), the Constitution (1996, s. 25 (6)) and the Land Policy (1997) makes the securing of the tenure of the thirteen million or so inhabitants of the former homelands, a main objective. Since the Land Acts of the 1930s, these lands have been state or trust lands and the right to live within them acquired only through a notorious 'permit to occupy' (PTO).²⁵⁷ The permit was secure – for as long as the state willed. A good deal of land was lost through cancellation of these rights, albeit often including for local public as well as national or private interests.²⁵⁸

Whilst in the first years of post-apartheid governance, thinking was towards an individualisation and entitlement programme into absolute rights, this has been redirected through several pressures:

first, from claims by traditional leaders to hold the land themselves as owner/trustees ('tribal land');²⁵⁹

second, from pressure to deal with the fact that significant parts of these areas are held in common, not individually;

and a *third* and outstanding need to find a workable way to deal with the reality that much of the homelands is occupied by people with different levels of claim. This is due to the fact that wave upon wave of people since the 1950s have been forcibly settled on these lands following eviction from urban and (white) farm areas, despite these homelands being already customarily owned and occupied by others.²⁶⁰ The breakdown of the PTO regime has not helped. Nor has the fact that support for tribal authorities is uneven, and in a situation where alternative regimes for tenure administration are poor to non-existent.

The drafting of a Land Rights Bill from 1997/98 to deal with this situation has been noted several times. An important task of the law was to establish where

257 Trust lands refer to lands identified under the terms of a 1936 act to add property to the homeland areas and mainly held until the present under the South African Development Trust (SADT). As Claassens op cit. outlines, homelands have their legal origins in a 1913 law setting aside 7% of the land area for black settlement, increased to 13% in a 1936 law. Although these laws were repealed in 1991, these areas are still vested in the state or SADT. The PTO regime has broken down along with other land allocatory regimes, leaving occupants of homelands in a tenure-less situation although their occupation rights are guaranteed by the Interim Protection of Informal Land Rights Act, 1996.

258 Ntsebeza, op cit.

259 This power traditional leaders are now claiming derives less from customary mandate than from the powers they have acquired through being instruments of the state (McDonald op cit., Cousins 2000). In general, the South African case is rivalled in this respect only by the mailo regime of Uganda, where chiefly authority was so blatantly reconstructed as land ownership by clear dictate of the early colonial state. The fact that some chiefs in South Africa have taken presumptions of tenure to undue lengths has not enhanced their popularity as agencies in whom primary title might in future be vested (Claassens op cit.).

260 Leading to the focus upon 'un-packing' these layers of rights: refer DLA 1999, Cousins 2000, Claassens op cit., McAuslan 1999d.

primary title would be vested. Faced with the complicated findings of local research, the draft law proposed that this be a matter each community would decide itself. This was to be achieved through making it possible for individuals or groups of persons to have their land transferred out of state land into private landholding regimes.

However, just at the point when Cabinet might have been laying the groundwork for the law to go forward to Parliament as a Bill, the change from the Mandela to Mbeki administration (1999) saw work on the law halt, and an inclination emerge in the new administration towards divesting these lands directly to tribal authorities.²⁶¹ Should such a strategy come to pass, occupants of the former homelands will remain as much tenants on their own land as in the past, although with different and possibly even less benign landlords.

Zimbabwe

In the same vein, the colonial Rhodesian administration secured all ownership of land to itself in Zimbabwe, justified in this case on the grounds that traditional African forms of tenure did not recognise or provide for ownership of land, or security of rights in land.²⁶² This position was maintained up until the eve of Independence in the Tribal Lands Act 1979, in which the state was designated as acting as trustee over native property.

This law was repealed after Independence and replaced by the Communal Lands Act of 1982. Any pretence that communal lands were held by the state in *trust* for the inhabitants was dropped. Indeed, the new law stated that the President would *permit* communal land to be 'occupied and used' in accordance with the provisions of the Act (s. 4).

Moreover, *permissive customary occupancy* is strictly for residential and agricultural purposes (s.7-8). Rights to occupy, use or to hold rights in land for other purposes - such as holding forests or grazing land in common - is not availed by the Communal Lands Act (s. 9).

Section 6 emphasises the right of the President as landowner to remove tracts of Communal Land into State Land. Any part of Communal Lands may also be 'set aside' at the discretion of the President (Minister) for lease-holding or any other purpose (s. 9-10). Consultation with the local district council is obligatory but that body does not have the right to reject the proposal. The Minister may order the eviction of residents (s. 10 (3)), although with provision of alternative land or on payment of compensation for what is frankly called in the law '*such dispossession or diminution*' (s. 12). The right to object to dispossession or appeal to the courts, is not provided.

Customary tenure and customary ownership of property involves the majority of Zimbabweans, and securing land was the main impetus for independence. So far, the tenure insecurity of the majority who already occupy land has not been tackled, but on the contrary has been exaggerated.

The considerations of the *National Land Policy Framework Paper* in late 1998 therefore represented an important development. These recommended removal of ownership of communal lands from the President to village assemblies,

²⁶¹ DLA 2000.

²⁶² GoZ 1998b.

which would hold land in trust for members. Allocation would be through village-based institutions. Unlike the Tanzanian plan upon which it was modelled, traditional leaders were to play a key role, and a Traditional Leaders Act was enacted to provide a framework for this (1998).²⁶³

Several semi-public workshops were held in 1999 to discuss the proposals, since overtaken with the white settler land issue.

Namibia

The handling of the 'Native Reserves' in Namibia has been no less disappointing.

It will be recalled that the Constitution of Namibia vested all untitled land in the Government (Schedule 5 (1)). Article 100 reiterated this by vesting all '*land, water, and natural resources below and above the surface of the land*' in the State, '*if they are not otherwise lawfully owned*'. Lawfully owned was understood as land owned through statutory entitlement (freehold, leasehold). This excluded the Native Reserves or communal lands as they are now known, wherein the vast majority of Namibians live.

As in Zimbabwe, these Namibians ceased to be tenants of the colonial state only in order to become tenants of the modern independent state (1990).

Democratising tenure was not a route which SWAPO then or since has chosen to take. Nor has it chosen to follow the Botswana model, which would have seen communal lands vested in autonomous Land Boards, if not communities or individuals themselves.

In 2000, the Namibian Government still reiterates state ownership of communal lands such as in its National Land Policy, 1998 (s. 3.1) and Communal Land Reform Bill (s. 17 (1)). Although rejected in its current form, the latter is expected to return to Parliament without modification to this aspect.

Unlike Zimbabwe, both documents do at least now emphasise the trusteeship function of the state, a declaration not present in the Constitution of Namibia. However, state trusteeship is *not* posed as for the resident traditional communities, but -

for the purpose of promoting and economic and social development of the people of Namibia, in particular, the landless and those with insufficient access to land who are not in formal employment or engaged in non-agricultural business activities (s. 17 (1)).

This hints at a disturbing development; whereas before the focus was upon the alienated commercial farm lands as a source of land for the dispossessed and poor, the communal lands may now be the target for such resettlement and reallocation. This is posed within the principle of freedom of movement by any

²⁶³ The Tanzanian plan as set out in GoT 1994.

citizen – a principle which in this case will compete with local tenurial interests.²⁶⁴

Thus, ten years after Independence, the majority of Namibians still do not legally own the land they had managed to hold onto during the long colonial period.

Kenya

The case of Kenya is as clear and illustrates the kind of dangers which may be ahead for inhabitants of the northern Communal Lands of Namibia should their lands be made available to those who apply to lease them.

Most land in Kenya was declared Crown Land in 1902 including African-occupied lands. A Government Lands Act of 1915 replaced this and gave the Governor power to demarcate native reserves of various types. A first native reserves law of 1930 reserved certain areas of Crown land '*for the use and benefit of the native tribes of the Colony for ever*' (s.2), but allowed the Governor to grant leases of up to 33 years to non-Africans, if local Africans did not object. The Governor could also excise land for public purposes (s. 15).

This established the framework for what were through various new statutes to become the Trust Lands of Kenya.²⁶⁵ Title in Trust Lands was vested in County Councils '*for the benefit of the persons ordinarily resident on that land*' and the County Council was to -

give effect to such rights, interests or other benefits in respect of the land as may under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual (Chapter IX Trust Land, Constitution of Kenya; s. 115 (2)).

So far, so good. However, the Constitution proceeded to give the County Councils largely unbridled powers to allocate trust land to non-residents/customary owners, and not just to public bodies or for public purpose, but -

to any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident ... either by reason or the use to which the area so set apart is to be put, or by reason of the revenue to be derived from rent in respect thereof (s. 117 (1)).

Colonial limitations that this should be limited to a lease of 33 years, exercisable only if local Africans did not object, and the land in general protected against 'undue legislative interference' (as through the Order of 1939), were abandoned.

The way was thus opened for allocation of trust land to private persons and businesses, on the grounds that their presence or private business will be 'good for the local community'.

The agent of the Council in land matters is central Government's Commissioner of Lands (Trust Land Act s. 53). In setting aside trust land, any rights, interests

²⁶⁴ A similar change was made in 1993 to the Botswana Tribal Land Act, to open the way for non-local persons to access resources in tribal lands – a decision which is contentious in those tribal areas where land is already in short supply (White op cit.).

²⁶⁵ In most respects the post-Independence Trust Land Act, 1963, is that of the Native Lands Trust Act of 1938.

or benefits under African customary law are extinguished.²⁶⁶ The Commissioner of Lands need simply give notice to the County Council that the land is required for the '*purposes of the Government of Kenya*'.

Purposes is not defined. A main purpose was to be able to enforce the adjudication and conversion of local rights into freehold titles. Conversionary entitlement was the objective of the 1955 land reform programme, fully subscribed to by the new Independence Government, and administrations since. The Land Adjudication Act was enacted to direct the process. In practice this process has taken a good deal longer than originally envisaged, and fifty years hence, the conversion of customary rights into freeholds is still underway.²⁶⁷

By no means all rights converted remained with the customary occupants, but were acquired through one means or another by non-local persons, even as first title deed holders. The extinction of customary rights by the Commissioner of Lands to make way for settlement schemes involving persons not from the local area, were an especially common feature of the nineteen sixties and seventies.²⁶⁸ There have been a multitude of other, generally individual allocations, also made in technically legal ways to outsiders. Widespread diminishment of local informal rights has resulted.²⁶⁹

BOX ONE illustrates the frustrations felt by individual residents of Trust Land when they attempt to halt reallocation of part of their land for private benefit. The case relates to a Trust Land Forest, Kamiti. Such reserves may be established by County Councils under the terms of the Trust Land Act.²⁷⁰ Many have done so in order to secure revenue from timber harvesting. County Councils are also empowered to dispose of trust land, securing the premium paid to themselves.

BOX TWO examples a case touched on in Chapter One; a more successful initiative by coastal people to protect their tiny religious forest sites, *Kaya*, from reallocation by the County Council to private interests, by using a conservation law to good, if imperfect effect (Antiquities & Monument Act).

266 Constitution, s.118 (4); this and related powers all directly put into the Trust Land Act, Cap.288.

267 National Development Plans and Statistical Abstracts give figures of 2.1 million title deeds issued and registered by the mid 1990s, but with an unspecified number remaining to be finalised; officials of the Ministry of Lands cite figures of more than two million in this latter category. They remain uncollected in land offices, those entitled not having the knowledge, funds or interest to bother collecting them. Meanwhile, most titled lands have changed hands, but with the change in ownership either not recorded, or often still in process, years later, rendering the whole purpose of entitlement questionable and subject to an ever-spiralling descent into dispute. See GoK, 1994b, 1994d, 1996a, 1996b.

268 GoK, 1996b, Okoth-Ogendo, 1976, 1999.

269 Kenya Human Rights Commission 1996, 1997, Akech op cit., Juma & Ojwang (eds.) op cit., Pander 1997.

270 Trust Land Act, Cap. 288, s. 13, 37 and pursuant to s. 117 of the Constitution.

BOX ONE
FAILING TO SAVE FORESTS FROM SALE
The case of Kamiti Forest in Kenya

In 1994 a local farmer filed an application in the High Court seeking to stop Kiambu County Council from excising part of **Kamiti Forest** for housing development (Miscellaneous Civil Application No. 1146 of 1994). The plea was dismissed on the grounds that under the Local Government Act (s. 144, 145, 177) there was no reasonable ground for concluding that the Council was failing in its duty. Further empowerment to the County Council to subdivide Kamiti Forest into plots, or 'do any other thing it wished' said the judge, was given in the Trust Land Act. The only action the farmer could seek was compensation but as he did not live next door to the forest and could not therefore claim a customary subsistence use in its products, he had no *locus standi* to bring the case.

Kamuaro 1998 uses this incident as yet another example where more fundamental principles of the Constitution and Trust Land Act are being defeated by the trustees and courts given that -

'In respect of the occupation, use, control, inheritance, succession and disposal of any Trust land, every tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing African customary law' (s. 69 Trust Land Act).

BOX TWO
HALTING THE ALLOCATION OF RITUAL FORESTS
Coastal Kaya in Kenya

The two coastal districts of Kwale and Kilifi are trust lands administered by County Councils. Kaya Forests are found within these areas. These are customary areas of the Mijikenda tribes. They serve as sites of worship, burial grounds and a place of connection with ancestors. Those that remain today are many but small, often no more than a few hectares in the midst of close settlement. Local elders usually manage Kaya, and some remain in pristine conditions.

The practice of retaining patches of indigenous woodland intact for socio-ritual purposes is common throughout Eastern Africa. The Ufiome tribe in Tanzania refer to these as *kayamanda* and each Ufiome village has at least one (Alden Wily, 1994c). Loiske 1996 and Brandstrom 1996 record similar ritual forest patches in other parts of Tanzania.

The threat to Kaya in Kenya derives from *'some very powerful persons who have both monetary and political connection and are able to circumvent the law. It is these outsiders who benefit ... not only from allocation of Kaya forest land but they are often allocated beach plots as rewards for political patronage. Thus the allocation has not always been done by the appropriate County Council but rather directly by the Commissioner for Lands who has the necessary legal power to allocate at will, under Section 53 of the Trust Land Act' (Kamuaro 1998).*

He records action taken to protect them *'As community leaders and conservationists laid out reasons to keep the forests intact, the National Museums of Kenya, through its Coast Forestry Conservation Unit, devised a way to protect and conserve the Kayos. It argued for the gazettement of the forests to promote biodiversity conservation... Through their efforts and lobbying by Mijikenda elders and community activists, the Government resolved to gazette certain Kaya under the Antiquities and Monuments Act as places of important paleontological and historical heritage and to do the same for other Kayos under the Forests Act'.*

'The official gazettement of the Kaya was not in itself a guarantee of security or of continued access and use of the Kaya by local people... In fact the Constitution and Trust Land Act should have provided enough leverage for the protection of local rights ... clearly not enforced by the Commissioner of Lands and the County Councils...'

Gazettement shifts control from the local level to the state, and subject local rights to the permission of the Forestry Department and the National Museums of Kenya. Nor does the gazettement process necessarily revoke the titles given to private developers, who first accessed the forests through allocation by the County Councils and the Commissioner of Lands. In many Kaya the threat remains.

The meaning of trusteeship

A fundamental query revolves around whether or not a trustee County Council reallocates land in its care in the interest of the inhabitants, in the spirit required by the Constitution and Trust Land Act.

A plethora of cases regularly emerge in the national press which suggest abuse of trusteeship and manipulation of the law in ways which cannot be justified by claims that the action will somehow benefit the (dispossessed) or other local inhabitants.²⁷¹ An emerging conclusion is that the terms of the Constitution and Trust Land Act are not able to provide the level of protection needed for customary landholders - and were possibly never intended to.²⁷²

Ambiguous constitutionality is the subject of a case described in BOX THREE. This centres upon the future of an important customarily-owned forest in Maasailand.

Inadequate law

There are concerns as to the legal insufficiencies of Kenyan land law to protect customary owners. Referring to section 54 of the Trust Land Act which protects officers, Kamuaro writes –

Instead of the Trust Land Act guaranteeing access to justice for the people it is supposed to protect, various provisions of Kenyan land law serve to limit this by protecting Government officers and those who obtain land illegally from liability arising from their actions' (1998).

Another source of problem has been the inadequate periods for lodging objections, especially deleterious where literacy levels are low and availability of newspapers or government gazettes to hear of intended extinction of customary rights scarce. There is frequent failure to make the legal notices publicly available on the date indicated, reducing further the real time period available for objection (Ole Simel 1999, Kamuaro op cit., Kenya Human Rights Commission 1997). Not surprisingly many an objector finds himself time-barred before he begins, or worse, the ruling is only applied once the expense of court costs have been incurred.

271 During one week in October 1999 for example, the Daily Nation newspaper reported an appeal by the Ogiek Welfare Council 'to return their land which was being routinely allocated to other people' (October 22); reports of double allocations (October 23); allocations of forest land to officials (October 23); a questionable allocations of 60,000 acres of land in Kilifi Trust land to salt manufacturing firms (October 25), controversy over the planned settlement of squatters in Malindi District 'where some of the people on the list of names prepared are said to be dishonest intruders' (October 27), an admission of a KANU MP that he was allocated 15 plots in Thika Town which he later gave to his supporters, councillors and leaders (October 30). As an Editorial of the Daily Nation that week opined: '... it is rudely brought home to us that there is no end to scandals in that sensitive government office (Commissioner of Lands)'. Refer Daily Nation passim and East African Standard passim for high level of public attention to tenure matters in general.

272 Akech, op cit., Kenya Human Rights Commission, passim, Kamuaro, op cit.

BOX THREE
TACKLING ISSUES OF CONSTITUTIONALITY
The Loita Forest Case, Kenya

Loita Forest, more correctly known as Naimina Enkiyio Forest, may extend to 60,000 ha. It is located within two Divisions of Narok District (Entasekera and Olorote) and entirely within the Loita Division, the boundaries of which coincide with the territorial boundaries of the Loita section of the Maasai people. Although the Division was declared an adjudication area in 1969, it was never set apart for this purpose. The entire Division (the forest included) remains Trust land, vested in the Narok County Council.

Naimina-Enkiyio is a sacred forest to Loita Maasai and a critical pasture and watershed area. The forest comprises dense moist forest including the invaluable *Podocarpus*, *Juniperus*, *Aruninaria* and *Olea Africana* species, interspersed with glades. Some areas are shrublands. The forest is the focus of a series of Maasai myths and legends and described today as a Maasai cathedral (Karbolo, 1999).

In the early nineties, Narok County Council issued notification that it would set apart Loita Forest as a County Council Nature/Game Reserve for tourism, providing camp sites, nature trails, etc.), in order to generate revenues (*Standard* 31 July, 1993, 4 December, 1993, Ole Karbolo 1999).

Already a well-organised section with a long history of self-managed projects, Loita leaders established *the Loita Laimina-Enkiyio Conservation Trust* (1994) for the purposes of embedding local ownership of the forest, which the members hoped the County Council would award them. The Trust challenged the intention of the County Council to set apart the area in the High Court which ruled against them (1995).

The Trust lodged an appeal (1996), still being heard by a three-judge bench to consider whether or not the constitutional rights of the Loita section had been abused by the refusal of the court to rule in its favour. The clause under contention is section 115 (2) of the Constitution that each County Council holds land in trust for the benefit of the persons ordinarily resident and *'shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual'*. The appeal is pending in mid 2000.

The County Council claims it is acting to the benefit of all inhabitants of the district, not just the members of the local Loita clan. The Trust and members of the community, unhelpful of a favourably ruling, have shifted their strategy towards trying to persuade the Council members of their case, outside the courts, so far with no success.

Most pernicious is the protection given to *entitlement* through Kenya's Registered Land Act (Cap. 300). Section 143 (1) makes a first registered owner immune to challenge, no matter how he or she obtained the property. Section 143 (1) prevents *'rectification of the register'* even if the title has *'been obtained, made or omitted by fraud or mistake'*. The timing of Cap. 300 suggests this clause was designed initially to secure white settler properties from challenge on grounds that their original allocation was dubious.

Such shortfalls in the law share a more fundamental shortfall in constitutional guarantees of private property (s. 75); in reality it is not private property which is considered sacred but *title deeds*. Untitled rights in practice have little protection. Of such realities, dispossession of customary owners have steadily accrued.

5 THE DRIVE TO REPLACE CUSTOMARY RIGHTS

Whilst Kenya is the outstanding example in the region of the commitment to replace customary rights with entitlements, the commitment towards this has been everywhere in evidence. In practice the process has proven less a matter of conversion than loss. A wide range of customary rights disappear in the process. Rights of women to land and rights to hold property in common have been common casualties. Pastoral rights have also been diminished. Hunter-gatherer tenure rights have virtually disappeared.

Denial of rights to these groups was arguably never the intention. Rather, problems arise in both failure to acknowledge these rights in land as existing and then failure to provide a workable means for them to be embedded in state law (statutory tenure regimes).

The demise of hunter-gatherer tenure rights

The case of the hunter-gatherer San of **Botswana** was mentioned earlier, and the fact noted that eventually these people did see (some of) their lands move from State Land to Tribal Land status, with the creation of two Tribal Land authorities in the Kalahari (1978).

However, no change was made in the way in which these new 'tribesmen' could establish their rights within these Tribal Lands. The same norms as provided for the majority agricultural tribesmen in the rest of the country applied. Therefore in order to secure land in Tribal Lands, these hunter-gatherers were forced to apply for housing plots and farm plots. Housing was beyond their means or priorities, and agriculture inappropriate in the desert environment and alien to their traditional land use regimes. Nonetheless, in order to secure some measure of security for these people, a land rights programme in the 1970s and 1980s assisted San apply for farm fields and to establish settlements - a programme of very partial success.²⁷³

A similar situation exists in respect of the San of **Namibia**.²⁷⁴ It is also widely the case in East African states in respect of their own hunter-gatherer minorities. The Hadza of **Tanzania** have suffered a lesser degree of dispossession, mainly through declaration of some part of their area as two village areas.²⁷⁵ In all these cases it is not that hunter-gatherers are *denied* land ownership, just that they may only secure tenure through operating as if they were settled agriculturalists.

The demise of pastoral tenure rights

Numerically, hunter-gatherer groups throughout Africa represent tiny minorities. Many more people are as directly affected by virtue of being pastoralists. Pastoralists (as compared to settled agro-pastoralists) extend from East Africa to the Horn.

Even where pastoralists represent a substantial part of the total population, it is only in small **Djibouti**²⁷⁶ and **Ethiopia**, and most recently **Tanzania**, where laws

273 Alden Wily 1994a, Ng'ong'ola passim.

274 Brormann, passim, Thoma op cit., Kipi 1997.

275 Hanby 1999, Madsen 2000.

276 Amadi, 1997, Bruce et. al. op cit.

provide for some degree of recognition of pastoral tenurial norms. In **Ethiopia**, the Land Reform Proclamation of 1975 returned some critical wet pasture to many pastoralists through the nationalisation of commercial farms, and the declaration that nomadic people would have usufruct rights over land for purposes of grazing and related purposes.²⁷⁷ The payment of dues to landlords also was made illegal. Beyond this and the redefinition of parts of the country according to 'nations', tenure security is still fraught. The 1997 Rural Land Administration Proclamation for example, makes no provision for pastoral rights in *settled* areas. Several current projects seek to secure pastoral rights in such areas.²⁷⁸

In **Sudan**, the steady encroachment of pastoral lands by the state for conversion into arable allocations leaves pastoralists in northern Sudan 'landless and poor' with no provision in state law for their tenure.²⁷⁹ A similar situation existed in **Somalia**, at least up until the war. Conflicts between pastoral use of dry woodland and accelerating destruction of these by urban charcoal producers, has ultimately reached unprecedented levels in Somaliland (northern Somalia), causing the Government to embark upon a plan to localise control over woodlands. Issue of permits for harvesting for charcoal production will however continue to be a function of the state.²⁸⁰

From pastoralism to ranching, group to individualised tenure

The situation in **Kenya** embodies many of trends observed thus far. At Independence pastoralists found themselves located in Trust lands. Those living in the more accessible areas of the country have lost a great deal of land since; through individual re-allocations by County Councils to outsiders; re-designation of local lands as Forest and Wildlife Reserves, and the setting aside of these areas for settlement schemes, plots made available to people from other parts of the country.²⁸¹ Appeal against such processes has met with limited success.²⁸²

Losing land through conversionary processes

Just as much loss has occurred through tenure conversionary processes. This needs to be set once again in the context of the Kenyan land reform programme begun in the fifties which sought to transform all land ownership in the country into a single freehold regime, eliminating any hint of the kind of communal land use arrangements considered at the time antithetical to modernisation.

277 Gadamu et al., 1999.

278 Hesse & Trench op cit.

279 Kirk, 1996, Shazali & Ahmed, 1999.

280 IUCN Workshop on Community Involvement in Forest Management, June 2000, Kampala.

281 A significant proportion of the 302 agricultural settlements established since Independence has been on pastoral lands; GoK 1996b, Okoth-Ogendo 1997.

282 Kenyan Human Rights Commission 1996, Pander op cit., Lenaola et al. 1996.

It took little time for the inappropriateness of individualising pastoral property to penetrate early-Independence thinking of the Kenyan administration and for some effort to be made to introduce critical elements of customary tenure into statutory provision. The compromise was the enactment of the Land (Group Representatives) Act, Cap. 287. This provided for a group of pastoralists to register their names as co-owners of a discrete pastoral area. However, by the time the law was enacted, the modernisation commitments of the state meant that the law's intention was less to provide a vehicle for group rights that a route through which pastoralism could be reconstructed into 'modern' ranching, the agricultural policy at the time.²⁸³ Some decades later, a similarly aborted attempt was made to give cognizance to communal elements in tenure arrangements in urban areas.²⁸⁴

Setting aside the questionable transformation of arid land cattle-keeping implied, the unsatisfactory tenurial nature of the ranch construction combined with a weakly formulated process for defining co-owners and for registering the results (the membership of each 'Group').²⁸⁵ Nonetheless, 302 Groups were forcibly created, and ranches formed around these new tenurial arrangements.

Insult was advanced upon this legal injury. This was through a 1979 Presidential Directive enforcing the subdivision of these group ranches into individual plots. From that time the Land (Group Representatives) Act was used not to form groups so much as to identify who would receive a share of the subdivided area.²⁸⁶

As if this were not transformation enough, this development has been marked by corrupt process, made yet worse through a court system which has given but feeble sign of being able to bring these actions to justice. ANNEX H describes examples.

The main source of problem has been the inclusion of the names of officials, politicians and other outsiders on the names of the original group register, names which deliver entitlement; entitlement which may not be challenged for the protection provided first registrations as mentioned earlier. In some cases, considerable amounts of local forest are involved, subdivided and cleared.²⁸⁷

By no means all pastoral owners affected have taken the loss of land rights incurred lightly. ANNEX H outlines key court cases which have ultimately led to proposed amendments in the core Land Adjudication Act but not the offensive terms of the Registration of Land Titles Act. The gazetted Bill has not however reached Parliament.

Local organizations (and government itself) report that 'almost all' of the 302 group ranches established have endured the same kind of problems described in ANNEX H.²⁸⁸ The exploitation of poor and illiterate Maasai by wealthier

283 See Pander, *op cit.* for a good example of the problems encountered most recently in the new Trans Mara District towards creation and subdivision of group ranches.

284 Reference is made here to a pilot effort in the 1990s in Voi township in Kenya to introduce community land trusts as a framework for resettling groups of urban squatters, not ultimately provided for in law or practice. Refer Bassett & Jacobs 1997.

285 As set out respectively in the Land Adjudication Act, Cap. 284 and the Registered Land Act, Cap. 300.

286 Survival International, 1995a, 1995b, 1997a, 1997b, Pander, *op cit.*, Galaty 1999, Ole Simel *op cit.*

287 In Trans Mara District especially; see Pander *op cit.*

288 GoK 1998b, 1999d.

Maasai with political connections, has been a constant underlying theme of the way in which the law has been misused and is ultimately proving incapable of protecting group interests.²⁸⁹

The end result is a great deal of landlessness on the part of poorer pastoralists and severely constrained livelihood for those who did find their names recorded on registers and received allocations. Sales of pastoral land for non-pastoral use (mainly agricultural and business) are now routine. Degradation of fragile dry woodlands in these pastoral areas is rife.

Pastoralists in **Tanzania** have experienced a lesser and different mode of dispossession over the same period, but which is as well documented.²⁹⁰ Periodic state appropriation of the lands of Tanzanian Maasai through state reallocation to private investment has been particularly destructive of their rights. Barabaig pastoralists lost some 100,000 ha of prime land to the establishment of wheat schemes in the 1970s, a development which through use of inappropriate Canadian prairie techniques put the area to virtual total degradation within ten years.²⁹¹ Forcibly evicted, Barabaig moved into forested areas which have since been destroyed.²⁹² An important development in the Barabaig case was recognition by the Government that these people were due compensation, payment of which was however late and little.²⁹³

Uganda

The fewer and considerably less articulate Karomajong pastoralists of **Uganda** received no such attention in the new 1998 Land Act. Indeed, the devolution of tenure administration into autonomous Land Boards at the District level, supported by 4,517 Parish Land Committees, directly contradicts location and mechanisms of most pastoral tenure and access rights management.²⁹⁴ The land law does provide for *Communal Land Associations* to be constituted and registered to own or manage land as a group (s.16-27). Whilst in principle this is an instrument which could be helpful to pastoralists, it is perhaps rather too like the failed Land (Group Representatives) Act of Kenya, to win the confidence of pastoralists.

Securing pastoral tenure in new law

It is in Tanzania however, where a recent effort has been made to redress the tenure insecurity of pastoralists. Local lobbying to the Presidential Commission on Land (1991-92) was catalytic, well supported by local and international NGOs.²⁹⁵ Both in its declamatory principles and in the substance of the law, the

289 Refer Galaty, op cit.

290 Although the Range Development and Management Act, 1964, Cap. 569, did intend (and initially succeed) in implementing a comparable group ranching regime, the law fell into disuse and was finally repealed by the new Land Act 1999. A large literature exists on Tanzania Maasai land matters and this including increasingly virulent claims that even the famous Ngorogoro Conservation Area illegally embraces pastoral lands (Lane 1997, Potkanski 1997). See Mwaikusa 1997, Shivji & Kapinga 1997b for an overview. Also see Igoe & Brokington 1999 and Mustafa 1997 for a case of pastoral dispossession invoked through wildlife conservation provisions (Mkomazi Game Reserve in north-eastern Tanzania). All areas referred to include fragile dry bush lands or woodlands.

291 Niamur-Fuller et al. 1994.

292 Alden Wily 1996, Massawe 2000a.

293 Niamur-Fuller et al. op cit.

294 Nangiro & Abura 1998, Alden Wily 1998h.

295 GoT 1994, Mwaikusa op cit., Alden Wily 1998e.

Land Act and Village Land Act reiterate the need to pay due regard to pastoral rights reiterated.

BOX FOUR
PROVIDING FOR PASTORAL RIGHTS IN NEW LAND LAW

Provisions for pastoral rights in the Land Act 1999 (LA) and Village Land Act 1999 (VLA) include the following:

- A stated principle of the need to protect pastoralists from disadvantage through land market operations (LA s. 3 (1) (9k));
- Through protection for unregistered rights including 'the use of land for depasturing stock under customary tenure (LA s. 4(3))
- Protection against loss of pastoral rights when land is partitioned (LA s. 162 (3g));
- In the definition of village land including pastoral tenure (VLA s. 7 (e) (ii) (iii));
- In the issue of a Certificate of Village Land (VLA s. 7 (7));
- In the exercise of management by the Land Manager (Village Council) to allow for joint land use agreements between villages for pasture and water access (VLA s.11, 58);
- Through the important provision for land to be retained by communities as registrable commonage (see later) (VLA s.57 (3)).

II OPPORTUNITIES

1 CHANGING LEGAL ATTITUDES TO CUSTOMARY RIGHTS

Throughout the above account, one outstanding source of tenure insecurity is suggested; the manner in which modern land law in the region regards unregistered or informal rights over property. In rural areas, these are usually customary rights.

Observations on the status of customary rights in land were made in Chapter Two. TABLES 3.1 and TABLE 3.2 now add to these. TABLE 3.1 focuses upon whether or not statutes formally recognise customary rights in land in the same manner that they provide for other tenure regimes (freehold, leasehold, granted rights, etc.). It notes if and how customary ownership may be registered and titled. TABLE 3.2 provides an overview of the legal protection given to unregistered rural rights in general, including not only those deemed to be customary.

The maintenance of tenure insecurity

The findings are clear. *First*, taking the region as a whole, customary rights have limited support in national law. They can not often be registered, and the right to remain on those lands is mainly only permissive, dependent upon the goodwill of the tenure management authority. This authority, we have seen, is usually the state itself.

We have seen how this operates in respect of geographically-defined communal lands in Kenya, Zimbabwe, South Africa and Namibia. It also operates more widely in the region (Rwanda, Zambia, Malawi).

Legal toleration rather than legal support, is the dominant reality, offered mainly as a temporary measure, until such rights may be converted or extinguished. On the whole this intention remains in some new tenure laws. This is the case in Ethiopia, Eritrea and Zambia.

In **Eritrea**, where the process has been most recently launched (1994), citizens continue to occupy land which will be reallocated to them, or perhaps to others through new distribution regimes, and will hold those lands under a new form of tenure which includes only some of the incidents of customary tenure. A central change will be that the locus of control over those lands moves from community to state bodies (Local Administration Bodies), as described in Chapter Two.

In **Ethiopia**, most citizens now occupy land under 'holding rights' which have some resonance with customary norms but only by accident.²⁹⁶ There too, because the new regime of holding rights does not encompass all types of land, customary procedures and customary rights in practice co-exist to an extent as described later in reference to commonage.

296 Negash 1998.

TABLE 3.1: PROVISION FOR CUSTOMARY TENURE IN NATIONAL LAW

COUNTRY	NATIONAL LAND LAW PROVIDES FOR CUSTOMARY LAND LAW	TITLE FOR CUSTOMARY RIGHTS AVAILABLE
UGANDA	YES Fully legal as one of four regimes in plural system Constitution (Article 237 (3) (a)) and Land Act, 1998; s. 5-10.	YES Through <i>Certificate of Customary Ownership</i> (s. 8, Land Act, 1998) Also provides for conversion to freehold if the owner wishes and if customary regime allows (s.10-14).
TANZANIA	YES Fully recognised as one of two regimes by Land Act, 1999: customary and granted. Customary tenure is to operate in Village Lands and may operate in Reserved Lands. Customary rights given statutory protection whether registered or not (s. 4(1) Land Act, 1999). <i>'To ensure that existing rights in and recognised long-standing occupation or use of land are clarified and secured by the law'</i> is made a main principle of the new law (s. 3(1) (b)).	YES <i>Customary Right of Occupancy</i> . The Village Land Act, 1999 is mainly for adjudicating, recording, registering and issuing titles for customary rights. No capacity to convert directly to Granted Rights. Section 18 (1) makes a customary right of occupancy certificate <i>'in every respect equal to a granted right'</i>
ZANZIBAR	NO Since 1963 state law has regulated landholding without direct reference to customary rights and Land Tenure Act, 1992 makes landholding only legal through registration and entitlement from Government.	NO
KENYA	PERMISSIVE ONLY Assumed that customary tenure will disappear as Trust lands are converted to freehold tenure. In interim, customary tenure may continue (s. 115 Constitution). Customary rights vulnerable to elimination through conversion, allocation for other uses by govt.	NO
RWANDA	SUSPENDED Recognised and regulated through laws of 1960, 1961, 1975, 1976. Bias towards Bahutu customary norms. Since 1994 genocide, all land rights are suspended, pending new settlement and tenure plans. Affects 90% of country.	NO By definition customary rights are <i>'unregistered'</i> .
ERITREA	NO Abolished by 1994 Land Proclamation but permitted to operate until provisions of law fully in place so long as does not contradict the principles of the law. Still operating because implementation slow.	NO
ETHIOPIA	NO Rural land-holding reconstructed and administered according to criteria set out in Proclamation No. 89/1997 which have little in common with customary regimes.	NO

MALAWI	PERMISSIVE ONLY The 1965 Land Act removed original title in customary land from chiefs and vested it in the nation/President (Section 25). Clear intention to recognise customary tenure and rights in new Policy and law.	NO Land Act, 1965 gave Minister power to grant leases out of customary lands without consultation (s.26); some 30,000 grants in 1994 alone. Customary Land (Development) Act allows conversion to freehold. Suspended until new policy and law.
ZAMBIA	YES Recognised as one of two regimes; customary and leaseholds (Land Act, 1995, s. 7). Customary tenure procedures highly modified by law.	NO Provision for conversion into a <i>Customary Leasehold Title</i> (Lands Act, 1995; s.8).
ZIMBABWE	PERMISSIVE ONLY Communal Land Act 1982 recognised customary tenure but gives President high powers to reallocate. Inhabitants have only occupation and user rights. Proposed but un-approved new Policy aims to make customary tenure legal and equivalent to other tenure regimes.	NO Permits to Occupy only, and for business purposes (Communal Land Act, s. 9(1)). Draft Policy 1998/1999 proposes a Customary Certificates of Title to individuals, groups, village councils (common land).
MOZAMBIQUE	YES Major thrust of new Land Act, 1997, Article 9; recognises customary rights in land.	YES Through registration of land under the name of rural communities, name chosen by themselves, or individuals, or other. Regulations provide procedure (1998, 1999)
BOTSWANA	YES Tribal Land Act 1968 brings customary rights into national law but modifies by removing root title and allocation powers from chiefs to district land boards and restructures rights not necessarily in accordance with custom. Customary tenure regimes of hunter-gatherer (San) and pastoral minorities (BaLala, BaKgalagadi) not recognised, and they access rights only on basis of agriculture	YES <i>Certificate of Customary Land Grant</i> is the commonest title in Botswana used for homes and fields only. Richer persons with larger holdings secure Leaseholds.
SOUTH AFRICA	YES Constitution secures customary rights (Article 211). Interim protection <i>Interim Protection of Informal Land Rights 1996</i> . <i>Extension of Security of Tenure Act 1997</i> secures occupancy of tenants. <i>Transformation of Certain Rural Areas Act 1998</i> gives interim local security to 23 coloured areas. <i>Communal Property Associations Act 1996</i> enables groups to acquire, hold and manage property.	NO Through conversion into freeholds, leaseholds, and entitlement via establishing a Communal Property Association. Main provision planned through Land Rights Bill, to provide for recognition, registration and certification of 'protected rights' which could be customary and described as customary. Development on this halted 1999-2000.

NAMIBIA	PERMISSIVE ONLY Ownership vested in state with promotion of conversion of all but homes & farms to leaseholds. As owner, state may appropriate and reallocate outside community.	YES <i>Customary Grants</i> planned under (aborted) Communal Land Reform Bill for homes and farms by Land Boards. Lifetime only and not able to be transferred outside family. No provision for grazing to be held in titled customary grants only by lease.
LESOTHO	AMBIVALENT The <i>Laws of Lerotholi</i> provide for allocation of land by traditional authorities, answerable to the King as per customary modes. However, the 1979 Land Act made void the customary system of land allocation and with it, the power of chiefs. Conflicting allocations continue with high level of dispute and shortfall in resolution.	NO
SWAZILAND	YES Operates within feudal kingship regime in Swazi National Lands. These are owned by the King Ngwenyama (or, sometimes, the Ndlovukasi - Queen Mother) held in trust for the Swazi Nation. Swazi Administration Order, 1998, endorsed chiefly authority over these lands.	NO

TABLE 3.2: EXTENT OF SECURITY FOR UNREGISTERED RIGHTS

COUNTRY	EXTENT OF SECURITY PROVIDED IN LAW
UGANDA	HIGH: By implication even if unregistered customary rights secured by Article 237 of 1995 Constitution and Land Act, 1998). Whilst registration directly encouraged in law (s. 5-9) and conversion to freehold encouraged (s. 10), registration is not compulsory. Ambivalent law in respect of occupants on mailo land whose right requires registration (Certificate of Occupancy) to be secured (s. 31).
TANZANIA	HIGH: Encourages registration: states principle <i>that existing rights in and recognized long-standing occupation or use of land are clarified and secured by the law</i> (Land Act 1999; s. 3(1) (b)). However s. 4(3) provides for protection of <i>unregistered lawful rights</i> (also see 4(6)). Loophole in law may generate insecurity in respect of 'un-used or unoccupied village land' (Land Act, 1999;s. 2) with assumed but un-stated intention to appropriate these lands for allocation to public and private investors.
ZANZIBAR	LOW: Land reforms of 1989-1994 only recognise landholding via registration and entitlement.
KENYA	LOW: Land under unregistered rights including those which are customary directly subject to reallocation and a main source of tenure insecurity and even 'land wars'.
RWANDA	LOW: Unregistered Rights are the majority; Land Decree 1976 forbade sales which leave owner with less than 2 ha but not often followed. Rights now suspended.
ERTREA	LOW: 1994 Land Proclamation aims to make only registered rights justiciable.
ETHIOPIA	LOW: All land rights de-secured through 1975 Land Proclamation. Customary rights have no <i>locus standi</i> . All unregistered hold vulnerable to dictates of central state, which until mid nineties included periodic redistribution. Relocation has been considerable in some provinces. However 1997 Proclamation guarantees access and improved security of standing occupants and gives Regions power to make laws as long as stay within broad parameters of the Federal law. Redistribution is upon decision of community itself (s.2 (4)). Owners of 'holding rights' may bequeath and sell and exchange 'for as long right remains in effect'.
ZAMBIA	MEDIUM: In law main sphere of unregistered rights (customary) are protected but in practice vulnerable as all other land held by unregistered means to reallocation.
ZIMBABWE	MEDIUM: Main sphere is customary and these by ownership of these lands by President and right of state and district councils to reallocate virtually at will. New Traditional Leaders Act 1998 designed to restructure procedures for local input on land decisions, not evidently widely implemented.
MOZAMBIQUE	MEDIUM: As main sphere of unregistered rights, customary rights secured in principle by new law but threatened repeatedly by retained right of state to allocate same lands to others and to place area under concessions which have similar effect.
SOUTH AFRICA	HIGH: through current public and legal commitment to secure informal rights in general but on interim basis which might yet see rights in key spheres (e.g. customary) de-secured through emphasis upon conversionary routes.

BOTSWANA	MEDIUM: in principle high but in practice women, non-livestock-owners and non-agriculturalists find few means through which informal rights are recognised. Added insecurity through opening tribal lands to access by any citizen (1993 Amendment) with the poor tending to lose land to wealthier outsiders. Similar effect of the Fencing Act, allowing citizens to fence communal land (only the wealthier have the means) creating classic enclosure with loss of access.
NAMIBIA	LOW: Unregistered landholders (usually in communal lands) have no security against reallocation by lease, enclosure of common lands, or appropriation by state. Communal Land Reform Bill would give security mainly to registered customary rights, and these do not allow for customary rights over pasture, woodland to be registered.
MALAWI	LOW: Customary lands main sphere of unregistered rights and these de-secured by 1965 law allowing their allocation under lease.
LESOTHO	LOW: Constant risk from statutory setting aside of lands for other purposes by state agencies, and allocation of customary lands under leaseholds. Unresolved conflicts in allocation regimes drive insecurity.
SWAZILAND	MIXED: Majority of population live in Swazi National Lands (74% of land area), held in trust by King, over half of which is administered by his chiefs under the Swazi Administration Order, 1998. Level of security considered fair, but chiefly allocations erratic and subject to manipulation and corruption.

BOX FIVE
INCIDENTS OF CUSTOMARY RIGHTS IN LAND IN NEW LAWS

TANZANIA

Sections 18 and 20 of Village Land Act 1999 states that a customary right of occupancy will be -

- In every respect of equal status and effect to a granted right of occupancy
- May be allocated by a village council to a citizen, family of citizens, a group of two or more citizens
- May be allocated in areas designed Village Land or Reserved Land
- May be held in perpetuity
- Will be subject to conditions as set out in the law and additional conditions prescribed by the village council as land manager
- May be assigned to other citizens living or working in the village
- Is inheritable
- Is liable to prompt, full and fair compensation if acquired by the state for public purposes, following the procedures set out in the law
- Will be governed by customary law; and any rule of customary law or decision taken in respect of land held under customary tenure, whether held individually or communally, shall have regard to the customs, traditions and practices of the community concerned to the extent that it is consistent with fundamental principles of National Land Policy (as set out in section 3 of the Land Act 1999) and does not deny 'women, children or persons with disability lawful access to ownership, occupation or use of such land'.

MOZAMBIQUE

Articles 7 to 15 of Land Act 1997 provide that -

- All citizens including individuals, men, women and communities, may hold the right of land use and benefit (not the land itself) and may acquire this individually or jointly and in the case of communities.
- This right may be acquired by occupation in accordance with customary norms and practices, or by occupation for not less than ten years
- The lack of a title or registration shall not prejudice the right
- The right may be transferred by succession and is not subject to a time limit when the holder acquired it through occupancy or its purpose is for a dweller or family use.

UGANDA

Section 4 of Land Act 1998 state that customary tenure is a form of tenure -

- Governed by rules accepted as binding and authoritative by the class of persons to which it applies
- Is applicable to any person acquiring land in the area where those rules apply
- Is characterised by local customary regulation so long as they do not contradict gender-affirmative provisions of the Constitution (Articles 33, 34 & 35) or deny women, children or those with disability ownership, occupation or use of land
- Applies local customary regulation and management to individual and household ownership, use and occupation of, and transactions in land
- Provides for communal ownership and use of land
- Provides for parcels of land which may be recognised as subdivisions belonging to a person, a family or a traditional institution
- Is owned in perpetuity
- Section 9 provides for a certificate of customary ownership to be taken to confirm and to be conclusive evidence of the customary rights and interests specified in it and that it shall be recognised by financial institutions, bodies and authorities as a valid certificate for purposes of evidence of title.
- If the rights and interests in the title allow it, the holder of the certificate may lease, lend, mortgage, pledge, subdivide, sell or transfer the land, or dispose of it by will.
- Section 10 provides that any person, family, community or Association holding land under customary tenure may convert that tenure into freehold tenure.

BOX SIX
PROCEDURES FOR CUSTOMARY ENTITLEMENT

MOZAMBIQUE

The procedures for customary entitlement are provided in Articles 5-13 of a detailed Technical Annex (1999) to the Land Regulations (1998) under the Land Act 1997.

- The exercise will be carried out as a matter of priority where land use conflicts exist or at the request of the local community (Article 7).
- The process is to be led by a technical officer from the national Cadastre Services and will be conducted as a community-inclusive delimitation exercise. It is the community which will be entitled and which will be able to secure the title in any name it chooses. Individuals may also apply for entitlement through similar steps but this is unlikely to be effective without the community first securing an overall title out of which an individual may apply for his or her own part of that land to be placed under his/her own name.
- Community entitlement will be conducted in five steps:
 - First, provision of information about the process and completion of forms of application by the community.
 - Second, the community will produce two maps showing the boundaries of its area as agreed with its neighbours.
 - Third, the assisting technician will convert this into a map using geo-referenced points in the national Cadastre Atlas.
 - Fourth will be a report-back exercise to the community and its neighbours which will end in the signing of minutes of agreement.
 - Fifth, the land area will then be registered in the National Land Cadastre, and a Certificate issued within 60 days, and handed back to the community.

UGANDA

Customary entitlement is set out in sections 5 to 9 of the Land Act 1998, and elaborated in Regulations under the Act yet to be approved by Parliament, and broadly comprises:

- Application for a Certificate of Customary Ownership to the local Land Committee which will determine, verify and mark the boundaries, demarcate rights of way and other easements, adjudicate upon and decide in accordance with customary law any question or matter concerning the land referred to it by any persons with an interest in the land, record interests over the land, call and hear evidence as necessary and prepare a report and submit it to the Board;
- The Board will consider the application and the recommendations of the Committee and as appropriate will issue a Certificate of Customary Ownership;
- The Board will communicate its decision to the Recorder, who will be located at the Sub-County level between the local level Land Committee and the District level Land Board and who will be responsible for keeping records relating to these certificates.

TANZANIA

Customary entitlement is set out in sections 22-30 of the Village Land Act 1999 and elaborated in Draft Village Land Regulations, 2000, and broadly comprises:

- Application to the Village Land Manager (the Village Council);
- Within 90 days the Manager will make a decision on the application, taking note of guidelines set out in the law on matters such as whether or not the application will negatively affect the land access of the applicants family or dependants;
- If the Manager decides to grant the application then an offer on the land will be sent to the applicant to sign as accepted within 90 days and return with any fees, rent or payment stipulated;
- This will be receipted and signed by the Land Manager ;
- Within 90 days Manager will issue a Certificate of Customary Right of Occupancy signed by the Village Council Chairman and Secretary and signed and sealed by the District Land Officer;
- Certificate will be recorded in the Village Land Register, which will be a branch of the District Land Registry, where copies will also be kept.

In 2000 legal insecurity is considerable in those countries where clear determination of the future of customary rights remains to be made (South Africa, Malawi, Swaziland, Lesotho, Rwanda, Zimbabwe).

In many countries, an ordinary forest-local rural landholder does not know in the year 2000 whether it is by law or in default of law, or in default of the *operations* of the law, that s/he continues to occupy her/his land. S/he may even be unsure whether s/he owns the land or just the right to occupy and use it. S/he may have heard that the 'State owns all land' but be unclear as to what that implies – until s/he finds her/his landholding put in jeopardy through one action or another. Insecurity is the general rule. In the interim, the maintenance of local land relations through customary or community-based mechanisms operates.

2 LEGALISING CUSTOMARY TENURE

There are exceptions in the conditions of the above. These are important in their implication that customary security has finally moved centre-stage as an issue to be addressed. The manner in which this is occurring is even more significant. Whilst as shown in the preceding tables certain states seek only to further the dominant conversionary approach of the 20th century, other new laws treat customary in quite different ways.

This is particularly so in **Tanzania, Uganda and Mozambique** where new state land laws do not seek to replace and thereby extinguish and invalidate a customary interest in land but instead to make it a perfectly legal and secure way in which to hold property. Of necessity this involves not just new treatment of rights but of the regimes within which customary rights are exercised. Although differences pertain (BOX FIVE), the shared result is that customary rights acquire the same legal weight as other forms of landholding, for the first time in each country. This means customary landholding is bound to be upheld as private property.

Uganda

For Ugandans, the revolution in their tenure status in fact occurred through the terms of the new Constitution of 1995 (Article 237). This made customary tenure a legal way to hold land. At the same time, it declared that land was thereafter vested in people, not the state, so that landholders all over the country obtained for the first time, not only the right to hold land in customary ways but to own the land itself. Customary tenants of state overnight became land owners.

Mozambique

In Mozambique no change in root ownership of land was made. However, the Land Act 1997 did recognise customary rights in land through direction that nationals could hold the right of use and benefit to land by occupation in accordance with customary norms and practices (Articles 7 & 9).

Tanzania

In Tanzania, the Land Act 1999 makes the right of customary occupation the legal foundation for most rural landholding in the country and devotes a whole sister law to this (Village Land Act 1999).

Recordation of rights still the fundamental strategy

By virtue of recognising rights existing as by customary norms and practices, these laws recognise customary rights as legitimate even should they not be evidenced in certificates or deeds. Thus the Regulations under the new Mozambique Land Act of 1997 observe that –

absence of demarcation does not prejudice the right to use and develop land acquired by way of occupation by local communities and citizens, but if they require the issuing of a title deed then they shall follow the rules provided for here (Article 15 (2)).

For its part the Tanzania Land Act 1999 declares simply that existing granted, deemed or customary rights of occupancy ‘shall be deemed to be property’ (s. 4 (3)).

However, in recognition of the importance of documentation to security, all three laws strongly encourage customary rights be adjudicated/verbally certified, recorded and documented in titles. In Uganda, these will be known as Certificate of Customary Ownership, in Tanzania as a Customary Right of Occupancy and in Mozambique, as a Right to Land Use and Benefit.²⁹⁷ The procedures provided in the new laws are summarised in BOX SIX.

Customary law as the operating framework

Rules and mechanisms for administering these customary rights will be customary law, norms and practices. However, all three countries establish that customary norms will only apply in so far as they do not contradict the provisions of Constitutions, emphasising those relating to rights of women and children and the disabled (Tanzania, Uganda). In Tanzania these rules or practices must also conform with the sixteen principles of national land policy as set out in the law (s. 3 Land Act).

Flexibility in incidents of the rights

Because the rights will be founded upon customary norms, their incidents are kept flexible, to be determined by the adherents to the regime (BOX FIVE). The laws all provide explicitly for these to be capable of being freely transferred and held in perpetuity – should the customs under which they operate or the conditions stated on the title deed, permit this.

Implementation of new law

Taken as a whole, by definition, at least in the eyes of the law, in these states, an unregistered and undocumented customary right in land is now ‘secure’.

Making this real in practice is a different matter. In **Uganda**, the equivalency of customary tenure to freehold tenure is undermined by the opportunity provided in the law for customary rights to be converted to freehold rights, but not vice versa, suggesting freeholding as still superior.

²⁹⁷ Or what in translation is also sometimes called a Right of Use and Improvement.

Moreover, at least one half of the new customary land-owning sector has not in fact secured any land ownership at all; these are women who through the failure of the new law to include the promised clause on spousal co-ownership as described in Chapter Two, are rendered no more landed than they were before the enactment.

In **Mozambique**, the opportunity given in the new law for non-local and even non-citizen persons to establish rights in areas of customary occupancy, raises concerns of competing interests. It also makes the recordation of local rights all the more urgent. This is however not easily achieved in the absence of effective local tenure administration regimes, not provided for in the law. Subsequent Regulations under the Land Act attempt to remedy this as described in BOX SIX.

In **Tanzania**, the new legislation remains to be formally commenced, leaving millions of landholders in an uncertain tenure environment, if arguably no less secure than in recent decades through the lack of any legal provisions for local entitlement other than through the issue of granted rights by the state.

Overall however, millions of citizens in these three states have found their landholding both dramatically upgraded and greatly secured in principle and in law and in ways not imagined possible a mere decade past.

Positive developments in **South Africa, Zimbabwe, Malawi** and **Namibia** towards recognition of customary tenure and rights have been noted. At this point the most likely movement towards this is in Malawi. Although they have taken several years to be formulated, and political will appears ambivalent, the recommendations of the Commission of Inquiry on Land Policy Reform in Malawi, were substantial.²⁹⁸

The proposal is that land will be classified as public, customary and private, and control over those lands will be vested respectively in the Government, Traditional Authorities and registered proprietors (private landholders). Traditional Authorities will hold customary lands in 'common trust', that is, the land will be *held* by them, not *owned* by them (8.3.3). Customary rights will be registrable and able to be documented in customary title deeds, such as is the case in Uganda and Tanzania, and as was also proposed in Zimbabwe's policy discussion paper in 1998 and in the uncompleted and possibly aborted Land Rights Bill of South Africa.

3 RECONSTRUCTING CUSTOMARY TENURE AS COMMUNITY-BASED TENURE

Examination is necessary as to what exactly is being made legal in these cases. For in no case is the practice the rules and norms of traditional regimes being delivered wholesale in the law.

First, its operations are subject to the higher law of Constitutions. As we have seen these establish parameters as to what constitutes land ownership in the first instance. In both Tanzania and Mozambique, land is vested directly in the state. Whether traditional or not, modern customary rights in those two countries are no more than rights to occupy and use land, although in both cases potentially in perpetuity. In Uganda determination of where primary title

²⁹⁸ GoM 1999.

is to be vested will be up to each customary regime to determine. It is quite possible for one regime to declare this vested in landholders whilst another might chose to vest this in the community as a whole or even the tribe.

More immediate limitations are placed upon the exercise of customary rights in respect of different sectors of the society. Tenure as a whole is subservient to the Bill of Rights of each national Constitution. Each new Land Act reminds customary landholders and administrators of the parameters set out there: customary rules, norms and practices denying women full and equal access to land rights are firmly demonstrated as illegal.

Second, the more subtle alteration relates to the context within which customary rights will operate. For what is really being recognised in all these countries is less customary rights and customary ways to hold and transfer land than *unregistered* local rights in land and rights which arise out of community-based regimes – whether they be founded in tradition, custom or otherwise.

The need for this will be clear. In both Mozambique and South Africa, account has been given of the plethora of both customary and modern and overlapping rights which may exist in many local circumstances, as a result of changes including years of state or war-driven population dislocation. Landholding as it exists today in any one area may not accord with tradition but may have a relatively new logic all of its own, founded upon current settlement patterns, and through this relatively novel forms of consensus and direction.

It is significant therefore that the Land Act of Mozambique provides not only for rights acquired through customary norms and practices but through occupancy (of ten or more years). The law locates the community, not traditional norms, as the means through which legitimacy in landholding is determined.

It is in **Tanzania** where the changing character of customary to community tenure is most clearly discerned. In real terms, what the new Village Land Act 1999 of Tanzania provides for is less the recognition of customary land rights than recognition of *unregistered local land rights* which occur in village lands, spheres where customary land tenure has been operational for the last quarter century in uneven ways.

Many rights being defined by the Village Land Act as within the realm of context of customary rights do in fact have origins in traditional norms. Many others stem from allocatory processes which are more distinctive for being locally and community-based than for being customary in character. The allocatory systems are also more distinctive for being community-based and informal than for being traditional or regulated by customary law. Often distinctions between the two are blurred.

This situation has arisen as a direct result of the village-making strategies of the 1970s which reconstructed rural community as rural village, and reconstructed customary regimes as village-based regimes. Whilst many customary rights and processes were lost, many others were integrated into the new framework. The result is that what was a customary right to land has in many cases become a village right to land. BOX SEVEN provides a short tenurial history of the situation.

Irrespective of their origins, these land rights will be known and named as Customary Rights of Occupancy and will have the potential to be regulated by local customary norms and practices as arising in the modern community context. If the regime were to be most exactly named, it would be termed not customary land tenure at all but village land tenure, and the rights resulting, village land rights of occupancy.

BOX SEVEN
THE CHANGING 'CUSTOMARY' RIGHT TO LAND IN TANZANIA

The British-introduced Land Ordinance of 1923 will remain in place until the Land Act 1999 is officially commenced, not expected now before 2001. The Ordinance is notable for the fact that customary land rights were acknowledged as legal and named Deemed Rights of Occupancy. Whilst in law these were arguably equivalent to those rights granted by the state (Granted Rights of Occupancy), in practice they were vastly inferior. This arose from the right of the Governor and then President to alienate customary lands more or less at will. Many of the instruments for this were planning and administrative laws culminating in recent times in the *Rural Lands (Planning and Utilisation) Act 1973*. This allowed the Government to extinguish customary rights in rural settlements.

Tanzania's modern rural land history centres upon Villagisation (1973-1977). Once this programme got underway administrative rather than tenure frameworks for land occupancy within villages was provided; in a 1975 *Villages and Ujamaa Villages (Registration, Designation and Administration) Act*, replaced by the *Local Government (District Authorities) Act* of 1982. This law did not, and still does not address land tenure in villages, wherein virtually all the rural population resides today.

A central aspect of village-making was the creation of means for villagers to elect their own governments (Village Councils). Agricultural Policy of 1982 dictated that Village Councils as legal persons should be able to hold long leaseholds over all land in the Village Area and thereafter sub-lease plots to member households. No law was promulgated to effect this. It was implemented through administrative directives.

Implementation of this policy was slow, with only one fifth of Village Councils securing Village Title Deeds. Few of these then sub-let the land to member households. By 2000 the majority of rural citizens occupied land permissively, in accordance with local decision-making.

Meanwhile, the Land Ordinance was still in effect and no law had actually *extinguished* customary land rights. A steady stream of claims for customary lands lost through village-creation began to reach the courts especially after 1992 when the Land Commission provoked interest in these matters. Most claims were from one part of the country and referred to lands lost less through Villagisation than through the use of customary lands for creating large estates (Arusha Region). To defeat these claims once and for all, a *Land Tenure (Establishment of Villages) Act* was enacted in 1992. This was quietly revoked a few years later when declared unconstitutional by a Court of Appeal.

Now the *Village Land Act 1999* validates all allocations made in village land since January 1970 (s. 15), thereby extinguishing customary claims to those same lands. The current pattern of landholding that exists in each village will be the basis upon which adjudication is implemented in order to register those rights in the Village Land Registry as what the new law names 'Customary Rights of Occupancy'.

The extent of loss of customary lands as a result of Villagisation needs comment. In some parts of the country whole communities were relocated and their lands left behind. More usually, occupants of an area retained their fields but were forced to relocate their houses in a central settlement area in the Village Area. Many of these people have since returned to their original lands once the aggregating strategies of Villagisation were abandoned in the 1980s. Some did not regain their fields, as these had been reallocated to others who have remained on them. In particularly the more fertile and densely populated parts of the country, no households actually moved or lost any land at all; groups of existing hamlets were simply re-named as a Village.

New village governments tended to rely on customary mechanisms in their allocation procedures. Villager elected to the Councils were often elders. A core directive was that every household be assured land. Many rural poor gained rather than lost land.

4 THE CRITICAL NEW OPPORTUNITY: RECOGNITION OF COMMON PROPERTY RIGHTS

A main effect of the 20th century failure to give customary and other community-based rights the support of state law has been to make it difficult for these landholders to secure property which they hold in common. Whilst individual holdings could be converted in some cases to freehold tenure, there was a region-wide absence of statutory mechanisms for holding land in common (excepting that briefly provided by Kenya's Group Ranching Act).

The capacity to hold land in common is a central tenet of local tenure regimes throughout Africa. Historically, it was mainly official anathema to this capacity which prevented the early integration of customary tenure regimes as whole into national laws. Customary and communal tenure tended to be assumed as one and the same, and irrelevant to prevailing notions of private property. The view has been held – right up until the present in many countries – that communal property does not represent a viable ownership form and is contradictory and threatening to the supposed superiority of individualised tenure regimes. The latter are alone acknowledged as private property and given the support and protection of supreme law.

Drawing a distinction between communal reference and common property

Legal and political thinking surrounding customary tenure has been widely underscored by misunderstandings. Three distinct notions have been typically conjoined.

First is an idea of shared root ownership of all land by the tribe or group, a concept which may be termed *ownership in community*, and which resonates with comparable notions of sovereignty, dominion, and territory in European regimes, and indeed the notion of radical title which we have seen has had such powerful influence on the continent. This is a notion which may be regarded as largely symbolical.

Second, is *communal reference*, or the fact that the regime is upheld through and by community support, not through any external dictate. Communal tenure systems exist because the community says they exist.

Third is a yet different and fully material construct, the idea that a group of people may hold similar interests in the same area of land, a land area which may be defined as a discrete estate. What arises out of this notion is commonage, tracts of land which may have boundaries and known owners.

These *common property resources* logically tend to be areas of local pasture, swamp and forest, lands not well suited at the best of times, to subdivision into family plots. Whilst in some countries common property resources have historically implied open access, this was open access only within the social boundaries of the group, and as often as not, governed by rules to which all members of that group adhered.

In most countries of eastern and southern Africa, random open access to common property only began to occur with late colonial disaggregation of notions of public and private tenure, open and closed property access, and their

placement into respectively discreet 'customary' and 'modern' spheres.²⁹⁹ The former was unregistrable and the latter, through provisions in national land law, registrable.

The urgent need for a modern construct of commonhold

Meanwhile, the fact remains until the threshold of the 21st century that certain estates – and forests prime among them – remain as unsuited as they have historically been to individualisation. Nor has the appropriation of these properties to the central government level undertaken partly in default of adequate community ownership, always proved helpful to their retention as forest or other natural resource spheres.

Provision for commonhold as a modern statutory form marks the single most radical innovation of changing land relations in the region today.

Expectedly this is being provided mainly where customary tenure is being legalised as a viable tenure form. For in recognising customary tenure, the customary capacity to hold property in common must be provided for. TABLE 3.3 summarises the current status. Details by country follow.

²⁹⁹ Alden Wily 1988.

TABLE 3.3: PROVISION FOR COMMUNAL PROPERTY IN NATIONAL LAW

STATE	TENURE LAW RECOGNISES COMMON PROPERTY AS A LEGAL AND PRIVATE RIGHT IN LAND
UGANDA	YES Land Act 1998 s. 4, 16
TANZANIA	YES Village Land Act, 1999 s. 22 and Land Act 1999 s. 19
ZANZIBAR	YES - in principle Land Tenure Act 1992 through creation of trusts where 10+ persons are joint interest holds. Main emphasis is upon individual entitlement.
KENYA	NO Only non-corporate opportunity suspended through deactivation of Land (Group Representatives) Act, 1968 in 1979.
RWANDA	NO Virtually no common land remains other than minor grazing areas in one province (Umutara). No provision for registrable group private ownership.
ERITREA	NO No provision for registrable collective rights in 1994 although hints at their permissive existence in Article 48 permitting villagers to use pasture and wood as is 'customary'.
ETHIOPIA	LIMITED Rural Land Proclamation 1994 requires that allocation of 'land for house-building, grazing, forests, social services and such other communal use be carried out in accordance with the particular conditions of the locality and through communal participation' (s. 6 (6)). Room thus made but outside context of category of 'rural holdings'.
MALAWI	NO Land Act 1965 makes no provision for common property rights to be registered as freehold or leasehold or for customary rights of any kind to be registrable.
ZAMBIA	NO Lands Act 1995 makes no provision for registrable communal/group leaseholds out of customary land, a provision made for individual holdings (s.8).
ZIMBABWE	NO No provision for registration of group rights in Communal Lands in Communal Land Act 1982.
MOZAMBIQUE	YES Land Law Article 7(1) of 1997.
BOTSWANA	NO Tribal Land Act 1968 provides for entitlement to individuals, commonage to be available to individualised leaseholding.
SOUTH AFRICA	YES The Communal Property Associations Act 1996 provides for groups to collectively acquire, hold land. Aborted draft Land Rights Bill provides for a commonhold.
NAMIBIA	NO Proposed in Policy 1998 through registered 'family trusts', mainly for urban areas.
LESOTHO	NO Grazing land communally owned but not registrable as such.
SWAZI LAND	NO Grazing land communally owned but not registrable as such.

Uganda

In Uganda provision for communal tenure is given in the right to own land beyond the individual, as extended households, groups, clans or otherwise, and provides for its entitlement as such (Land Act 1998). The law also provides for Communal Land Associations to be formed to own *and manage* (larger) tracts of land. These are available to any group of owners not necessarily those who hold land customarily. That is, a Communal Land Association could exist over land held by freehold, mailo or customary entitlement.

Tanzania

New law in Tanzania also provides for the first time for common property to exist in national law and to be registrable. Repeated reference is made to the landholding and registration capacity of not just individual persons but –

a family unit, a group of persons recognised as such under customary law, or who have formed themselves together as an association, a primary co-operative society or as any other body recognised by any law (Village Land Act 1999 s. 22 (1)).

The capacity to hold land in common is of primary concern to the majority, those citizens who live in rural areas and within the framework of village organization and village lands. Hence the detailed provisions of the Village Land Act. However ‘a group of two or more persons’ may also hold title in government land (General Land) and Reserved Land,³⁰⁰ albeit as legally constituted persons.³⁰¹ This affects urban areas, which fall within General Land. It also allows groups to secure title to Reserved Land – a fact of positive implication to community-based forest tenure and management explored later.

The Village Land Act does more than recognise common property as a legal and registrable form of ownership – it encourages this. The Village Land Act requires the members of each and every village community to ‘set aside’ all those parts of their area that they agree should be held as common land by the community as a whole. These are admitted into the Village Land Register as recorded commons (s. 13). *Existing* common lands shall be deemed common property thus constraining their subdivision and individualisation during adjudication and registration. Description and registration of the community’s commons has to be undertaken prior to any adjudication seeking to register and title individual, household or other private landholding in the Village Area – a sure incentive to its implementation.

This provides an unusual level of support for the formalization of common properties.

At the same time one risk implied in the new law should be noted. This arises in the last-minute revision of the interpretation of government land (General Land) defined specifically *include ‘un-owned and un-used land in village lands’* (Land Act 1999 s. 2). Wildlife authorities for one have already interpreted this

300 Under a Granted Right of Occupancy, Land Act, 1999; s. 19.

301 The implication of the law is that groups need to constitute a legal person (i.e. have been formed under one or other statute, such as registered as a partnership, a group, trust, co-operative, company, etc. (s. 19 (1) (2)).

as giving them the go-ahead to co-opt unfarmed commons in villages which border Game Reserves, in the event halted by the Commissioner of Lands, who responded positively to complaints of dispossession by the five concerned communities.³⁰²

The risk of state co-option of such lands for various uses has been very real in the past as the Commission of Inquiry into Land Matters documented.³⁰³ As recorded earlier, there has also been de facto loss of forests through the State's ownership of wildlife and mineral resources, allowing it to freely allocate concession and permit rights to these resources in customarily-held lands, even those existing within a known village area boundary. In practice, the redefinition of land in Tanzania as discrete spheres of Government (General) Land, Reserved Land and Village Land helps entrench a notion of boundaries as to where and how the state may act (see later). As told in Chapter Two, Village Councils are made the Management Authority over Village Lands.

Zimbabwe

Currently, there is no provision in Zimbabwe for ready statutory possession of common property such as is now possible in Tanzania and Uganda. The Rural Development Councils Act 1988 and Communal Land Forest Produce Act 1987 endorsed State possession of common property by giving the President, Minister and Rural Development Councils complete control over use and management of natural resources in the communal areas.

These bodies have regularly enacted controlling by-laws and allocated woodlands and rights of access to other than local inhabitants. Local occupants have only minor subsistence rights over wood and non-wood products, and only if the Minister or Council finds this reasonable. Legal space for customary ownership over even the most residual of woodlands does not exist.

Nonetheless, change could slowly arise should the pending policy proposals of 1998/99 return to the political agenda in due course. These recommend that customary certificates of title be available to individuals, households and groups.³⁰⁴

Mozambique

The new land law in Mozambique provides for communities or groups of persons to hold land in a statutorily-recognised manner. Article 7 of the Land Act, 1997 states that national (meaning citizens) –

individuals and corporate persons, men and women as well as local communities may hold the right of land use and benefit' and may acquire title for this 'individually or jointly, under a form of co-title.

The decree states that in all cases communities shall 'observe the principles of co-title'. The title to a local community '*shall be issued in the name chosen by the*

302 This involved five Maasai villages which were bullied by the Ngorongoro Conservation Authority to release their lands to become Wildlife Management Areas under its authority. The area is now managed as five distinct but related village-owned and managed Wildlife Management Areas. Pers. comm. T. Peterson 1999, F. Mutakyamilwa, Ministry of Lands, Housing & Urban Development, 1999.

303 GoT 1994.

304 GoZ 1998b, 1999b.

local community' (Article 10 (4)). This helpfully puts paid to the need for a community to construct itself first into a legally-recognised body. Community is defined as –

a group of families and individuals living within a geographical area at the territorial level of a locality or subdivision thereof and which seeks to safeguard its common interests through the protection of areas for habitation or agriculture including both fallow and cultivated areas, forests, areas of cultural importance, pasture land, water sources and areas for expansion (Article 1).

As with the new Tanzanian law, the absence of title will explicitly not prejudice the legality of such holdings (Article 10 (2)). Regulations under the law (July 1998) state that verbal testimony will have the same value in terms of the law as a title deed (Article 14 (2)). BOX SIX earlier outlined the procedures through which community title may be secured.

South Africa

In South Africa, the Communal Property Associations Act 1996 was enacted to enable groups of people to acquire *and manage* property as groups (and provided the model for Communal Land Associations in the Uganda Land Act 1998).

The procedure has shown itself as somewhat bureaucratic, limiting wide adoption, and its success constrained by the fact that many groups who apply to be granted land through this mechanism are

'sets of individuals that have come together with little if any previous mutual involvement for the sole purpose of getting sufficient critical mass to purchase a farm'.³⁰⁵

There may also be problems which relate to its novel authority structure. This has been most obvious in areas where traditional authority is well entrenched and where the egalitarian principles of CPA do not accord well with the hierarchical arrangements favoured by traditional authorities.³⁰⁶

The need to provide for the holding of property in common has nonetheless become more, not less, clear to policy and law-makers. Thus the draft Land Rights Bill 1999 sought to make it as simple as possible by providing for common rights to be deemed to be 'protected rights' in equal degree to those held individually. Common rights were to accrue through membership to either a legal entity or community (s. 9 (2)).

That draft Bill also provided for a community (as well as individuals, legal entities, communal property associations, etc.) to seek to have their land transferred out of state land into private property as a '*commonhold title*' (s. 37). A commonhold title was defined as communal ownership and use of land, in

³⁰⁵ DLA 1999.

³⁰⁶ *Ibid.*

perpetuity, and governed by *the 'shared rules of the member of the community'* (s. 45).

Should the Bill ever be re-enter the policy-making arena, then this commonhold option will likely be the most popular route through which communities secure their land interests. Use of Communal Property Associations and Trusts may fall away.

Namibia

The 1998 National Land Policy of Namibia suggests the likely adoption of a communal associations route, with probably similar results as experienced in South Africa. Groups of persons may hold land jointly but only as 'legally constituted family trusts' or 'legally constituted bodies and institutions' (s. 1.11). This means groups of persons first have to register their existence to the satisfaction of one or other statute, and then proceed to make claim to the land.

This intention is directed towards urban lands (section 2.5). Support for common property rights in rural areas is barely mentioned in the Policy. Section 3.3 dealing with rural land actually limits this opportunity, saying that tenure rights will be exclusive individual rights, adding lamely that -

However, the sharing of land and natural resources to mutual benefit between neighbours will be encouraged, particularly in times of drought and other stress.

The issue of customary grants (s. 3.4) and their registration (s. 3.5) do *not* provide for communal or private group tenure. Section 3.9, dealing with grazing makes no provision for rights in communal grazing to be registered or titled.

The above policy terms were put into the Communal Land Reform Bill, 2000. The right of the President to redesignate any communal lands as State Land was emphasised in reference to grazing commonage (cl.29 (1) (c)), confirming the main strategy towards the private enclosure of these lands.

NGOs in an organised forum (NANGOF) and the National Farmers Union (NNFU) have been increasingly vocal in their criticism of the handling of commonage and their wholesale availability to non-local individualisation and enclosure.³⁰⁷ Concern as to the impact of such leaseholds and the enclosure of communal lands that will result, saw the Bill rejected by the second house of the legislature, even after its safe passage through Parliament in February 2000.

The tenor of the debate suggests it likely that in the rewriting of the bill for resubmission to Parliament, clearer provision will be made for customary entitlement over common local resources, grazing, woodland and other. Should Namibian policy and law-drafters gain access to the legislation emerging in Tanzania, Uganda and South Africa, they might well chose to adopt a statutory commonhold solution. As is the case in those other states, this would in turn do much to enhance local community identity and the slow emergence over time,

307 NNFU 1999, NANGOF 1996, 1999, Namibia Nature Foundation 1999.

of a more community-based approach to tenure regulation itself – developments given no support at all in the first communal lands legislation proposed.

Zambia

The Land Act 1995 made no provision for statutory common property tenure. The subsequent effort at a draft National Land Policy (1998-99) did not remedy this and instead aimed to hasten the individualisation of customary property through conversions into individual leases.

Malawi

In contrast, recommend policy (1999) in Malawi hinted at the need for a form of commonhold to be provided.³⁰⁸ The final recommendations of the Malawi Land Commission advised the -

*design of a mechanism more appropriate to Malawian cultures for recording and authoritatively determining corporate or community interests in specified properties whether within or outside the domain of customary law.*³⁰⁹

In practice, the first draft of the National Land Policy (July 2000) fails to deliver this promise, focusing upon the issue of registrable entitlement to individual and family customary rights (“Customary Estates”) and seemingly retaining title over remaining common lands under the Traditional Authority.³¹⁰

Eritrea

In its dismissal of customary tenure as out-dated, the 1994 Land Proclamation only provides for individualised issue of lifetime usufruct and leaseholds.³¹¹ Not a single provision in the law takes account of the fact that substantial collective rights existing traditionally and in respect of modern developments undertaken by peasant associations and villages (such as in woodlots). Nor does it take account of the fact that pastoral common property tenure regimes exist in the north and south-west of the country. Emphasis is upon allocation of discrete plots for residences, farming and businesses. Under ‘Miscellaneous Provisions’ the law does state that ‘*all villages in Eritrea shall, according to local custom, use their own pasture and wood*’ and ‘*Government ... may issue general or special regulations and directives pertaining to the use of pasture and wood*’ (Article 48).

5 PROVIDING FOR BUNDLES OF RIGHTS IN THE SAME LAND

Another customary facility of direct relevance to forest ownership and community management, is the traditional capacity for individuals, families or groups to hold different types of rights *in the same land*.

308 And refer Nkata 1999.

309 GoM 1999.

310 This issue is not well developed in the First Draft and may undergo change. Refer GoM 2000: 6.2 passim.

311 Refer Tesfai 1997 for background on the tenure situation. Also see Chisholm op cit., Dessalegn op cit. and Hesse & Trench op cit. for implications on practical natural resource management initiatives.

In this way primary ownership of a forest may be overlaid with recognition that other persons have legitimate certain other rights to the forest or its produce. This operates along the following lines. The forest may be owned by an agricultural community but one which recognises that certain pastoral people may enter the area and use it for purposes of seasonal hunting or grazing. Or, whilst one household might exert primary rights over a forest, its neighbours might have unchallenged rights to collect dry fuelwood and wild foods from that forest. Or, viewing the case from a different perspective, a community might consider a certain mountain forest its own property, but be prepared to accept the right of the state to order its conservation and protection.

Current land laws in the region do not provide easily for different interests in the same estate to co-exist. Nor has this been a particular interest in the current wave of land reform. However, by virtue of allowing customary tenure to operate, adoption of such strategies could occur. Article 21 of the Land Act in Mozambique could be put to such effect for example: especially helpful where concession rights have been issued over local land or where different groups occupy and use the same areas. Even the terms of the Land Act in Zambia could arguably be used to such effect (s. 7).

Once again, it is in **Uganda, South Africa** and **Tanzania** where direct attention has been given to the need to acknowledge and account for plural but different rights in the same land. The Land Act, 1998 in **Uganda** makes reference to 'third party rights' (s. 6(1) (e)) – at least in respect of customary tenure regimes. Through the construct of common land management regimes (s. 24) through which Communal Land Associations will exercise shared tenure and land use, it may be assumed that the potential for different interests in the same land to be reflected in titles, exists.

A similar assumption may be made in respect of the Communal Property Associations Act of **South Africa**. There is no reason why the members of the association should not define different interests in the land among themselves. However the main emphasis of the Land Rights Bill was to 'unpack' multiple rights, with the implication that singularity was the objective.

The Village Land Act 1999 of **Tanzania** requires the adjudication process to 'take account of any interest' in the land being examined and even if no claim is made (s. 53 (3) (f)). Record and registration of such rights must include those not amounting to primary ownership (s. 57 (1) (g)). Provision for 'the rights of women' in the land and 'the rights of pastoralists to use and have interest in land' must be part of the determination of the Village Adjudication Committee (s. 57 (3)). Provisions for land sharing arrangements between pastoralists and agriculturalists are set out (s. 58). Access by pastoralists of forest areas for both seasonal grazing and hunting has been an important topic of negotiation already in some parts of Tanzania, such as illustrated in BOX SEVENTEEN of ANNEX B.

Chapter Four: FOREST-RELATED CONSTRAINTS & OPPORTUNITIES FOR COMMUNITY INVOLVEMENT IN MANAGEMENT

I CONSTRAINTS & OPPORTUNITIES

1 THE DISPOSSESSORY EFFECTS OF RESERVATION

As introduced in Chapter One, the act of creating Forest Reserves has been the main purpose of Forest Acts since the 1920s together with provision to allow Forestry Departments to control and regulate their access.³¹² In most Forest Acts the process is a straightforward matter of declaration through legal notice in the Government Gazette, with limited provision for local objection to be heard and considered. BOX ONE gives examples from older forest laws.

BOX ONE TRADITIONAL RESERVE CREATION

In **ZIMBABWE** a reserve is declared by the Forestry Commission recommending to the President that he declare any land a demarcated forest. If the land is on titled land compensation is due. If it is in communal lands, only consultation is required and *not* with local people but with the Minister responsible for Communal Land and the District Council in the area. No provision is made for that Rural District Council to reject the proposal (Forest Act Cap.19:05; s. 9).

In **BOTSWANA** the Forest Act gives the President power to declare any area on State Land to be a forest reserve (Forest Act, Cap. 38:04; s. 4). The Minister of Local Government may do the same when the forest is in Tribal Land but on the recommendation of the District Land Council and Land Board only (s. 5). No provision is made for consultation or objections from local people affected.

In **UGANDA** the Forest Act authorises the Minister, by statutory order to declare a central or local forest reserve 'after instituting such inquiries as he shall deem necessary' (Cap. 246 s.4).

In **KENYA** the Minister may, by notice in the Gazette, declare a reserve, giving 28 days notice of the intention (Forests Act, Cap. 385 s. 4). Both the Constitution and the Trust Lands Act provide for the creation of reserved forests in trust land and to be removed from Trust lands (Constitution s. 117 (1) (a), s. 118 (2) (a)). No provision is made for consultation with the customary owners affected. Such persons may however apply to the High Court for determination of the legality of the act of 'setting apart' (Trust Land Act s. 12(a)). Provision is made for compensation and if there is dissatisfaction with the amount agreed, appeal on this matter (s. 12 (b)).

³¹² On the whole Forest Departments may also freely issue licences for timber harvesting in forests which are outside declared forest areas as well, County Councils in Kenya may also do so (Trust Land Act s. 37 (1) (b)). As elsewhere in the continent, communities affected do not have the power to stop these licensees operating in what they may perceive as their own lands.

Reservation as land appropriation

Of course much of the forest land co-opted into reserves is local property held customarily or in other informal ways. Compensation has been rarely paid for the loss of such rights, which we have seen are barely acknowledged as tenurial rights.

As practised over the last century, reserve-creation may be seen as essentially an act of land appropriation.

Everywhere it has represented the formal withdrawal of local property into the supposedly protective hands of the state. Extinction of local tenure results and the land and forest is vested in Government or Presidents, to dispose of as they will, within what we have seen, are the rather liberal bounds of the law.

Downgrading tenure rights to access rights

At best, common property rights are downgraded to *access rights*.

Even here the trend is towards *limiting access* to certain product collection rights. Collection of dry and fallen fuelwood is the most common right allocated to forest-local communities and sometimes the only right.

The major intention is towards the extinction of *all* customary rights, access as well as tenurial, and to re-allow these within a regulated and income-generating permit and licensing regime controlled by the state.

Where forest-local communities have presumed themselves as owners of those forests for hundreds, if not tens of years, and fashioned their socio-economy around such tenure, the impact is predictably most extreme, setting in action not only loss of lands, but of the character of the society itself.

Severest impact upon forest-centred societies

This has been the case, for example, with indigenous forest dweller societies. Pygmies in **Uganda** were finally successfully evicted from Bwindi and Mgahinga in the late 1980s in order to secure these montane forests as habitat dedicated to gorillas.³¹³

Chapter One recorded a collaborative forest management initiative in Bwindi Forest, designed to involve forest-adjacent communities (and see BOX TWELVE in ANNEX B). In fact only certain users in the community were involved and among those only a handful were members of the dispossessed Pygmy community. Even those who have secured permits are predictably resentful that they are being accorded the 'privilege' of using one or two minor resources in forests which had, up until a decade ago, been their home for centuries

Comparable loss of long standing land rights has afflicted Pygmy populations in Rwanda.³¹⁴

A similar case exists in respect of Mount Elgon Forest Reserve, on the other side of Uganda. Again, state-people 'collaboration' is on-going in that forest. However, at the same time as settled agriculturalists on the edge of Mount Elgon are being involved in regulated product use, the Park authority is evicting the Benet whose ancestral home is the reserved forest.³¹⁵

313 Wild & Mutebi op cit., Alden Wily & Kabannanukye 1996.

314 Overeem 1995, Luling & Kendrick 1998.

315 UWA 1998, and GoU 1997a.

There may be no doubt that reservation as a matter of course decimates local land interests. It is difficult to select examples as the loss of land through this mechanism has been ubiquitous.

In fact, it is difficult to imagine a single Forest Reserve among the hundreds on the sub-continent that was *not* previously owned by some or other local community. The establishment of Game Reserves has caused a similar demise in rights.³¹⁶ By virtue of the nature of forests and wildlife range, the rights dispossessed are community rights, land interests held in common.

A continuing trend

More important, the trend continues. BOX TWO records the sentiments of local people who are losing their forest to reserve making in **South Africa**. Eviction of forest dwellers has been common in **Kenya** and the case of the Ogiek outlined shortly most prominent. These are forest hunter-gatherers who have seen their forests steadily appropriated first for reservation as reserves and then as the site of settlement schemes for land-short farmers from other areas.

Now the Boni forest dwellers in Lamu District have been informed that Government is to gazette their ancestral homeland, the Boni-Lungi Forest, as a Forest Reserve, but assures the population that their 'access will not be denied'.³¹⁷ They will however, cease to own it.

BOX TWO DUKUDUKU IN SOUTH AFRICA

'Land ownership – or at least the right to stay on the land – is the main issue in the Dukuduku forest. There have been forced removals, protests, barricades on the road, threats against tourists, etc. because the dreams for eco-tourism in the Dukuduku forest are still only just that – dreams.

The Minister of Water Affairs and Forestry is insisting that people leave the forest – one of the last forest ecosystems on the coast – so that it can be conserved.

Themba and his wife are reluctant to give their names since they serve on a committee negotiating about the future of the forest. Other forest dwellers call them sell-outs after they had spoken to the Minister. The 'radicals' led by one Timothy Mphanga pulled them out of a taxi and then forced them to join a toyi-toyi against leaving the forest. Says Themba, 'Minister Ngubane, of the IFP, had a plan to conserve part of the forest and use another part for people to stay in, but Kasmal ignored this and told us in no uncertain terms that we will never have electricity, or a clinic, or water as long as we stay in the forest.' The people living there already could conserve it, Themba argues. Then they could run tourists businesses inside the forest. If only the (Natal) Parks Board could get along with the community in the forest.

Baba Msweli's voice echoes through the forest as he denounces the Natal Parks Board as the devil itself. 'The white people want to move us out of the forest because they say we cannot look after nature. But all the nature they brought are these gum trees and the fur trees which have long tails looking like their hair.'

Extracted from Munnik, 1999.

316 In Tanzania for example, the inclusion of the Maasai Ngorogoro Forests within the Ngorogoro Conservation Area has generated a great deal of conflict over the last decade (see Lane, op cit.). Igoe & Brokington, op cit. document the case for Mkomazi Game Reserve.

317 Letter from District Commissioner, 30 November 1999, to Survival International, UK.

The View from a Conservation Perspective

To diverge, a strong argument may be made for the act of reservation serving the interests of forest conservation.

Reconnaissance of the location of especially montane Forest Reserves as islands within spheres of intensely cultivated land, supports this view. Forest Departments legitimately argue that had these areas not been reserved the forests would have disappeared.

This is surely the case, given the tenurial and strategic circumstances in which reservation has operated, with no provision for these same estates to be secured at the local level, and where forest conservation has been adjudged beyond the competence and jurisdiction of local populations.

And indeed, as will unfold in this chapter, there may be no doubt that the act of setting aside forest in order to keep it – *reservation* - remains as relevant today as when it was advanced in Africa in the early decades of last century. Its *modus operandi* is however dramatically changing.

Dis-empowering conservationist instincts

Certain facets of reserve-creation should not be glossed over however; those which have actually ill-served the conservation objective intended. For in the act of withdrawing authority from periphery to centre, the state also relieves the community not only of its property, but responsibility for the forest, through undermining local proprietorial interest.

From a position of custodianship (albeit often passively exercised), forest-adjacent communities are re-located as either tolerated forest users, under watchful regulation, or just as commonly, as forest abusers and encroachers (and criminalised accordingly). For what reservation has consistently signalled to many a community is that the forest is no longer theirs and therefore no longer their problem; to quote some of those affected 'if Government wants our forest, then Government can look after it'.³¹⁸

Regrettably, this occurs at the very time when local people could and should be furthering existing or latent mechanisms for forest protection, in order to deal with growing pressures upon these resources. Instead, this maturation of customary norms is truncated. The custodial underpinnings of what has belatedly come to be understood as an essential force for success – local will and action – are cut away. In the process, a further loss occurs: indigenous forest knowledge.³¹⁹ Indigenous regimes for conservation are demeaned and lose currency.

Reservation as opening not closing access

The same diminishment tends to place a physical limit upon the sphere of conservation. The appropriated forest becomes the boundary of forest resources which must be retained and forest beyond this boundary is permitted to deteriorate. Tanzanian villagers have recorded for example, that -

318 As cited in Sjöholm & Wily op cit.

319 Loiske 1996 gives an excellent example of how traditional practices may mature into modern management systems if given the incentive and custodial space to do so.

*When Government took the best forest for itself, we were less careful of the forest left to us. The foresters were so often telling us how important it was to keep the protected forest safe that we got the idea that our village forest was not valuable, even though it had been part of the same forest! Before we had regulated the forest as one area. We were strict. No one could settle there or make charcoal or do those things that destroyed the forest. But after Government made Bereko Forest Reserve, our rules dropped away for the forest which Government left to us. That is why you see it as it is today – ruined.*³²⁰

An opposite effect may be induced. Other villages in Tanzania have seen the creation of Government Forest Reserves as the signal to focus extraction on those areas, whilst keeping their own village forests rigorously intact.

For them, the situation is clear – a Government Forest Reserve is to be regarded and used as an open public estate, free for all who have the wit and means to harvest it, legally or otherwise. When it comes to their own forest, protection is exacting. ‘*This is ours*’ they say.³²¹

These anecdotes are not casually recorded, for they illustrate why matters of ownership and not just *access* are so central to the future of forests. To a real degree these bear witness to the time-old truism that people tend to look after their own property best. Property which enters the national domain risks becoming public property in a rather too literal sense. Recognition of this underwrites much recent consideration of why tenurial and custodial interests are so critical to modern forest conservation efforts.³²²

2 ACTING TO RE-SECURE FORESTS

In the main, local, rural communities have been powerless in events of reservation and have tended to accept their loss with resignation if not meekness. From time to time they have even encouraged this kind of appropriation in order to save the forest. This occurs where community powers to control their members have been undermined to an extent that they endorse the state’s view of itself as the only fit guardian of forests, and crucially, see no hope of re-securing authority over the forest themselves. IUCN reports on community forest management in such vein in Chihota and Seke Community Areas in Zimbabwe -

The communities feel that management should rest with government, which is in a position to introduce tougher laws and also effectively monitor use. This preference is based upon community fear of government officers, and perceptions that government has more resources for adequate policing, and will therefore pay for it. The Rural District Council is least preferred because they are already accused of failing to manage their own woodlot. The communities are against management by local people or authorities because they perceive locals as abusing authority and being corrupt and because they are known and relate to each other, local policing creates conflicts among community members (IUCN, 1997).

320 Alden Wily, 1994b. A similar sentiment is expressed in The Gambia where villages are now being assisted to re-secure jurisdiction over local woodlands previously demarcated as state reserves; refer Sonko & Camara op cit.

321 As is the case in villages adjacent to Geita Forest Reserve, Mwanza Region as cited in Alden Wily and Monela op cit.

322 For example see Tee in referring to USA, Verges referring to Latin America, Hussein referring to Asia, all in Ogelthorpe (ed.) op cit. Discussion of the issue is Alden Wily forthcoming.

Acceptance of state co-option is becoming less common. The response of Maasai and coastal peoples in **Kenya** to loss of forests was described earlier. BOX THREE describes another case in Kenya where the Ogiek nation as a whole has determined to retrieve its forest lands through the courts. The situation of the Ogiek illustrates a number of points made thus far in respect of local forest land rights:

First, as hunter-gatherers, these people failed to secure their land in the same manner as other tribes on the basis of their hunter-gatherer way of life, and in part due to their own weak institutional base at the time through which they could argued their case more successfully as did agricultural tribal leaders throughout most of Africa, resulting at least in ubiquitous native reserves and now communal lands;

Second, dispossession of forest lands for national economic and environmental ends has been continuous, and always on the assumption that conservation and local ownership are incompatible;

Third, in more recent decades, Ogiek have seen these same appropriated forests repeatedly excised for private purposes to the benefit of prominent citizens and the settlement of more influential tribes – a common fate of Forest Reserves in the region as land shortage becomes more acute;

Fourth, the role Ogiek forest dwellers could have played as willing and efficient forest guardians throughout the last seventy years has been steadfastly ignored with consequent exaggerated loss of forest;

Fifth, compliance with the state policies has sharply declined around the turn of the century. Ogiek have organised themselves to resist further eviction and to retrieve forests lost to them.

BOX THREE
FIGHTING FOR RETURN OF ANCESTRAL FOREST LAND
THE OGIEK OF KENYA

The Ogiek are a hunter-gatherer society of under 20,000 persons who traditionally occupied moist montane forest areas in Kenya, especially along the Mau Escarpment. It is in that area where six major forest national forest reserves were gazetted by the colonial Government (1932-1957), totalling more than 300,000 ha and unforested parts of which were given to white settlers (Molo Highlands) (Blackburn 1986).

Relative Ogiek groups live today in Mount Elgon and other mountain forest areas in Kenya. Ogiek survive through honey-gathering, each household placing a hundred or more log beehives in their forested environment. Forest beekeeping remains the mainstay today, supplemented by livestock-keeping and some farming. Like hunter-gatherer societies throughout the world, Ogiek operate and still operate in socially-discreet groups, each possessing a discreet forest territory.

The 'Dorobo' land problem as it is known has an official history of some seventy years. They were first evicted to make way for the Reserves in the early 1930s, and provided with alternate land in lowland Maasailand in 1941 where they were unwelcome and unable to continue honey-keeping. Thousands died. Others returned to their forest lands thereby illegally occupying Reserves. They were violently evicted every five or so years right up until the 1980s.

By the mid eighties Government was prepared to allow them to remain in one selected forest area, South West Mau and established the Korau Settlement Scheme wherein relatively few Ogiek actually secured plots (KIFCON 1992a). British Government conservation support for the Mau Forests saw a detailed project developed which was designed to both provide all Ogiek in the area with secure tenure at the same time as mandating them as responsible for the conservation of the forests (KIFCON 1992b). This never went ahead and following settlements by the Office of the President from 1995 saw much of the Mau Reserves settled – but not by Ogiek but by land-short farmers from other areas. Forest degradation on a wide scale has resulted and the Ogiek most Ogiek remain landless squatters at Forest Stations.

Ogiek believe they are being made the scapegoat for Government's mismanagement and the corruption of settlement officers (OWC 1997, 1999a, 1999b, 2000). They formed an Ogiek Welfare Society, marched on Parliament in 1996, and have taken their grievances to court. Four current cases:

The first concerns the Tinet Ogiek of **South West Mau Forest Reserve**, 5,000 of whom who were ordered to leave the settlement along with non-Ogiek settlers in 1999 as a result of excessive clearing, but who have secured an injunction against this, whilst the allocation of most of their area to non-Ogiek is examined.

A second case involves **Eastern Mau Forest Reserve**, where 5,883 Ogiek found again their forest allocated to 30,000 outsiders, who have cleared and destroyed the forest and where all springs have dried up, critical given that the Mau Escarpment is one of Kenya's major sources of catchment.

A third case concerns Ogiek from **Trans Mara forests**, evicted in the 1980s to make way for private forest clearing and allocation of 11,000 acres. This is a private action by dispossessed Ogiek.

A fourth claim has been lodged by Ogiek of **Mount Elgon**, a community of only 1,500 people. Whilst Government agreed to their land claim and provided an area for official settlement within the boundaries of the Forest Reserve, in practice this community has found the site used for allocation to other persons who are able to pay for the plots (OWC 2000).

In **Zimbabwe**, the tenure by the Forestry Commission over at least fifteen Demarcated Forests is under dispute by local people, mainly on the grounds that the forest is historically their own and/or that they were not consulted as to its gazettelement.³²³

³²³ Bradley & McNamara (eds.) op cit.

Mushove described the case of Mzola State Forest in BOX FOUR in ANNEX B. Cases have reached the courts, none yet resolved in community favour. Meanwhile the Forestry Commission has been forced to look closely at co-management regimes, rather than the expensive and tiresome process of evicting and re-evicting forest populations. The *Mafungabusi Joint Forest Management Project* developed in the 1980s as described in Chapter One, is the result, but as elaborated there, neither extended to other forests nor modified to directly address the issues of tenure and jurisdiction that underlie it.

Focusing state-community agreement upon access rights

In situations where states like Zimbabwe make no move altering the tenurial foundation of the forest, local demand focuses upon securing access rights, all that is offered by Forest Commissions or Departments. This was noted even as early as 1993 in respect of Nyangui Forest Area in Zimbabwe.³²⁴ A similar demand for forest products as a right rather than a privilege is now being commonly seen elsewhere in the region.³²⁵ It is often from this source – a demand for *access rights* in government estates – that the drive for CIFM is being officially shaped. This suits Forest Departments who as a general rule resist challenge to their assumed tenure and therefore control over these properties.

At the same time, more and more foresters are beginning to perceive that fundamental tenurial issues underlie the failures of centralised forest regimes to halt the degradation of forests under their care, and to pay more interest to the foundations upon which management and even benefit-sharing of products or access, are based.

Communities Using Tenure To Advantage

Communities themselves are helping to drive this trend. In a modest way, local refusal to surrender possession of local forests is discernibly emerging as a strategy of community involvement, particularly where this is locally-initiated.

Where they are able, communities are using opportunities in tenure laws to endorse their stand. The landmark case of *Duru-Haitemba Forest* described in Chapter One (and BOX SIXTEEN in ANNEX B), is a good example. This was a case where eight communities in Tanzania were driven to reclaim their forests in the face of ineffective Government management. When their community-based forest management efforts met resistance, their claim was immensely strengthened by the fact that the demarcated forest not only fell traditionally and currently within their recognised respective Village Areas, but that these areas were in the process of being surveyed and titled to them.³²⁶

In some cases, this is now extending to claims to retrieve lost forests, no where clearer than in the conditions of South Africa, where the right to reclaim land is a fundamental precept of post-apartheid land reform. Accordingly a number of State Forests are under claim and arrangements for transfer of tenure having to

324 Nhira & Fortmann 1993.

325 Hansungule, *op. cit.*, mentions this in respect of Zambian Reserves, Bernard & Harris, in respect of Malawi, 1998 as does the Preliminary Report of the Malawi Presidential Commission on Land Policy Reform (1998). Kasanga *op cit.* mentions the same assumption of rights in forests in Lesotho, perhaps the most understandable of all given that many Reserves are plantation estates created with the input of local people and for the purpose of product extraction.

326 Alden Wily with Haule *op cit.*

be made in respect of the Dwesa-Cwebe Forests as described by Grundy in BOX TEN of ANNEX B. Ngome Forest in the Ntendeka Wilderness Area is another case in point.³²⁷ Just how restitution of conservation wildlife and forests areas may occur without loss of conservation efforts is outlined in BOX FOUR which discusses the landmark case in this area in South Africa, that of the Makuleke area of Kruger National Park.³²⁸

BOX FOUR MAKULEKE IN SOUTH AFRICA

'In 1969 three villages belonging to the Makuleke clan were forcibly removed from some 24,000 hectares of land known as the Phafuri Triangle in the name of conservation. Most of the Phafuri – in which nine ecological zones overlap resulting in extremely biodiversity – was then incorporated into the Kruger National Park. Conservationists viewed this as a great success. To the Makuleke it was a crushing blow, leaving them disempowered and impoverished.

After the eviction from their Phafuri land the majority of the Makuleke people were settled in Tlhaveni in the former Gazankulu while some members of the community relocated to the adjacent areas of Zimbabwe and Mozambique. The Makuleke royal line was 'down-graded', reduced to mere headmen under the authority of Chief Mhinga, on whose land they had settled. With the introduction of the new regime in South Africa in 1994, restitution legislation enabled the Makuleke to seek to get back their land.

In 1996 the Makuleke lodged a formal claim for the restitution of their land. This claim was the strongest land claim against a Schedule 1 Park and was bound to establish an important precedent for South Africa. Viewed as an environmental hot spot, the Phafuri's prominence as a conservation area meant that decisions on its future would have profound policy implications, including redefining the term conservation. This process was fraught with conflict with many external interest groups, ranging from animal rights to sustainable use advocates, vocally involving themselves in the negotiation process.

After an eighteen-month negotiation process, agreement was reached. This recognised the Makuleke as owners of the Phafuri. The Makuleke voluntarily agreed to use the land for conservation purposes, subjecting conservation and land management decisions to a Joint Management Board, consisting of themselves and the National Parks Board. Essentially, the Phafuri remains an integral component of the Kruger National Park, but the Makuleke have exclusive commercial rights over the area. The responsibility for achieving conservation has now been moved to the grass-roots level, ensuring that the interests of the Makuleke are now bound up with those of conservation. This has resulted in them launching several conservation initiatives. Today, the clan of about 8000 people looks forward to a brighter future following a precedent-setting land claim settlement inside the Kruger National Park'.

Extracted from Moloi 1998.

3 PROMPTING REVIEW OF STATE TENURE

Arguably at the turn of the century there is mounting pressure from local populations as to their rights. This combined with changing attitudes to the role of states and nature of their tenure rights, is resulting in gradual of the grounds upon which the state holds properties of national significance such as forests.

327 Pers comm. J. Clarke June 2000.

328 A case which has reached equal public prominence concerns the San claim over part of Gemsbok National Park and related areas, successfully effected.

This is materialising in two ways. First, some jurisprudential soul searching is apparent as to whether Government Land implies as estate private or land held in trust for the public. The trend is towards the invocation of classical doctrines of public trust. At the same time, grounds for Governments to fully own property is acknowledged.

Distinctions are beginning to emerge between these two categories of national property. Decisions as to how this should be embedded legally are a subject taken up by Land Commissions, and most recently that of Malawi.³²⁹ The issue is more popularly expressed in the increasing demand of civil society that lands like forest and wildlife reserves be regarded as land held in trust (and on trust) by governments for society.³³⁰

A good example of resolution has been given in **Uganda**. The new land law provided for governments (both central government and local governments) to hold property as private persons, but established that properties of national value and importance, like forest reserves, be held by them only as trustees. Accordingly the law denies the state the right to lease or sell those lands (s. 45 (4)).

Reasserting the boundaries of public purpose

Second, the issue is forcing the template of public interest or public purpose to centre-stage. Lawyers, critics, and policy-makers are looking to its meaning carefully, with a main intention to limit the conversion of public purpose into private purpose. In Chapter Three, we saw that this was being weakly answered in respect to property in general, through the failure of new tenure laws to narrow definition. Investment purposes, which include private interests, remain within the realm of public purpose in most laws.

However, greater restriction is appearing in forest legislation, tied to the more specific question as to how safe forests have proved in Government hands. The answer has proved so negative in **Kenya** that even violent confrontation has arisen on the matter. BOX FIVE gives the main case in point; a small and degraded urban State Forest Reserve, Karura Forest, which like so many of Kenya's Reserves, has been subject to state-directed reallocation, and for private, not public, end purpose.³³¹

329 GoM 1999, 2000.

330 Nshala discusses public trust doctrine in respect to Tanzania's handling of natural resources (undated). Also see Lavigne Delville op cit. for West Africa.

331 Wass (ed.) op cit., IUCN 1996, Matiru op cit.

BOX FIVE
QUESTIONING POWERS OF STATE OVER FOREST LAND
KARURA FOREST RESERVE IN KENYA

In 1998 Nairobi residents became aware of clearance for high cost housing construction was being undertaken within the 1,041 hectare **Karura Forest Reserve**. Although mainly now a (poorly-managed) plantation forest Karura is valued in the city as one of its few remaining green spaces. As people became aware that the Commissioner of Lands had excised over half the area for private development, civil protest grew. Local environmental organizations led the protests supported by numbers of angry citizens. Marches were made on the forest attempts made to block further felling and construction. Tree planting days were organised to re-forest the cleared areas. Public meetings were organised. Police and demonstrators clashed. A well-known environmentalist, Professor Wangari Maathai, was among those beaten by the police. This brought the matter into the international press.

When challenged in Parliament in late 1998 to disclose the facts of the matter, the Minister of Lands confirmed that 64 companies had been allocated a total of 564.14 hectares. When journalists went to the company registry to investigate, the files had 'mysteriously disappeared'. Investigation of public records showed that excisions to Karura had been made gradually over a number of years since 1994. The Commissioner of Lands had been careful to exclude these from the entitlement he had delivered under pressure to the Forestry Department in early 1994. That is, the Commissioner secured personal control over half the forest, offering the Forestry Department secure tenure only over the remainder.

The powers given the Commissioner of Lands to dispose of Government Land and without necessarily limiting these to public benefit rendered the excisions perfectly legal – with one exception. The Government Lands Act requires land in urban areas to be disposed of through auction. Karura Forest is indisputably within an urban area. There is no evidence that auctions ever took place.

Environmental agencies did not know or take up this opportunity to legally challenge the allocations. Instead, opposition petered out particularly after the public sacking of the Commissioner of Lands in November 1999. Construction on the plots purchased from the Commissioner has ceased, but with not a single surrender of title deeds. The expectation is that in due course, the plots will be developed.

The case is seen as a watershed in Kenya. Many were surprised at the 'fury and bitterness' with which publication of the Karura allocations was met. It appears, wrote the *East African*, that 'theft of public land has been all too rampant in Nairobi where every available land has been grabbed, never to be recovered. To go for the only remaining forest within distance of the city is the limit for many residents'. The *Sunday Nation* wrote 'The unprecedented furore over Karura may be the closest Kenya has come to a full-fledged movement of environmental activism'.

Sources of information: *The East African Standard, The Daily Nation, The East African Weekly Newspaper, The Sunday Nation, May 1998 – December 1999.*

It has been shown earlier that Kenyan law grants the President and his appointee, the Commissioner of Lands, virtually absolute powers over Trust Land, now shown to be inadequately tied to the interests of local populations. Now with the Government Lands Act (Cap 280: s. 7) we find a similar case, and with even less constraint. Quite simply, the President may 'make any grant or disposition of any estates, interests or rights in or over Government Land" (s.3). There is no provision for public transparency of process or limitation upon purpose.³³² The fact that the President holds such land *not* in trust for the people but in

³³² Other than the requirement exemplified in BOX FIVE that if the property fall within a township area, that the plots be disposed of through auction, the place and time of which should be gazetted at least a month before (Cap 280:s.12 & 13).

trust for the state itself, adds to the dangers. It is through such a *carte blanche* legal right to dispose of government property that Kenya has lost 400,000 ha of reserved forest since Independence.

Excision as the instrument

The instrument used by the state to reallocate forest reserves in Government Land is one used throughout the region, excision and up until recently assumed as an automatic right accompanying the right to declare reserved areas in the first place.

As with processes of reserve declaration, older forest laws show no right to contest revocation and provision for consultation is yet more minimal (BOX SIX). Once created, a Forest Reserve is considered less *public* property than the private property of the state, to dispose of as it will.

BOX SIX
TRADITIONAL PROCESSES OF RESERVE REVOCATION

BOTSWANA The President may *'at any time, by order published in the Gazette, declare that any forest reserve shall cease to be such a reserve, or that the boundaries of any such reserve shall be varied'* with no procedure provided (Forest Act, Cap. 38:04 s. 9).

ZIMBABWE The President as owner of communal lands is only required to consult with the Minister responsible for its administration and the Rural District Council established for that area (Cap. 19:05, s. 9 (b)); there is no requirement to consult with or even inform the residents of the locality.

KENYA The current Forest Act (Cap 385: s. 4 (1) (c)) permits the Minister to declare that a forest area shall cease to be a forest area. As shown below, so also may the Commissioner of Lands and in contradiction to the recommendation of the Forestry Department or its Minister. No local consultation in either case provided for.

UGANDA Forests Act (Cap 246) makes no provision for excision or revocation except in respect of local forest reserves, in which respect compensation to the Local Authority may be at the Minister's discretion, be considered (s. 8).

ZAMBIA No provision was made for consultation in the old law but the new Forests Act 1999 requires consultation with the local authority, which again has no right to reject the proposal (s. 9 (2)).

SOUTH AFRICA Revocation of the designation of a State Forest is achieved *'by notice in the Gazette'* with no other action required (National Forests Act, 1998, s. 50 (4)).

Forest Departments as administrators not owners of Reserves

For foresters a good part of the problem lies with the fact that as forest administrators, not owners of state land, they do not in fact possess the power to halt excision and reallocation of Forest Parks or Reserves.

It was precisely this conflict of interests internal to government which led the Forestry Department in Kenya to find a way to circumvent wilful disposal of forests under its care. What it has sought to do is to pressurise the President and Commissioner of Lands to title Forest Reserves in Kenya *to itself*. The catalyst to this derived from a private action to secure another forest in the urban Nairobi area, as described in BOX SEVEN.

BOX SEVEN
PRIVATE ACTION FOR PUBLIC BENEFIT
NGONG FOREST ROAD RESERVE IN KENYA

The **Ngong Road Forest Trust** was registered in the mid nineties by a group of Kenyans living nearby the Ngong Road Forest Reserve and concerned at its diminishing size and degradation. The Reserve was originally gazetted as around 1,000 ha. Complaints to the Forest Department led to no improvement in its protection. Nor did it halt excisions from the forest by the Commissioner of Lands for private end uses. Several hundred hectares were excised and housing and other developments made.

The Forestry Department declared itself helpless in the face of the powers of the Commissioner of Lands. The Trust encouraged the Forestry Department to request allocation of the Forest Reserve to itself, to limit the powers of the Commissioner. This was achieved.

Once it received the title deed over the Ngong Road Forest, the Forestry Department entered agreement with the Trust, permitting it to act as the manager of the Reserve. This was expressed in a *Memorandum of Understanding* signed by the Trust with both the Forestry Department and the Kenya Wildlife Service, made ex officio members of the Board of the Trust. The purposes for which the Trust may manage the Forest Reserve and raise revenue to support its management, relate to educational, scientific and protection purposes.

Scrutiny of the entitlement to the Forestry Department showed that less than half of the Reserve was allocated to the Forestry Department. Fears that the Commissioner of Lands had retained the remainder to dispose of as he willed, have since been realised. In addition, evidence has been collected to show that the sales of this forest land were made at below-market rates to prominent citizens, with payment due over an extended period of time at very low interest rates.

Source of Information: Ngong Forest Road Forest Sanctuary Trust, Forestry Department, Karura.

Meanwhile, the modest success of the Ngong Trust, achieved slowly over nearly a decade, prompted public outcry as to the destructive quarrying developments within a third forest in the Nairobi environs, *Ololua Forest Reserve*. This was again a case where the Forestry Department found itself powerless to prevent allocation of quarrying rights, ordered by higher authorities. Whilst the initial response to public outcry was muted, a commission of inquiry was established and by May 2000, the quarry owners had their permit revoked.³³³

This developed established the precedent for the Forestry Department to seek to secure entitlement over other Forest Reserves. This has met with some success, with title deeds sent for a handful of Reserves each year.

However, as in the case of Karura and Ngong exemplified above, the forest areas entitled fall well short of the area originally demarcated and gazetted as Forest Reserves.³³⁴ The remainder in each case has been retained by the Commissioner of Lands.

³³³ Daily Nation 13 January 2000, 5 May 2000.

³³⁴ Pers. comm., Survey Office, Forestry Department, Nairobi.

4 REVISING THE PROCESS OF REVOCATION

In light of the above, it is no surprise that the **Kenya** Forests Bill 2000 seeks as a matter of priority to establish the proposed new Forest Service as not just the forest authority but owner of reserves. Whilst vesting all forests in the state as per the principle of radical title discussed earlier (clause 21 1), the Bill defines the owner (of all interests in the forest) as, in the case of State Forests, the Kenya Forest Service, and in the case of Local Forests on trust land, the local authority (County Council) (cl. 3).

More precisely the Bill addresses the processes through which the boundaries of any Forest may be altered. This is prefaced by the already approved new National Forest Policy 1999 which makes a main objective to '*limit the purposes for which the Kenyan state may in future cause forests to be excised or reallocated*'.

The Bill extends provisions for public notice and therefore the opportunity to seek injunction against the proposed excision and sets out a list of environmental criteria which first must be met (BOX EIGHT). Notably these exclude social considerations; such as the impact such revocation might have upon standing access rights to the reserve. This is provided for however in an earlier clause which secures the right of forest communities to produce '*as has been the custom of that community to take from such forest otherwise than for the purpose of sale*' (cl. 21 (2)).

**BOX EIGHT
PUTTING THE BRAKES ON WILFUL DISPOSAL OF FORESTS
THE KENYA CASE**

Clause 25 (2) of the proposed new Forest Act allows the Minister to declare that a State Forest shall cease to be a forest or alter the boundaries of a State Forest only unless such cessation or alteration

- a) does not endanger any rare, threatened or endangered species;
- b) does not adversely affect its value as a water catchment area;
- c) is subjected to an independent environmental impact assessment and is found not likely to have an adverse environmental effect;
- d) does not prejudice biodiversity conservation, cultural site protection or the educational, recreational, health or research use of the forest;
- e) is recommended by the relevant District Forest Conservation Committee and a certificate issued to that effect by the Board;
- f) is notified to the public -
 - (i) by a notice published by the Service in the Gazette and in two daily newspapers of national circulation; and
 - (ii) by posting a notice in such manner as may bring it to the attention of the persons likely to be directly affected by such excision one hundred and eighty days before the excision or alteration of boundaries.

(3) Any persons, institution or non-governmental organization may file an objection to the intended declaration with the Service before expiry of one hundred and eighty days as specified in (2) and upon receipt of the objection, the Board shall give the objector a hearing, deliberate on the matter and deliver its decision within sixty days of receiving the objection.

(4) Any objector aggrieved by the decision of the Board, he may appeal to the High Court within thirty days after receipt of such a decision.

A shift towards greater environmental and social accountability is emerging in other new forest laws. The Forests Bill 1998 of **Namibia** requires issue of notice seeking to revoke or modify the creation of a State Forest to be preceded by consultation with all those people living in or near the forest (cl. 18 (2)). Compensation is also to be paid for any loss of rights that existed in respect of those Reserves (cl. 18 (4)). Although the Forestry Act 1997 of **Malawi** does not require that forest-local persons be consulted, it does now insist upon the conduct of an environmental assessment to be carried out and its findings to be taken fully into account prior to any action (s. 28).

The Forest Resources Management and Conservation Act 1996 of **Zanzibar** allows degazettement of a Forest Reserve, alteration of its boundaries or change of its status to a Nature Reserve, only after the Minister has solicited and considered comments from persons in the vicinity and the conduct of an environmental impact assessment as to the likely effects of this action (s. 32). Even more detailed requirements emerge in the draft mainland *Forest Bill* for **Tanzania** (2000, cl. 30, 36).

5 REVISING THE PROCESS OF CREATING GOVERNMENT RESERVES

Ever greater change is occurring in the manner in which a Forest Reserve may be created in the first place. In this regard, social rather than environmental considerations are proving prominent.

Thus, the proposed new forest law of **Namibia** requires the Minister to publish a notice or *'by any other means that are practicable'* in the area, to give those affected *'an opportunity to express their views on the matter'* (Forest Bill, 1998, s.13 (4)).

In **South Africa**, the National Forests Act 1998 refers to creation of forests in the context of expropriation of property (s. 49) and refers to the Expropriation Act 1975 as the legal instrument.³³⁵ *The Minister* must give notice of the proposal to declare a protected area through publishing the notice in the Gazette and two newspapers in the area, broadcast the notice on the radio, consult the Environmental Coordination Committee, the chief executive of the local authority in the area, and consider all the comments and objections submitted to him (s. 9).

In **Ethiopia**, the 1994 Forest Proclamation states that creation of reserves which will result in the eviction of the peasantry, may only be effected after *'consultation and consent of the peasantry'* and subject to *'the assurance of their benefits'* (s.4 (5)).

The **Zanzibar** Forest Resources Management and Conservation Act 1996 takes care to require the Minister to publish notice of intent to gazette a reserve in a newspaper and to deliver copies of the notice to persons living in or near the proposed Forest Reserve (s.19 (2)). The Administrator must solicit public opinion during the following 90 day period of review and *'attempt to identify any existing rights, recognised by law or by custom, over land resources...'* (s. 21) and hold *'at least one public meeting'* (s. 22).

³³⁵ The Minister may also reserve State land 'if the Minister of Public Works agrees' (s. 50) and may reserve Trust land for a Trust Forest in accordance with terms of the KwaZulu Ingonyama Trust Act, 1994, or where outside KwaZulu, then with agreement of Minister of Lands (s.50).

The mainland Bill for a Forest Act, 2000 of **Tanzania** provides the most advanced example of making reserve creation more transparent. This may be considered a necessary development in a country where there are already more than 500 gazetted National and Local Authority Forest Reserves and where there remains an estimated 19 million hectares of *unreserved* forest over which tenure needs to be formally established. BOX NINE summarises the proposed process

The orientation of the process towards protection of local rights is considerable. A point to note for later discussion is that the Minister is bound to keep in mind the possibility that the forest will be better sustained and managed, not as a Government Forest Reserve at all, but as a Village Land or Community Forest Reserve.

6 RECONSTRUCTING RESERVES

Changes are also taking place in the character of reserves themselves, and again to the broad benefit of forest-local interests. This is occurring in two respects; first, the *meaning* of reserved is changing in important ways, and second, the scope as to who may create, own or manage reserves is widening.

Examination of these trends brings us directly to the fundamental issues with which this paper is concerned, posed initially as broadly the following –

how far do emerging new forest policies and laws enable communities to:

- *secure ownership of forests in their vicinity?*
- *and/or secure jurisdiction over those forests?*
- *and/or play a significant role in their operational management?*
- *and with what manner of powers may they be involved in these ways?*

And how do issues of tenure and the provisions of new tenure law in particular enhance or constrain these opportunities?

Focus will now turn to a country by country review within which these may be finally answered.

BOX NINE
FINDING A FAIRER WAY TO CREATE GOVERNMENT FOREST
RESERVES
THE TANZANIA CASE

In summary, the Draft Bill for a Forest Act 2000 sets out the following procedure (cl. 30-31):

- *First*, notice of intent has to be given in at least one newspaper which is available in the area, exhibited in the offices of local authorities in the area, and given publicity in the area *'in such manner as is customary in the area or as is otherwise calculated to bring it to the attention of all persons living in the vicinity...'* The Bill lists six items which the notice and information must cover.
- *Second*, the Director is made responsible for collating all objections and representations, arising in one or more village assembly meetings, undertaking consultations with organizations and persons in the public and private sector, and submitting a report to the Minister. The report must include comments directed to *'whether it would be preferable to declare the forest area... a village land or community forest reserve'* [rather than a Government Reserve].
- *Third*, public meetings in at least one or more villages must be held to explain Government's reasons and to directly hear opinions and objections. The draft law requires the Director or chief executive officer to attend himself and to encourage the participants to express their views.
- *Fourth*, the Minister will submit the report to the National Forest Advisory Committee. The Committee will have 90 days to consider the report and make a recommendation to the Minister, who will make the decision as to go ahead, request more information or further consultation, refuse to make an order, or, to *'make an order declaring the area to be a village land or community forest reserve'*. If the Minister fails to take action of some kind after 180 days, it is to be assumed that he has refused to make a reservation order.
- *Fifth*, where customary claims have been made, relating to rights to land or trees or forest products, the Director will appoint an investigator to go to the area and go over each one with the claimants. The investigator must be a person *'with knowledge and understanding of customary law and practices relating to land or forest use or of the principles and practices of sustainable forest management'*. The Director of Forestry will make sure the appointment of the investigator and the timing and place of meetings is publicised so that all relevant persons are informed.
- *Sixth*, the investigator is required to facilitate and assist persons to present claims and to give those who for good cause have not made a claim, an opportunity to be heard. He is to make investigations and consult to ensure he gets full information. He is required to record rights which he concludes can continue to exist without adverse affect on the forest. Where the continued exercise of those rights will seriously jeopardise the purpose of the forest reserve, then he shall recommend either that the rights be modified, the boundaries or management arrangements be modified, *or that that the establishment of a village land or community forest reserve would be preferable as a way of balancing maintenance of rights with protection and sustainable use*. He may also recommend that the area is of such high national and international significance that rights should be extinguished and replaced by licences issued by the Director or extinguished, subject to the prompt payment of fair compensation for all losses and disturbances.
- *Seventh*, the report must be copied to the local authorities in the area and the investigator must hold village assembly meetings in the area to take comments. He shall then revise his report and submit to the Minister who has 180 days to consider it. Where the proposal for a forest reserve is being made by the Local Authority, then it is the Executive Director who must consider the investigator's report. The Minister makes a decision.
- Any person who is aggrieved by the decision, may appeal to the High Court and the High Court may confirm, rescind or vary the decision.

II REALISING NEW OPPORTUNITIES IN NEW FOREST LAW

COMMUNITIES AS FOREST OWNERS & FOREST MANAGERS

1 TANZANIA

Revising the meaning of reserved land

First, we need to turn back to the Land Act 1999. It will be recalled that that law removes any notion of reserved land as automatically the property of Government by declaring it a land *management*, not land tenure category. Reserved Land now stands as a class alongside General Land and Village Land. These are distinguished by where management authority is located; in the case of General Land, the Commissioner of Lands has authority. In the case of Village Land, each of the 9,225 Village Councils designated as Land Managers, has authority. Land rights allocated in respect of the former will be known as Granted Rights, and those in the latter, as Customary Rights.

The distinction between General and Reserved land is just as important. **Reserved land**, once considered to be automatically Government Land is now referenced not by ownership but by how the property in that category is managed and its use regulated. The framework is one of protective legislation. Relevant laws are listed as mainly environmental laws, including the Forests Ordinance Cap. 389 and the National Parks Ordinance Cap. 412. The Land Act takes the opportunity to create a new category of reserved land; hazard land, which is to defined and regulated by the land act itself.³³⁶

The law is quite clear that reserved land does not necessarily imply state ownership. Both the Land Act 1999 (s. 22 (1) (b) and the Village Land Act 1999 (s. 18 (1) (b) provide for either customary or granted land rights to be acquired in Reserved Land. This opens the way for communities among other parties to seek to own these reserves. This gains support from provisions which permit the transfer of land from state to village classes (Land Act 1999, s. 6).

Providing for communities to secure already Reserved Forests as their own

The proposed **Forest Bill (Third Draft 2000)** notes this development and delivers no legal impediment to the transfer of National and Local Authority Forest Reserves to forest-local communities. Two routes are availed –

First, communities, along with individuals or companies, are among those who may apply to *lease* a National or Local Authority Forest Reserve (cl. 27).

Second, the Minister is given powers to alter the status of government reserves ‘*to become a Village or Community Forest Reserve*’ (cl. 36). These provisions are aside from the management authority communities may attain over a government forest reserve, outlined shortly.

³³⁶ Section 7 of the Land Act, 1999 details exactly what this includes – mangrove swamps, coral reefs, wetlands, offshore islands, land within sixty metres of a river bank, shoreline, beach, land on very steep slopes, etc.

Constraining appropriation of local common property

As described earlier in BOX NINE procedure in the Forest Bill constrains unjustified creation of new Government Reserves. This is not designed to impede the setting aside of forest land for forest protection or management but to ensure that local people are giving ample opportunity to secure these themselves, as community or village reserves.

Further, the Bill disables any assumption by the state that it may consider *unreserved* forests as its own. This is only so where the forest land is expressly General Land. Problems with the potential reach of such government land have been recorded earlier. This was in reference to the definition of General Land as including '*unoccupied and unused village lands*'. It will be recalled that even before the Land Act has commenced its operations, the Commissioner of Lands has felt obliged to inform the interested government agency that this does not include any land over which village or villager interests could be identified as existing by the courts.

It is notable that the draft Forest Bill takes it lead from this position by stating that national forest does *not* include unoccupied or unused village lands (cl.4 (a) (iii)). Further, it reminds Local District Governments who may be similarly tempted to assume unreserved forest as their own that such forests only include land where the right of occupancy, lease or licence has been granted to that local authority (cl. 4 (b) (ii)).

These provisions are critical in a situation where the perimeter boundaries of individual areas of each village (Village Areas) are often vague, with less than one quarter of village communities having had these surveyed and demarcated. Most of these are in well-settled parts of the country. Village lands in those districts where unreserved natural forest abounds are often extremely large, covering many square kilometres, and the perimeter of each community's Village Area, vague. It is in such areas that the break to be placed upon the tendency of District Councils to assume ownership of unsettled or unoccupied land adjacent to villages is most relevant. The reconstruction of Mgori Forest as five Village Land Forest Reserves in 1996 described in ANNEX B, is a good (and positive) example of these forces at work.

Communities creating their own reserves

The above provisions arise in the context of clear support in the Forest Bill for communities to create their own forest reserves out of currently unreserved lands. This was first proposed in the National Forest Policy 1998, which identified Village Reserves as a main mechanism through which unreserved forests could be secured under protection (Policy 4.1.2).

Village Land Forest Reserves (VLFR)

In the draft law these become Village Land Forest Reserves (VLFR). These may be *declared* or more formally *gazetted* at the National level (s. 39). This takes into account the 500+ Village Forests already informally in place, and the fact that only one of them is actually gazetted, a not uncomplicated or cost-free process for the community.³³⁷

³³⁷ Mpanga Forest Reserve, Tanga Region. At 60 ha it is much smaller than most VFR now established, the largest of which is more than 10,000ha.

It also takes into account considerations arising out of working experience of community-based forest management in the country –

first, that it is wise to see the community operate CBFM for several years, prior to it embarking upon the permanent commitment towards retaining the forest in perpetuity;

second, that for many communities, the act of announcing gazettelement nationally is regarded as a crowning achievement rather than as a first step;

third, that some of the village forest reserves are too small to warrant the expense of national level gazettelement which involves formal survey of the forest area;

fourth, that literally hundreds of Village Land Forest Reserves could readily be created over coming years with encouragement and support, a trend which national level gazettelement would slow; and

fifth, formalization of such processes should be devolved in line with the wider devolutionary strategies of the Tanzanian state.

Accordingly, the Bill provides for VLFR to be declared through notification to the local District Council and through record of the fact in a *Register of Village Land Forest Reserves*, which each District will be required to establish (cl.41 (2)). Districts in Mwanza and Tabora Regions already operate informal registers.³³⁸

Communities may seek to more formally gazette their VLFR, after three years of demonstrated management (cl. 42 (1)). In this case, the Director of Forestry may chose to make conditions or enter a joint management agreement with the community in regard to one or other aspect of its management regime (cl.42, s.43).

Community Forest Reserves (CFR)

By far the majority of village land reserves will be created and owned by the community membership as their shared land in common. There are already occasions however where a sub-group of the community, often a sub-village, ritual society or clan owns a forested area within the Village Area.³³⁹ Provision for this is made as Community Forest Reserves (CFR) (cl. 49-55). Potentially, a CFR also covers instances where several villages want to share the ownership of a forest, or where some members from those communities want to share ownership and management.

Private Forests

The Bill also provides for an even more local level of forest reserve, the household forest. These fall into the category of Private Forests. In most forest laws, old and new, this class tends to be scripted in reference to large (and by inference, wealthy) landowners. The Tanzania Bill takes care to include smallholders by providing for a Private Forest to be created where an individual customary right over land is held (cl.4 (d), cl. 25).

³³⁸ Alden Wily & Monela op cit.

³³⁹ Ritual forests in particular are common as described by Gerden & Mtallo 1990.

This provision again builds directly on pilot experience to date which includes the existence (by late 1999) of more than 1,000 household forests, declared as protected. These are found in Mwanza and Tabora Regions, instituted through the *ngitiri* programme elaborated in BOX TWENTY in ANNEX B. Most of these are extremely small, averaging less than three hectares (TABLE 1.8).

Whilst minor forests are involved, this development is important in districts where forest has dwindled to dangerously low levels. Where pressure to convert residual lands to agriculture is high, it offers a route through which farmers may hold onto woodland legitimately and with local socio-environmental approval and thereby add to the local and national forest estate. Already in Mwanza and Tabora Regions, the potential to declare household forests has been an important catalyst to whole communities taking action in respect of their much larger and community-owned forests.³⁴⁰

Communities as forest managers

When it comes to how forests and woodlands in Tanzania will be managed, new policy and law adopts community-based forest management as one of its main strategies. The law states its aim to be to –

encourage and facilitate the active involvement of the citizen in the sustainable planning, management, use and conservation of forest resources through the development of individual and community rights, whether derived from customary law or this Act, to use and manage forest resources (s. 3 (2) (a)).

And to -

delegate responsibility for the management of forest resources to the lowest possible level of local management consistent with the furtherance of national policies (s. 3 (2) (c)).

The autonomy of villages to manage declared VLFR is emphasised; the Director may issue guidelines and models for management plans and by-laws, which village councils must pay due regard to, but ‘*without being required to comply*’ (cl. 41 (6)). Accountability to the community rather than the state is stressed: VLFR are to be managed by committees and through management plans ‘*which have the support of the whole community*’ (cl. 40 (2), s. 41 (4)).

Community-based management of Government’s Reserves

Each National and Local Authority Reserve is to be managed in accordance with a Management Plan which must include specification of how forest-adjacent communities will be involved, and to justify cases where they will not be involved (cl. 17-19). Village Councils or a community group may apply to manage such an area (cl. 34 & 46). Reserves or parts of Reserves so managed, will be known as **Village Forest Management Areas (VFMA)**, to distinguish them from village-owned and managed Village Land Forest Reserves (VLFR).

Agreement as to the terms of local management of VFMA will be expressed in *Joint Management Agreements* (cl. 22). Management may be operated jointly with a Government Forester or the community may be designated the Manager and manage more or less autonomously.

The forest management powers of communities

340 Alden Wily & Monela op cit.

The formulation of *Forest Management Plans* becomes the central construct for management in the Bill, with four categories described; an outline plan, detailed plan, village forest management plan and a private forest management plan (cl.17). Eleven common aspects to be addressed are listed in the law. The manner in which a *Village Forest Management Plan* in particular is to be formulated (cl.20) is notable for four points -

First it specifies the right of the community to set out the terms and conditions for the granting of permits for use of the forest for domestic purposes ('domestic user permits') and also non-domestic use permits 'as required' (cl. 56). In short, the power to determine and regulate forest access is made integral to community-based forest management;

Second the regime to be adopted by the village community may seek to *limit or exclude* forest access by non-community members (cl. 47);

Third accountability to the community is required as set out in the manner in which a Village Forest Management Committee is appointed (cl. 40 & 47);

Fourth whilst foresters are obliged to comment upon the plans made by communities, and whilst communities are in turn required to give these comments their consideration, they are not bound to accept them (cl. 20);

Fifth scope for intervening when community-management does not proceed as promised is provided; a forester or district council may serve a notice on a village council to show cause as to why it is not managing its forest by the terms of its own agreed plan and regulations, and as necessary may take over management until the local regime is restored (cl. 48).

Legislative powers

The capacity whereby villages in Tanzania are able to embed community rules in formal By Laws, to be upheld by the courts has been commented upon above. The Forest Bill uses this facility, identifying Village By Laws as a legal instrument through which communities may manage their forests (VLFR or CFR), or indeed any part of a Government Reserve which has been mandated to their management care (cl. 34, 38, 44).

A community-based forest future

The stage is thus set for a potentially significant community-based forest future in Tanzania. TABLE 4.1 sets out the likely framework.

The growth area of new Forest Reserves will certainly be in Village and Community Forest Reserves, not least because these will accrue in as yet-unreserved areas, and where the declared strategy is to bring these under clear ownership (and mainly local ownership) as fast as possible. The supporting role of land legislation has also been observed in its requirement that communities may only begin to entitle household property once commons have been registered (Chapter Three).

In the process a considerable amount of woodland may be expected to be secured. Some millions of hectares exists within the boundaries of different Village Areas. Many more millions exists beyond these boundaries.

Rural communities may be expected to keenly adopt the strategies being offered them towards securing these within their own (expanded) village boundaries as their own common property. To not put too fine a point upon it, the act of declaring forest reserves will frequently serve to expand the immediate Village Area as commons.

ANNEX B (BOX SEVENTEEN) described how five villages in Singida District manage the 45,000 ha *Mgori Forest* as five discrete Village Forest Reserves, despite the long and costly efforts of the Forest Department to survey, demarcate and gazette Mgori Forest as a National Forest Reserve. BOX TEN now adds a postscript to that case. It describes how those five communities brought weakly-tenured land under their own jurisdiction and for all intents and purposes, as their own private commonhold.

The significance of this example should not be missed. Most of the 20th century saw the steady withdrawal of prime forest estate in Tanzania as elsewhere, from periphery to centre, from local to state aegis. The 21st century may well see reversal in these trends in the opening of opportunities for ordinary citizens to secure forests as their own. The signs are that villagers will, like governments before them, use the law to its maximum in service of this development.

BOX TEN
REVISITING THE CASE OF MGORI FOREST

Mgori Forest is a 44,000 ha woodland managed as five adjoining Village Land Forest Reserves, each village community recognised as the commonhold owner of its respective Reserve. This was not how community-based management of Mgori Forest began.

Prior to 1995, Mgori Forest was claimed as Government Land. Even local villages did not claim more than the peripheral western part of the forest as falling within their respective Village Areas. Their Village Areas had never been surveyed so the boundary was in effect open to negotiation.

When the Forestry Department demarcated the forest, communities demanded that the western third be excluded to allow for their continued use of the forest. At great expense a new boundary was cut to allow for this. In the event, it became apparent that neither the central Forestry Division nor the local government (Singida District Council) had the means to manage the Reserve. Even the number of Forest Guards required to protect the vast area were beyond their means.

It was at this stage that government turned to the forest-adjacent communities for their assistance. The resulting agreement was that the five forest-adjacent villages on the west of the forest would manage it in partnership with Singida District Council. Mgori became known in 1995-1997 as collaborative management.

As the on-the-ground managers in a situation where there was no District Council presence beyond one supporting field officer, the villages established working protection quickly with more than one hundred village forest guards. Fires, illegal harvesting and clearing for short-term millet production ceased. Illegal hunting of elephants by outsiders was curtailed.

The villages achieved this through sub-dividing Mgori into five Village Forest Management Areas, each demarcated and guarded by their own youth. These boundaries consolidated as perceived extensions to their own settled Village Areas and were hotly defended among their respective communities.

When the time came to survey Village Areas in the District, Singida District Council acknowledged the existence of local interests and confirmed each Village Forest Reserve as within the boundaries of the respective Village Areas. This provides the basis for the issue of Certificates of Village Land, not entitlements but the foundation upon which each village will regulate landholding within that area. Each VFR will be registered as a commonhold, owned by the membership together.

Scope to convert such areas to agriculture is limited. With Village By-Laws in place relating to the management of these Village Reserves, the village communities are bound to retain the areas as intact, and well-managed forest.

TABLE 4.1: LIKELY COMMUNITY MANAGEMENT OF FOREST RESERVES IN TANZANIA

LEVEL	FOREST RESERVES	LANDHOLDER	LIKELY MANAGER	FRAMEWORK FOR MANAGEMENT	INSTRUMENTS FOR MANAGEMENT
NATIONAL	National Forest Reserves NFR - Protection Forests - Production Forests	Government	FBD (Forestry Dept) - Or Executive Agency - Or forest-adjacent communities - Or private lessees (plantation FR)	Where not FBD itself or Exec. Agency, through Joint Management Agreement (JMA) with adjacent community	MANAGEMENT PLAN Legal backing to manage via Regulations under Forest Act or Village By-Laws when community is Manager
	Nature Forest Reserves	Government	FBD - Or Executive Agency - Or conservation NGO - Or forest-adjacent communities	As above	MANAGEMENT PLAN With legal backing of Regulations or Village By-Laws when community is Manager
DISTRICT	Local Authority Forest Reserves LAFR	District Council	District Forestry Officer (DFO) - Or forest-adjacent communities	Direct management by DFO or by designated agency, village, or group through JMA	MANAGEMENT PLAN With legal backing of District Council By-Law or Village By-Law/s
COMMUNITY	Village Land Forest Reserves VLFR	Village Assembly ³⁴¹	Village Forest Management Committee (VFMC) appointed by Village Assembly & approved by Village Council	Autonomous, supported by technical guidance of DFO	MANAGEMENT PLAN With legal backing of Village By-Law
	Community Forest Reserves CFR	Group	Group Forest Management Committee (GFMC) appointed group members, with support of Village Council	As above	MANAGEMENT PLAN With support of Village Council and legal backing of Village By-Law
HOUSEHOLD	Private Forests in Granted Land	Grantee	Grantee of private land	Covenant with FBD	MANAGEMENT PLAN , approved by FBD if 50+ ha.
	Private Forests in Customary Land	Holder of Customary Right of Occupancy	Holder of private land	Own plan, endorsed by Village Council & Assembly	MANAGEMENT PLAN supported by Village Council By-Law

341 Adult membership of village and constituency which elects Village Council every five years. Described in No. 9 of 1982 as the 'supreme authority' in the community.

2 ZANZIBAR

For purposes of land and resource management, the island of Zanzibar, a member of the United Republic of Tanzania, makes its own laws. **The Forest Resources Management and Conservation Act 1996** cites three objectives for implementation and the first of these is to –

encourage and facilitate the active involvement of local people in the sustainable planning, management, use and conservation of forest resources'
(s. 3 (2) (a)).

This is realised in provisions for Community Forest Management Areas to be created (Part V of the Act).

Community Forest Management Areas (CFMA)

These may be created in both unreserved and reserved forests (s.36), but apply mainly to the former given that virtually all forested areas have been gazetted (12,000 ha) and most of the coastal mangrove forests.

A CFMA comes into existence through the creation of a *Community Forest Management Group* (CFMG) (s.38). This group applies to the Forest Administrator to agree to the creation of a CFMA which he does following investigation of the situation and local consultation (s.39).

Agreement describes the management regime the group will adopt, the rules of access and use, fees to be charged, permits and licences to be issued. Rights and duties of each party are also set out (s. 41 & 65) and the CFMG may be exempt from payment of royalties of fees (s. 73). The law provides for members of the group to be appointed with the powers of enforcement officers (s.45). It is regarded as a legal person for the purposes of the law and can be sued if it breaches the agreement (s. 47 & 48). Several groups have been formed and manage forested areas, including a mangrove forest.³⁴²

3 LESOTHO

A main thrust of Lesotho's **National Forestry Policy 1997** and **Forestry Act 1999** is to devolve forest management to local communities. This includes State Forest Reserves. After consulting with the appropriate Local Authority, the Chief Forestry Officer -

shall advise the Minister on the transfer of ownership, control and management of any forest reserve to individuals, groups of individuals, communities, organization or co-operatives (s. 11 (3)).

This divestment will be through written agreement –

binding on both the parties and shall provide that the Minister shall have a right to reclaim the forest reserve if the said agreement is breached materially (s. 11 (4)).

³⁴² One of which, Kisakasaka is described by Lindsay 1998.

Existing natural forest groves and self-help woodlots (*liremo* and *matsema*) will be declared Community Forests (s. 17 (3)). The Liremo Control Order, 1970 had vested these in the Basotho Nation and given local chiefs the power to administer them

New private, community and co-operative forests may also be created out of allotted or leased land, with the holder of the land explicitly recognises as the owner/s of the forest (s. 17). If asked to assist in their management, the Forestry Department may charge for its services (s.19), emphasising the intention for the Forestry Department to evolve as a service agency.

The significance of these bold provisions is tempered somewhat by the facts that the forest estate is extremely small,³⁴³ and that most Reserves and protected areas were created with local (paid) labour through woodlot and conservation developments since the 1940s and especially the Lesotho Woodlot Project of the 1970s.

Community powers to manage forests

There is unclarity in Lesotho as to the ownership of trees and shrublands outside demarcated woodlots and reserves or home-farms, with increasing but contested allocation. Land allocation itself is caught between two and now possibly three regimes of tenure jurisdiction: chiefs, central state and new local governments (Councils).

In principle, land falls to the King and his chiefs, in whom the 1993 Constitution vested the right to allocate. The same Constitution gave Parliament the right to determine the mechanics of such allocation. The Land Act 1979 made *Village Development Committees* (VDC) the local land authorities. The forestry law's declaration of all natural resource areas reserved by chiefs as now Community Forests may undermine chiefly powers further.

Management powers of communities

There are several routes through which communities or groups may regulate Community Forests. The first is the longstanding agency of VDCs. The second may be through the establishment of a Natural Resource Management Committee which may be given powers to manage a Special Area. A more recent development is Village Councils, to be created through a new Local Government Act 1996 and in whom land allocatory powers are to be devolved.

These democratically elected bodies will have considerable regulatory powers at their disposal when put in place. Support for local government as a whole is however mixed, chiefs correctly seeing their establishment as a further erosion of their powers. Some are doubtful they can perform in the conflicting circumstances.³⁴⁴

343 The estate mainly comprises 10,000 ha of plantation area (some 6,000 ha planted) and various indigenous forest patches which amount to widely diverging estimates of size but may be as little as 35,000 ha in sum (Chakela op cit.). At least one third of Lesotho's rural communities have a woodlot, of mainly eucalyptus and pine species (GoL 1999).

344 GoL 1987, Kasanga op cit.

4 MALAWI

If Lesotho plans to devolve ownership and management to the local level, Malawi intends to encourage this only for currently unreserved woodlands, and to entrench yet more firmly the distinction between government and non-government forests.

However, CIFM is the hallmark of the new policy and law. The new **National Forest Policy 1996** states a main objectives as to remove -

restrictions to access and use of forests, the promotion of community participation in forest management, and the promotion of communal and individual ownership of forests and forest resources (Policy; 2.2.1, 2.2.3).

No competing role is given to the private commercial sector.

Communities as forest owners

Although through draft new National Land Policy makes it clear that government holds land only in trust for its citizens, this has not encouraged forestry policy-makers to consider also widening the foundation of Government Forest Reserve management. The **Forestry Act 1997** is clear that existing Forest Reserves will remain under Government jurisdiction (s. 21).

Nor is new protection provided in that law against the co-option of private or community land for the purpose of creating new Forest Reserves (s.22 & 23), such as is the case in proposed Tanzanian and other yet newer forest enactments. If anything, the risk of 'good' forest being brought under state jurisdiction is increased by the strength of provisions for the Minister to declare protected forest areas in any land category (s.26). Where the land is customarily held, the Traditional Authority will be informed of the protection actions that he is required to implement (s.27).

Communities as forest owners

At the same time, a main part of the new forest legislation enables individuals or groups to also set aside or reserve such residual woodlands as they have in their customary land areas (Part V). Customary lands are those properties held by neither state nor individual entitlement under the Land Act (Cap 57:01). These are sometimes estimated as including up to 44 percent of the total forest estate, if generally much poorer forest than those already brought under state tenure and management.

Now any headman may demarcate a *Village Forest Area*, to be protected and managed for the benefit of the village community – albeit, '*with the advice of the Director of Forestry*' (s. 30). Reforestation of bare land may be the objective. *Individual Forest Areas* are also encouraged.

The creation of Village Forests is not in fact a new provision but has its origins in early colonial legislation (1926) whereby Headmen were encouraged and empowered to establish these on Customary Lands.³⁴⁵ Many hundreds were created, and their management sustained by local leader directive up until the time they were relocated in the 1960s in the hands of new district councils.³⁴⁶

³⁴⁵ This was also the case in Uganda; see later.

³⁴⁶ Dubois & Luwore op cit.

The Forestry Act 1997 is unclear as to the intended tenure of Village Forest Areas; will these lands fall to the community or to headmen? The proposals of the Malawi Land Commission and draft policy thus far suggest that such lands will be vested in Headmen, although in trust for community members. Preceding the new land policy and proposed new basic land law, the Forestry Act makes no provision at all for groups to form legal entities in whom ownership of Village Forest Areas or other land tracts could be directly vested.³⁴⁷

Communities as forest managers

Provision is made for communities to be involved in some manner in the management of **Forest Reserves** but less in terms of decision-making than as assisting parties '*for implementing management plans mutually acceptable to both parties*' (s. 25). Formulation of plans for Reserves remains entirely the preserve of the Director, who is not required to involve communities in their drafting or to even consult them.

The main entry point of communities in Forest Reserves will be on matters of access. On the whole this is likely to be limited as the example of Chimaliro Forest Reserve given in Chapter One illustrates. The law does provide however an interesting opportunity: adjacent communities, may, through arrangement with the Director, access bare parts of Reserves for planting their own trees, using species determined by the Director (s. 36). The right of the community to harvest and freely dispose of the produce is emphasised (s. 37).

Local operational management of **Village Forest Areas** is assumed. This need not necessarily be the headman or village community in its entirety but may include '*any educational, religious or interested institution*' (s.31 (5)). Indeed most projects initiated to date, such as the Mwanza project described in Chapter One do tend to work with church, women and other such groups, not village communities as a whole.

Moreover, local autonomy as to management is limited. It is difficult if not impossible by the terms of the new law for a Village Forest Area to be declared without the support of the Forestry Department and its management subject to government support (s.31 (5)). Agreement as to the creation of a Village Forest Area may include -

'specifications of the nature of the forestry and other practices to be followed, the assistance to be provided by the Department of Forestry, provisions for the use and disposition of the produce and revenue, allocation of land to individuals or families for afforestation' and 'formation of village natural resource management committees for the purpose of managing and utilising village forest areas' (s.31).

³⁴⁷ Clear provision is made in the law for tree tenure; both planted and indigenous trees will be respectively owned by the farmer or the community depending upon its location (s. 34).

Village Natural Resource Management Committees are made the institutional focus of local-level forest regulation in both policy and law. Their right to source funds is made an objective of the law (s. 3), and their main function is to organise the harvesting and regeneration of 'essential forest products' (s.31). The law is ambivalent as to their regulatory powers; they may make rules but only with the approval of the Minister (s. 33). In practice this may take some time as has proved the case thus far. Determination as to how costs and benefits of management are divided between the Department of Forestry and the Committees is in the hands of the Minister (s. 32). Section 74 (2) does provide however that confiscated products will be forfeited and paid to the local management authority – at least in the first instance.

5 ZAMBIA

Zambia also has a new **National Forestry Policy, 1998** and **Forests Act, 1999**. Communities again feature, but in this case, largely in concert with other players including offices of the central state. Local involvement is structured through *joint management*, a central construct of the proposed law. Participation rather than subsidiarity is the intended *modus operandi*. The whole is underwritten by a view of community interests and roles as forest users, rather than as potential owner-managers.

Communities as forest owners

The law provides for classes of *National Forests* and *Local Forests*. Both fall into the category of State Lands. The difference lies in their relative importance to national or local interests, and in the manner in which they may be managed. The law opens with the declaration that all trees in these reserves and elsewhere are vested in the President on behalf of the Republic 'until lawfully transferred or assigned under this Act or any other written law' (s.3).

Whilst divestment of Forests is not the intention of policy or law, an opportunity for a community or group to secure ownership does now legally exist. Section 15 (1) allows that '*nothing shall be construed as to prevent or restrict the granting of any right, title or interest in an area of land comprised in a National Forest*'. Section 23 provides the same in respect of Local Forests, with a proviso that the Minister may make modifications in these grants. These would probably limit to whom Local Forests could be divested, and establish clear conditions and reversionary clauses should the owner fail to meet them.

Privatisation of commercial forests to the private sector is an intention of Policy which makes '*encouraging forest ownership by individuals in the spirit of the Land Act, 1995*' one of its strategies (3.1) and it may be assumed that the above provisions were entered into law for this purpose.

There is, in any event, no useful mechanism in the Land Act 1995 through which a *community* might secure registrable group ownership of land. As outlined in Chapter Three, that law assures customary tenants security in principle but encourages individuals to convert customary land to individually-held leaseholds on the confirmation of the local chief that the person has been allocated that land. The status of properties held in common is particularly vague in the Land Act. Although technically such a lease may be held by more than one person, this is clearly not the intention of the law. Whilst the draft land

policy (1998) agrees that 'more research is needed towards further securing customary rights', its direction is towards hastening conversion of customary rights into individual leaseholds.

Communities as forest managers

Both National and Local Forests will be under the control and management of the proposed Forestry Commission (s. 14 & 22), the establishment of which is arguably the main objective of the new law. Local people are *not* to be involved in State Forests. They may be involved in management of a Local Forest through their participation on a *Joint Forest Management Committee* (s. 22).

The framework for this assignment will be the statutory declaration of a *Joint Forest Management Area (JFMA)* (Part V). JFMA may also be declared outside Local Forests in 'forest plantations or open areas' if the local community has given consent (s. 25). In theory, use of this opportunity in areas outside reserves could give rise to a class of 'community forest' but again, this is not developed in either the policy or law.

Local citizen participation in a *Joint Forest Management Committee (JFMC)* is limited to three persons, alongside representation from the Chief, the proposed Forestry Commission, the local government authority, current licensees, and representatives from the Department of Agriculture, Department of Water, Lands and Fisheries and the Zambia Wildlife Authority (cl. 26 (1)).

The Committee will operationalize its management through a *Management Plan*, to be written for each National Forest, Local Forest and Joint Forest Management Area (s.30). These are to take account of submissions from local communities in the area (s. 31). On the approval of the Commission, these plans will be gazetted and binding upon the managers (s. 32-34). The function of these Committees is 'to manage and develop the forest and to distribute the benefits among the local communities' (s.27).

Management powers of communities

Whilst in principle any powers could be delivered to JFMC through agreement, the positioning of the law is towards involving these committees as protection agents and managers of benefit-sharing. Section 28 provides that a percentage of revenues payable under the Act rendered from the use of forest resources within a *Joint Forest Management Area* will be payable to a fund set up by the Committee for this purpose. The Committee may use those funds to meet its technical and administrative costs (s. 28 (2)). It may also raise revenue from any other source (s.28 (3)).

6 NAMIBIA

As elsewhere in the region, community forest management is entering forest law in Namibia for the first time. The construct for this is *Community Forests*, one of three classes of declared forests, along with State Forest Reserves and Regional Forest Reserves. New **National Forest Policy** and a **draft Forest Bill 2000** have been under development since 1997 and the latter in particular has altered over time. It is anticipated that the final Bill will be gazetted and enacted by February 2001.³⁴⁸

³⁴⁸ The draft bill has been singularly un-available to the public. The version available to this study was the 1998 version.

Forest communities as owners

There is no intention to devolve ownership of *State Forest Reserves* (or the new class of *Regional Forest Reserves*, a class which may ultimately be dropped).³⁴⁹ At this time only two State Forest Reserves exist and one is already earmarked for conversion to a Community Forest Reserve.

State Reserves may be created out of communal lands (s. 13 (2), s. 14). This builds upon the fact outlined earlier that communal land is vested in the state and the intention is to create regional land boards able to lease out communal land, and not only to local customary occupants but to any citizen or agency.

The act of creating a government Reserve is however now subject to consultation (s. 13 (4), s. 14 (3)) '*to give persons affected an opportunity to express their views on the matter*' but without the power to reject the proposal. More useful to local populations is the provision that the Minister may not proceed to create either State or Regional Forest Reserve until he is satisfied that '*effective management cannot be achieved through management of that communal land as a community forest*' (s. 13 (2) (b), s. 14 (1) (b)).

Provision for the creation of *Community Forests* is the main new thrust of the law. As described in Chapter One, several substantial areas originally surveyed and demarcated to be State Forests are now earmarked as potential Community Forests, several parts of which are under emerging local management.

The character of such Community Forests is less clear however. In the first instance, areas which could be encompassed in such a designation need not necessarily be wooded and may include areas of settlement (cl.15 & 32), suggesting similarity with the construct for *Village Forest Areas* in Malawi which may embrace interspersed settlement, farmlands and woodlands. In Namibia, wildlife conservancies, from which the construct of Community Forests partly borrows, often include settlements (B. Jones, op cit.).

The first Integrated Forest Management Plan for part of the Community Forest of **Uukwaluudhi** confirms Community Forests as more integrated land management initiatives than forest-centred developments.³⁵⁰ Many of the activities and rules in the Plan relate not to forest utilisation or management but to the use of the area for grazing, cultivation and even construction of houses. The stated aim of the local plan is '*to develop the community's capacity to manage and utilise its forest, range agricultural and water resources sustainably*' and the Forestry Committee is to '*advise the community on utilisation of forest, range and agricultural resources*'. The local community rules devised require the payment of fifteen Namibian dollars for any hut constructed in the area for the purpose of sale. Support for on-farm tree planting is a key element of the Plan.

Nor is it yet clear how far Community Forests will be identified and managed on the basis of existing community formation, and with what extent of support from the entire community. Practice underway ahead of the Bill's enactment requires that only 150 persons in the community support the declaration of a certain area of local woodland as a Community Forest.

349 Pers. comm., H.F. Shiweda May 2000.

350 Ontanda Village Plan op cit.

A Community Forest may be created only by written agreement with the Minister (s. 12). No indication of its tenure is indicated in a situation where there is no legal provision for communal lands to be registrable property, and in the Communal Land Reform Bill, provided only for residential and cultivation plots (cl. 21).

Communities as forest managers

As is uniformly the case in the forest reform movement in the region, regimes of protection, use regulation and forest development are to be concretised into formal Management Plans, in this case, again subject to the approval of the Director of Forestry (cl. 12 & 15). There is no requirement for communities to be involved in the management of State or Regional Forests, nor is there legal provision for co-management by state and reserve-adjacent communities. However, the 1998 version of the Bill did state that plan formulation will occur only after '*consulting with the people who reside or near or in the area where the reserve is situated*' (s. 12 (2) (3)).

Management of any State, Regional or Community Forest will be by a *Management Authority*. This is an undefined person or body and could be an individual, a private company, an environmental agency, church group, community, a local government, or the Forestry Directorate itself. In the case of Community Forests it need not directly involve the community but be a body which -

the Minister reasonably believes represents the interests of the persons who have rights over the communal land and is willing and able to manage the communal land as a community forest (s.15 (1)).

This may build upon the wildlife conservancy initiative which are sometimes managed in Namibia by private companies. Local people in those circumstances are primarily identified as beneficiaries, gaining employment and product benefits dispensed by the management authority. In the Forest Bill, emphasis is placed upon '*equal use of the forest and equal access to the forest produce by the members of the communal area where the community forest is situated*' (s. 15 (2f)). Agricultural activity may also be undertaken (s. 32). Domestic fuelwood and housing materials may also be extracted (s.25 (3)).

Powers of management for Community Forests

The main route for devolving authority to the local level may prove to be in provisions for designation of Honorary Foresters (s. 8) and Licensing Officers (s. 9). The above-mentioned case of Ontanda village shows that such persons need not necessarily be local persons but approved by the community.³⁵¹ Village Forest Committees may be created but no provision is made in the version of the Bill available to these authors which suggests they may attain regulatory powers of any kind. In Ontanda, the Committee supports the Honorary Forester who acts as both Forest Guard and Manager. He issues permits in consultation with the Headman (not the Committee), patrols the forest to inspect permits, and reports upon livestock movement, diseases and deaths in the forest.

³⁵¹ Ibid.

7 SOUTH AFRICA

South Africa's post-apartheid land reform commitments directly impact upon the status of forests and the way in which they are owned and managed. This is acknowledged in the terms of new **National Forest Policy 1996** and **National Forests Act 1998**.

The setting for this is a substantial resource including 1.4 million hectares of commercial plantation, 327,600 hectares of natural forests of the moist and/or montane type and up to 28 million hectares of woodland. Whilst the former are largely under Government as State Forests of various categories, or private ownership, notable areas of both natural and planted forest fall within ex-homeland areas. The more valuable of these are managed by the state or state-supported conservation agencies. Exactly how these may be returned to local jurisdiction will remain undecided until the Mbeki Administration determines its course in respect of homeland tenure, noted earlier as an issue in considerable contention and political indecision.

Communities as forest owners

In the interim, the Forestry Department (DWAF) has embarked upon a drive to privatise at least planted forests. Those of good commercial viability are to be privatised through leases to private companies as described in BOX TEN of ANNEX B. At this point, lessees are being offered security for up to 70 years, even in the face of changing ownership as the result of successful land restitution claims.³⁵²

The handling of State Forests which are natural forests is proving more complex. Whereas in 1996, Policy anticipated that the state might retain these through payment of cash compensation (Policy: 1.4.5), by the time the National Forests Act was enacted in 1998, there was clearer provision for groups of local people to become owner-managers themselves. *Communal Property Associations*, provided for in 1996, are identified as a likely construct, along with community trusts, local management boards and companies. Tribal authorities and new local governments are also being examined for their potential to carry workable legal forms. As is the case in all development spheres at this time, the weakness of rural institutional development combines with conflicting local norms and interests to make determination of frameworks through which community forest ownership might operate, uncertain.

Communities as forest managers

New policy (1996: 2.6) and law is clearer as to the right of communities to now be involved in management operations. Communities may apply or be invited to apply to manage a State Forest or any other protected forest area, '*jointly with an organ of State, or alone*' (National Forests Act s. 29 (1)). Should the offer meet with the approval of the Minister, he may enter an agreement with the community (s. 30). The subjects to be covered in the Agreement are listed in the act (s. 31). Where the forest is a State Forest, the Minister must formally licence the activities which the community may carry on under the community forestry agreement (s. 30 (3)).

³⁵² Pers comm., J. Clarke June 2000.

In practice, autonomous operational management by communities is not yet developed, with rather complicated arrangements tending to be devised as exemplified in BOX TEN in ANNEX B.

8 ZIMBABWE

Zimbabwe is also clearly in a period of transition as to its policies towards local level involvement in forest management, but in this case with minimal new development in formal policy or law.³⁵³

Communities as forest owners

As the situation currently stands, communities have no tenurial rights over forests or woodlands. Protected forests broadly fall into Demarcated Forests and Nature Reserves and Private Protected Forests. The former two classes are managed by the parastatal Forestry Commission. These are declared out of either State Land or Trust Land (communal lands) and some Demarcated Forests are owned by the Commission directly as freeholds (**Forests Act** Cap. 19:05, Part IV).

The Commission also manages a number of plantations and indigenous woodlands in communal lands, as does the National Parks Authority for combined forestry and wildlife management.³⁵⁴ Both agencies in effect lease the forest land (but without legal contracts) from the President, who owns communal lands.

Otherwise, the many millions of hectares of unreserved woodland found in communal lands are administered by district councils in consultation with central government. Both levels routinely issue concessions and permits to outside private interests over these customarily owned lands.

At this point, there is little in national forestry policy or programmes that suggest the state would advance a policy towards community-based ownership of forests of any kind. Whilst revised frequently, the Forest Act is a 1949 law, and deals mainly with the establishment of the Forestry Commission and arrangements to regulate the extraction of timber. A recent policy statement from the Forestry Commission (1999) makes no mention of communities at all, despite being involved in disputes with communities in virtually all its fifteen plantation areas (mainly in Manicaland Province) and its twenty-three demarcated forest areas or indigenous woodland reserves (mainly in Matebeland North Province).

The laws where some leeway for community tenurial interests might have been expected are in the **Communal Land Act 1982** and the **Communal Land Forest Produce Act 1987**. The former has been described earlier as the instrument that established local rights in these areas as those of permissive occupancy only (s. 4). It will be recalled that the President may readily remove any forest from communal land into the State Land sector (s.6).

³⁵³ An outline draft new Forest Policy has been prepared.

³⁵⁴ GoZ 1998b.

The Communal Land Forest Produce Act makes no alteration in state control over forests. The Minister may allow exploitation by local inhabitants only as far as he considers reasonable (s. 3(2), s.5 & 7). These customary occupants may not use produce defined as major, any produce in protected areas, or produce which has been licensed to someone else (s. 4 (1)). Nor shall they sell the minor products which they are permitted to use, such as fuelwood, brushwood, or poles, or fell a tree unless it is *on 'land legitimately occupied for the purposes of farming'* and only if *'the product is necessary to develop the land'* (s. 4 (3)).

The **Natural Resources Act, Cap. 20:13**, another very old law (1941, amended more than twenty times) does not depart from this position or provide an alternative opportunity for community-based management of woodland resources. Rather, its main objective is to allow the Board to remove people and stock for developments 'as it considers necessary' (s. 46-52).

In sum, not a single provision in national law softens the prime state tenure and jurisdiction over forests in communal land. Yet it is from this area of law – rights in communal land – that some reform may be expected, should the much-mentioned proposed new national land policy be adopted. In that (currently unlikely) event, then the forestry sector would be confronted with the need to recognise at least forest in communal land areas, as owned by communities through proposed Village Assemblies and no longer subject to control by the Commission and/or rural district councils.

Communities as forest managers

Practice, rather than policy and law, suggest that community involvement at least in the *management* of woodlands is an emerging strategy, if inchoately so.

As outlined in Chapter One, numerous rural communities are involved in some way or another in natural resource *utilisation* programmes, such as CAMPFIRE, and through these, by implication, some element of resource management. The conclusion was drawn that the level of involvement in decision-making is weak, given the legal and organizational focus of control in the hands of rural district councils, or increasingly, in private enterprise developments. It will also be recalled from Chapter One that the Forestry Commission itself has shown itself unwilling to extend the now long-standing Mafungabusi pilot and even on that site, has not developed a Management Plan for the main forest area which includes local people in management.

Less formal cases also outlined in Chapter One suggest that woodlands are in practice being locally managed in some areas, mainly to sustain pasture potential. Even these are constrained by limited rights to set aside areas or enforce decision-making.³⁵⁵ They, like so much associated with the communal landed resources of Zimbabweans, would gain greatly by improved recognition of community land rights, and through this, community identity and empowerment.

355 Cousins 1993, Francis op cit., Katerere, Guveya & Muir op cit.

9 MOZAMBIQUE

The ownership and management of forests is also complicated in Mozambique, but being addressed by policy and law-makers, following the radical departure in such matters premised by the Land Law 1997. As outlined in the previous chapter, a central issue of the land reform concerns communities and their rights to land and rights to exert control over lands, forest land included.

Communities as forest owners

The **Land Act 1997** provided for the state to declare a wide range of protected areas and in so doing extinguishes local tenure of any kind. The law also provides for the state to issue entitlements of potentially permanent duration to non-local persons, including foreigners, mainly for investment purposes. At the same time, it will be recalled, the law gives dramatic new recognition to the multitude of unregistered, local rights in land, and has made important procedural provisions since to assist rural communities identify and secure these rights (Regulations 1998 and Technical Annex 1999). This may occur through delimitation of community areas and issue of certificates over these.

Nonetheless, particularly in respect of forest land, ample ground for conflict between community and private sector entitlement exists. The Land Act 1997 makes these available to either category of future owner. The main constraint is that in respect of future private sector allocations, these areas must be shown to be neither viably occupied nor used by local people, testimony which may however derive from only three persons (Regulations 1998). Unanswered questions remain as to how far the already stretched Cadastre Service will be able to assist communities delimit their lands in more secure ways than this consultation suggests. As observed in Chapter One, the handful of projects looking into securing forests at the community level have not found it easy thus far.³⁵⁶

The flourishing concessionaire culture is an additional constraint. Millions of hectares of good forest land have been allocated to a wide range of safari, hunting, timber extraction and agricultural enterprises, usually with a foreign base.³⁵⁷ Whilst most allocations have been on a product-centred concession basis others have been outright allocations, now enabled by the Land Act to be made permanent rights. In either case, local inhabitants have rarely been consulted. Even now with the new **Forest and Wildlife Act 1999**, they gain no power to prevent these allocations. Kloeck-Jenson (1999a) cites figures for 1997 from the Forestry and Wildlife Department which show that nearly one million hectares of forestry concessions had been applied for -

'but not one has involved any form of community consultation, despite covering vast areas ranging from ten to 125 thousand hectares upon which thousands of smallholders reside'.

³⁵⁶ Anstey op cit., Mushove pers comm. June 2000., Filimao pers comm. June 2000.

³⁵⁷ Kloeck-Jenson 1999a, 1999b, McGregor op cit.

The strength of the concessionaire culture in the new **Forest and Wildlife Act, 1999** needs to be seen in this light, as must the weakness with which it approaches the rights and roles of forest communities in securing and sustaining forests.

This may however yet see remedy. For as has been the case with the Land Act 1997, the drafting of subsequent Regulations may improve community rights. Regulations under the new Forest & Wildlife Act are being drafted in late 2000. In the meantime the law offers only a limited strategy towards harnessing the thousands of communities located in forested areas as a conservatory or management force. Nor does it further the definition of community in their relation. Instead state ownership of forest and wildlife resources is emphasised (Article 3(a)), and exaggerated by legal reminder that local people have no right to exploit forests except '*where such exploitation is undertaken solely for subsistence purposes*' (Article 9).

To this end communities may however declare *Areas of Historical and Cultural Value* (Article 10), to be managed in accordance with local norms and practices, and for solely subsistence functions (Articles 1 (37), 13 (1), 13 (2)). These are not to be declared by communities themselves but by Government, involving communities '*in a participatory manner*' (Article 10 (4,5)).

Communities may also apply for permits and even enter concession contracts of up to 50 years (Articles 15 & 16), a slim likelihood better-financed private interests. As noted above, local people must be consulted prior to issue of licences and concessions but without the power to halt these (Article 17).

Communities as forest managers

More substantial provision is made for local involvement in the management of forest resources. The Land Act 1997 determined that '*communities shall participate in the management of natural resources*' and shall rely upon '*customary norms and practices*' towards this (Article 21).

This is developed in the Forest & Wildlife Act 1999 as permission for the state to delegate management authority on a case by case basis to the private sector, associations and local communities (Article 33). However, unlike most new forest laws, no structure is identified through which this offer might be routed. A new institution is created by the law but one that is more administrative than managerial in its capacities. This is the *Local Resource Management Council*, to be established probably at district levels and which is to include representation from the local community. Its mandate is to ensure that there is local participation in '*the exploitation of resources and in the benefits generated through such utilisation*' (Article 31).

This reflects the main objective of current forest management strategies vis a vis communities as being to secure a share of benefit from the predominantly private sector involvement in forestry. As Kloock-Jenson 1999a observes -

'Indeed, the dominant paradigm influencing the thinking of most government officials and private operators is one in which local communities ... should be acknowledged with minor forms of tribute. They are NOT perceived as important stakeholders in forested areas with whom one must consult and negotiate.'

Powers of community managers

These difficulties stem in part from the absence of clear community identity, social-legal personality or recognised institutional form, in which management powers may be embedded, expressed and made enforceable. Customary regimes and rules locally apply and in some areas, with effect. The majority case is however one where there are conflicting authority systems and each with erratic adherence power.³⁵⁸

As recorded earlier, within a single area there may be more than one traditional authority representing different sectors of the population, and these leaders may compete among themselves. Where they do not, local headmen may compete with politico-administrators sent by central government to the area, and who in turn have erratic support depending upon their political affiliation to either Frelimo or Renamo parties.

Rural areas under these officials are in fact subdivided by administrative localities (*localidade*) through a system devised by Frelimo. This has an uneven foundation in traditional socio-spatial terms and even less relevance to real patterns of forest rights and use in the local area.³⁵⁹ Locally-elected government does not exist at all in the rural areas, only just beginning to be put in place in urban areas.³⁶⁰

10 UGANDA

A new **Forest Bill** was first drafted in mid-1999 and is under revision in 2000, expected to be put before the political Cabinet in early 2001. Policy development has been the more prominent sphere, also still in draft (**National Forestry Policy 2000**).

The driving force in these developments is a political commitment to establish a National Forestry Authority (NFA), an autonomous entity to take over the functions of a Forest Department which has proven itself unequal to the task and seen more than ten senior staff fired in the public interest in 1999-2000 alone, usually for reasons of financial malfeasance.

Uganda has also embarked upon a very serious programme of devolution of authority to District Councils and subordinate Sub-County Councils (Local Government Act 1996) and has, it will be recalled, adopted a comparable strategy towards tenure control and administration, now rooted in fully autonomous District Land Boards, supported by Parish Land Committees, a level which lies between villages and sub-county administration. As is the case in neighbouring Tanzania, devolution represents a main national strategy, to affect all sectors.

Devolution of at least certain forest estates (those which are minor) is part of emerging Forest Policy and law. Immediately following the Land Act 1998, 192 forests originally created by local authorities as Local Forest Reserves but then centralised to the Forest Department, were returned to District Councils.³⁶¹ These new Reserves embrace less than 5,000 ha in total, ranging from 3 to 96 ha.

³⁵⁸ *ibid.*

³⁵⁹ Kloeck-Jenson 1999b, Mushove pers comm. May 2000.

³⁶⁰ Through a package of 12 laws mainly including No. 7-11 of 1997.

³⁶¹ Statutory Instrument No. 63, The Forest Reserves (Declaration) Order, 1998. The Forests Act (Cap. 246) in fact also provides for Village Forests, their management to be determined by a person or persons which the District Council appoints (s. 4 & 9).

Communities as forest owners

Devolution of forests to communities initially had no place in the first policy and legal provisions mooted. Over the period of drafting (1999-2000) a sharp change has however occurred, steadily increasing the profile of rural populations in forest management. Whilst in the 1999 draft of the Forestry Bill, forest adjacent communities were posed as but one of many stakeholders whose interests should be considered, they now appear as a main actor in the late 2000 draft (still to be finalised in early 2001). A notion of a Permanent National Forest Estate which comprises both Government and non-Government Forest Reserves embraces this idea. The latter would comprise private, group and community reserves.

Communities as forest managers

Community Forest Reserves would be those declared out of customary land, much in the same way as this is proposed (and underway) in neighbouring Tanzania. This development is unsurprising, given that following the 1995 Constitution and Land Act 1998, the new National Forestry Authority will be confronted with the fact that most of the three million hectares of still-unreserved forest is in fact already fully legally owned under customary tenure.

Nor will it be especially difficult for the final Forestry Bill to identify constructs through which a community could securely hold and manage forest land. This is provided in the Land Act 1998 in the form of Common Land Associations, devised precisely for such cases as common woodland or other common resources. Even more simply, as shown in the previous chapter, a community may take out a Certificate of Customary Ownership without forming a formal Association.

Central Forests embrace the one million hectares of forest already reserved. No intimation in either draft policy or law suggests these might be subject to devolution, even on a case by case basis. These are however, through the terms of the Land Act 1998, held, not owned by government, and in trust for citizens (s. 45, pursuant to Article 237 (b) of the Constitution). A local government (such as a District Council or Sub-County Council), may seek to hold such estates under their own trust (Article 237 (2a), Land Act, s. 45 (3)).

More powerfully, the Land Act provides an opportunity for local communities to request that the reserved or protected estate be returned to their care or ownership (s. 45 (6)).

In terms of management operations, the policy looks to communities as collaborators, with their roles defined through *Joint Management Agreements*. In practice, as elaborated in Chapter One, only new initiatives involve communities as decision-makers but in a way that is highly likely to set the course of CIFM in this power-sharing direction.

In late 2000, attention is being given by the forest law planning team to the instruments through which communities might manage parts of Central Forests and/or manage their own Community Forests.³⁶² The most obvious instrument is again one found in neighbouring Tanzania: the Village By Law, or in Uganda

362 Forest Act Planning Workshop, Entebbe, December 2000.

also the Parish By Law. These are minor laws able to be promulgated under the terms of the new Local Government Act 1997 by hamlets (villages) or groups of three or four villages (parishes). The Sub-County Council and District Council may promulgate more powerful by-laws.

In the case of Central Forests, the National Forestry Authority could delegate its own roles and powers to the selected community. In this case, it would almost certainly prefer to see the social group formed into a legal person or association, in order to hold it legally accountable for the responsibilities and rights it acquires. It is not impossible that the first Ugandans to form Communal Land Associations may therefore be forest-adjacent communities looking for an institutional framework through which they may secure authority over a government Reserve in their vicinity.

11 KENYA

In late 1999 Kenya approved a new **National Forestry Policy** and expects to present a new **Forests Bill 2000** to Parliament, unlikely to enter law until early 2001. As in the case of Uganda, the position of communities in the law has slowly increased over several years of legal drafting. The greater preoccupation of the law is however, like Uganda and Zambia, the creation of a semi-autonomous Kenya Forest Service.

As noted earlier, one of the most striking innovations of the proposal is that all State Forests be vested in this body, removing these from the more general and demonstrably vulnerable class of Government Land.

It will also be recalled that Local Forests existing in Trust Lands already fall under the trustee tenure of County Councils, which the draft Forests Bill refers to as ownership (cl. 3). No provision at all is made for Community Forests to be created out of either reserved estates or the many millions of unreserved woodlands in Trust lands. This is disappointing given that the Forests Bill provides an ideal opportunity for this, building upon the right of customary occupants in Trust land to secure their tenure, albeit presently only through conversion into freehold/leaseholds. Typically, these entitlements are vested only in individual holders.

Nonetheless, an opportunity of sorts for communities to secure such entitlement over customarily held forest/woodlands is provided through the construction of *Forest Associations* (cl. 45). These are to be legal entities, registered under un-named laws, and details of their formation not provided for in the Forests Bill itself. The only prescription is that a Forest Association may be formed only by a person/s living within five kilometres of the edge of a forest (cl. 3).

This suggests an NGO-like identity, likely to be formed not by forest-adjacent villages, but by local elites that have the means of registering such legal entities. They have no obligation to involve households, hamlets or villages that directly border the forest. This is disappointing in a situation where even from 1991, the importance of community adjacency to forest management was stressed, and where, contrary to popular opinion in Government, village-based formation is

bountifully apparent, under the auspices of headmen-defined areas.³⁶³ In practice, local communities might well find themselves excluded from forest management in any real sense.

The objective of Forest Associations as posed in the draft Forests Bill is not to devolve ownership of State Forests or Local Forests but to involve them in operational management. Once formed, an Association may 'apply to the Chief Conservator for permission to participate in the conservation and management of the forest' (cl. 45 (2)). Although not set out, the potential for authority to be devolved from the Service to such an Association is considerable in default of restrictions. These powers are however unlikely to including policing powers, especially given the new provision of the law to allow Foresters to bear arms 'after acquiring requisite training' (cl. 50 (2)).

12 ETHIOPIA

Finally we may turn to Ethiopia which although outside the region is increasingly influenced by developments within it.

In 1994 the Federal Government of Ethiopia enacted the **Forestry Conservation, Development and Utilisation Proclamation**. Local communities are identified throughout the law as a main beneficiary group, but not one that may own forests or manage them independently of the state (s.3). When developing plans to manage State and Regional Forests, the state must do this –

'in a manner so that inhabitants do not obstruct or hinder forest development and will facilitate conditions that ensure their well-being in such a way that inhabitants of the forest will be beneficiaries from the development' (s. 5 (2e)).

Forest users are identified as central government or regional organizations or concessionaires (s. 9 (2)). Local inhabitants may also be '*issued rights to use forest products in an amount necessary to satisfy their ordinary domestic needs by paying appropriate fees*' (s. 9 (3)). This may include allowing forest products, grass and fruit to be harvested, as well as beehives to be kept in protected forests (s.10).

363 KIFCON 1992a, 1992b, Wass (ed.) op cit.

Draft Forest Policy

A more community-centred approach appears in the Forest Policy that has been under draft at the federal level since 1998, following completion of a four volume Forestry Action Plan. Regional Governments are to develop their own policies within its parameters. At this point of draft, it a classification of *National Priority Forest Areas (NPFA)* of which 58 have already been designated, embracing some 3.6 million hectares. These will be divided into protected and productive forests.

A main thrust is towards privatisation of commercial plantations, and encouragement to individuals, organizations and associations to develop new forests, mainly woodlots. Ownership rights will be assured (Strategy 3.4.1) – at least ‘to the last coppice rotation’ (3.4.2). In respect of existing protected areas, production forests ‘*will be managed by joint forest management or consigned to individuals, organisations and associations*’ (Strategy 3.1.4).

All forests will be managed ‘*with the involvement of local populations*’ with an emphasis upon them securing benefit from the development and related non-forest developments (3.2.2). They will participate in management planning (3.2.3) and mass education to create conservation awareness will be launched (3.2.4).

How far the policy is developed into regimes of real co-management or autonomous management remains to be seen. As illustrated in Chapter One, there are a handful of CIFM initiatives underway in Ethiopia, none of which directly designate communities as forest managers, and which are still mainly geared to buffer zone developments or apportioning of access rights.

Chapter Five: CONCLUSION

THE CONSTITUTION OF COMMUNITY – THE ULTIMATE ISSUE

We have now reached the end of this study. Chapters Three and Four have explored issues identified at the beginning of this discussion, first by identifying the constraints and potentials, and then by addressing these in a country by country context. This chapter seeks to bring the findings together in general conclusions. It ends with the suggestion that community-level institutional and socio-legal formation is the single most important development to now be promoted towards securing both community tenure and management rights over forest land.

1 WHO OWNS FORESTS?

The core question posed at the beginning of this chapter was ‘who owns forests and where are forest-local communities placed in this regard?’ This may now be answered.

In brief, the facts are that forest-local communities currently own very little forest, and what they own, excludes the ‘best’ forest and is held in ways which are extremely weakly tenured in the eyes of national law.

This is because forests perceived as most valuable have been withdrawn from the local sphere and placed in the hands of the state as reserved property, and because most unreserved forest tends to be held customarily or related community-derives forms of informal local rights. Customary tenure, we have seen, has not been well-regarded in national laws throughout the last century, and all forms of unregistered property have been vulnerable to involuntary loss. Property *held in common* has been especially vulnerable, considered in effect to be un-owned, and an important target of state law for enclosure into registered freehold/leasehold entitlement.

Of course, the situation is somewhat more nuanced than the above suggests, both through less-than-straightforward positions in existing policy and law, and especially in light of the many changes which are currently underway.

2 THE CHANGING CONSTRUCT OF RESERVES

A degree of ambivalence in the tenorial status of *reserved forests* must first be remarked. This arises from the location of Forest Reserves mainly in Government Land, but where the definition of the status of government as owner and/or guardian, and the nature of this property as government’s land or public land has been imperfectly defined and unevenly applied. Older Forest Acts eschew mention of who actually owns Forest Reserves, dealing rather in matters of managerial jurisdiction, the business of forestry departments.

Government Land as Public Land held in Trust

New Forest Acts are more mindful of the issue, if still cautiously so. State Forests remain just as firmly under state authority as in the past, just as firmly mandated to Forest Departments and semi-autonomous Commissions as in the past. However, through heightening of concepts of public trust, the proprietorial

powers of the state have seen a great deal of new constraint; in a growing number of states, governments hold reserves and other state land only in trust for the real owners, the citizenry as a whole.

This, as we have seen, puts considerable break upon the behaviour of Forest Departments in their regard. The plethora of new environmental considerations, entering by way of policy or the implications of international protocols, merely adds to the constraint. At least in theory, the 21st century should see a great deal less loss of forest land from the public sector than has been the case over the last fifty years.

Reservation as a land management not tenure class

We have also seen some refinement in the meaning of reserved land to more properly denote land *set aside* for particular purposes, purposes that are regulated under various laws, including those of forestry. In sum, reserves have come of age as a construct, as a land management not land tenure category. Strictly speaking, this is not so much new in law, as new in the public interpretation of the law.

It gains greatly however from new positions being taken as to who may set aside and protect, manage and develop forests, and in turn adds force to this expansion. Where previously this was the preserve of governments and to a less marked degree, private large landowners, it is now broadly the case in new policy and law that more or less any legal person or entity may establish a forest reserve. As we have seen, a prominent part of many new forest acts is to lay out the procedures for this.

Diverse frameworks

Just how wide open the possibilities are thrown varies state to state. In no state has there been total demise in government's capacity to create new forest reserves. There has however been great alteration in the balance of its role with other agencies of society.

Broadly speaking, this falls into a continuum of several paradigms. Devolution of state forests is most prominent in **Lesotho** and potentially **South Africa**, where there are clear intimations towards the Government authority playing a lesser and lesser role, refining itself towards that of advisory agency and watchdog. At the other extreme, best illustrated in the case of **Zimbabwe** and **Kenya**, there is no intention whatsoever to yield an inch of public estate beyond the hands of central or local government.

By far the more dominant approach is one in which the singularity of state tenure gives way to duality, between what may be referred to as a *Government Forest Estate* and a *Non-Government Forest Estate*. These will co-exist, with different degrees of attrition from the former to the latter. In the main the dividing line is tenurially determined, with existing State Forests being retained but allowing for currently unreserved forests, mainly on communal lands at the turn of the century, to become **Private, Group or Community Reserves**. This is most explicitly to be the case in **Uganda, Tanzania, Malawi, Namibia and Mozambique**.

In this manner, the act of setting aside dwindling forest resources is firmly retained as the central construct of forest management, and indeed gains weight through widening its scope. Both private sector and community roles are to the forefront of this development.

3 PROVIDING FOR COMMUNITY-OWNED FORESTS

The potential to re-secure forests lost to the state

Following on from the above, two routes through which local people may secure forest ownership are now availed. The first is more limited, in the potential to re-secure forests lost to them, now in state hands.

The only country in the region which has made an unambiguous commitment to allow state property to become community property is **Lesotho**, where however, forests are a much lesser estate than elsewhere (excepting Zanzibar), largely in planted patches and community-created in the first place. Through constitutionally-determined processes of land restitution, the South African state is obliged to devolve ownership of many State Forests to their original owners, something which will slowly occur over coming years.

By design or otherwise, legal opportunities in forest law are emerging elsewhere, to be realised on a case by case basis. These may or may not be activated by either communities or state. In practice, such movement is likely to occur only in where locally-based management is well rooted and demonstrated as the platform upon which divestment would over time appear logical and fair.

Such opportunities, we have seen, are availed in the emerging laws of especially **Tanzania** and to a lesser degree in **Uganda, Namibia** and **Zambia**.

Restraining appropriation of local forests to state

Just as important, the capacity of governments to continue appropriating local forests to become state forests is seeing constraint. This is less through alteration in their own policies than necessitated through the terms of changing land relations in the region.

In particular, as has been prominently explored in this volume, new land laws are introducing customary and other community-derived land rights into state law as fully justiciable *private rights in land*, and which may only be extinguished through payment of compensation at the same levels for any other kind of property – a sure disincentive to wanton appropriation.

Provision for Community Forests

At least partly consequent upon the above, but gaining support from changing perceptions as to how forests should be secured and sustained in the first place, local communities in most countries in the region are now able to create their own forests out of community or other local lands.

Legal provision for this entirely new opportunity is most developed in **Tanzania, Lesotho, Malawi, Uganda** and **Namibia** thus far. Private Forests are also emerging as a stronger and more flexible class of protected area, allowing for even minor on-farm forests to be retained for purposes of forestry.

A community-based forest future?

The commitment to bring yet more forest into the reserved category has not declined. As noted in Chapter One unreserved woodland actually comprises the greater portion of forest resources in the region and has become a main focus of forest management strategies.

Through new constraints and changing strategies as commented upon above, it is highly likely that the majority of new reserve owners will be communities and who will hold these lands increasingly as commonholds. This represents a stark contrast with the situation throughout the 20th century.

TABLE 5.1: THE POTENTIAL IN NEW FOREST LAWS
FOR COMMUNITIES TO SECURE OWNERSHIP OF FORESTS

COUNTRY	CURRENTLY GOVERNMENT FOREST RESERVES		FORESTS OUTSIDE GOVERNMENT LAND	
	DIRECTLY PROVIDED FOR IN THE LAW	INDIRECT OPPORTUNITY EXISTS IN THE LAW	DIRECTLY PROVIDED FOR	INDIRECT OPPORTUNITY EXISTS IN THE LAW
TANZANIA	NO	YES	YES	
ZANZIBAR	NO	NO	YES	YES
UGANDA	NO	YES	YES	
KENYA	NO	NO	NO	NO
ETHIOPIA	NO		YES	
ZAMBIA	NO	YES	NO	YES
MALAWI	NO	NO	YES	
ZIMBABWE	NO	NO	NO	NO
BOTSWANA	NO	NO	NO	YES
SWAZILAND	NO	NO	NO	NO
LESOTHO	YES		YES	
MOZAMBIQUE	NO	NO	YES	
SOUTH AFRICA	YES		YES	
NAMIBIA	YES		YES	

TABLE 5.2: CURRENT AND PROPOSED CLASSES OF PROTECTED FORESTS

COUNTRY	CLASSES OF RESERVED FOREST UNDER CURRENT FOREST LAW	IN NEW OR PROPOSED FOREST LAWS & POLICIES
UGANDA	Central Forest Reserve Local Forest Reserve (Forests Act, Cap. 246)	Central Forest Reserve Local Forest Reserves Private Forests Community Forest Reserves (Draft Forestry Bill Dec. 2000)
KENYA	National Forest Reserve Nature Reserve National Park (Forests Act Cap. 385)	State Forest Local Authority Forest Arboretum, Recreation Park, Mini-Forest Private Forest (Draft Forestry Bill, 2000)
TANZANIA	Territorial/National Forest Reserve Local Authority Forest Reserve (Forest Ordinance, Cap.389)	National Forest Reserve Local Authority Forest Reserve Village Land Forest Reserve Community Forest Reserve Private Forests (Draft Bill for Forest Act, 2000)
ETHIOPIA	State Forests Regional Forests Private Forests (Forest Proclamation, 1994)	National Priority Forest Areas (NPFA) Private Forests (Draft Federal Policy, 1998)
ZANZIBAR	Forest Resources Management and Conservation Act, No. 10 of 1996	Forest Reserve Nature Reserve Community Forest Management Area
BOTSWANA	Forest Reserve National Park & Game Reserve	No change indicated (Forest Act, Cap.38:04)
SOUTH AFRICA	No data	Forest Nature Reserve, Forest Wilderness Area National Park, Provincial Reserve State Forest Private Forests (National Forests Act, 1998)
NAMIBIA	No data	State Forests Nature Reserves Community Forests (Forest Bill, 1998)
LESOTHO	No data	(State) Forest Reserves Private Forests Community Forests Co-operative Forests (Forestry Act, 1999)
SWAZILAND	Indigenous Forests Private Forests (Private Forests Act 195, Forests Preservation Act, 1910)	New Forest Policy being drafted. Details unknown.
MALAWI	Central Forests Local Forests	Forest Reserves Village Forest Areas (Forestry Act, 1997)
MOZAMBIQUE	National Parks National Reserves	National Parks National Reserves Areas of Historical & Cultural Value (Forest & Wildlife Act, 1999)
ZAMBIA	National Forests Local Forests (Forests Act, 1973)	National Forests Local Forests Joint Forest Management Areas (Forest Act, 1999)
ZIMBABWE		Demarcated Forests Nature Reserves Private Protected Forests (Forest Act, Cap. 19:05)

TABLE 5.3: POTENTIAL & MECHANISM FOR
HOLDING FORESTS AS COMMON PROPERTY

	POTENTIAL & MECHANISMS AS PROVIDED IN NEW LAND & FOREST LAWS
Uganda	STRONG Land Law: customary rights guaranteed (Constitution, 1995) and registrable entitlements provided for include community-based landholding. Also provision for Communal Land Associations to hold and manage properties like local forests and under any tenure regime (freehold, mailo, customary). Forest Law: draft suggests Communal Land Associations will be used.
Tanzania	STRONG Land law: customary rights guaranteed in law (1999) and commons in village land to be registered as common property in Village Registers. The Customary Right of Occupancy is a registrable form of entitlement available to one, two or more persons, groups, communities, villages etc. Granted Rights of Occupancy from Government land may also be held by legal groups of persons. Forest Law: recognises the above and also Village Councils as potential owners.
Zanzibar	MEDIUM Land Law: makes it clear that property may be held jointly and in common and refers to 'communal interest' (Land Tenure Act 1992 s. 16-18) and Registered Land Act provides for creation of a Trust where ten or more joint interest holders. Forest Law: Community Forest Management Areas have no tenurial implication.
Kenya	MEDIUM Only form for group holding was in a now-suspended law and for pastoralists (Land (Group Representatives) Act). Forest Law: Bill provides for Forest Associations as legal persons.
Eritrea	WEAK Land Law: No provisions in No. 58/1994, No. 95/1997 for community-based entitlement. Land use plans will identify commons but these will not be registrable. ed. Forest Law: no data
Ethiopia	WEAK Land Law: No. 89/1997 makes 'Holding Right' for agricultural purposes only. Pasture, forests etc. will be set aside as commons without construct as owned land. Forest Law: weak, no provision.
Malawi	WEAK Land Law: currently only informal constructs although Draft Policy is for a statutory commonhold form to be introduced. Forest Law: Weak. Village Committees are not legal persons although can have their rules approved, and not a tenure construct.
Zambia	WEAK Land Law: no provision for group registrable tenure. Forest Law: no construct provided.
Zimbabwe	WEAK Land Law: no provision although proposed Policy 1998/99 advised a Customary Certificate of Title over shared lands and capacity to hold titles as groups. Forest Law: no constructs provided.
Namibia	WEAK Land Law: even aborted Communal Land Reform Bill did not provide constructs. Forest Law: proposed Management Authorities that do not root tenure, only management.
South Africa	MEDIUM Land Law: Communal Property Associations provide a construct for common ownership of land. Forest Law: no constructs identified.
Lesotho	MEDIUM Land Law: Informal customary mechanisms only. Forest Law: intends to root through existing village and cooperative structures.
Mozambique	STRONG Land Law: emphasises right to be tenured in common and provides Certificate. Forest Law: weak, no constructs provided.

TABLE 5.4: ATTENTION TO FORESTS IN NATIONAL LAND POLICIES

COUNTRY	PROVISIONS DIRECTLY RELATING TO FORESTS
Uganda	No land policy but <i>Constitution, 1995</i> provides basic policy, Chapter XV which includes one article on environment (245) and under land declares that forest reserves will be held by Government or a local government in trust for the people (article 237 (2)).
Tanzania	<i>National Land Policy, 1995</i> Not directly covered, despite attention given to wildlife areas, wetlands, coasts, islands (7.4), agricultural and rangeland land use management (7.2, 7.3). Forests included under sensitive areas for which protective mechanisms to be developed (4.2.9), which developed into the law as the class of Reserved Land including a new category of Hazard land (Land Act, 1999). Significantly, one policy statement that no part of sensitive land should be allocated to individuals was followed into law, where provision is fully made for individuals, groups, communities to hold forests.
Zambia	<i>Draft National Land Policy, 1998</i> Not covered directly or indirectly.
Swaziland	<i>Draft National Land Policy, 1999</i> Not covered. However, land policy formulation designated Level One Policy with 12 other policies concurrently being developed with the objective to make them consistent and integral to the National Development Strategy. Forestry Policy designated a Level Three Policy, under Rural Land Policy (Level Two).
Namibia	<i>National Land Policy, 1998</i> Not covered.
Malawi	<i>Report of Presidential Commission of Inquiry on Land Policy Reform, 1999</i> Environmental concerns prominent with strong recommendation that new land policy be fully integrated into development policy specifically including obligations under international environmental treaties and with overall orientation towards ecologically balanced use of land and land-based resources (Ch. 8). A goal of the proposed new basic land law specified as defining the framework for sectoral management of land development, including forests (8.4.2).
Zimbabwe	<i>National Land Policy Framework Paper, 1998 & Summary Document, 1999</i> Framework Paper singles out tenure & administration of forest areas held by Forestry Commission and National Parks Authority as a source of conflict which new land policy must resolve (4.3.1.2), and with conflicts also between Rural District Councils and communities as to use of woodland, to be resolved through devolving ownership of these lands to communities (Village Assemblies).
South Africa	<i>National Land Policy, 1997</i> Does not directly cover forest issues.

TABLE 5.5: PROVISION OF NEW/DRAFT FOREST LAW FOR
COMMUNITY INVOLVEMENT IN THE MANAGEMENT OF FORESTS

COUNTRY	CENTRAL & LOCAL GOVERNMENT FOREST RESERVES		OTHER FORESTS (Village, Community, Open Areas, Unreserved lands)	
	PROVISION FOR AUTOMOUS MANAGEMENT BY COMMUNITY	And/or PROVISION FOR SOME IN- VOLVEMENT	PROVISION FOR AUTONOMOUS MANAGEMENT BY COMMUNITY	And/or PROVISION FOR SOME INVOLVEMENT
TANZANIA	YES	YES	YES	YES
ZANZIBAR	YES	YES	YES	YES
UGANDA	NO	YES	YES	YES
KENYA	POSSIBLE	YES	NO	NO
ETHIOPIA <i>(Draft Policy)</i>	NO	YES	YES	YES
ZAMBIA	One class of Forests only (Local Forests)	Local Forests only	NO	YES
MALAWI	NO	YES	YES	YES
MOZAMBIQUE	YES	YES	YES	YES
ZIMBABWE	NO	YES	NO	YES
BOTSWANA	NO	YES	NO	NO
SOUTH AFRICA	YES	YES	YES	YES
LESOTHO	YES	YES	YES	YES
NAMIBIA	NO	YES	YES	YES

**TABLE 5.6: INTENDED LOCAL LEVEL AGENCIES FOR
COMMUNITY INVOLVEMENT, THEIR LOCATION AND THEIR POWERS**

COUNTRY	AGENCY AT LOCAL LEVEL INTENDED TO FOCUS CIFM	LEVEL AT WHICH OCCURS	ASSESSMENT OF POWERS
Uganda)	Communal Land Association Parish Council Village Council	Most local level of community	HIGH POTENTIAL: CLA may regulate own property Councils may make a minor form of by-laws but little use of this facility yet and real potential for authority and adherence untested.
Tanzania	Village Council (legal persons) Village Forest Management Committee Group Committees	Most local level of community	HIGH POTENTIAL: Includes power to make By-Laws and virtually all regulatory functions associated with forest management and use (apprehension and fining of offenders, issue of permits & licences, etc.) Tested and shown to be effective.
Zanzibar	Community Forest Management Group	Community	HIGH POTENTIAL: Includes powers to regulate, enforce, issue permits, collect fees, fines, etc. May be designated as Enforcement Officer. Only beginning to be tested.
Kenya	Forest Associations	Forest-local within 5 km; could be individual agency, need not necessarily be village-based or involve all adjacent communities t	MEDIUM POTENTIAL: Unlikely to be given policing, licensing or fining powers. Not finalised and not tested. Extension of right to form associations in relating to non-reserved forests, and clearer allocation of powers by forest law, desirable changes to current draft Forests Bill
Zambia	Joint Forest Management Committee	Likely to involve a number of communities and dominated by Government, tribal and other representatives	LOW POTENTIAL: May raise revenue but no provision to take on licensing powers or fining offenders.
Ethiopia <i>(as per draft Policy only)</i>	Joint Forest Management Committees	Likely to involve state and local partners	MEDIUM POTENTIAL: Current initiatives suggest dominance of state partner in real decision-making.
Malawi	Village Natural Resource Management Committees	Most local level of community	MEDIUM POTENTIAL: Management powers derive from Ministerial regulation and the authority of rules made by Co. weak.
South Africa	Communal Property Associations Community Trusts	Could be most local level of community but could be at any other level	HIGH POTENTIAL: Unknown in practice how potential authority will be applied.
Namibia	Management Authority	Need not necessarily involve communities as actors.	MEDIUM POTENTIAL: This will be realised through designating a person as honorary forester to hold powers. Actual community powers weak and not being developed through forest law. Headman holds some powers but not necessarily in representative or democratic ways. Village Forest Committee likely to have only advisory and consultative role.
Lesotho	Village Councils Managed Area Resource Committee Co-operatives	Most local level of community	MEDIUM POTENTIAL: In principle; not clear that either avenues being used and capacity to regulate, issue permits, enforce decisions legally ambivalent.

2 THE IMPACT OF NEW LAND LAW ON COMMUNITY FOREST RIGHTS

The main concern of this study has been to examine the role of land relations upon community roles in forest future and, at the risk of some repetition; concluding comments on this are made here.

The centrality of tenure in forest management

The argument focusing the study has remained constant throughout: an argument which holds that ownership of forest land is the ultimate stakeholding upon which any agency including a community may found its interests in the forest. There may be no doubt that the way in which the state and its laws recognise land rights and the regimes which sustain them, is a main determinant in the extent to which local communities have been able to own forest lands in the past and the extent to which they may be able to do so in the future.

The argument of this study has been that land relations also determine the wider relationship of the state with people, such as in the way in which a community may be involved in management of the resource. Without exception, the greater local forest tenure security is, the greater the authority the community will have in the relationship. CIFM that avoids or ignores issues of tenure as informally or formally existing is forced to found the relationship upon grounds that may be unstable, un-lasting and remote from the more fundamental stakeholding interests of the community.

Over most of the last century, the founding tenurial relationship of forests and communities has been stressed to say the least. Recognition that communities may even possess tenurial interest in forest land has been slight, and existed usually only in default of more powerful interests acting to secure the forest for themselves.

The most powerful of these forces we have seen is the state itself, steadily securing forests to its own tenure and jurisdiction. Its interest has been economic and political; the latter founded upon a notion that as the national authority, it alone is the appropriate guardian of these assets. The failure to give customary, community-derived, and especially *common land rights* a place in state law has helped prevent the emergence of alternative options. The dominance of tenure ideology and paradigms towards individualised landholding has exaggerated the case.

The democratisation of property rights

Now however, we are seeing a change in centrist command and control strategies and which present unexpected opportunities for a quite different approach to state-people relations in general, including forest future. Moreover this is a shift which locates citizens, and in this case, forest-adjacent communities, as central actors. This signals substantial improvement in the fortune of local people, and hopefully in the future of forests also.

Factors driving and realising this change from land relations are proving quite precise. The most critical, we have found are two: *first*, the changing status of *customary tenure*, and *second*, as a function of the first, new cognisance of the time-old capacity of African tenure regimes to provide for property *to be held in common*.

The implications are proving enormous. So far this has been most dramatically seen in law in the case of **Uganda**. There, recognition of customary rights as fully legitimate in the eyes of national law was inseparable from the equally dramatic democratisation of the land ownership from state to people. In a nation where the majority of inhabitants were no more than tenants of state on public land, democratisation would have had little meaning, had not the customary land ownership of these tenants been recognised at the same time. Without it, the transformation in property relations would have been symbolic, rather than instrumental in the revolutionary alteration in rights.

Whilst it is difficult to not recognise customary tenure as a legal way to hold land where primary state title is relinquished, it is, conversely, quite possible for customary rights or interests in land to be recognised, without recognising that they also own the land itself. This has been the case in **Mozambique** and **Tanzania**, which have made customary tenure a legal way to hold interests in land, including in perpetuity in much the same way as freehold rights are held. These two states, and Tanzania in particular, have been important examples throughout this study for both have advanced CIFM in important ways, including those which directly relate tenure issues to community roles and jurisdiction in forest future.

The trend towards new recognition of customary land rights has been shown as still new and limited. Abolition of customary rights has been effected in some states (Eritrea, Ethiopia) and the capacity to secure rights only through freehold/leasehold/granted regimes is provided elsewhere (Namibia, Zambia, Kenya, Zanzibar, Rwanda, South Africa). Botswana provides an exception in that certain classes of customary rights were made registrable forms as long ago as 1968.

Particularly in places where the right to convert customary rights to modern European forms is limited, or rendered limited through absence of appropriate machinery, millions of citizens remain technically landless. This is the case in respect of inhabitants of communal lands in **Malawi, Zimbabwe, Namibia** and **South Africa**. The risk of land loss by the hand of the state is most pronounced in these areas.

The modernisation of customary tenure

A number of important corollaries to recognition of customary rights have been explored. First, includes the fact that once customary rights are made justiciable private rights, then provision has to be made for their administration. This has encouraged devolution of tenure regulation, even to the village level in some states (**Uganda, Tanzania**). This development reinforces devolutionary management and control over local natural resources.

Second, has been the fact that more often than not, what is being recognised is less customary tenure in its traditional forms than **community-based tenure**, which may or may not build substantially upon past norms and practices. Added to this transformation has been the subjugation of customary tenure to national norms as established in ever-more rigorous ways in supreme constitutional law, and which may significantly alter yet further, just what is defined as customary. Women have been identified as the major potential beneficiaries of this modernisation.

It has been remarked that the functions of traditional authorities in this development are also reshaped and in general, undermined. In those cases where adherence to such authority is unwanted, in conflict or demise, this may represent a useful liberation of informal property regimes from tribal authority, and ultimately another thrust towards modernisation of African regimes of landholding.

The modernisation of common property rights

Of main interest of course to the subject of this study has been the equally profound transformation which recognition of customary land tenure has upon communal tenure. Common property resources are the tangible output of communal tenure, lands that are owned by not one person or one household but by a group of people. Swamps, forests, woodlands, water sources, mountains, wildlife range and pastures are typical common properties in Africa.

What has been shown is that recognition of customary tenure allows for such common rights to be perceived and registered as **private group rights**. The implications are enormous; common property interests gain security of tenure and endow new stability upon common property resources like forests.

Commonhold as a new state law tenure form

This transformation alone has given rise to a whole new form of statutory tenure in some states, and one which may well compete with individual-centred regimes in those areas where land resources are appropriately held in common. The forms of this commonhold tenure have been identified as various, such as available through simple certification or through more formal tenure associations. Of such forces, customary tenure is being further re-made. State law recognition of customary rights in land and customary tenure as a legal regime through which land may be acquired, held and transferred, is by no means quite the model met even fifty years past.

3 COMMUNITIES AS FOREST MANAGERS

If the changes identified in this volume as a virtual wave of forest reform in the region are still cautious and ambivalent towards the idea of communities owning forests, it is proving more wholeheartedly in support of their participation in the *management* of forests.

Communities managing government forests

However, this is again, mainly in respect of the 'lesser', undeclared forest resource. When it comes to forests important enough to have already been co-opted as government forest reserves, community participation is more erratically posed in the new policies and laws (TABLE 5.5).

In general, **Tanzania** is positioned at one extreme in this respect, and **Zambia** at the other. A clear opportunity to *autonomously manage* a government forest is provided in Tanzania's proposed legislation and the already enacted laws of **Zanzibar, Lesotho, and South Africa**. A slighter possibility towards the same is provided in **Mozambique** where communities are among those to whom the state may delegate its management functions and powers, more likely to be realised in co-management arrangements. A similar conjunction may emerge in Uganda's final draft Forestry Bill.

The intention to encourage local community *involvement* in government's management regimes for reserves is provided in the full range of new forestry laws. Even here there is diversity as to the actual role of the community intended, and the range of forests where policy and law allows them to be involved.

In **Zambia**, for example, community involvement is restricted to one class of government forest, Local Forests, and their involvement as but one party in an otherwise Government-dominated Joint Management Committee. Elsewhere community involvement is more definitively posed in terms of state-people partnership but with diversity in the real powers likely to be devolved to the community partner.

In a growing number of cases, the community could at least in theory be awarded powers available to officials as honorary foresters or through direct permission as set out in joint management agreements to fulfil such functions. This is legally possible in the new forest legislation of **Lesotho, Zanzibar, South Africa**, and in the draft forest laws of **Kenya, Tanzania, Uganda** and **Namibia**. Enacted or draft policies and laws in Ethiopia and Malawi suggest a more limited role for communities, as agents of the state's management regime.

Communities managing their own forests

Nor, we have found, may autonomous community-based management be assumed in respect of those forests which communities themselves create and manage. The creation of Community Forests in the first instance is effected by Directors or Ministers in Namibia, Zanzibar and Mozambique, and less rigorously so in respect of Malawi's village management areas

Approved management plans and joint management agreements are the common constructs upon and through which a community forest might be declared. In contrast in Tanzania, it will be possible for communities to simply declare the forest themselves through district-based registration and to be assured of the right to determine its access, regulation and management more or less autonomously.

Whilst in all new Forest Acts, an implicit shift is indicated in the function of government foresters from policeman and controllers to technical advisers and environmental watchdogs, this is most tangibly made the case in the proposed Tanzania law.

The influence of new practice

On the whole, differences in the way in which new policies and laws pose communities in forest future, correlate positively with the manner of involvement underway in pilot initiatives. That is, where initiatives involve forest-local people as mainly beneficiaries of forest management or as co-operating users, so too does the law now (broadly) make provisions along these lines. Where communities are involved in forest management as managers, so too are new forest laws, providing a legal foundation for this to be sustained.

The current approach to CIFM was reviewed in Chapter One. It was found, that most states (and southern Africa states especially) launched community involvement mainly in product-centred terms, thereby introducing communities more into the realm of forest benefit than forest management per se. Arguably, it is only in Tanzania where devolution of controlling authority over the forest characterised CIFM from the outset.

Movement towards more power-sharing approaches has however been observed. This shift is reflected in the terms of new forestry laws. Still, in many states, community roles remain in policy and law largely shaped around functions of supervising local use of forests and distributing benefits, in estates which are otherwise owned and controlled by government.

This could not contrast more strongly with the way in which the enacted **Lesotho** and **Zanzibar** laws and especially the proposed forest law of **Tanzania** pose community involvement in forest management. The issues of concern there are set out as issues of authority; the task of Village Forest Management Committees is to manage, to make plans, make decisions, make rules, enforce those rules, exercise protection, issue permits, restrict access, deal with offenders, and to devise and implement forest developments.

Questions as to if and how the forest will be accessed and used, and its products shared, and through which arrangement, are but one of the tasks of management and more importantly, proceed only from establishment of community-based management authority. Therefore these laws list the definition of forest use rights as but one of the 'rights and duties of villagers' to address.

In this, the government forester acts as technical adviser, and monitor of progress, and with powers to intervene in the event of clear failures. In such a paradigm CIFM represents state involvement in community-based management, not community involvement in state forest management.

4 THE POSITION OF COMMUNITY IN RESOURCE GOVERNANCE

It has been established that there is good deal of potential for local people to manage forests, even in circumstances where their right to own valuable forest is still to be limited.

But how, it was asked at the beginning of Part Two, are these communities to root their management regimes in ways which make their decisions, rules and operations enforceable?

What has emerged in these chapters is that a prime determinant for community management is in the nature of the community itself; more precisely, in *first*, the extent to which the community has identifiable social boundaries, *second*, has formal institutional form, and *third*, powers of regulation at its disposal. For if there is one essential to working community-based forest management, it is for communities to be able to determine who may access the forest and to be able to exclude those whom it determines should not have access, or at least not free and unregulated access.

For this to be workable, the rules must have weight beyond those which customarily or for modern social reasons, members of the community feel obligated to adhere. In short, the forest managing community must possess the power to manage and to enforce in ways that are also binding upon foresters themselves. Moreover, should such outsiders to the community fail to adhere to these rules, the community must be able to bring them to punish them appropriately. If the offender should fail to agree to the punishment or to pay the fine, then again, the community needs the power to bring this failure to court. The court itself needs to be able to rule on the basis of clear rules.

All the above are automatically assumed powers of government forest managers, and for communities to operate successfully as forest managers, they too need these powers. It is in precisely the extent to which new forest laws are or are not permitting such powers to accrue to forest-local communities, that most marked differences are being seen within the region.

Again, these accord largely with the position policy-makers are taking as to the role of communities in forest management in the first place as outlined above. However the vision the state holds as to the potential role of local citizens is strongly influenced by its current roles and position in the management of society. In short, the more strongly community is socio-legally defined, the more strongly it is being developed and supported in new forest law as a forest custodian and manager. The weaker the institutional identity of community, the more likely it will be involved as a beneficiary and forest user, *co-operating with* forest management, endowed with minimal decision-making and management enforcement powers.

TABLE 5.6 above summarised the bodies identified in the previous chapter as the planned agencies of CIFM. Most are new associations, having to be devised in situations where there is a vacuum of local level organisation and recognised roles in politico-administrative hierarchies. It will be recalled that a corollary trend is evident in tenure administration.

Empowering communities to govern

The outstanding case in both areas is **Tanzania**, where the village community is being posed as both *land manager* and now as *forest land manager*. Many comments have been made in this study as to the unusually high level of socio-spatial cohesion and institutional formation at the community level in Tanzania, and the unusual capacity these village communities possess to regulate themselves and their local resources; a capacity they gain through being able to elect their own governments. This is no informal or traditional Village Development Committee but a formal executive and legislative entity, with powers clearly set out in local governance law.

There is no doubt in the minds of Tanzanian foresters that the existence of village governance has been the critical factor in the rapid development of community-based forest management (CBFM) in their country in recent years. In short, when needed, a viable socio-legal and institutional community form was already in place and able to be used (and in the process revived and improved in many cases).

So also, may there be no doubt that without the existence of village government in Tanzania, any attempt to devolve tenure management and control to the grassroots would also have been eschewed.

It may be safely concluded that the extent of local government development lies behind the extent to which community has socio-institutional and legal form. Local government reform in most countries in the region is moving very slowly towards involving the community level in its sights. For most of the twentieth century, local government meant district or county councils, borne out of the construct of colonial native authorities. While these structures consult and link often with traditional authorities, real representation is rarely found below the district level.

This is now changing. **Eritrea's** new administrative law looks to village assemblies and **Ethiopia** is refining its post-revolution construct of peasant associations, both likely to evolve into formal grassroot organs of governance. **Uganda** adopted a new local government law in 1997 which makes provision for Sub-County Councils, if less development at the village or parish level where councils play a support role. **Swaziland** and **Zimbabwe** contemplate land policies that could lead directly to new governance formation at the grassroots.

In those countries where there is minor institutional and socio-legal development at the grassroots, its absence is felt strongly in the paradigms for community involvement. Councils, Committees and Associations arise out of this lacuna, together with the extension to more local persons than in the past, of the long-standing facility of distributing power through designating selected persons as Honorary Foresters.

The results are less than satisfactory. Recorded earlier was the frustration experienced by village actors in **Malawi, Zimbabwe, Zambia** and **Mozambique** in circumstances where they cannot enforce rules or be granted the powers in the first place to genuinely manage. Of such constraints, uneasy co-management arrangements are being born, new institutions created or complex arrangements being pursued. It is hardly surprising that in these countries the words 'participate' and 'be consulted' are more common in new forest laws than 'be mandated to', or 'may do'.

What these constructions do represent however is the clear beginnings of frameworks through which community identity may evolve, breaking new ground in this area. More development towards this can only accrue.

In conclusion, there may be no doubt that there is a revolution of sorts underway in the region in the part ordinary citizens may play in their society, including the remote rural poor. In forestry the change may be illustrated by the fact observed earlier that a mere ten years past, a study such as this would have examined forest strategies for the *extent of access* to the forest they granted local people. The state's generosity could have been safely measured in the comparative number of bundles or fuelwood headloads permitted.

At the opening of the 21st century, these documents have been examined for the extent to which they grant these same local people the opportunity to own the forests themselves and regulate their access. Of such changes, state-people relations are undergoing sharp change and steps towards democratisation being realised in the most practical of ways. Over time a silent social transformation of sorts may accumulate. In the process, community itself will gain in identity and force. With hindsight it may well be remarked, that turn-of-the-century efforts to more seriously involve communities in forest future, played a small but significant role in the wider democratisation of society.

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ANNEX A: Summary of Content of Four New Forests Laws

BOX ONE
MAIN PROVISIONS OF THE FORESTS ACT, 1999
ZAMBIA

1. Creates the **ZAMBIA FORESTRY COMMISSION**, to advise Government, control, manage and conserve forests, to be headed by a Director-General. This will be a corporate body and will take over functions currently held by the Forest Department
2. Provides for creation and revocation of **NATIONAL FORESTS** and **LOCAL FORESTS**.
3. Allows the Minister to declare any part of a Local Forest, forest plantation or open area, to be a **JOINT FOREST MANAGEMENT AREA**, with the consent of the local community.
4. A Joint Forest Management Area will be managed by a **FOREST MANAGEMENT COMMITTEE** comprising of representatives of the Chief, Commission, villagers [3 persons], local authority, licenses, Department of Agriculture, Water, Lands and Fisheries, and Wildlife Authority.
5. All National, Local and Joint Forest Management Areas will be subject to **MANAGEMENT PLANS**.
6. Restricts charcoal production in all areas [State and Customary Lands].
7. Provides for licensing.
8. Regulates import and export of forest produce.
9. Provides for timber marking.
10. Sets out powers of forest officers.
11. Describes offences, penalties and forfeitures.
12. Give Minister power to regulate on 17 matters.

BOX TWO
MAIN PROVISIONS OF THE FORESTRY ACT, 1997
MALAWI

1. Sets out 12 purposes of the act which include promotion of community involvement in the conservation of trees and forests in reserved and other areas.
2. Confirms role of the Director of Forestry but establishes **FORESTRY MANAGEMENT BOARD** to include non-government representation.
3. Provides for the continued declaration of **FOREST RESERVES** out of public land and through acquisition of private land.
4. Provides for declaration of **PROTECTED FOREST AREAS** beyond reserves.
5. Promotes participatory forestry on customary land, including demarcation of **VILLAGE FOREST AREAS**. Director may enter agreement with the management authority of the Village Forest Area,
6. Minister may make **RULES** to apply to Village Forest Areas and other customary land areas.
7. Local **VILLAGE NATURAL RESOURCE MANAGEMENT COMMITTEES** may make rules to be approved by the Minister.
8. Provides for direction as to tree growing by Minister.
9. Proscribes setting of fires, and provides for declaration of **FIRE PROTECTION AREAS**.
10. Provides for licensing and sustainable use of forest land in all land areas.
11. Restrict export and importation of forest produce.
12. Establishes a **FOREST DEVELOPMENT AND MANAGEMENT FUND**.
13. Defines offences and penalties.
14. Provides for cross-border forest management agreements and management plans.

BOX THREE
MAIN PROVISIONS OF THE FORESTRY ACT, 1999
LESOTHO

1. Provides for **PRIVATE TREE TENURE**; those planted on private land are vested in the planter. Trees which are not planted – i.e. natural – are vested in the State but the Minister may transfer their ownership to individuals, communities, organizations or co-operatives as he may deem fit.
2. Provides for duties of the **CHIEF FORESTRY OFFICER**.
3. Redesignates Forest Fund as **FORESTRY FUND**, to be controlled by Principal Secretary.
4. Chief Forestry Officer to prepare a **FORESTRY SECTOR PLAN** to guide management.
5. Existing **FOREST RESERVES** to be managed by Chief Forestry Officer who may advise Minister to transfer ownership, management and control of any forest reserve to individuals, groups of individuals, communities, organisations or co-operatives, through written agreement that shall be binding on both parties.
6. All existing 'liremo' forests (traditional natural forest patches) and forests created by 'matsama' (self-help) shall be reclassified as **COMMUNITY FORESTS**.
7. A Local Authority may establish a Forest Reserve.
8. All forest reserves will be subject to **FOREST MANAGEMENT PLANS**.
9. The Chief Forestry Officer may enter **AGREEMENTS** with holders of land for the management of a **PRIVATE FOREST, COMMUNITY FOREST** or **COOPERATIVE FOREST**.
10. Forest enterprises owned or run by government may be transfers to individuals, groups, communities, organisations, co-operatives.
11. The Chief Forestry Officer may issue licences subject to the Forest Management Plan.
12. Acts causing fire illegal.
13. Procedures for handling offences, penalties, and compounding indicated.
14. Chief Forestry Officer obliged to educate and advise on forestry matters.
15. Minister able to regulate on 14 listed matters.

BOX FOUR
MAIN PROVISIONS OF THE FOREST & WILDLIFE ACT, 1999
MOZAMBIQUE

1. Sets out nine principles upon which the law operates, including that forests and wildlife are state property, and an objective is that conservation, management and utilisation of forests be promoted without contradicting local customary practices.
2. Provides for division of forests into conservation, production and multiple-use classes. Protection areas divided into **NATIONAL PARKS, NATIONAL RESERVES** and **AREAS OF HISTORICAL AND CULTURAL VALUE**.
3. **AREAS OF HISTORICAL AND CULTURAL VALUE** will be set aside on the basis of religious, cultural or historical use and interest. Use will be only according to the customary practices and norms of the local communities.
4. Promotes private sector involvement in the exploitation, management and conservation of forest and wildlife resources.
5. Exploitation of forests will be by way of a simple permit or a forest concession contract, the former reserved for communities and national operators who are citizens.
6. Concessions, available to all persons, will be limited to 50 years duration. Granting of concession areas will be preceded by local consultation in the area, and operations must provide unimpeded access into the area being exploited by local communities *for subsistence use*.
7. Species which may be used for fuelwood and charcoal production are to be listed in a decree.
8. Communities may be issued simple hunting permits. Sports hunting may be carried out in designated areas and ranches and commercial hunting in game ranches.
9. Restocking of forests and wildlife to be encouraged.
10. Management of resources to be through **LOCAL RESOURCE MANAGEMENT COUNCILS**, to be defined through a decree, and including a function to ensure local community participation in the exploitation of forest and wildlife resources and a share in the benefits generated.
11. Provides for delegation of management powers to local communities, associations or the private sector.
12. Local communities to be exempt from paying fees for using forest and wildlife resources in their local areas.
13. Inspection given an important role in the law, with community agents included as a mechanism with forest and wildlife guards, and 'sworn-in' guards. Fines for offences listed in the law.

ANNEX B: Examples of Community Involvement in Forest Management in Eastern & Southern Africa

BOX ONE JOINT FOREST MANAGEMENT OF MAFUNGABUSI IN ZIMBABWE

The **Mafungabusi Resource Sharing Project** centres on the Mafungabusi Forest Reserve [82,000 ha], one of 21 Forest Reserves in Zimbabwe. The Forest is owned by the Forestry Commission. The project arose as a pilot project to resolve conflicts among the community, the local Gokwe Rural District Council and the Forestry Commission. It is described as joint management and involves communities in the management of resource-sharing.

The project was launched with a PRA, workshops and negotiation process, in which forest activities were agreed. The Reserve was zoned into a Core Area, reserved for wildlife, a Buffer Zone, where grazing is permitted, and a Transition Zone, where certain harvesting activities are carried out.

Resource Management Committees [RMC] were formed to manage different forest-use projects: beekeeping, grass cutting, wild food collection, grazing and wildlife management. These five-person Committees are sub-committees of local Village Development Committees (VIDCO). Each is responsible for overseeing an activity in the forest. The RMC charges five Zimbabwean dollars for two bundles of grass cut and collected Z\$ 7,620 in 1996 [against the \$17,674 collected by the Forestry Commission for timber harvesting by concessionaires].

Sources of information: Zimbabwe Forestry Commission, 1997; Vudzijena, 1998,

BOX TWO
THE MWANZA PROJECT
IN MALAWI

The SADC-funded **Sustainable Management of Indigenous Forest Project** operates in five villages in **Mwanza District**, in southern Malawi and is executed by the Wildlife Society of Malawi.

The project embraces an area of 6,154 ha **of which half is forested (3,016 ha)**. It aims to reduce deforestation through community empowerment, the control of illegal timber and fuelwood/charcoal, trading, to support and regulate trade in non-timber products. The project began with a PRA in 1996, fielded an awareness raising campaign on environmental issues, and carried out leadership training, helped communities develop rules for natural resource management, and to develop land use plans and forest management plans.

Project activities include management of natural resources and woodlots, farms and other areas; encouragement of natural regeneration of indigenous trees and shrubs, and restocking through tree planting including fruit trees. This operates at the household level with **Individual Forest Areas** being established, at the village level, with establishment of **Village Forest Areas** at an institutional level [churches, schools].

Off-farm income generating activities are also being supported, with 22 beekeeping clubs established, 25 guinea fowl clubs, indigenous fruit processing, bamboo furniture making, and fire briquette production.

Mauambeta notes the main problem facing villagers to be their lack of authority to confiscate and dispose of forest products obtained illegally. Writing a year later, Dubois & Luwore observe that such rules were eventually approved by the Minister but these appear to be limited.

Source of information: D. Mauambeta 2000, Dubois & Luwore 2000.

BOX THREE
AN OVERVIEW OF COMMUNITY INVOLVEMENT PROJECTS
IN MOZAMBIQUE

Tchuma Tchato ['Our Wealth'] was one of the first Community Based Natural Resource Management [CBNRM] Programmes established in Mozambique [1994]. It covers 200,000 ha of mainly mopane forest, along the banks of the Zambezi River close to the borders of Zimbabwe and Zambia. The area was one of several areas given out to safari operators as a concession in 1993.

Community involvement arose as a result of conflicts between the private operator, the local Government and the local community. Action was taken by the Provincial Services of Forests and Wildlife with IUCN, IRDC and Ford Foundation financial support. Resolution was through **agreement** to share the taxes collected by the state on private safari operations; 33% goes to the local communities; 32% to the local Governments, and the remaining 35% goes into the national tax system [1995 Interministerial Diploma]. The funds for the community are received by **Community Natural Resource Management Committees**, established as part of the programme. In 1998 the communities received the equivalent of US\$ 11,650. This was used to improve community facilities such as establishing maize grinding mills. Received monies were also used to support 'community scouts'.

Tchuma Tchato was inspired by the Zimbabwean CAMPFIRE programme. By early 1999 the project had received around US\$ 400,000 to support it. A similar second development has been launched in the **600,000ha Daque** area further south in the Zambezi Basin.

Filimao et al. 1999 comment that: *'Probably the main outcome is the Community Committees which allow for a dialogue between the three parties: the private operator, the Government and the peasants. These CBOs are emerging as the bodies which will guarantee an equitable and sustainable use of natural resources'*. They note the main challenges being to decide how to maintain the Provincial CBNRM Unit without external support, how to enforce community ownership of the resources and how to attract more environmentally and socially sensitive private investors to the zone. Negrao (1999a) offers a more sanguine critique, pointing out that the entire idea is dependent upon the level of tourists, already shown to be erratic, and notes that the development has not promoted income-generating activities outside the tourist-dependent sector.

Other CBNRM projects in Mozambique include –

- Another **tourist concession development**, given to a company which then involved smallholders in the area as shareholders, who together hold five percent of the value and receive a return accordingly. The area includes the Elephant Reserve. Negrao [1999a] finds this project problematic and lacking in transparency;
- The **Mecula Reserve project close to Lake Malawi**, developed by a private company, [MADAL], which has divided its concession area between private safari operators and the local community. The latter is referred to as a 'partner', and receives a portion of income from tourist revenue;
- A **buffer zone development next to Gorongosa Reserve** in the central Sofala Province, funded by the African Development Bank but directly administered by government. This project provides credit to the communities for development, through a revolving fund scheme, and is not dependent upon local tourist revenue;

Continued ...

- The ***Licuat*** project, financed by the World Bank, ***still in its research phase***, designed to involve the communities in land use planning and to develop resource-based revenue from the forest or from the buffer area, from both agricultural development and eco-tourism;
- The ***Zambezi River Delta Project*** in the Marromeu Reserve, funded by IUCN, and designed to again involve tourist operators to generate revenue for local people;
- ***Chipanje Chetu*** Project, North Sanga District towards community-based resource management [see following box].
- The ***Support for Community Forestry and Wildlife Management Project***, a FAO/Netherlands/Mozambique project, concentrating upon an unreserved humid woodland of 12,000 ha [Narini] and Mecuburi Forest Reserve [195,000 ha] in Nampula Province and two smaller unreserved miombo areas in Maputo Province [Namaacha and Magude]. See following boxes for details.

Sources of Information: Filimao et. al. 2000. Negrao 1998, 1999a, Mushove 2000, Anstey 2000, Foloma 2000.

BOX FOUR
COMPARING MZOLA IN ZIMBABWE
& MECUBURI IN MOZAMBIQUE

Mzola was proclaimed a state forest reserve according to Government Proclamation No. 44 of 1954. The forest covers about 68,000 ha and is situated towards the southern edge of the Zambezi escarpment in north-western Zimbabwe. The forest's main feature is a NE-SW plateau of aeolian deposits of Kalahari sands that stands at an average altitude of 1100 m. The forest vegetation is a transitional type between miombo and *Baikiaea*/mopane woodlands.

According to a census carried out in 1995 there were about 4,000 illegal residents in the forest area. Most of these people took advantage of the general state of lawlessness during the post-independence civil disturbances in Matabeleland to settle themselves in Mzola after the forestry authorities had withdrawn their presence for the same security reasons. Despite winning a court order to evict all the 'squatters', the Forestry Commission never managed to evict people especially during the 1995/96 general and presidential elections. There is no doubt that politicians played an appeasement game in order to capture all the votes they could from Sinamagonde Ward, represented, at that time, by a councillor illegally resident in Mzola forest reserve. The current situation in the forest is one of impasse: the forestry authorities have resumed a business-as-usual attitude as they issue commercial logging and grazing concessions to private companies, completely ignoring the physical presence of the forest dwellers. On their part, the forest dwellers also continue with a similar attitude and, in cases, they are actually consolidating their claims as shown by the construction of brick schools and houses.

About 1300 km NE of Mzola Forest is **Mecuburi Forest Reserve** in the mid-altitude plains of Mozambique's Nampula province. It was proclaimed a reserve in 1950 and covered 230600 ha. In 1967 about 35000 ha were de-gazetted, leaving the forest reserve with 195600 ha. Most of the forest area lies at an altitude between 300 and 500 m. The most representative vegetation is humid miombo dominated by the genera *Brachystegia*, *Julbernardia* and *Uapaca*.

From the time of its proclamation as a forest reserve, Mecuburi has always been inhabited. However, the number of people living in the forest reserve increased significantly during the post-independence civil strife in Mozambique. A census carried out in May 1999 indicated that there were no less than 40,000 people living in the reserve area. This trend was made possible by the complete abandonment of the reserve on the part of the forestry authorities. The forest dwellers are organised at the local level according to ten *regulados* (kingdoms).

In both cases the central (political) authorities have demonstrated their unwillingness to forcibly remove the 'illegal' forest dwellers. On the other hand, the legislative instruments that should be used by the technical, field officials fall short of providing effective tools for the implementation of sustainable and collaborative forest and wildlife management initiatives involving not only the resident communities but their neighbours, who also depend on the same forest resources.

In both cases, the way forward should be a humble approach that starts with building up mutual trust with the resident and neighbouring communities. This can then be cemented by gradually introducing joint (state and communities) management of the resources taking into account the reproductive capacity of the resource base. Mecuburi Forest reserve is one of the pilot areas in which the Project FAO/Netherlands/Mozambique - *Support for Community Forestry and Wildlife Management* is trying out joint-management models for the conservation of that rich miombo woodland. In Mozambique's case, the recent legislative reform provides a conducive environment for such initiatives. No such environment exists in Zimbabwe yet.

By Patrick Mushove, FAO/Netherlands/Mozambique Project, *Support for Community Forestry and Wildlife Management*. March 2000.

BOX FIVE
A CASE FROM NORTHERN MOZAMBIQUE
THE NARINI WOODLAND

Narini is a miombo woodland covering 40% of a 12000-ha watershed drained by the Sanhote and Muerri streams in the mid coastal zone of Monapo District in Mozambique's northern province of Nampula. According to the Land Act (1997) and the Forest and Wildlife Act (1999) the local communities here exercise customary use rights over the land and its resources, but only for subsistence purposes. Residents from five *regulados* ("kingdoms"), namely, Cateia, Muroto, Morimone, Mpwata and Mripa depend on the woodland for most of their forest-based needs and for shifting agriculture. Part of the watershed straddles the district boundary between Monapo and Nacala-a-Velha districts, further complicating claims to the woodland.

Despite the provisions in the Forest and Wildlife Act, local unlicensed people engage in small-scale commercial logging of *Chlorophora excelsa*, *Milletia stuhlmannii* and *Azelia quanzensis* as well as charcoal production to satisfy the urban markets in nearby Monapo, Mozambique Island, Nacala Port and Nampula City. Middlemen with or without exploitation permits issued by the government authorities buy the primary products at the roadside (Nacala Corridor) for resale in towns.

The Project FAO/Netherlands/Mozambique *Support for Community Forestry and Wildlife Management* is working with voluntary interest groups from around Narini Forest with the following objectives:

- (a) streamlining the local institutional arrangements for better community-based natural resources management;
- (b) assisting in the legalisation of the local people's claim over the use and management of part of the Sanhote/Muerri watershed; and
- (c) assisting the local communities develop CBNRM.

The implementation of the project has been an uphill journey since mid 1997:

1. The disintegrated nature of local communities in the predominantly matrilineal and often polygamous society in northern Mozambique deals a significant blow on the finiteness of the 'local community' concept. A polygamous man in this society may have the wives scattered in two or more *regulados*. For planning purposes one is forced to define the household in function of the woman-headed "family" unit. The civil strife that ended in 1992 also caused much displacement of people and to this day many have not yet made up their minds as to which place they consider their definitive home.
2. While the new forest law 1999 should be commended for introducing, for the first time, the concept of local communities, it still has some way to go before practical definitions of the key concepts relevant to rural development practitioners on the ground are achieved.
3. Although the ultimate rationale behind the inclusion of "local communities" was to improve the peasants' standard of living, the articles dealing with the commercialisation of natural resources offer no preferential treatment to the peasants. Instead, these articles continue to favour the middlemen and the private sector who already have the capital required to obtain an exploitation permit. In other words, these articles "close their eyes" and pretend not to see the commercialisation of the same natural resources already being undertaken by the capital-deprived communities.
4. Regarding the legalisation of land use and management, the costs involved are too high for the peasants (about USD10000 is required by the Surveyor General's Department to demarcate and issue a formal title for the use and management of the 12000 ha of land). This leads to the conclusion that this process of legalisation is unsustainable as a strategy for encouraging peasant communities to manage natural resources under a secure tenure regime'.

By: Patrick Mushove, FAO/Netherlands/Mozambique Project, *Support for Community Forestry and Wildlife Management*, March 2000.

BOX SIX
CHIPANJE CHETU IN SANGU DISTRICT
MOZAMBIQUE

Chipanje Chetu is an IUCN supported project located in Sangu District, Niassa Province in north Mozambique, bordering Tanzania. This is a community-based natural resource management programme [CBNRM]. It began in 1998. IUCN was interested to support the programme given that it was a remote area where experimental options were possible, the population was small and local people had an interest to secure the woodland resources.

The area in which the project operates includes a small population of some 1,416 persons or 346 families spread among four settlements. Each settlement has a relatively distinct village area. The total area covers some 400,000 ha [400 sq. km].

The forest resources in the area are significant and include the high value timber species of *Dalbergia melanoxylon*, *Khaya nyasica* and *Azelia quanzensis*. Honey and wax production has commercial potential.

The project began with conventional participatory rural appraisal. Out of this arose the establishment of principles to guide the project which determined to assist the local population to secure the ownership of the natural resources within their respective village areas and to establish community-based management of these resources.

In important respects the project borrows from emerging CBFM experiences in Tanzania with its emphasis upon securing tenure rights at the local level and assisting the communities to create the socio-legal institutional basis needed in order to sustain community-based resource management. Similarly, the project adopts the maxim of Tanzanian CBFM of 'process, not programme'. Although there is no history and legal framework for communities to promulgate by-laws, the project has adopted this Tanzanian model. This is problematic, as local rules being made do not have legal backing.

Commenting on progress thus far, Anstey 2000 concludes that progress towards devolution is mixed.

'The rules or By-Laws evolved and now implemented by the Comites carry authority ... only to the extent that they are acceptable locally by the relevant communities and can be implemented by the Comites and community scouts. They have no formal state sanctioned legality – in fact many are illegal in state terms (the use of traditional firearms possession of which is illegal in itself, the confiscation of saws or nets for local use, the hunting of any animal or use of any fish or tree without a state issued licence, etc.). However they have the considerable advantage of having being developed locally'

'It is also worth noting that the rules developed by the Comites are probably more enabling, subtle, flexible and pragmatic than those evolved through a two-year process at the national state level (the new Forestry and Wildlife Law of 1999), embodying as they do advances concepts such as setting fines in relation to market value of the product; setting no limits to use where none is actively needed ...'

Anstey concludes that whilst the project is prompting devolution, it does not yet have support of politicians or administrations and this will be required to see local level jurisdiction embedded.

Source of information: Anstey 2000.

BOX SEVEN
THE CHINYUNYU PROJECT
IN ZAMBIA

The NORAD-funded **Chinyunyu Community Forestry Project** is situated in a rural area 100 km east of the capital, Lusaka.

The project began in 1990 following complaints to the Provincial Forestry Office of indiscriminate cutting of trees for charcoal production. Being in unreserved trust land the forest does not come under the direct aegis of the Forestry Department. Nevertheless, staff of this department began the project by working together with army, police and the Chief's Guards to 'flush out' illegal charcoal burners.

Groups under five **Conservation Committees** now regularly tour the areas to keep illegal immigrants and charcoal burners out. Licences for charcoal burning are now strictly controlled by the Chief. The project established a camp in Chinyunyu, a nursery and eight village nurseries to encourage on-farm planting. This is the main thrust of the project.

Direct community decision-making and control of the project is limited. Lukama notes that a continuing problem is the top-down directive approach of the 'assisting' Forestry Extension staff. The Chief sought help and Government is helping, but not through a community-based approach. It is mainly a relationship between the chief and the forestry department, not the community.

Lukama notes the absence of rules devised by the community or able to be upheld by them. Regulation is conducted through local government laws and most cases require the Forestry Department to bring them to the courts.

Source of Information: Lukama 2000.

BOX EIGHT
SUPPORTING LOCAL COMMERCIAL USE OF
WOODLAND IN ZAMBIA
THE MUZAMA INITIATIVE

Most of Northwestern Province is woodland of the intact miombo and Kalahari woodland types. Population is generally low. In 1980 a GTZ-supported project assisted traditional beekeepers in the province to create an international market for their honey and beeswax through the creation of the **North Western Bee Products Company**, and through issue of international certification of the organic quality of the honey. Critical support came from the certification of the soils of the area as excellent. The organic extractive operations were certified as sustainable through the issue of a Soil Certification from the Forest Stewardship Council. The area covered by this certification was 800,000 ha of woodland in Mufumbwe and Kabompo District,

Later, **Muzama Crafts Ltd** was established (1998) to support up to 60-70 pit-sawing groups and carpenters with markets, based on the same area and certification. Uchi Mukula Trust was established to support the initiative, and is the largest shareholder in both companies. The paramount chief and prince chair the trust.

All land in Zambia is held by the state unless alienated into leaseholds. Whilst the forested area in North Western Province is not reserved, the Forestry Department controls its access and the issue of licences to beekeepers, pit-sawer and carpenters was by FD through three year licences. On the expiry of these licences, the Forest Department did not renew them but issued commercial timber extraction licences to South African commercial interests. The FSC certification was withdrawn. Local livelihoods plummeted. The matter has reached contentious levels. The Director, Minister and now Vice-President have all received open letters from the Trust and local licensees, widely published internationally.

Management of the forests by local users or communities is not structured although each pit-sawing and beekeeping group operates in its harvesting in sustainable ways approved by the trust and crafts companies. Vague intentions of Muzama Crafts to help establish village-based forest management were truncated in 2000 by the problems being experienced with the Forestry Department.

Sources of information: personal communication, P. McCarter, Provincial Forestry Action Programme, J. Mellenthin, Muzama Crafts Ltd, Uchi Makula Trust, 2000a, 2000b, Craftsmen and Women's Development Organisation, May, 2000

BOX NINE
THE RICHTERSVELD CASE
IN SOUTH AFRICA

The Richtersveld is a remote and desert area. It is noted here not because of the strategy it offers towards community involvement in resource management. The following derives from Van Sleight 1998.

“The Richtersveld became a National Park in 1991 in an agreement between the National Parks Board and the Nama community – sealed by a mock Nama wedding. According to the agreement, the Parks Board has a 24-year lease from the community at R80, 000 per annum with a six-year notice period. Employment and training preference would be given to people in the surrounding towns and these communities would share in the decision-making of the park. The nomadic stock farmers, whose goats and sheep had been grazing the area for almost 2,000 years, would be allowed to do so in the park. There is, however, a great deal of cynicism detected at the mention of Richtersveld being a landmark of successful people and government co-operation.

While most agree that the park played a significant role in carrying a positive image of the Richtersveld out to the world, what people really need is food on the table and that is yet to come. Employment is provided for only a small number of people as park wardens and administrative staff. Kiewiet Cloete, a small diamond miner and resident of Kuboes, feels that the community is partly to blame for their own dissatisfaction. There is a lack of skills in negotiations and management. The local people do receive lease money from the park through a community trust, but they do not know how to use the money effectively. Kiewiet also highlights inconsistency on the side of the Parks Board decisions, which is a problem. “For the past six years they had six leaders. Where does it leave us? These people move on, we stay where we are.

The Manager of Transform (Training and Support for Resource Management) Programme – a joint venture between the Department of land Affairs and GTZ – agrees that the park is failing in some of its key objectives and is not delivering on many of its promises. “Much of the training did not happen, and the Richtersveld Park itself is still dependant on a mining company for its infrastructure. Archer raises the concern that the diamond mines are set to close in eight years’ time, so changes need to come soon”.

Source of Information: Van Sleight 1998.

BOX TEN
COMMUNITY FOREST MANAGEMENT
IN SOUTH AFRICA

Tree planting and management is largely done where there is relative security of tenure. Thus in most communal areas, people plant and manage trees within their own homestead plots. For the past ten years or so, small-scale farmers in KwaZulu-Natal, on the east coast, have been involved in outgrowers schemes set up by the large commercial timber companies, most growing their trees in their agricultural fields which, like their homestead plots, are *de facto* private lands. Here, benefits accrue directly to the farmers, but in cases where outgrower schemes have been laid out on communal land held by the chief, benefits are shared amongst the stakeholders. These outgrower schemes have been successful for several reasons, amongst them strong tribal traditions, and a relatively clear understanding of land rights and land ownership.

Involvement in management of communally-owned natural resources in South Africa is affected by many of the problems found elsewhere in contemporary Africa, but until 1994 the situation was aggravated by the apartheid policies of the previous government. Waves of forced settlement of people in over-crowded 'homeland' areas, dating back over more than half a century, have resulted in disputes over rights of occupancy; lack of cohesion amongst community groups; lack of traditional leadership; loss of faith in government initiatives; reliance on remittances and state pensions; and a severing of the link with the land as an element in people's livelihood strategies. In many instances, conservation works, such as contour construction, clearing alien vegetation along stream beds, and tree planting, were instigated by government departments in 'homeland' areas, and carried out as part of 'food for work' programmes. Today, therefore, community members are loath to volunteer their labour for such work unless they are guaranteed of remuneration. In areas where traditional practices have remained strong, such as in Venda for example (in the north-eastern corner of South Africa), leaders complain that western influences have undermined their authority, and young people are no longer willing to adhere to the established resource management codes.

Land reform has had a high platform with the new government of South Africa, and thousands of land claims have been registered over the past four years. Restitution is a slow process, however, and in many cases communities have not had their land returned to them; instead they have been given a stake in its future management and development, together with other interest groups. This is particularly true of many State Forest areas, which were designated by forcibly removing the previous occupants.

In several cases, government departments have initiated **joint forest management projects** in an attempt to improve the relationship with surrounding communities, and to encourage sustainable use of the forest resources. However, the majority of these initiatives have been unsuccessful because the underlying conflict over the land remains unresolved. In addition, the needs and expectations of the two sides, State and community, are often not compatible, with community members being asked to participate in management programmes which aim to preserve the biodiversity of the area, rather than meet their livelihood requirements. In some cases, the solution may not be to transfer direct ownership of State land to communities, but rather to guarantee rights of use of certain products. In others, restoration of the land appears to be the outstanding need.

An example of this comes from the coastal forest region of **Dwesa/Cwebe**, in the Eastern Cape, where the original intention was to assist stakeholder communities to set up a Trust through which to manage the use of the State-owned Reserve. By late 1999 it was agreed that the land on which the Forest Reserve stands should be handed back to the community. The plan is for the Forestry Department and the community to embark upon various income-generating schemes with a view to leaving the community with the major share in the management of the forest over the longer term, once they have enough revenue to do so.

Continued....

Unlike other countries in Africa, communities in South Africa have not yet been involved in quota-setting for controlled use of State forest resources, or monitoring of their own resource use, although the Forestry Department plan to introduce this in the near future. The commercial trade of natural resources, particularly of game and traditional medicinal plants, is a thriving industry in South Africa, and mining of plant resources on State land is rife. Forest guards are not able to control incursions into forest areas, and local communities have been alienated from these resources for so long that they feel powerless to prevent outsiders from over-exploiting them.

During 1999, the government Forestry Department (DWAF) undertook a restructuring programme, which aimed to devolve management of many of their marginal plantations in former homeland areas to the communities which surround them. Again, ownership of the land issue has been a stumbling block, as has the prevalent conflict between traditional leadership and the new local government structures. In some cases, government plantations were established on State land and others on community land which was leased for the purpose. Initially it was envisaged that communities would take over management of these plantations by setting up Communal Property Associations, which would be democratic institutions, representative of all stakeholders in the community. This has proved problematic, however, and now other legal entities such as Trusts or Companies are being considered instead. Standard lease agreements are another option. In especially complex situations, the final solution may well be for the government to maintain its ownership of the plantations, but to investigate more participatory methods of managing them in future.

By Isla Grundy, University of Stellenbosch, Project Leader, *Rural Development Forestry Education and Training Programme* with Peter Neil, Forestry Adviser, Department of Water Affairs & Forestry, Pretoria, February, 2000.

BOX ELEVEN

GOLINI-MALUNGANJI IN KENYA

The **Golini Maluganji Community Reserve** in Kenya covers around fourteen square kilometres, linked to the **Shimba Hills National Forest Reserve** [217 sq. km], one of the only two remaining coastal forests in Kenya and important for its elephant population. Traditionally this population migrated to another small forest some miles away, held under private and customary ownership.

Golini Maluganji Community Reserve [GMCR] was formed in 1993 and officially opened in October 1995, after five years of negotiations between the Kenya Wildlife Service (KWS), the local Kwale County Council, a handful of European settlers in the area and around 150 local Digo and Duruma households, and an independent agency, the Eden Wildlife Trust.

Although the area is designated a protected area, it is variously owned, firstly by title deed holders and secondly by local households who own customary rights in their land, otherwise vest in the County Council as Kwale Trust Land. KWS and the Eden Trust provide the funding for the project, mainly expended on infrastructure development to protect the area and to encourage and provide for tourism.

The objective of the initiative was to retrieve the small Golini-Maluganji Forest for elephant use and to keep the corridor between Shimba Hills Reserve and Maluganji Forest unsettled, unfarmed and available as a corridor for the elephants.

The means was to bring the owners of this unreserved forest area into a benefit-sharing arrangement of the profits of elephant tourism. This was achieved through the creation in 1994 of a limited liability company, including the local householders as shareholders of tourist-related ventures in the area.

The elephant habitat conservation objective has been achieved, with a decline in cultivation in key areas and free movement of elephants between the Government Reserve and the local 'Community Forest'. Kiiru cites Golini-Maluganji as a unique development in Kenya, as the first project in the country where '*peasant farmers have given up individually-owned parcels of land for wildlife conservation*'. The anticipated benefits to local people have been much lower than they had hoped however, partly as a result of declining tourism. It also appears that the project is dominated by a handful of local elite players, government and the conservation agencies.

Source of information: Kiiru 1996.

BOX TWELVE
BWINDI & MGAHINGA GORILLA FOREST PARKS
IN UGANDA

The Bwindi Impenetrable and Mgahinga Gorilla National Parks are the last of several sites for gorilla in Africa. They also represent unique moist montane forests in East Africa. In order to secure the co-operation of the local population, In 1992, Uganda National Parks (now Uganda Wildlife Authority) decided to permit certain illegal uses to continue through formal agreements. A **CARE-funded Development Through Conservation Project** investigated forest uses and drew up provision plans, which provided for selected user groups around the forest to sign agreements with UWA.

Determination of which uses are permitted is made by UWA. The details of each permitted resource [such as vines for weaving or dry fuelwood], the names of harvesters, nominated by each user group, the quantities to be harvested and timing of harvesting are all set out in respective **Memoranda of Understanding** [MoU] between the UNP and the parishes. These MoU also make provision for enforcement, monitoring and modification.

Harvesting began in 1994. Wild & Mutebi reported that *‘The resource users collect small quantities of resources and spend little time in the forest. Monitoring of each activity has been initiated and mechanisms have been put in place to minimise interaction with mountain gorillas. Relations between communities and park staff have begun to improve ... the experience suggests that co-management has great potential for effectively including local communities in the management of protected areas...’* [1996].

The designation of the initiative as ‘collaborative management’ may be a misnomer given that the community is not involved in management, but are rather legal users to the management by UWA. The level of enforcement and monitoring makes the regime expensive. Alden Wily & Kabanankye suggest that UWA would have been wise to directly involve the 1,000 or so Pygmy forest dwellers as forest guardian. Instead, this population was evicted from Bwindi Forest in the late eighties, their ancestral home. Today they live as squatters and beggars on other people’s land on the edge of the forest. Very few Pygmy are included even as licensed users through the MoU agreements.

Sources of Information: Wild & Mutebi 1996, Alden Wily & Kabanankye 1996.

BOX THIRTEEN
MOUNT ELGON FOREST IN UGANDA

Mt. Elgon Conservation and Development Project has been supporting Mt. Elgon National Park develop collaborative management arrangements since 1995/96, when two pilot agreements were developed with the communities of Mutushet and Ulukusi Parishes in Mbale and Kapchorwa Districts.

Since signing the two pilot agreements in 1996, the lessons learnt have been used to revise the approaches used in future negotiations. Reviews have shown that there have been improvements in both pilot areas with regard to relations between the Park and the community, reduced illegal activities and better control of resource use from the Park. However, there were problems with a lack of awareness and understanding of rights and responsibilities amongst many community members, and ongoing debate about what resources should be allowed to be harvested. These problems relate partly to the process used to negotiate the agreements, which relied too much on Parish-based committees and not enough on involvement of individual resource users, and gave too much emphasis on Uganda Wildlife Authority (UWA) dictating the terms of the agreement. There are also some other problems relating to the use of the Parish as the negotiating unit such as conflicts with people who come from outside the Parish to use the resources.

Collaborative management at Mt. Elgon National Park has also faced a number of difficulties, mainly because of ongoing reorganisation and difficulties within UWA. For example, the Project has spent a lot of time training Park staff, only to lose key staff to transfers, redundancy, or staff leaving to seek better opportunities outside UWA. The World Bank funded reforms resulted in a reduction in community conservation staff at both Mt. Elgon National Park and at UWA headquarters. Policy support and decision-making from UWA headquarters has been delayed as key staff have left and been replaced by new people. There has also been low morale amongst many of the field staff and some of the rangers have been accused of allocating land within the park for cultivation or allowing other illegal activities. Illegal resource use and agricultural encroachment is widespread throughout areas not covered by the pilot collaborative management agreements.

Despite the problems, the results of the two pilot agreements were positive. As a result, efforts have been underway to expand collaborative management to neighbouring areas using revised approaches, with more focus on identifying and working with the resource users in some areas, and using villages instead of Parishes as the entry points. Work is ongoing in 12 Parishes. More staff have recently been trained and small teams have been formed to ensure better coordination between law enforcement and community approaches and to try to overcome problems with lack of progress in some areas and staff corruption in others. Draft collaborative management guidelines and a field manual have been developed to help the rangers structure their fieldwork.

The Park has also been developing some simpler boundary management agreements for the use and management of the trees planted around the boundary of the Park. These aim to help overcome boundary disputes and give the neighbouring people some immediate benefits from selective harvesting of the trees and cultivation in the 10m boundary strip in areas where the boundary needed replanting (as in the taungya system). Two of these agreements have been signed and several others are being developed. They seem to be working well, and can be developed fairly quickly as a way of reducing boundary problems. The longer term idea is to incorporate the boundary agreements into collaborative management agreements as they are developed.

By David Hinchley, IUCN Chief Technical Adviser, *Mount Elgon Conservation & Development Project*, January 2000.

BOX FOURTEEN COLLABORATIVE FOREST MANAGEMENT IN UGANDA

Institutional development

Collaborative Forest Management [CFM] is a recent concept for the Uganda Forest Department [FD]. A CFM programme was developed by FD in 1998. This comprises both institutional development and piloting. A CFM committee was formed at FD. The Committee comprises senior staff from all sections of FD and is responsible for overseeing CFM initiatives. It ensures coordination and links the field and policy makers. A CFM Coordinating Unit has been formed as the implementing arm of the committee. This is a technical unit responsible for the day-to-day implementation of CFM. Its main mandate is towards training and awareness raising.

Piloting

Implementation began in six pilot areas in late 1998. One area has since been put on hold for later action and one other was abandoned after being offered to an international private investor for the development of a plantation. Four sites remain active: **Namatale Forest Reserve**, 663 ha, a small, degraded natural forest, encroached and with timber illegally extracted; **Budongo Forest Reserve**, a relatively intact natural forest with biodiversity significance and a site for eco-tourism, where illegal harvesting is also common; **Mpanga Forest Reserve**, a small mainly intact forest, which is both a site for eco-tourism and research; and **Tororo Forest Reserve**, 369 ha, a small urban plantation site, currently subject to theft of trees and agricultural rather than tree-planting activity.

The main issue facing CFM is whether illegal charcoal burning and encroachment may be reduced through CFM.

Implementation begins with a lengthy period of relationship-building between the community and the FD field staff. This moves into intensive investigation of the social and ecological dynamics of the forest and local people's dependence upon it. Negotiation follows, and the formulation of an agreement. To guide the field staff, the CFM Unit has conducted four workshops, and provides regular on-the-job support. The intended outcomes will be:

- a long term agreement between the FD and the local village specifying the nature of their relationship
- a 5-year management plan for the area, including a 5-year and more detailed 1-year workplan
- a monitoring plan for the CFM process, covering both ecological and social aspects.

Emphasis has been placed upon the following:

- achieving equitable distribution of benefits
- ensuring participation of as many of the villagers as possible in all stages and especially during negotiations
- gaining consensus on the terms of management, *before* attempting to gain representation
- instilling a sense of ownership and authority over the resource in the local management partners
- ensuring flexibility on the part of FD towards potential compromise.
- Building mutual trust and respect as a strong foundation of future partnership.

Continued....

Progress

Progress varies. **Mpanga** and **Budongo** lag behind due to logistical and FD staff constraints. They are well into the investigation stage. Agreements, management plans and monitoring plans have been completed with four of the communities adjacent to **Namatale** and **Tororo**. The Agreements cover portions of those reserves. Experience is limited but we have promising indicators that CFM will work in these sites.

In **Tororo**, the strategy agreed is for local people to rehabilitate the degraded forest by planting their own trees. This has been undertaken by more than 100 households over a 16 ha area. Their enthusiasm has been impressive. Once plots were allocated, planting began within the week, and before the field staff had had the chance to provide technical assistance. Consequently, technical aspects of planting is sometimes weak and there has been some loss of saplings. Enthusiasm for growing trees has been demonstrated by people removing their own crops from the forest land, to allow the seedlings to grow. The people have written the plantation rules themselves, and these are strict. Anyone who has not managed to successfully plant and maintain his/her area after 2 planting seasons (1 year) will lose that plot, which will be re-allocated to someone else

In **Namatale**, similar successes have been noted. A sense of ownership, authority and responsibility over this seriously degraded and formerly abused forest has produced astounding results. Approximately one third of the Forest Reserve has been deforested and is under banana plantations. However, in the CFM area, the people have decided to reclaim the "lost" forest, re-locate the displaced boundary, and convert the area into a multiple-use forest, to be planted with useful native tree species. A wide boundary will be planted using fruit and fodder trees. There is realization that there will never be enough resources in the forest to supply the needs of the people, and this resulted in the establishment of a community nursery for developing on-farm alternatives. This was a village initiative, and was carried out almost entirely at their own cost. The technical assistance of the FD was requested at an early stage. Many thousands of seedlings have already been produced and planted out on private land.'

By Penny Scott, CFM Adviser, Forestry Department, Kampala, January 2000.

BOX FIFTEEN
INSTITUTIONALISING COMMUNITY-BASED FOREST
MANAGEMENT AT THE LOCAL GOVERNMENT LEVEL,
TANZANIA

Our Forests

There are two kinds of forest in Babati District; forest in National Forest Reserves and forest within Village Land. The four NFR cover 25,871 ha. Three are moist montane mountain forests.

The forest in Village Areas is mainly dry woodland. There are three types: **Acacia woodlands**, growing in damp, low-lying areas; **miombo woodlands**, often in hilly areas, sometimes with a high, closed canopy [20 m] and including several very valuable timber species [*Brachystegia microphylla*, *Brachystegia spiciformis*, *Julbernalia globiflora*]; and **scrub woodlands**, without timber species but including important polewood species such as *Combretum* and sometimes including the highly valued mpingo carving species [*Dalbergia melanoxylon*].

Seventy-three of Babati's 82 villages have some forest/woodland within their Village Area [89%]. Sixty percent are degraded. Most [89%] are less than 500 ha.

Our Policy

Babati District Council has been helping people take active control over their natural resources for some time. The local government [District Council] has a special programme called Local Management of Natural Resources. With its help we have helped villages confirm their Village Area boundaries and to survey and map them. In 1994/95 the District Forestry Officer helped eight villages establish the first Village Forest Reserves in the country. These were made from Duru-Haitemba Forest which had been surveyed for gazettement as a National Forest Reserve. The way in which the villagers took over the management of Duru-Haitemba turned it from being a degraded area into a well-managed and intact forest pointed the way forward for future forest management in unreserved lands.

National Policy supports us. Today, new **National Forest Policy** [1998] is looking to ordinary people to secure and manage the forests of Tanzania in their own local lands as Village Forest Reserves. It also encourages villagers to take on management responsibility for those forests already gazetted as Forest Reserves in partnership with Government. A **new Forest law** is being drafted. New land laws directly support the establishment of VFR by villages by requiring them to register their common lands.

CBFM in Babati District

Our aim is to save what forest/woodland is left in our District. To achieve this we aim to see every tract of forest brought under effective, local level management. This means -

- That all 25,871 ha of Government Forest Reserves will be under the management of those villages with which they share boundaries. These number 26. The forests will therefore be managed as 26 distinct **Village Forest Management Areas [VFMA]**. Together with the advising Foresters, each village will plan exactly how it will protect and manage its VFMA and sign an Agreement with Government on this basis.
- That all 73 villages where it is known that significant forest patches remain will become VFR. These will range from 25ha to 2,500 ha. These will cover at least 22,000 ha.
- That those private farmers who have significant patches of woodland within their farms will retain these as forest with the support of their communities. Together with the fifty or so traditional ritual forests which already exist, these will number up to 100 forest 'patches'. They will be registered as Private Forests of up to 1,000 ha.
- Therefore Babati expects to have more than 48,000 ha of community-managed forests.

We are making good progress: In mid-1999, just over 19,000 ha are already under direct community management [39% of the potential]. This includes Twelve Village Forest Reserves [VFR] (13,376 ha) and eight Village Forest Management Areas [VFMA] in Ufiome Forest Reserve[5,635 ha].

Source of Information: Babati District Council, 1999a.

BOX SIXTEEN

DURU-HAITEMBA FOREST IN TANZANIA

The setting

Tanzania has an abundant forest resource which includes 19 million ha of still unreserved forests. Most unreserved forest is miombo woodland. Much of it is within the boundaries of one or other village area. All rural people in Tanzania live in villages. At the time of village registration, the community describes its perimeter boundary. The agreement of neighbouring villages is essential.

From 1983 Tanzania adopted a policy of assisting Village Councils to secure title deeds over their respective Village Areas. Village Councils are the elected governments of each village community. The intention was that farmers could then sub-lease their home and farm plots from the Village Council. The Village Council would hold the remaining land within the Village Area in trust for the community.

In the event, the titling process was very slow largely because of the rigorous survey procedures. Around 20% of villages had received Village Title Deeds by 1990. With donor programme assistance the villages of Duru-Haitemba in Babati District began the long process of formally agreeing village boundaries, demarcating, survey and mapping.

The Forest & Beekeeping Division has always sought to increase the amount of forest brought under protection as National or Local Government Forest Reserves. At the same time that one arm of government was helping villages secure ownership over local woodlands as within their Village Areas, another arm was seeking to remove those forests from local control to make them National or Local Government Forest Reserves.

Duru-Haitemba Forest

This was the situation with Duru-Haitemba Forest in Babati District, a tract of miombo woodland (9,000 ha). It was declared that this would become a Forest Reserve in 1990. The boundary was surveyed and Forest Guards posted to the area. Those villagers living adjacent to the forest were annoyed because they claimed the forest as within their own areas. A long period of negotiation as to where the boundary should lie ensued. Meanwhile the Forest Guards randomly, and corruptly, allocated access rights.

Village leaders refused to inhibit access or degradation on the grounds that Government had taken the forest and should look after it itself. By mid-1994, the forest was badly damaged. Village-based rules governing settlement in the forest, timber harvesting, charcoal burning, fell away.

Shortly before gazettement, the Forestry Department in consultation with the District Council Forester decided to work out a fairer arrangement with the villagers in a bid to secure their support for the Reserve. Expert assistance was secured.

During the process of negotiation in September 1994 it became clear that Duru-Haitemba Forest would be better managed by the local people. Gazettement was delayed to allow the eight village communities to show if they could succeed to do this. Provisional plans were drawn up by each of the eight villages, in reference to the part of the forest which they agreed fell respectively in their own spheres. Active management by the eight Village Forest Committees began and had immediate impact. Outsiders who had been clearing the forest for cultivation, using the forest as a site of cattle grazing and watering, felling timber and making charcoal were evicted. Rigorous rules were devised and enforced. These rules were agreed by the community membership at Village Assemblies.

Boundaries were marked, between each Village Forest following village to village negotiation. Each community closed about half of each forest to any use to allow it to recover. Over 100 youth volunteered as guards, in lieu of contributing labour to other village projects [school building, road clearing].

Continued....

Village Forest Management becomes Village Forest Ownership

During boundary marking it became apparent that the entire Forest fell within the Village Area of one or other of the eight villages and that these same communities were well embarked upon the process of securing title deeds for those Village Areas. The process was accelerated and Title Deeds in due course secured. This put a final end to any plans of government to gazette the forest as its own Reserve. This led directly to the notion of Village Forest Reserves. Within a year, the construct was being adopted in draft new national forest policy, finalised in 1998. Providing for Village Forest Reserves is a main part of the draft new Forest Bill 2000.

Providing a Legal Framework for CBFM

In mid 1995, the District Council endorsed the existence of the eight Village Forest Reserves by approving the Village Forest By-Laws which each community submitted to it. In this way, ordinary community rules entered law and have to be observed by all persons, not just community members. This has allowed each community to fine offenders and take those who fail to pay the fines to the district court. The use of Village By-Laws to enable communities to enforce their forest management regimes has proved very important in these eight villages. It has since been adopted as the Tanzanian model for CBFM.

Providing a Concrete Case for Policy-Making to Develop

CBFM of Duru-Haitemba Forest began in late 1994. Six years later, the condition of the forest has recovered, soil loss from eroded forest hills has declined, game has returned, beehives show increased occupancy, and understory development is significant. Whilst the need for patrolling has fallen with less than a quarter of Village Guards deployed, each community maintains a rigorous regime of conservation management, with generally the upper half of each forest still closed to any activity other than visits and herb collection. Grazing zones have proved the most difficult to regulate. Not a single fire has occurred in the forest since 1994. Several villages have used their Forest Management Committees and By-Laws to extend management and regulation to degraded swamp and lakeside areas within their villages. As of January 2000 a further ten more Villages in Babati District have established their own Village Forest Reserves, covering more than 20,000ha of miombo woodland which would otherwise have been lost to clearing, settlement and degradation.

Sources of Information: Alden Wily & Haule 1995, Alden Wily 2000a, Babati District Council 1999b, Rwiza 1999.

BOX SEVENTEEN

MGORI FOREST IN TANZANIA

Like Duru-Haitemba Forest, Government surveyed and demarcated Mgori Forest in order to make it a National Forest Reserve [37,000ha]. The local people complained, saying that it was Foresters themselves who were raping the forest and allowing it to be settled by outsiders. Following the success of turning Duru-Haitemba Forest in Babati into a community-managed forest, it was decided to work with Mgori people to see if they too, could do a better job. The people were challenged by the idea. I was appointed to work with the people on this by the Singida District Council. For the first year or so I was assisted by an expert who visited every few months. These are the early steps we took:

The process

- The first task was to identify which villages shared the boundary with the planned Government Reserve. These were five. With the villagers, we also covered the entire forest with villagers to see who was living within illegally. We discovered a number of new settlements of people who had moved in from other districts and were clearing the forest for millet production.
- We met with village leaders and whole village assemblies to discuss if and how they could manage the forest. They were keen and the first task was to agree which village would look after which part of the forest.
- This took some months. Many hundreds of hours were spent in the forest by village boundary teams, arguing and agreeing the boundary, and then marking it. Marking was done with oil paint.
- Then we helped each village committee prepare a detailed plan of action as to how it would protect its part of the forest, prevent fire spreading, and use it properly. These became draft **Management Plans**. Each community elected a **Forest Management Committee** to manage the forest for them. Although each village made its own plan and had its own rules, the plans were similar. Each village zoned its **Village Forest Reserve** into Protected and Use areas. A fire management plan was made and implemented.
- A main rule in each case was that access to the VFR was restricted to members of that village. Outsiders could apply to use the forest, and might or might not be given permission by the Village Forest Committee.
- Clear rules were set out, and against each rule, the punishment that would result if the user broke the rule. Leaders (members of the Village Council and the Committee) were to be fined double the amount if they broke a rule; one fine for breaking the rule, and one fine for abusing their responsibility
- Each village forest committee appointed patrolmen. Altogether over 100 young men volunteered for this task. They were excused other community jobs [road clearing, brick-making for the school classrooms] and were told they would get a reward every time they apprehended a person breaking a rule. The reward would come from the fine which the offender was to pay.
- Each Village Forest Committee opened a Forest Management Bank Account in Singida town. Fine money is put into the account. Each payment is receipted using a Receipt Book which is endorsed by the District Council so that it is a legal document.
- The five villages have formed a **Mgori Forest Co-ordinating Committee**. This meets once or twice a year. The meeting has been important in keeping each other going. One meeting demanded that Pohama Village, which was failing to protect its forest, elect an entirely new committee and remove the corrupt Village Chairman. This was done and Pohama is now managing its Village Forest Reserve better.

Continued....

The impact

- Today Mgori Forest is saved. In February 1995 it was disappearing. Many areas were being cleared by shifting cultivators. Most of the good timber had gone. Fires damaged the forest every dry season. Today, April 1999, the forest is in very good condition. Game has returned in big numbers and species which had disappeared have returned. Now, instead of having no wild meat, villages have a new problem - elephant damage to their fields. They are puzzling now how to deal with this.
- The flora of the forest has dramatically improved, even though it is only four years since they began their protection. Central Government sent a inventory team in 1996 to set up 15 blind sample plots. In March 1999 the team came back and looked at the plots. Only one tree in the 15 plots was missing.
- The condition of the forest is so healthy and undisturbed that bees are returning to the hives, with a lot more honey being produced and sold.
- The villages tested deliberately burning patches of the forest to keep down big fires. This is working well.
- People are proud of their work and their success. They have stopped illegal timber fellers and armed hunters. They have negotiated with pastoralists to not burn the forest when their young warriors pass through looking for game and pasture.
- Outsiders are now respecting the rules of the villages and recognise the forests as belonging to the villages. They never respected the rules of government about the Forest.
- The villagers are getting better at managing. Before they always waited for me, the government forester, to deal with a problem. Now they deal with problems themselves.
- The villagers are also sorting out their own politics. Some leaders are not helpful. Two villages got rid of bad leaders.
- Keeping money is always a problem. There have been bad experiences with fine money going missing. Now their records are better and accountability is better. The committee has to show its records to the community at the Village Assembly meetings. It has to answer any questions.
- The District Council is now willing to recognise the forest as belonging to the villages. We have helped each village survey and demarcate their Village Areas. Each Village Forest Reserve is now included within the Village Area of that community as their own land.
- Three villages have added other land to the Village Forest Reserve. The five Village Forests now cover 45,000 ha, not just the 37,000 ha which Government wanted to gazette. In addition, each village has identified 'spare forest areas', forest nearer the settlements which they are now protecting but know they will one day allocate to new generations looking for farms.
- All five villages are now cautious about letting new people settle in their villages. Through the VFR, they understand now they have a problem with land shortage in the future.
- Now villagers are also controlling their livestock better. Each owner has to keep his cattle in the Village Grazing Zones. Some of these are in the forest, some outside.

The community-based management approach is working well. It costs Government nothing. I am the only officer involved. No one can now bribe the officer to collect timber or to hunt or to clear land, because I do not have the right to issue those licences or allow those things any more. My senior officers also do not have that right, and the villages will not recognise any permits that any official might issue.

There are still many problems. These are inside the village and also in Government and the District Council. But we are making progress, bit by bit. I have started working with five more villages to make Village Forest Reserves.

Extracted from E. Massawe 2000a, 2000b.

BOX EIGHTEEN

UFIOME FOREST RESERVE IN TANZANIA

Ufiome is a mountain Forest Reserve, its peak at 2,379 metres. It lies just above Babati town. The people of Babati town and many villagers depend entirely upon Ufiome for their water supply. More than 20 springs rise on Ufiome. Babati Lake is fed directly from Ufiome. Ufiome was reserved in 1968. Then the mountain was mostly high forest. Today, most of the forest is gone. What is left is poor. The reason is over-harvesting. The FR was closed for timber harvesting in the late seventies. Illegal harvesting continued.

Process

The process of establishing village-based management of Ufiome began in August 1998, led by a Forester from central Government [Forestry & Beekeeping Division], working closely with the District Council Forester. Each of the eight villages which border the Reserve was strongly in favour of taking on responsibility for that part of the Reserve which borders its village lands. This was not just for products. In fact, the wood products from Ufiome FR are now very few [fuelwood, some polewood, thatching grass]. The villages were concerned about the over-harvesting, often by outsiders, and the problems they were facing with water because of degradation. Farmers were finding soils tumbling from the mountain in the rains and washing their own fields away. Lake Babati had started to flood more frequently, the waters entering the town and destroying shops and houses.

Strategy

The strategy for village-based management of Ufiome is founded upon the following principles:

- That forest managing communities are those which **directly border** the FR
- That these communities are included in FR management **not** on the basis of being forest users, but because they live next to the FR and are therefore the logical guardians of the forest. The Ufiome villages express this in the following way: "**When Ufiome is destroyed, we are destroyed with it.**"
- The communities themselves determine which parts of the FR they will each look after. They agree **Village Forest Management Areas [VFMA]** with each village in control of one VFMA.
- Management arrangements are made with whole communities, not groups within the village or sub-parts of the village community. This is because the community has special powers as a registered 'Village' that it may put to use in management. The Village Council is very important in this process. All adult members of the village elect the Council as their 'government' every five years. This 'government' can make bye-laws to enforce rules agreed by the community beyond those members.

Plan

The arrangement is set out in a simple **Agreement** reached by the community and the Government. The Agreement recognises the following:

- That Ufiome FR will always remain a Forest Reserve.
- That central Government [FBD] is the '*ultimate*' authority over the Reserve.
- That FBD is now devolving the operational management to the people who live on its boundary - the eight villages. This includes the right to regulate how the forest is protected and used. Each Village Forest Committee **has been designated as Manager of its VFMA.**
- Each community can call upon Foresters for technical advice, and mediation if needed. They must meet with the Forester every few months. The Forester must check the condition of the forest every year.
- That FBD retains the right to approve each village's plan of action ['**Village Forest Management Plan**'] and any **Village Bye-law** which it may make to give its management rules the weight of law.

Today, Ufiome Forest Reserve is managed by the eight adjacent villages as eight Village Forest Management Areas. Improvement is already being seen. The Village By-Laws are being considered by FBD and when approved, will be passed by the District Council. Then the Village Forest Committees will have secure powers as Managers and also will be made accountable.

Extracted from Ringo & Rwiza 1999.

BOX NINETEEN

GOLOGOLO JOINT FOREST MANAGEMENT IN TANZANIA

The **Gologolo Joint Forest Management Project** was begun by the Forestry Department in September 1997, with technical and financial support provided through the German GTZ-funded *Natural Resources and Buffer Zone Project* which operates in Lushoto District, famed for its excellent montane forests, much of which is embraced within 18 National Catchment Forest Reserves.

Shume-Magamba Forest Reserve (12,425 ha) was selected as the pilot for several reasons. First, its importance as a catchment forest. Second, because it presented one of the worst scenario cases for mismanagement and stemming from a range of reasons involving both government and community; third, because of its unusual character as comprising both valuable indigenous montane forest and a substantial area [c. 3,000 ha] of equally valuable commercial exotic plantation area. The argument was made that if collaborative forest management could work in Shume-Magamba Reserve, then it could work anywhere.

Shume-Magamba is surrounded by 14 or so villages but with several most prominent in both their physical and historical relationship with the Reserve. The largest and most 'problematic' community was **Gologolo Village** entirely surrounded by the Reserve, and with virtually no common land of its own. Most of the villagers cultivated on cleared plantation plots allocated (usually in un-transparent ways) by forestry staff.

This is where work to find a new way of managing Shume-Magamba Forest Reserve began. The end result was the establishment of co-management over the logical sphere of influence of Gologolo Village, now known as **Gologolo Village Forest Management Area**. This embraces over forty percent of the Reserve (5,300 ha). It includes 1,300 ha of commercial plantation and 4,000 ha natural forest.

After a lengthy process of shared assessment, planning and negotiation by villagers and government foresters, the regime agreed comprised co-management by a **Joint Forest Management Committee**. A highly detailed **Joint Management Plan** was worked out and a clear **Memorandum of Understanding for Joint Management** agreed. Responsibilities were shared by the two partners. These included the delegation of protection activity to the community which would in return receive continued access to bare plantation areas for cultivation, exclusive access to minor forest products and periodic rights to use fallen timber.

Writing in April 1999, the Director of Forestry reported that whilst the project was new and still fraught with problems: "*The protection of the forest is considerably improved. There are fewer fires. The reporting system for offences and offenders is more effective. Patrols by villagers are regular and the level of illegal activity has decreased. There is better understanding and trust between the forest administration and the villages, and less conflict. There has been some saving in costs of silvicultural operations in the plantations but even greater reduction in costs, as a result of the improved protection and decline in loss of valuable timber through illegal means*" [Iddi, 1999]. The Director also noted that "*it is amazing how cheap promotion of community forestry can be. There is hardly any finance required. The main pre-condition is the willingness of the forest administration to acknowledge communities as partners in decision-making and to share the benefits of forest management*".

The two foresters participating in the co-management operation are less sure of Gologolo's success. They have found two main problem areas; first, that rich pit-sawyers and saw millers from outside the area have been able to pervert local leadership. Second, that the division of rights and responsibilities has put the community in the position of wanting 'more and more benefits' because it has ultimately concluded that government is not sharing control over the forest with them, just sharing the work of management with them' [Hozza, 1999a]. A village evaluation in June 1999, whilst finding the initiative an overall success, recorded ordinary villager views that the Committee was 'corrupt'. Changes in village organization and leadership have lessened the problems since. Now one of the main problems facing these Foresters is how to secure enough logistical and funding support to enable them to bring more valuable Forest Reserves in the District under FD-Village co-management [Hozza, 1999b].

Sources of Information: Iddi 2000, Hozza 1999a, 1999b, NRBZ 1999, Alden Wily 1998f.

BOX TWENTY NGITIRI IN TANZANIA

Ngitiri is a Sukuma name denoting the tradition of setting aside pasture for drought periods. This traditional practice has been adopted by foresters in three regions to set aside not pasture but wooded areas to allow for their recovery. Although the idea has its origins in a NORAD-funded programme in Shinyanga Region, it has been most thoroughly developed in eleven districts in Tabora and especially Regions, with World Bank-funded financial and technical support. The current *ngitiri* initiative also builds directly upon the community-based forest management experiences of Arusha Region, begun with Duru-Haitemba (see Box Sixteen).

Reviewing the *ngitiri* programme in 1999, Alden Wily & Monela found 1,415 different *ngitiri* were operational and registered and that several hundred more were in the process of being declared. Over 800 were in private household lands and owned by those households. These were extremely small, sometimes no more than a few hectares. The remainder were larger, owned and managed by sub-villages or by the village community as a whole. These have since been renamed Village Forest Reserves. *Ngitiri* is now used to refer to household forests or Private Forests.

In comparison with the many thousands of hectares being conserved and managed by Tanzanian villagers in other regions, the *ngitiri* initiative may seem slight, encompassing less than 30,000 ha by end 1998, and much of this very poor and degraded forest. However, Alden Wily & Monela observed that the *ngitiri* initiative –

*“represents an important thrust of community-based forest management in Tanzania for the very reason that it extends the approach into those areas and regions of the country where such resources are now much diminished and even non-existent, assisting communities to earmark degraded lands for woodland regeneration. Secondly, it brings the initiative into the private sector, encouraging individual households to reassess their farm resources with a view to protecting rather than clearing their residual woodland patches. This has proved particularly rewarding, in that it is in such small areas that silvicultural management techniques may be profitably applied. A growing number of farmers with very small *ngitiri* now routinely thin and prune to produce only those trees they have most use for. Significantly, they do this with the support of the whole community, which makes protection rules, to which all members of the village agree to adhere”.*

Source of Information: Alden Wily & Monela 1999

ANNEX C (1) : Constitutional Clauses on Property

COUNTRY	CONSTITUTIONAL ARTICLES ON LAND OWNERSHIP
UGANDA	<p>1995 CONSTITUTION Chapter 15 of 1995 gives founding policy on tenure:</p> <ul style="list-style-type: none"> - democratisation of root ownership from state to people - devolution of tenure administration to district Land Boards - recognition of four tenure systems (customary, freehold, leasehold, mailo) - creation of Land Tribunals independent of state or judiciary.
TANZANIA	<p>1977 CONSTITUTION (12 Amendments by 1995). <i>Under Review.</i> General Article 24 on rights to property and Article 27 stating duty to protect public, communal, and other people's property.</p>
KENYA	<p>1969 CONSTITUTION (18 Amendments by 1997) <i>Under Review.</i> Tenure relations directly provided for only in respect of Trust lands which vests ownership of original native areas in County Councils as Trustees for the <i>occupants</i>, with powers to allocate and 'set aside' for their own purposes. State also able to co-opt for unspecified government purposes (Chapter IX; sections 114 – 120). Sanctity of private property provided in general protection of private property (i.e. not just land) clause s. 75. Constitutionality of eviction of owners during land clashes because not of local ethnic origin questionable (1990s Land Clashes) and demonstrates contradiction with Ch. IX above. Commitment to draft new Constitution (Act No 13 of 1997) delayed by heated political debate as to who should control and implement the task, still not begun in late 2000. Review of property relations part of the planned review (s.10 (d) (vii)).</p>
RWANDA	<p>POST-INDEPENDENCE CONSTITUTION IN EFFECT SUSPENDED since Civil War 1994. Commitment made to establish a Commission to draft a new Constitution. In the interim, so-called 'organic law' operates (mixture of old Constitution, Arusha protocols and some new laws).</p>
ERITREA	<p>1996 CONSTITUTION Article 23 under Fundamental Rights does not guarantee or protect private property but permits any citizen to acquire, own and dispose of property, individually and in association with others. Also states that '<i>all land, water and natural resources below and above the surface belong to the State. Usufruct rights of citizens will be determined by law</i>' (Article 23 (2)).</p>
ETHIOPIA	<p>1992 CONSTITUTION Article 40 entrenches Land Proclamation of 1975. Provides for rights of all Ethiopians to land, collective root ownership, ban on sale of land, but ability to lease out.</p>

MALAWI	<p>1994 CONSTITUTION</p> <p>Article 28 articulates the right of every individual to acquire property alone or in association with others. Declares all lands vested in the Republic (Article 207) but gives Government title to all rights in property vested in the Government (Article 208) which has created elements of contradiction. Safeguards existing interests in property in general (Article 209).</p>
BOTSWANA	<p>1966 CONSTITUTION</p> <p>Article 8 provides for protection from deprivation of property except through compulsory acquisition for public interest or 'to secure the development of the property for community benefit', or for mineral development (s. 8 (4)).</p>
ZAMBIA	<p>1991 CONSTITUTION</p> <p>Does not expressly protect the right to land, only the right to property in general. Appropriation provided for in Article 16.</p>
ZIMBABWE	<p>1980 CONSTITUTION (16 Amendments by 2000)</p> <p>Through the protection from deprivation of property clause provides a detailed framework for the contrary process, the compulsory acquisition of land for redistribution and settlement programmes (s. 16). Several key amendments early 1990s to this clause, widening right to appropriate (settler) lands. Last (16th) Amendment in 2000 makes former colonial power responsible for payment of compensation. Important amendment in 1987 relating to restriction of residence within Communal Land of persons who are not tribes-people in cases where this would be deemed to be contrary to the interests of tribes-people or their well-being (Article 22).</p>
MOZAMBIQUE	<p>1990 CONSTITUTION</p> <p>Article 46 vests ownership of land in the State and declares that land 'may not be sold, mortgaged, or otherwise encumbered or alienated'. Article 47 directs the State to determine conditions for use of land, grant this to individual or collective persons' and must take into account 'its social purpose'. The law shall not permit domination or privilege in land access to the detriment of the majority. Articles 48 and 87 recognise land inheritance.</p>
SOUTH AFRICA	<p>1996 CONSTITUTION</p> <p>Article 25 addresses property matters:</p> <ul style="list-style-type: none"> Makes provision for the enactment of laws to ensure that citizens have access to land on an equitable basis Makes provision for the restitution of rights in land (individual or communal), previously prejudiced as a result of racially biased laws Recognises various forms of tenure, including freehold tenure and customary tenure; Provides for land reform to proceed whilst at the same time safeguarding existing property rights; At same time saves right appropriate for equity and redress of wrongs; Recognises the customary status and role of traditional leaders and of customary law (Article 211).

NAMIBIA	<p>1990 CONSTITUTION</p> <p>Article on property, (Article 16) does not make specific reference to land. Schedule 5 (1) to Constitution vests all land previously owned or 'controlled' by the pre-Independence Government in Government of Namibia; this places communal land under state. Article 100 vests 'land, water and natural resources' in the state 'if 'not otherwise lawfully owned' with same effect.</p>
LESOTHO	<p>1993 CONSTITUTION</p> <p>Vests ownership in the Basotho nation. (Article 107). The power to allocate land, revoke grants or rights vested in the King (Article 108). Allows Parliament to make laws on allocation (Article 109) and resulting Land Act 1979 widely viewed as contradictory to Article 108.</p>
SWAZILAND	<p>NO CONSTITUTION</p> <p>1968 Constitution repealed in 1973 but with three land clauses saved (Cap VIII: section 93-95):</p> <p>Section 93 provides for Government to make grants, leases or other dispositions as it sees fit;</p> <p>Section 94 confirms all land vested in the Ngwenyama in trust for the Swazi Nation shall continue to be so; and these rights may not be vested in any other person or authority. However, open to compulsory acquisition for public purposes;</p> <p>Section 95 deals with mineral and mineral oils.</p> <p>Constitutional Review. Commission sitting.</p>

ANNEX C (2): Losing Rights Through Constitutional Amendments. A Note On The Zimbabwe Case

1980-1990

For the period 1980-1990 the Zimbabwe Constitution was bound by two conditions agreed to at Lancaster House in 1979, in order to secure British acceptance of independence *first*, compulsory acquisition would be on willing seller-willing buyer basis, and *second*, the Constitution would not be amended for ten years (GoZ 1998b). The target of these clauses was protection of the occupancy of the white settler farming minority.

1990-1993

Parliament amended the Constitution in 1990-1993 in order to remove the above constraints (No. 15 of 1990, No. 9 of 1993). It also enacted a new Land Acquisition Act in 1992.

The changes enabled government to earmark the properties it wanted and to pay for these through non-market determination and over a more flexible time period. The new terms were the cause of some international criticism (Palmer 1998). In practice the new terms were barely used; Van den Brink 2000 documents how right up until the 2000 crisis, farms continued to be acquired on a willing-seller willing buyer basis and at open market rates.

The crisis in 2000 arose through the drafting of an entirely new Constitution proposed by President Mugabe which was rejected by a national referendum in February 2000, not for its land clauses but because it would have also resulted in legal extension of the President's tenure in office. The proposal also included a clause to enable the state to determine whether or not it would compensate those from whom it took land (cl. 57).

Having failed to secure approval of the new Constitution by referendum, Government announced an amendment to section 16 of the current Constitution and the Land Acquisition Act of 1992 to remove any last constraint upon the appropriate of property or the need to pay compensation. Some 1,200 white-owned farms were initially occupied by persons claiming to be veterans of the liberation war of the 1970s, resulting in the physical removal of their owners, and violence, abundantly reported in the local and international press. By mid 2000 841 farms embracing 5.2 million acres of the 27.5 million acres owned by white farmers were announced as subject to expropriation.³⁶⁴

In June 2000 the proposed constitutional amendments were enacted. Significantly this was not only a law amending the Constitutional but enhancing the terms of the Presidential powers.³⁶⁵

³⁶⁴ These had already been earmarked several years ago. Land owned by Zimbabwe's 4,500 white farmers represents 21% of the total land area and around 70% of the prime agricultural land. Refer van den Brink op cit., GoZ 1998b.

³⁶⁵ No. 5 of 2000, amending Constitution and Regulations issued under the Presidential Powers (Temporary Measures) Act (Cap. 10:20), by Statutory Instrument 148A of 2000.

From 1980 until 2000 the provisions of the Zimbabwe Constitution provide for government to take land *for settlement for agricultural or other purposes; for purposes of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources, or for the relocation of persons dispossessed* (section 16 (1)) and also s. 2 of the *Land Acquisition Act, Cap. 20:10*).

Now in 2000, a new sub-clause 16A has been inserted which lists the factors which will now be taken into account as of 'ultimate and overriding importance' in respect of compulsory acquisition of land:

- (a) under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;*
- (b) the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;*
- (c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land;*

and accordingly –

- (i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and*
- (ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement'.*

(2) In view of the (above)... the following factors shall be taken into account in the assessment of the any compensation that may be payable –

- (a) the history of the ownership, use and occupation of the land;*
- (b) the price paid for the land when it was last acquired;*
- (c) the cost or value of improvements of the land;*
- (d) the current use to which the land and any improvements on it are being put;*
- (e) any investment which the State or the acquiring authority may have made which improved or enhanced the value of the land and any improvements on it;*
- (f) the resources available to the acquiring authority in implementing the programme of land reform;*
- (g) any financial constraints that necessitate the payment of compensation in instalments over a period of time; and*
- (h) any other relevant factor that may be specified in an Act of Parliament'.*

ANNEX D: Overviews of Land Reform in Eastern & Southern Africa

BOX ONE LAND REFORM IN UGANDA

Tenure reform began in 1988 with the establishment of a committee under the Ministry of Agriculture to look into ways to increase security of tenure and to make land more freely available for investment. Research into tenure systems was conducted with the support of USAID and the Wisconsin Land Tenure Center. This direction altered over time. From 1993 four Bills for a *Land Tenure and Control Act* were drafted, eventually gazetted in early 1998 as a Land Bill, and enacted in June 1998 as the Land Act.

An important intervening factor was the enactment of an entirely new Constitution in 1995. This set the policy framework for land tenure change with a strong orientation towards the democratisation of property relations. A main clause was the removal of root title from the state to landholders. Government retained ownership of environmentally-significant resources including forests to itself but as trustee for citizens only. Democratisation was to be furthered through the removal of authority over property titling and transfer from government to district level Land Boards, to be fully autonomous of either central or local government. Dispute resolution was to be similarly removed from the judiciary into a regime of independent land tribunals, operating also at the local level.

The **Land Act 1998** included a rigorous timetable for establishing the new institutional framework for land management and dispute resolution and a funding mechanism to support the capacity of local people to benefit from its provisions [e.g. to title their land, or to buy out landlords under the mailo system] [Land Fund].

In practice, implementation of the institutional framework has been problematic, dogged by weak support within central government and financial incapacity to deliver. Not a single target date set out in the Land Act 1998 has been met. Some District Land Boards are in place but are essentially not operating. No Land Tribunals have been created. Critical regulations needed as instruments by which both Land Boards and Tribunals may operate have not been enacted two years after their initial drafting. The Land Fund is not operational. Difficulties arising from the fact that the new law did not fully revise the registration laws are also beginning to be felt. There has been some social unrest as a result of land disputes not being able to be heard in ordinary courts and remaining unresolved. Land grabbing and squatting on ex- Government Land has flourished in especially urban and peri-urban areas and Municipal Councils are experiencing a dramatic loss in revenue through no longer being able to charge rent on properties. Forests have become a target for squatters in some areas.

A programme of national sensitisation was successfully launched and most citizens are aware that their customary right in land is secured and that they may no longer be wantonly evicted. A 1999 study offered practical guidance to reshape targets, but requiring amendments to the law still not made in late 2000. These include asking Parliament to allow courts to hear disputes until the tribunals are in place and to reduce the number of Land Boards and Committees needed for tenure administration. Amendment is also sought to put a hold on certain categories of land until the state is able to define exactly which land it will retain as its own property. In the interim, public contention has grown over ambivalent proposals to render spouses co-owners of primary household land which Cabinet sought to side-step by declaring this a subject for domestic, not land law, a decision which has drawn yet more criticism.

Main sources other than policies & laws: GoU 1993, 1995, 1996, 1998, 1999a, 1999b, McAuslan 1998c, 1999a, 1999c, 2000, Alden Wily 1997c, 1998b, 1998c, 1998h, Ovonji-Odida et al. 2000, Adoko 1998a, 1998b, Nangiro & Abura 1998, Mutyaba 1998, Nsamba-Gaiiya 1998, ULA 1996, UWONET 1997, 1998.

BOX TWO
LAND REFORM IN TANZANIA

Attention to tenure matters began in 1989-90 with the establishment of a Technical Committee in the Ministry of Lands, Housing and Urban Development to draft new Urban Land Policy. This was overtaken by a Ministerial recommendation to establish a **Presidential Commission of Inquiry into Land Matters**. This began in January 1991 and presented its final report in January 1993. To achieve its objective, the 12-man Commission travelled widely in the country, holding 277 meetings attended by 80,000 people. The prime recommendation of the Commission was to vest root title of most of the country in respective village communities, and to remove control over tenure administration from the executive into an autonomous Land Commission. This met with no support from Government.

In 1993 the Ministry drew up a position paper and draft **National Land Policy** which drew heavily upon most other aspects of the Commission's recommendations. This was presented to Cabinet in December 1994 and the subject of a public workshop in January 1995. The National Land Policy was approved by Parliament in August 1995.

Drafting of the requisite new basic land law began in early 1996, led by a foreign expert working with a Tanzanian team. The inclusion of the foreign expert angered the Commission Chairman, who launched a non-government agency to lobby for land rights. Reform issues remained muted in the public arena.

A final **Draft Bill for the Land Act** was presented by the working group in November 1996, and remained uncirculated until late 1998. At that point, the lengthy draft was gazetted as two proposed laws, a **Land Bill** and a **Village Land Bill** and changes made. Limited public discussion ensued immediately before their debate in Parliament in February 1999, where the two laws received full support. A commencement date for the two laws has still not been set by late 2000. Regulations under both acts have been drafted.

Piloting is intended as the means of implementing the new laws, beginning in selected areas. This will be helpful given that most tenure administration and dispute resolution will be conducted by people themselves in their respective villages. Unlike Uganda, Tanzania has chosen to use the existing and well-established village governance machinery for tenure administration and local dispute resolution, rather than depositing these functions in district level agencies.

The Land Act and Village Land Act designate the elected Village Councils as Land Managers, responsible for guiding community decisions as to the distribution of land within the village into household, clan, community or other lands, and their adjudication, registration [Village Land Register] and titling. The importance of clear, accurate and comprehensive guidance to villagers is thus critical. Justification for the unusually detailed, procedural and prescriptive nature of the Tanzanian laws is also suggested.

Whilst the Tanzanian laws were subject to insignificant public consultation in their formulation, they have received abundant academic critique. Disappointment has been expressed at the failure of the government to release its ultimate ownership and control over land. However there is as widespread approval for the law's handling of the rights of women, urban squatters, pastoralists and customary tenure in general, including the capacity of groups of people to hold land in registrable ways. At this point, the main question facing the reform is the extent to which political will to release powers as suggested in the new laws, will be realised and Village Councils assisted as Land Managers to entitle their constituents with Customary Rights.

Main sources other than policies & laws: GoT 1991, 1994, Shivji 1994, 1995, 1996a, 1996b, 1997, 1998, 1999a, 1999b, 1999c, Shivji & Kapinga 1997a, Alden Wily 1998e, 1998g.

BOX THREE

LAND REFORM IN ZIMBABWE

Independence was mainly fought on the demand for land to be more equitably distributed in a country where a white settler minority of some 4,500 people only owned the greater share of fertile farmland (70%) or 27.5 million hectares, and 21% of the total land area available.

Immediately after independence, the Zimbabwe Government launched one of the most extensive land resettlement programmes in Africa. A condition of Independence agreed at Lancaster House in 1979 was that the new regime could only tackle the land question through acquiring farms on a willing seller-willing buyer basis for ten years and could not amend the Constitution to alter this.

A Restitution & Redistribution Reform

The programme aimed to resettle 162,000 poor, landless and displaced families on nine million ha of land. Achievement was partial, with only 71,000 families settled on 3,498 444 ha of acquired land. Despite this, there is evidence to suggest that the programme had successful aspects, with an improvement in quality of life for those who benefited.

The programme comprised several schemes named as Models A, B, C and D. These provided different forms of organization, from uniform, family based holdings, to collective co-operative farming plans. The main form of tenure on resettlement land was 'permit tenure'. This allocated land rights but retained ownership by the state.

Resettlement slowed, Government claiming difficulty in meeting the high prices to continue acquiring land on this basis and represented the main constraint to implementation of the reform. As soon as it was able Government amended its Constitution to remove restrictions on acquiring land. A new Land Acquisition Act 1992 was passed to allow Government to enable land valuation to replace the willing-buyer-willing-seller provision, and placed a ceiling on the number of farms able to be owned, ceilings on farm size, and controls regulating absentee landlordism and foreign ownership. The law also allowed designation of areas for land acquisition and resettlement.

In 1993 Government appointed a Commission of Enquiry into Appropriate Agricultural Land Tenure Systems (The Rukuni Commission) which reported in 1994. The Government produced a new policy statement in 1996 focusing on a new phase of settlement. National and Provincial Land Acquisition Committees were established to identify commercial farms suitable for acquisition, which numbered 1,471 farms.

By the mid-nineties, Zimbabwe had achieved one of the highest rates of land acquisition and resettlement on the continent (Kinsey 1999, Van den Brink 2000). In 1998 Government announced the second phase of the Land Reform and Resettlement Programme (LRRPII). The five-year programme aimed to acquire and distribute an additional five million hectares for resettlement. Its inception phase included a learning phase, adoption of leasehold and freehold options to enable settlers to be titled, and a Communal Area Reorganisation Model to decongest certain areas.

Between September 1998 and March 2 2000, 59 farms were acquired [c. 90,000 ha] at fair market value totalling 250 million Zimbabwe dollars, and providing for 1,700 families to be resettled. There was criticism of the selection of beneficiaries, which has formally shifted onto wealthier and more able farmers, and provided politicians and officials with land. By mid 2000 the programme had totally collapsed in the face of President Mugabe's encouragement to war veterans to invade white settler farms, resulting in several thousand farms being invaded and generating some loss of life and considerable protest. The political opposition movement gained greatly in support but significantly, at no time during the election campaigning laid out an alternative land acquisition and reallocation programme.

As outlined in Annex C (2), constitutional amendment has played a prominent role in the handling of the white settler land issue. Eventually in mid 2000 the Constitution was amended to remove any constraint upon the expropriation of settler land. With each passing month of 2000, more and more farms have been earmarked for expropriation without intention to compensate owners.

Continued

A Land Tax Act has also been passed, to impose heavy taxation upon all farms above a specified size for each of the recognised six agro-climatic zones.

Moving into Tenure Reform

Issues relating to non-settler land rights have been put on hold during the white settler land crisis.

In 1998, with FAO assistance, Government commissioned a study designed to produce a comprehensive new land policy framework. The Commission presented a detailed Discussion Paper in November 1998] and draft outline policy. This was briefly discussed in a semi-public workshop in June 1999. No action was taken to approve the Policy. Chaired by the Chairman of the Tanzania Commission of Inquiry into Land Matters [1990-1992], the recommendations borrow significantly from Tanzania's land reform.

These include democratisation of root title from President to Village Assemblies in respect of land held customarily and to an autonomous National Land Board in respect of lands held under statutory law [freeholds, leaseholds]. In effect, all land will be known as either Village Land or non-Village Land and respectively governed by customary or statutory laws. Elected and autonomous District Land Boards will supervise land allocation by Village Land Registries established in each village. The definition of Villages with discreet boundaries and with their inhabitants formed into Village Assemblies, has already been provided for in the Traditional Leaders Act, 1998 (although not implemented yet). Village Assemblies will elect Village Councils.

The Village Land Registries, small elected bodies, will also serve as Village Land Courts. Certificates of Customary Title will be issued to men, women, households or other groups over land within the area defined by a Certificate of Village Land. Shorter term leases may also be issued for outsiders, mainly for service provision. Village commons will be held by the Village Council and managed in the interest of the village as a whole. Attention throughout is given to gender equity with Customary Titles to bear the names of both spouses. A more participatory and localised approach to land acquisition for resettlement is advocated. Land dispute resolution is to be provided with a partly-dedicated land court regime, beginning variously at either at the village or district land court, thence to the high court for appeal. The Framework Paper recommends that policy be put into the constitution and that a single comprehensive land act be drafted and enacted to bring together all aspects of land policy and legal provision.

Main sources other than policies & laws: GoZ 1998a, 1998b,1999a, 1999b, Palmer, 1998, Kinsey 1999, Van den Brink, 2000, Moyo 1998.

BOX FOUR

LAND REFORM IN SOUTH AFRICA

The Reform Programme

Prior to the elections in 1994, the African National Congress set out its proposals for land reform in the *Reconstruction and Development Programme: a policy framework*, (ANC, 1994). It stated that land reform was to be the central and driving force of a programme of rural development. Land reform was to redress the injustices of forced removals and the historical denial of access to land; to ensure security of tenure for rural dwellers, eliminate overcrowding and to supply residential and productive land to the poorest section of the rural population; to raise incomes and productivity; and, through the provision of support services, to build the economy by generating large-scale employment and increase rural incomes. As anticipated in the 1994 RDP policy framework, government's response has had three major elements:

Land Restitution covers cases of forced removals, which took place after 1913. They are dealt with by a Land Claims Court and Commission, established under the *Restitution of Land Rights Act, 22 of 1994*. By the cut-off date in March 1999, over 60,000 claims by groups and individuals had been lodged. By March 2000, some 1,450 property claims, mostly in urban areas, had been settled and about 300 had been rejected. Amendments to the Act in 1999 provided for simpler administrative processes for the resolution of cases. A major outstanding issue is the level of compensation to which claimants should be entitled. The high cost of compensation is in danger of swamping the budget at the cost of other land reform components.

Land tenure reform has been addressed by laws, which aim to improve tenure security and to accommodate diverse forms of tenure, including communal tenure. The *Communal Property Associations Act, 28 of 1996*, enables a group of people to acquire, hold and manage property under a written constitution. The *Land Reform (Labour Tenants) Act, 3 of 1996*, provides for the purchase of land by labour tenants and the provision of a subsidy for that purpose. The *Extension of Security of Tenure Act, 62 of 1997*, helps people to obtain stronger rights to the land on which they are living or on land close by. It also lays down certain steps that owners and persons in charge of the land must follow before they can evict people. The *Interim Protection of Informal Land Rights Act, 31 of 1996*, protects those with insecure tenure, pending longer term reforms. The *proposed Land Rights Bill*, covering the rights of people living on state land in the former homelands, was to have finalized the programme of tenure reform, set out in the *1997 White Paper on South African Land Policy*. However, the measure was overtaken by the elections in mid 1999.

Land Redistribution aims to provide the poor with residential and productive land. It started with a two-year pilot exercise to devise, test and demonstrate arrangements for a national programme, which began in 1997. The legal instrument to allocate a government subsidy to 'qualifying persons' for rural land, housing and infrastructure is the *Provision of Certain Land for Settlement Act, 126 of 1993*, previously introduced by the National Party. The Act, amended and renamed in 1998, had provided some 700,000 hectares to over 55,000 households by the end of 1999. Major outstanding issues are: who should qualify; the extent to which government should intervene in a 'market-based' and 'demand-led' process; and the coordination of government agencies in the planning and implementation of land redistribution projects.

In terms of the RDP policy framework, South Africa's land reform programme has failed to meet expectations. It has faced serious fiscal constraints, receiving less than 0.4 per cent of the government budget, over the financial years 1994/5-1998/9. Under the **Constitution**, landowners are entitled to market-related compensation. The Constitution also sets out responsibilities for land reform, which are not easily coordinated. While the national government is responsible for land acquisition, the provincial and local spheres are meant to provide services for settlement and agriculture. Constraints have arisen from the weak organization of rural people and the lack of capacity of governmental agencies, whose personnel lack experience and training".

Continued

The status of majority homeland tenure in 2000

The Land Rights Bill aimed to provide for far-reaching tenure reform in the rural areas of the ex-homelands by repealing the many and complex apartheid laws relating to land administration, by recognising customary tenure systems, and by bringing tenure law into line with the Constitution. The law was expected to confirm the rights of a broad category of rights holders who occupy, use and have access rights to land. It was to have provided for the transfer of property rights from the State to the de facto owners and to have devolved land rights management functions to them. Rights were to vest in the people, not in institutions such as traditional authorities or municipalities. The proposed law would have recognised the value of both individual and communal systems and would have allowed for the voluntary registration of individual rights within communal systems. Where rights existed on a group basis, they would have been exercised in accordance with group rules and the co-owners would have had to choose the structures to manage their land rights. The envisaged law was neutral on the issue of traditional authorities. Where such systems had proved functional and enjoyed popular support, the law would have provided them with legitimacy. Where they were no longer viable or supported, the proposed law would have enabled people to appoint new structures.

Following the elections of June 1999, the draft Land Rights Bill was shelved by the incoming minister, who instructed that new legislation be prepared to transfer state land in the former homelands to tribes. In an attempt to salvage work done on the bill, attempts are being made to desegregate the draft bill and incorporate the principles in regulations and amendments to tenure laws already on the statute books. The overall effect is expected to be the dilution of the significance of the reforms as originally proposed and a perpetuation of the dual system of land rights inherited from the colonial and apartheid past. It remains to be seen whether the proposed legislation to transfer land to tribes (i.e. tribal leaders) will prove viable or whether the draft Land Rights Bill will have to be reactivated. There is little doubt, however, that the cause of tenure reform in South Africa has been severely set back for reasons which have yet to be publicly debated.

The political opposition to tenure reform is, however, predictable. It changes the terms and conditions on which land is held, used and transacted. A tenure reform worthy of the name was sure to be challenged by those with vested interests in maintaining the status quo. Opposition stems from traditional leaders reluctant to abide by constitutional principles and from rent-seeking officials who seek to control and profit from land allocation. There are others who feel that priority should be given to capital expenditure on the redistribution of land alienated by European settlers. There is a reluctance to allocate funds to land administration, despite the fact that the Department of Land Affairs budget remains consistently under spent and that over 1500 officials (mostly supernumerary), employed by provincial governments, continue to allocate land under the old-order Bantu land regulations.

Currently, in South Africa, government's plans to redistribute freehold land to 'progressive' African farmers are in the ascendance. However, if experience in Zimbabwe and Namibia is any indication, the issue of tenure reform in the communal areas will continue to recur. In South Africa, there is increasing evidence that, contrary to expectations, rights-based policies (i.e. land restitution and land tenure reform) are likely to receive more political support than land redistribution, a purely administrative process. It should not be a case of either one or the other, but of obtaining a better balance between rights-based and administrative land reform measures⁷

By Martin Adams, December 1999, Pretoria.

BOX FIVE

LAND REFORM IN ZAMBIA

Since independence, Zambia has undergone three tenure reform processes. The first and founding phase was the enactment of the **Land (Conversion of Titles) Act 1975** which converted all land to state ownership. Under this Act freehold tenure was abolished and existing interests converted to statutory leaseholds of 99 years' duration (some had been of 999 year duration). Hence as of 1975, land could be held either through leasehold title or customary tenure [unregistered]. Only developments on land could be sold, not the land itself. This was popularly construed to mean that land had no value. All land was vested in the President and 'under-utilised' farmland nationalised. All transactions required Presidential [through delegation, Ministerial] approval. A stated intention was to remedy the exorbitant price of vacant state land, giving the President power to fix the value, and to impose rigorous development conditions.

In 1985, under mounting immigration of white South African and Zimbabwean farmers, the **Land (Conversion of Titles) (Amendment) (No. 2) Act, No. 15 of 1985** was enacted to restrict the granting of land to non-Zambians. This law also intended to protect land under customary tenure. The amount of traditional land that chiefs and councils could allocate was restricted to a maximum of 250 hectares. The **Lands Acquisition Act of 1990** allowed the state to expropriate property.

In 1991, a change of Government saw promotion of the private sector. A **National Conference on Land Policy and Legal Reform** was convened in mid 1993. An amendment to the 1985 law was drafted and provisionally approved by Cabinet in late 1993. This included a proposal to repeal the 1975 Act and reintroduce freehold tenure. The plan was that land would remain vested in the President and the law would enable him to alienate land without seeking the approval of local authorities. These measures were designed to attract foreign investment.

The introduction of the Amendment into Parliament in 1994 met with refusal by parliamentarians to even debate it and provoked much anger among chiefs whose authority over customary land was to be curtailed through the same revision. Hansugnule, Feeney & Palmer report that the proposals divided the country 'in ways second only to (earlier) Constitutional controversies' [1998]. Government withdrew the Bill but reintroduced it in a modified version a year later [1994], at which time it was passed. Freeholds were not re-introduced.

The 32 clause **Land Act, No. 29 of 1995**, is the current operational basic tenure law. The law divides the country into customary land and state land; the latter includes leasehold land, government land kept for parks and reserves, and land government devolves for district councils to administer and allocate [council lands]. The status of the last is ambiguous given their history as customary land made available by chiefs for service areas [see s. 6]. Councils may issue 99 leaseholds over these lands. Leaseholds are at the will of the President (or more exactly, the Commissioner of Lands) and may be made out of customary and state land. An innovation was to make all leases potentially 99-year leases [there had been limitations of duration in different categories previously] and the President may renew these [s. 10]. Parliament may approve the issue of freehold rights in certain limited circumstances [s.3 (6)]. Rent-seeking powers of state are high [s.4, 11, 12, 14].

A fundamental change in the law is that it reversed the principle of the 1975 Act that undeveloped land has no value. The 1995 Act acknowledges undeveloped and bare land as having value and restricts the powers of the Commissioner to repossess undeveloped properties. The right to compensation when the state does appropriate land has been increased. The law also saw a weakening in the 1975 law's requirement for Presidential consent to transactions. No provision is made for informal rights in state land (squatters). Eviction is freely effected.

Customary lands, some 94 percent of Zambia's total area, combines what were Trust and Reserve lands. How far the law protects customary land holders remains moot. Permission from the chief to sell land is required [s. 3]. Although not directly stated, land itself has regained 'value' with sales of vacant land, not just improved land or land with developments upon it. Section 8 allows customary landholders to convert their land into 99-year leaseholds with the chief's approval. Few citizens have done so, because of the survey and other costs involved and lack of information or accessible administrative support; entitlement is fully centralised in a slow bureaucracy.

Continued...

The procedures for acquiring land remain in the un-amended Circular No. 1 of 1985 issued under the 1985 Act. Should a customary occupant want to acquire a title over his/her land, s/he must secure a letter of approval from the chief and submit this to the district council which will discuss the application and approve it, forward this to the Commissioner of Lands in Lusaka who has final right of approval. A ceiling of allocations is set at 250 ha.

The 1995 law also established a Land Fund into which land taxes would be deposited [s. 16-18). It also provided for a centralised Land Tribunal [s. 20-29]. Neither development has yet been satisfactorily implemented.

In November 1998 the Minister of Lands introduced a **Draft Land Policy**. A main concern of the current Ministry of Lands is its limited capacity to provide survey services and the administrative support required to speed conversions and sales. A significant position taken in the draft document is a proposal to decentralise land allocation processes and to 'shorten procedures for land alienation', presumably to investors. Otherwise the document is vague. Chapter Four does indicate that the Ministry will enact (further) tenure laws but for unclear purposes.

Overall, the thrust of reform in Zambia has been towards concentrating authority over land in the central state, encouraging a market in land and encouraging conversion of customary rights into leasehold tenure. Customary owners in general feel their rights unprotected in law and stable only in default of ready administrative support through which customary land may be made subject to external leasing. Outsider access to local land is high, and tenure administration remains centralised, with few offices even at the provincial level. No effort appears to have been made since 1998 to advance new land policy.

Main sources other than policies & laws: Hansungule 1998, Hansungule et al. 1999, Kahokola undated.

BOX SIX

LAND REFORM IN NAMIBIA

At independence in 1990, 44% of land was in the hands of white settlers under freehold tenure and an estimated 50% of these were held by absentee landlords. The majority of citizens lived (and still live) in the northern part of the country in the so-called communal lands. Redistribution of property was an inevitable main agenda item of for those fighting for independence and for SWAPO, once it became the Government. The Constitution established however that whilst redistribution was an objective, private property would be appropriated only on payment of compensation [compulsory acquisition] [Article 16 (2)].

On assuming power SWAPO was clear as to its intention to transfer land from those with 'too much' to the landless majority. Research into land issues and national consultation on land issues got off to an early start culminating in an orchestrated **National Conference on Land Reform and the Land Question, June 1991**, notable for a plethora of papers and 'directed' decision-making. The Prime Minister reported that 'consensus had been reached' on the three principal areas of concern; viz.: correcting wrongs perpetrated by colonial dispossession, working towards equity in landholding and developing pragmatic policies to increase the efficiency of land use for production [Republic of Namibia, 1991]. The Conference called for reallocation of excessively large farms and under-utilised land, setting the stage for limited appropriation. The Conference also recommended that:

- Restitution of lost land prior to Independence would not be possible
- foreigners should have the right to use but not to own land
- very large farm ownership and ownership of several farms by one owner should not be permitted and such land should be expropriated
- a land tax should be imposed upon commercial farmland to generate income for the state and to penalise those holding masses of idle land
- small farmers in communal areas should be assisted to obtain access to the present commercial zones and given the relevant training and technical assistance to become commercial farmers
- women should have the right to own the land that they cultivate and to inherit and to bequeath land and fixed property
- the role of the traditional leaders in allocating land should be recognised but properly defined under law [ibid.].

Although the 1991 Conference set the stage for action, its resolutions were not adopted officially and a period of inaction followed. Against the recommendations of the conference, the Ministry of Agriculture continued to encourage enclosure of the northern communal grazing lands, often by outsiders to the area. NGO intervention accelerated and culminated in 1994 in a **National People's Land Conference (NPLC)** funded by Oxfam. The NPLC established a **Working Committee on Land Reform (WCLR)** and made policy demands reminiscent of those 'agreed to' in the 1991 Conference. Government was urged to speed up resolution of the key land issues (MWENGO Policy Alert 1996; Fuller and Abate 1997). In 2000, little progress on restitution had been made; foreign nationals still own 2.9 million ha and the State another 2.3 million ha.

More as a function of upcoming elections than NGO pressure, Government hurried through the long-drafted **Agricultural (Commercial) Land Reform Act 1995**, and before the WCLR could make its submission to Parliament. The law empowers government to appropriate over large or under-utilised farms or land in excess of two economic units. It also gives government first refusal on all sales of commercial farming land. The 1995 Act also established a *Land Reform Advisory Committee* to regulate the provisions of the Act.

Administration of those lands will be located in Land Boards and Traditional Authorities. An important provision is made for urban people to hold land as groups. In May 1996, Government produced a **Draft National Land Policy** and a **Draft Communal Land Bill**. The Policy was approved two years later [April 1998].

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It comprises a set of 50 simply-set out points, under principles, then urban and rural land. In content, it is a mix of generalities and concrete intentions. The intention to retain the ownership of communal land by the President as trustee is firmly retained [s.3.1].

The eventually gazetted **Communal Land Reform Bill, 1999** was passed by the first house of parliament in February 2000, after a heated parliamentary debate which declared the consultation process a failure. It was then rejected by the second house, the National Assembly in May 2000. The main issue of contention has been the plan to recognise existing enclosure of communal lands. Whilst many want the Bill to enter the law quickly to put a stop to new fencing, others want greater protection against enclosure put into law.

The Bill sought to entrench Presidential ownership of communal lands and made them available to occupation and entitlement by outsiders. It provided limited recognition of customary rights, allowing residential and arable land to be certified as customary rights, as lifetime usufructs, inheritable, but not transferable without permission. Grazing land and other commonage, the most important land resource of the north, was to be subject to land board allocation and able to be leased to non-customary owners and enclosed. Headmen and chiefs retain some roles but with the main power to be held by the new Land Boards. The autonomy of Land Boards from Government is ambiguous.

Overall, there has been little change on the ground in the land relations of Namibians, most of whom continue to hold their property as tenants of state in communal lands and with less than comprehensive recognition or protection of their rights. However, the last half of 2000 saw a new interest in restitution of lands following the Zimbabwe settler issues, and a series of proposals made to introduce higher taxes and to seek foreign aid to buy out willing owners and those identified as not fully using their properties. The latest plan is for the state to acquire some 9.5 million ha for redistribution within the next five years, to cost more than one billion Namibian dollars. The emergent NGO alliance [NANGOF] and local farmers are finally gaining a voice and beginning to influence political opinion [the National Council debate on the law in particular]. It is likely that tenure matters will become increasingly important on the public agenda.

Main sources other than policies & laws: GoN 1991, Adams & Werner 1990, MWENGO 1996, Adams & Devitt 1992, Werner 1997, Fuller & Abate 1997, NANGOF 1996, 1999, NNFU 1999, NNF, 1999, *The Namibian* passim.

BOX SEVEN

LAND REFORM IN MOZAMBIQUE

As in all African states, land ownership matters have been central to the battle for Independence in Mozambique and post-Independence policy. In 1979 the state promulgated a land law which vest land in itself, earmarked areas for socialist-oriented enterprise and restricted rural families to certain areas to encourage agricultural co-operative development, and some have argued, to provide labour for state enterprises [Negrao 1998]. These land laws [No. 6 of 1979 and No. 1 of 1986] permitted individuals to title their land and established titles issued by government as the only mechanism for foreign access to land.

After 1983 Frelimo embarked upon a programme to replace the unproductive state sector with private commercial enterprise, often involving foreigners and foreign companies and white South Africans and Zimbabweans in particular [McGregor 1997]. By the end of the war between Frelimo and Renamo in 1992, private, foreign-based enterprise had absorbed millions of hectares of land, seemingly irrespective of local tenure, and through processes which Kloeck-Jenson describes as 'haphazard, non-transparent and riddled with opportunities for corruption' [1998]. These enterprises were for agricultural, tourism, mining and timber extraction end use. Whilst many of these concessions remain un-finalised, Mozambique appears to be faced with two sets of contradictory rights in some parts of the country; nationals occupying land customarily with privately-titled concession rights to the same land. The nature of the **Land Law in 1997** needs to be seen in this light, and its adventurous attempt to recognise customary rights in a state culture and governance machinery which gives no account of these rights, as dramatic.

In 1992 the Land Tenure Center of Wisconsin, contracted by USAID to examine tenure issues, organised the **First National Land Conference** in Mozambique. This was undertaken in conjunction with the Governments Land Commission established the previous year and now named the **Inter-ministerial Land Commission** within the Ministry of Agriculture. A subsequent Conference was held in May 1994 [Kloeck-Jenson, 1997].

In October 1995, Government approved a **National Lands Policy (PNT) and an Implementation Strategy**. A draft new land law was prepared in January 1996. This was circulated to 200 institutions, experts, NGOs and the media. Working teams were sent to all ten provinces. A Technical Secretariat compiled the findings and submissions, presented to a (third) **Land Conference** held in June 1996 and attended by 226 participants drawn from public and private agencies. The resulting Working Document formed the basis for the Bill, considered by an open public session, two parliamentary committees and various other bodies, but not without conflict and delays [debate of the Bill apparently delayed three times in 1997]. NGOs played a critical role in mobilising pro-peasant support. The Bill was formally approved July 31, 1997. Regulations under the law were subsequently developed through a comparable working group mode with widely-inclusive non-governmental participation and finally approved by Cabinet in December 1998 [Quadros 1999]. Further new Regulations have been enacted [2000].

In the interim a range of national and foreign NGOs and academics founded a **National Committee to launch a Land Campaign**. Its aim has been to disseminate the new law, to promote justice by enforcing the application of the new law and to stimulate discussion between the family and commercial sectors which occupy the same land areas [Negrao 1999b]. Rights of women in land, the right of communities to participate in tenure-related decision-making and promotion of group action on land matters, have been important thrusts of the campaign. Manuals, leaflets, videos, comic books and plays have been developed. The Campaign operates in many areas of the country and continues into 2000.

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The new **Land Law, 1997**, is a concise set of articles, with minimal detail or procedural guidance. Nonetheless, ambiguities exist partly because of compromises reached as a result of intensive consultation. This rendered the law 'more a platform for understanding between the different actors and interests' than a strategy of reform' (Negrao 1999a). Key actors were Frelimo and Renamo, each with its own agenda. In 1997, Kloeck-Jenson observed that the law neither met the ambitions of most citizens nor met the keenest of the donor community to create a clear legal environment for the development of private property and a free market in land. At the same time, '*the law devolves more authority and autonomy to private investors and assumes a more conciliatory approach towards capital, both foreign and national*' [1997]. Ambiguities dog the law, only slowly being resolved through Regulations [Decree 16/87 1998, and 1999]. Still, the law is important in the new consideration it gives to ordinary landholders and its effort to ensure they play a role in tenure administration. This may provide a route towards local level organisational development, in a country where there is no local government in rural areas, and where political administrators vie for authority with traditional leaders.

Main sources other than policies & laws: Kloeck-Jenson, *passim*, Kloeck-Jenson et al 1998, Negrao *passim*, Quadros, 1999, McGregor, 1997.

ANNEX E: Objectives, Milestones and Public Participation in Land Reform Processes, and Certificates now obtainable for Land

TABLE ONE:
DECLARED & CHANGING OBJECTIVES OF TENURE REFORM

COUNTRY	DECLARED OBJECTIVES
UGANDA	<p>Changed over law-making process, 1988 – 1998</p> <p>In 1993 aim was to:</p> <ul style="list-style-type: none"> ▪ Establish a single system of land tenure ▪ Prompt conversion of customary to statutory freehold tenure ▪ Abolish mailo tenancy. ▪ Increase availability and marketability of land (<i>Draft for The Tenure and Control of Land Bill, 1993</i>). <p>By time the bill passed as <i>The Land Act, 1998</i>, aims were to:</p> <ul style="list-style-type: none"> ▪ Permit existing four regimes continue and give them a statutory basis; ▪ Remove state interests in as much land as possible with vesting of land in citizens not the state and automatic conversion of government leaseholds to freeholds; ▪ Provide statutory protection and rights for tenants; ▪ Devolve machinery for land administration and dispute resolution; ▪ Create a Land Fund with compensation and lending responsibilities; ▪ Increase marketability of land.
TANZANIA	<p>Expanded over policy-making process, 1989 – 1995</p> <p>Original objective (1989) was to legalise and increase market in land to make land available to local and foreign investment and to overhaul ineffective and corrupted tenure administration system. Objectives retained but limits sale of customary lands and devolves administration to village level, designating Village Councils as Land Managers.</p> <p><i>1995 National Land Policy</i> listed eight objectives, expanded into 15 principles stated in new law <i>The Land Act, No. 4 1999</i>. In précis –</p> <ul style="list-style-type: none"> ▪ President in trustee owner of all land ▪ Existing rights to be clarified and secured by the law ▪ Equitable access and distribution to be facilitated ▪ Limits on amount of land held by each person imposed ▪ Land to be used sustainably and productively ▪ The value of land to be realized ▪ Compensation for land taken by state to be fair, full, promptly paid ▪ Administration of land tenure to be transparent and efficient ▪ All citizens to participate in decision-making on tenure matters ▪ Market in land to be facilitated ▪ Regulation of market to be such that rights of rural and urban smallholders and pastoralists protected ▪ Rules of land law to be accessible to all ▪ Land dispute machinery to be independent, just and speedy ▪ All media forms to be used to disseminate information on land law ▪ The land rights of women to be treated in the same way as those of men.

<p>KENYA</p>	<p>Dramatic shift in idea of what needs reforming from mid-eighties TOR for a <i>Land Use Commission</i> (reiterated in National Development Plans from 1986 including 1998 plan for economic recovery (1999-2005), to tackle –</p> <ul style="list-style-type: none"> ▪ tax reform to encourage more productive land use ▪ regulations to limit land subdivision ▪ laws to encourage owners to lease out land ▪ means to help urban authorities obtain land for industrial and infrastructural development ▪ harmonisation of land use laws ▪ actions to resolve long-standing disputes ▪ decisions to ensure enough public utility land provided during adjudication processes ▪ operations of Land Control Boards which approve sales to be reviewed ▪ laws to be amended to promote rational urban development; <p>New TOR for <i>Commission to inquire into land law system in Kenya</i>, as gazetted, 26 November 1999 (derived from unpublished TOR of a proposed Task Force on Land in 1997, which never sat) –</p> <ul style="list-style-type: none"> ▪ To conduct a broad review of land issues for drafting a new land policy ▪ To recommend new legal and institutional framework ▪ To recommend guidelines for a basic new land law ▪ To take into account customary laws ▪ To incorporate relevant laws of other states ▪ To prepare drafts of new legislation ▪ To make other necessary recommendation.
<p>RWANDA</p>	<p>Drafts of new <i>National Land Policy, 1999</i> or 2000 not available but intention indicated as ‘<i>to restore stability in occupancy and ownership</i>’ following breakdown in tenure relations during 1980s, culminating in 1994 genocidal war, and in recognition that current occupants of a great deal of land in Rwanda are not either the recent (last decade) or original owners of the land. Apparent plan to adopt a <i>tabula rasa</i> approach, issuing rights over more or less equal-sized farm and house plots through village-making (<i>Imigududu</i>); this approach already initiated for resettlement of refugees. This will be confirmed/not confirmed when National Land Policy is made public in 2000.</p>
<p>ERITREA</p>	<ul style="list-style-type: none"> ▪ <i>Land Proclamation No. 58 of 1994</i> sought to – ▪ Overcome rising landlessness & disputes ▪ Provide a consistent system towards equity in landholding ▪ Increase the market in land (in Government leasehold land only) but limit sales in local usufruct sector ▪ Encourage investment by foreigners in Government leasehold land ▪ Eliminate customary systems in favour of a uniform lifetime usufruct. ▪ Also aimed and achieved the vesting of all land ownership in Government.
<p>MALAWI</p>	<ul style="list-style-type: none"> ▪ Presidential Inquiry on <i>Land Policy Reform, 1999</i> recommends a land policy which seeks to : ▪ Facilitate efficient use of land under market conditions ▪ promote the infusion and internalisation of environmentally sustainable land use practices ▪ guarantee secure and equitable access to land without discrimination ▪ ensure accountability and transparency in the administration of land matters. ▪ Noticeable shift in interest in studies and reports from 1966 to 1999 from conviction that conversion of leases out of customary land should be accelerated to promote a market in land towards view that customary land should be held intact as such and directives even issued to halt conversions, the continuation of the legal right to seek conversion to leasehold and thence to freehold, notwithstanding.

ZAMBIA	<p><i>Draft Land Policy, 1998 (no development in 1999-2000), seeks to improve upon new 1995 Land Law, and declares intention to:</i></p> <ul style="list-style-type: none"> ▪ maintain two systems of tenure, customary and leasehold tenure ▪ facilitate an efficient land delivery system ▪ facilitate foreign investment through the provision of land ▪ redress the gender imbalance and other forms of discrimination in land holding by encouraging women and people with special needs in the ownership of land ▪ regulate Estate management practice ▪ increase speed of dispute resolution ▪ generate revenue from land to finance Government functions ▪ provide accurate land information to institutions and the general public ▪ facilitate physical planning ▪ ensure that land is developed in accordance with conditions ▪ provide a clear description of Zambia's boundaries with its neighbours.
ZIMBABWE	<p><i>Focus of policy and law since 1980 has been upon restitution of white settler lands (see Annex B & C). Proposed new Policy of 1998 widened focus to communal lands. Discussed but not adopted in 1999-2000:</i></p> <p><i>Draft Land Policy, 1998/9 seeks to:</i></p> <ul style="list-style-type: none"> ▪ address historical and contemporary inequalities and inequalities in access to and control over land ▪ use state acquisition and redistribution as basis of larger reform including re-organising of village settlement ▪ address problems of landlessness, homelessness, squatting, overcrowding, poverty and insufficiency of food and other land based products ▪ encourage the optimal use of land in the interest of generating domestic accumulation and investment ▪ encourage environmentally friendly land use. <p>Policy proposed to vest title of statutory lands in an autonomous National Land Board and title of current communal lands in village assemblies and to establish village land registries to issue customary entitlement to households and to secure common land under village councils. Land tenure administration and dispute resolution to be similarly democratised.</p>
MOZAMBIQUE	<p>Significant changes in intentions from <i>original draft Policies</i> of Ministry of Agriculture in 1994-1996 to finally enacted <i>new Land Law, 1997</i>. Mainly in level of support for customary sector (increased), rights of foreigners to access land (increased in reality), relationship of local people with land and resource-related investment (to participate but with no veto), shift from precise to vague support for women's rights. Regulations, 1998 and now 1999 further 'amend' intentions.</p>
SOUTH AFRICA	<p><i>White Paper on South African Land Policy, 1997, seeks to:</i></p> <ul style="list-style-type: none"> ▪ deal effectively with the injustices of racially based land dispossessions of the past ▪ promote more equitable ownership ▪ reduce poverty and contribute to non-economic growth ▪ increase security of all occupants ▪ put in place a land management regime which supports sustainable land use patterns and allows for rapid release of land for development.
BOTSWANA	<p>Main shift in 1960s land policies realised through <i>1993 Amendment to the Tribal Land Act</i> in 1993 which weakened tribal control over land through opening access to all citizens, and in more subtle ways through <i>1991 Agricultural Policy</i> promoting enclosure of communal grazing land.</p>

<p>NAMIBIA</p>	<p>Prior to Independence, SWAPO determined to restore white settler land to inhabitants. Even from early 1991 Land Conference, eschewed outright restitution programmes (despite public demand and majority opinion of Conference towards this) and confirmed this finally in 1998 <i>National Land Policy (s. 3.11)</i>. Policy towards northern Communal Lands wherein majority black Namibians live, has retained its ambivalence since 1990. NLP clearer on urban land policy. Rural land administration to be vest in both Land Boards (regional level) and Traditional Authorities with poor definition of respective powers (s. 3.1). Provides for Freeholds, Permits to Occupy, Leaseholds and Customary Grants, registrable and inheritable to family members (s.3.5). Freedom of movement clause, combined with clauses on 'exclusive' and communal grazing, and function of Land Boards towards issuing leases, combine to suggest support for enclosure of communal land by outsiders (sections 3.2, 3.3, 3.7, 3.9) whilst section 3.20, promising legislation, seeks to inhibit enclosure in principle.</p> <p>Explicit support for group tenure in urban areas (s. 2.5) but no clear provision for group tenure in rural land and customary rights, only registrable for residential and arable purposes, signalling de facto state antipathy towards communal grazing (s. 3.4)</p>
<p>LESOTHO</p>	<p><i>1979 Land Act</i> introduced to consolidate previous laws and aimed to :</p> <ul style="list-style-type: none"> ▪ Introduce land use efficiency through leases ▪ phase out Laws of Lerotholi in favour of national statutes ▪ increase market in land ▪ improve women's access to land. ▪ democratise allocation procedures in communal areas through formation of elected Land Allocation Committees ▪ improve security of tenure for households <p>Review Commission, 1987, and subsequent reports advocate radical change in administration, dispute resolution, recognition of rights, capacity of non-nations to hold land, etc. New Land Policy Review Commission not established by end 1999, with continuing conflict between traditional and state authorities as to powers.</p>
<p>SWAZILAND</p>	<p><i>1999 Draft National Land Policy</i> lists following objectives:</p> <ul style="list-style-type: none"> ▪ to improve access to land and secure tenure ▪ to encourage the rational and sustainable use of land ▪ to improve productivity, income and living conditions and alleviate poverty ▪ to reduce land related conflicts ▪ to develop an efficient and effective system of land administration ▪ to encourage land ownership by Swazi citizens.

TABLE TWO: MILESTONES AND PUBLIC PARTICIPATION IN NEW LAND TENURE REFORM

STATE	MILESTONES	EXTENT OF PUBLIC PARTICIPATION IN FORMULATION OF NEW POLICIES AND LAWS
UGANDA	<ol style="list-style-type: none"> 1 Land Tenure Study commissioned 1988. 2 Agricultural Policy Committee 1989 established Technical Committee on Land Tenure Reform which prepared first draft Bill (1990) based upon findings of study. 3 Final Report of Committee, 1993 with second draft Bill. 4 Consultation on the Constitution (1992-1995) and new Constitution, 1995. 5 Revised Bill 1996. 6 NGO Uganda Land Alliance, 1997 established to critique Bills and lobby. 7 Draft Bill revised, March 1997, July 1997 following critiques. 8 Public debate on Land Bill March 1997 Kampala 2 Sept 1997 co-sponsored donors & Government 9 Draft Bill revised and gazetted as Bill No 4 of 1998 (Feb. 1998). Public debate encouraged. 10 Parliamentarians Workshop on Land Bill 1998 in Kampala in April 1998 with televised public dialogue involving the President. 11 Public meetings of the Parliamentary Committee on Land (May-June 1998) 12 Bill passed by Parliament 30 June 1998, assented 2 July 1998. 	<p>Public comment and public consultation slight until Bill gazetted early 1988 and published in newspapers. However land matters integral to widespread national consultation on the Constitution.</p> <ul style="list-style-type: none"> • 1992: ten issues from the draft Bill selected for limited debate in 50 meetings with 1,488 persons only, mainly officials. • 1998 March & April: post-Bill consultation in 13 districts on ten selected issues in the Bill 1998 involving around 2,000 persons only. • Following gazettelement of Bill in March 1998, published in press and debate open to the public. Over 100 meetings and over 100 articles in the press. • 'Sensitisation' (i.e. education on what has now been made law) given high priority in implementation and prominently involves NGOs (1999-2000).
TANZANIA	<ol style="list-style-type: none"> 1. Urban Lands Technical Committee formed to draft new urban tenure policy, 1990 2. 12 person Presidential Commission of Inquiry into Land Matters 1991-1993 3. National Land Policy 1995 4. Draft Bill for The Land Act 1996 5. Gazetted Bill for The Land Act and the Village Land Act, December 1998 6. Approval by Parliament, February 1999 7. Assented April 1999 8. Commencement Date yet to be set. 	<p>Consultation began well with Commission but dwindled thereafter.</p> <ul style="list-style-type: none"> ▪ Commission held 277 meetings with 80,000 persons. Drafted 18 principles of land policy in report 1993. ▪ Ministry of Lands drafted Policy 1993, 1994, held public workshop of mainly civil servants and politicians January 1995. ▪ Bill for a Land Act drafted by consultant with working group. Not debated prior to redrafting and tabling as two gazetted Bills 1998. Two workshops held with MPs. ▪ Emphasis now on 'dissemination' of what entered law. May combine educative programme for all future land managers – i.e. 9,225 Village Councils.

ZANZIBAR	<ol style="list-style-type: none"> 1. Establishment of a new regime for land administration and control in the Commission for Lands and Environment (1989) with regional and district advisory bodies 2. Land Tenure Act, 1992 replacing important post-revolutionary laws of 1960s and restructures rights in land as Government or private and roots all tenure in occupancy and use of property, readily confiscated for failure to use 3. 1990s saw assisting legislation developed in support of Tenure Act. 	No data
RWANDA	<ol style="list-style-type: none"> 1 Imigududu Directive (Villagisation), 1997. 2 Land Policy and Land Bill drafted, 1999. 	No evidence that participation, or even consultation intended. Commission of Inquiry NOT intended. Draft Land Policy and Draft Land Bill not available to public. Fear of provoking further tribal unrest given as the reason. However, by mid-2000 strong change in this strategy with declared intention to present Policy draft for NGO discussion at least. Policy draft due finally in end 2000.
ERITREA	<ol style="list-style-type: none"> 1 1992 – Land Commission (now Land and Housing Commission) Established to research and draft policy and laws 2 1994 – Land Proclamation 3 1994 – Education campaign in 8 of 10 provinces 4 1995/96 – studies to tackle specific issues (urban, disputes etc.) 5 FAO assisted GoE to plan implementation of new land act including draft land registration law. 6 New laws enacted in support of main law in 1997. 	None other than educational campaigns following Proclamation
MOZAMBIQUE	<ol style="list-style-type: none"> 1. Commission of Lands, Ministry of Agriculture, 1990-1995 carried out research 2. National Lands Policy, October 1995, following first multi-party elections, 1994 3. Draft Land Law, January 1996 4. Conference, public session, parliamentary commissions review, June 1996 5. Land Act, July 1997 6. Regulations drafted by four working groups, 1997 7. Draft Regulations to the Land Act, July, 1998 8. Enacted Regulations, December 1998 9. Land Campaign, 1998 continuing to disseminate law. 10. New Regulations in 1999, in 'Technical Annex' to Land Regulations. 	<p>High level of consultation.</p> <p>Draft Land Law, 1996 circulated to 200 institutions and working teams sent to all ten provinces to hold seminars and train persons who in term promoted discussion in the districts. Technical Secretariat produced Working Document to Conference on Land June 1996, 226 participants from civil society. Comments tabled to Cabinet and Parliament. Public session held. Considered by two Parliamentary Commissions.</p> <p>Draft Regulations discussed in 9 of 10 provinces and open sessions with 55 NGOs.</p> <p>Land Campaign to educate on rights on-going, mainly non-government and donor-driven.</p>

MALAWI	<ol style="list-style-type: none"> 1. Review of legislation affecting land policy by the Ministry of Lands and Valuation, 1996 2. Presidential Commission of Inquiry on Land Policy, appointed in March 1996, final report presented in November, 1999. 3. To be followed by the drafting of the Land Policy by the Ministry of Lands and Valuation with expected new draft Land Law (expected late 2000). 	<p>High level of consultation by Commission. 205 public hearings conducted by Commission in all regions, districts, tribal areas and major urban centres. Commission recommends its conclusions be discussed in four major workshops in all three regions and at the national level, to initiate 'consensus-building'.</p>
ZAMBIA	<ol style="list-style-type: none"> 1. Conference on Land Policy and Legal Reform. 2. Lands Bill (Amendment) 1994 produced by the Ministry of Lands in an effort to encourage private sector participation in land and to attract foreign investment. Bill was rejected in parliament, 1994. 3. A different version of the Bill was passed in Parliament in September 1995. 4. Draft new National Land Policy prepared by the Ministry, 1998. 	<p>Mixed Ministry conducted consultative seminars throughout the country in 1994, seeking national support for the proposed legislation in response to rejection of the Bill by Parliament. Proposals encountered violent opposition from local chiefs. Uncharacteristically, the Lands Bill was not gazetted, nor was it posted for 30 days before being passed as law. No public consultation on the Draft Land Policy, 1998, although before Cabinet for the whole of 1999. NGOs have not yet mobilise for consultation, reportedly due to financial constraints.</p>
ZIMBABWE	<ol style="list-style-type: none"> 1. Policies and programmes prior to 1994 directed to matters of land acquisition for redistribution by resettlement (1980, 1990, 1992). 2. Land Tenure Commission 1994; drew attention to main tenure issues and the need for reform (Rukuni Commission). 3. 1998 Donors Conference on Land Reform (Sept. 9-11, 1998): Communiqué issued. 4. Traditional Leaders Act 1998; provided village level institutional and land-related framework, not implemented fully. 5. Second Phase of Land Reform (Redistribution); Inception Phase Framework Plan (1999-2000) with target of 200,000 ha (118 farms), to include 1 million ha. 6. National Land Policy Framework Paper with Draft National Policy, 1998, circulated as a Draft National Land Policy, 1999, under discussion. 7. Chaos in all land matters through constitutional and political changes in 1999-2000. Future of restitution process unknown, and communal land tenure reform off the agenda. 	<p>Limited At most has involved a few urban-based NGOs. No public participation during and up to completion of the Draft National Land Policy, 1998, with input only through a single stakeholder workshop. Insignificant mobilisation within or outside Government for discussion. Communiqué issued as result of 1998 Donor Conference strongly included beneficiary participation and consultation, not since achieved in matters of land acquisition, settlement or policy formation. Referendum for new Constitution in Feb. 2000 arguably an important 'consultation', resulted in resounding 'No' to proposals but relevant land clauses reintroduced as amendments to existing Constitution in mid-2000.</p>

SOUTH AFRICA	<ol style="list-style-type: none"> 1. Department of Land Affairs (DLA) created, 1994 2. Land Reform Pilot Programme – LRPP, 1994-1996 3. Framework Document on Land Policy, May 1995 4. Policy Conference, 31st August & 1st September, 1995 5. Establishment of Provincial Offices of DLA, 1995-1996 6. Green Paper on South African Land Policy, February 1996. 7. White Paper of South African Land Policy, 1997 8. White Paper on Local Government, 1998 9. Establishment of District Offices of DLA, 1998-99 10. Enactment of laws, 1994-1999. 11. Land Rights Bill drafted by mid-1999, but suspended still by mid 2000. 12. New policy statement by Minister of Lands Feb. 2000 confused; no clear intimation of intended direction of Mbeki Administration on tenure issues. 	<p>Obvious high level of involvement in the pilots in nine districts, one in each Province (1994-1997).</p> <p>In policy making some 30 workshops held around the country and written submissions sought and received from the public.</p> <p>Land reform a constantly debated matter in public press including heated exchanges between government and civil society.</p>
NAMIBIA	<ol style="list-style-type: none"> 1. National Conference on Land Reform, 1991 2. The People's Land Conference, 1994 3. Draft Agricultural (Commercial) Land reform Bill announced, 1994 4. Draft National Land policy, formulated in 1995 5. Draft Communal Land Bill, 1995 6. Consultative Conference on Communal Land Administration, 1997 7. National Land Policy (White Paper), April, 1998 8. Communal Land Reform Bill approved Parliament but rejected by National Council May 2000. Returned for redrafting by AG Chambers. 	<ol style="list-style-type: none"> 1. High level of consultation in that Conference brought together all parties interested in the land question. 2. High, an NGO initiative. Pressed the need for land reform, focusing more on communal areas. 3. Limited, although discussed at the People's Land Conference, the whole process had been rushed. 4. High. Draft distributed for comment in 1996. The Ministry worked together with a range of stakeholders on the strategy for obtaining comments from as broad a segment of the nation. 5. NGOs, in particular NANGOF, held workshops in all parts of the country, national, regional, and local. 6. In response to discussions with stakeholders advising the Ministry on the dissemination of the Draft Land Policy, the Bill was disseminated nationwide. Key NGOs spearheaded the campaign. 7. High. Addressed issues surrounding the circulated Draft Communal Land Bill. 8. Consultation fielded but poorly conducted & reported and findings not given room in final debate process, with Bill 'pushed through' in February 2000 in National Assembly, generating protest and delaying confirmation of the bill by the National Council. Public involvement in tenure matters likely to greatly increase in 2000.

LESOTHO	<ol style="list-style-type: none"> 1. Land Act 1979 2. Land Review Commission 1987 3. Review of the law and Practice on the Compulsory Acquisition of Land and Compensation Payable, 1996 4. Draft Bill for Town and Country Planning (Amendment) Act, 1997 5. Commission of Inquiry (Land Policy Review Commission) 1999 but not clear that underway even in 2000. 	<ol style="list-style-type: none"> 1. No consultation towards Land Act, 1979. 2. Commission held 50 consultation meetings around the country, in all ten districts. 3. Consulted and pointed to the failure of the Lands Tribunal in the resolution of matters of compensation, failure of the Town and Country Planning Act to deal with the problem of informal settlements, and need for comprehensive land policy. 4. Enactment not yet effected. 5. To review the system of tenure, the nature and causes of major land problems, review legislation governing land rights, use and access etc. Long history of ignoring recommendations so unclear if action will be taken.
SWAZILAND	<ol style="list-style-type: none"> 1. National Workshop on Land Tenure, 1988 2. His Majesty's National Consultation Process; in three stages <ul style="list-style-type: none"> -The first of these was a 'vusela' team, (Swati word for 'to greet'). -The was carried out in 1992 in the form of the Tinkhundla Review Commission -The third, the Economic Vusela, 1995 3. Draft National Land Policy 1999. Critical changes proposed. 4. Not approved by mid 2000, awaiting findings of Constitutional Review. 	<p>Substantial consultation. Public workshops and consultations, via Economic Review Commission, etc. NLP draft 'yet to be enriched' by public consultation.</p>

**TABLE THREE:
CERTIFICATES OF OWNERSHIP OBTAINABLE THROUGH
REGISTRATION AND THEIR TERM**

COUNTRY	TITLES AVAILABLE THROUGH REGISTRATION	MAXIMUM TERM OF HOLDING
UGANDA	Certificate of Customary Ownership Certificate of Freehold Certificate of Mailo (may be subject to issued Certificates of Occupancy to bona fide tenants) Leasehold (from state, local governments or private owners)	Perpetuity Perpetuity Perpetuity Not stated but not limited. In theory could be one day less than in perpetuity.
TANZANIA	Granted Right of Occupancy (only available from General or Reserved Land) Derivative Right (Residential Licence) mainly in urban areas of General Land, and allocated by Local Authorities Customary Right of Occupancy (available only in Village Land, allocated by a Village Council in respect of its Village Area or in Reserved Land)	Up to 99 years, not renewable Two years, renewable For a term uncertain (potentially in perpetuity), or for up a certain term, renewable up to 99 years, or from year to year – depending upon local custom and decision of Village Council
ZANZIBAR	Right of Occupancy Leases	In perpetuity after three-year provisional issue of grant.
KENYA	Title Deed of Absolute Ownership (freehold) Certificate of Lease	Undefined, assumed to be in perpetuity Not registrable unless for 25 or more years; 999 years for agricultural land, 99 years for town plots.
RWANDA	Leasehold Urban leaseholds	No limit on term stated No limit on term stated ('indefinite certificates' against payment of annual tax)
ERITREA	Usufruct certificate (can convert to leasehold) Leaseholds	Lifetime (inheritable only by direction of land authority) Issued only to individuals Leaseholds: limited term
ETHIOPIA	Usufruct leasehold Leaseholds (to non-citizens)	Lifetime usufruct ,may subdivide to children and children may then inherit (land subject to redistribution) Limited term
MOZAMBIQUE	Un-named entitlement to non-nationals Un-named entitlement under common ownership of community or group or household	Title granted provisionally to non-nationals for 'five year authorisation' period during which certain steps must be fulfilled. With compliance, title then confirmed. Customary title – potentially in perpetuity.

MALAWI	<p>Customary Land Lease – suspended</p> <p>Certificate of Claim (freehold)</p> <p>Agricultural Lease</p>	<p>Granted by the Minister, 99 years (issue slowed by Ministerial directive in 1985, 1989 and finally prohibited in 1996)</p> <p>In perpetuity (Direct Grants made after 1902 and 1964)</p> <p>Various, depending on land use; 7 years, 14 years, 21 years, 33 years, 66 years and 99 years.</p>
ZIMBABWE	<p>Village registration certificates and settlement permits as per Traditional Leaders Act, 1998, Section 24; not implemented yet.</p> <p>Title deeds for freehold land</p> <p>State leaseholds with option to purchase (resettlement areas)</p>	<p>None specified</p> <p>In perpetuity</p> <p>Varies</p>
BOTSWANA.	<p>Certificate of Customary Land Grant</p> <p>Common Law Leasehold</p> <p>Tribal Grazing Land Policy Lease</p> <p>Freehold</p> <p>Fixed Period State Grant</p>	<p>In perpetuity, inheritable</p> <p>Variable term for non-traditional uses of tribal land</p> <p>50 years</p> <p>In perpetuity</p> <p>Resident – 99 years</p> <p>Business – 50 years</p>
LESOTHO	<p>Leasehold for residential</p> <p>Leasehold for business</p>	<p>90 years</p> <p>Short terms</p>
SWAZILAND	<p>Title Deeds for Title Deed Land</p>	<p>In perpetuity</p>
NAMIBIA	<p>Freehold</p> <p>Certificate of registration (proposed)</p> <p>Certificate of leasehold (proposed)</p>	<p>In perpetuity</p> <p>Communal Land Reform Bill proposed Certificate as lifetime usufruct, reverting to the customary authority for reallocation (primarily to surviving spouse). Only for residential and arable land.</p> <p>Leaseholds in communal land for up to 99 years as agreed by the land board and the grantee. Lease period exceeding 10 years requires Ministerial approval (Section 34).</p>
ZAMBIA	<p>Provisional Lease</p> <p>Council Title</p> <p>Customary Leasehold Title</p> <p>Leasehold Title (formerly freehold title)</p> <p>Subsidiary Leaseholds</p>	<p>14 years</p> <p>99 years</p> <p>In perpetuity</p> <p>100 years</p> <p>99 years</p>

ANNEX F: Conditions, Sales and Non-Citizen Rights to Land

TABLE ONE:
CONDITIONS TO LAND HOLDING

COUNTRY	CONDITIONS TO LAND OWNERSHIP SPECIFIED IN NATIONAL LAWS
UGANDA	WEAK None specified in the Land Act, 1998 but provision for conditions to be applied as per local custom in Customary Titles (s. 4 (1) (e)). Freehold Titles also may be made subject to conditions, restrictions of limitations (s.4(3)).
TANZANIA	STRONG National Land Policy, 1995 (4.2.8:iv) emphasises conditions as a means to discourage land hoarding. These will be defined through regulations (Land Act, 1999; s.34) and in the interim existing conditions of occupancy and active use apply. Little evidence of compliance. On village land, the law (the Village Land Act, 1999;s.27) specifies six conditions: active use, residence in the village, securing proper permissions before building, payment of required fees, charges, taxes, compliance with rules made by village council and also customary laws which apply in the area in respect of land ownership, boundary marks.
ZANZIBAR	STRONG Land Tenure Act, 1992 makes all grants conditional to occupation and use and provides fully for confiscation of land not developed/used.
KENYA	WEAK Land use directives made through Agricultural Act and Water Act; may declare preservation areas for soil conservation and watershed protection, Chiefs Act allows chief to take action to encourage production. Land Control Boards may direct to whom land is sold; evidence that poorer and smaller farmers more controlled than the large owners, with absentee owners, vacant lands, and speculation rife.
RWANDA	STRONG Mainly affecting customary unregistered holdings: 1976 Decree permitted sales of customary land only if the sale would leave owner with at least two hectares.
ERITREA	STRONG Strong conditions on arable holdings, held as Lifetime Usufruct: must occupy and use, may not sell but may lease out. Not automatically inheritable unless minors. Offspring given first right of refusal but must surrender other plots or claim to other land. Must be adult citizen.
ETHIOPIA	STRONG Strong conditions as in Eritrea and subject to periodic loss through redistribution (Federal Rural Land Administration Proclamation, 1997, s.2 (4)).
MALAWI	WEAK Land Act 1965 gives the Minister power to control land use etc., not widely used. Do not apply to private land under freehold title. Leaseholds routinely subject to covenants through Regulations made under s. 39 Land Act, 1965. Minor regulation by chiefs over customary land.
ZAMBIA	WEAK Renewal of leasehold leases subject to Presidential approval (Lands Act, 1995 – Section 10). Ground rent must be paid (Lands Act, 1995 - Section 11).

ZIMBABWE	<p>STRONG</p> <p>Occupation and use compulsory in respect of all lands. On land under the Communal Lands Act, 1992, occupation and use further conditional on membership or relationship to the recognised community in that area. Land acquired under resettlement is accompanied by certain conditions, and may have permit revoked if does not meet these.</p>
MOZAMBIQUE	<p>STRONG</p> <p>All land access fully dependent upon occupation and use.</p>
BOTSWANA	<p>STRONG</p> <p>Section 15 of Tribal Land Act, Cap. 32:02 amended in 1993 (s.10 (2)) allows Land Boards to cancel grants where land not cultivated, used, or developed to its satisfaction, or as prescribed, or has not been used in accordance with the purpose for which allocated.</p>
SOUTH AFRICA	<p>WEAK</p> <p>May be a focus of the Development and Planning Commission provided for in the Development Facilitation Act, 1995. Government awaiting the outcome of public consultation regarding introduction of a rural land tax (follows Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa; Katz Commission).</p>
NAMIBIA	<p>STRONG</p> <p>Through Agricultural (Commercial) Land Reform Act, freehold land is subject to compulsory acquisition by Government if under utilised or held in excessive amounts (more than two 'economic units'); may be acquired by a foreign national after the promulgation of the Act for a period exceeding 10 years. The National Land Policy, 1998 proposes the introduction of a land tax of all freehold lands.</p>
LESOTHO	<p>STRONG</p> <p>Every Mosotho is entitled to an allocation of land for farming (three fields) and for building a homestead but a prerequisite to allocation is marriage. Land may not be sold. A married woman may not register land in her own name (1967 Deeds Registry Act). In some customary lands it is practice that fields are subject to reallocation annually, depending on how well utilised they are.</p>
SWAZILAND	<p>STRONG</p> <p>Ownership of undeveloped land in urban areas discouraged by the application of punitive rates as provided by the Rating Act. Rights of women limited. In practice unmarried adults may not hold land.</p>

TABLE TWO: CEILINGS ON LANDHOLDING

COUNTRY	LIMITATIONS ON PLOT SIZE
UGANDA	NONE
TANZANIA	INTENDED Policy (4.2.8 (iii)) and The Land Act 1999 provides for ceilings to be imposed but the actual figure will be determined through regulations, not yet drafted (s. 21 & 179)
ZANZIBAR	NONE (s. 15 (1) Land Tenure Act, 1992) but there is a minimum size of land grant not less than 3/5 ha.
KENYA	NONE However, Land Control Boards may indirectly limit acquisition of new plots if find that the proposed owner will not 'fully develop' the land. Mainly affects the poor.
RWANDA	NONE But proposed new Land Policy and Land Bill expected to specify maximum landholding for different land uses.
ERITREA	PROVIDED Through allocation of equal arable plots and requirement that if opt to take land of parents then give up claim to other land. Only permitted to be allotted in one place, in one village. (1994 Proclamation, Articles 25, and equity Article 11).
ETHIOPIA	PROVIDED Ten hectares per household for peasantry. As much as needed for co-operatives and state commercial farms, held under leases.
MALAWI	NONE The Presidential Commission of Inquiry on Land Policy Reform reported widespread under-utilisation or non-utilisation of freehold and leasehold lands. Unclear is restrictions will be put into new Policy.
ZAMBIA	PROVIDED For customary rights only. The Procedures for Acquiring Land: Circular No. 1 of 1985 limits the granting of land in excess of 250 ha on customary land.
ZIMBABWE	PROVIDED Statutory instrument 419 of 1999 stipulates allowable farm sizes; exceeding this induces higher taxes.
MOZAMBIQUE	NONE But authorising entity varies according to size of required land holding (1997 Land Act, Article 19).
BOTSWANA	PROVIDED For customary rights only, minimum of five acres in Tribal Land (section 23, Tribal Land Act, Cap. 32:02)
SOUTH AFRICA	NONE
NAMIBIA	PROVIDED For freehold land – maximum of two economic units as defined by the Land Reform Advisory Commission.
LESOTHO	PROVIDED Under the 1979 Land Act, for mainly commercial and urban plots.
SWAZILAND	NONE

TABLE THREE: THE RIGHT TO SELL LAND

COUNTRY	LAW PROVIDES FOR SALE OF LAND OR RIGHTS IN LAND
UGANDA	NO LIMITATION Customary Tenure - able to sell if local customary land law allows (Land Act, 1998; s. 4 (1) (e)) with encouragement towards right to sell (s.9 (2) (f)). Freehold Tenure – freely permitted (s. 4 (2) (b) (iii) (iv)) Mailo Tenure – owner may only sell the land after giving the tenant first option to purchase (s. 36 (2)).
TANZANIA	SOME LIMITATION FOR RURAL MAJORITY Policy that ‘land has value’ (NLP 1995) put into Land Act 1999; s. 3 (1) (f) with specification as to how the value will be determined (g). Land acquired prior to act has no value other than improvements (s.20 (3)) and land with no improvements has no value (s.37 (8)). Granted Right of Occupancy (s.22 (1) (I)) may be sold. Customary Right of Occupancy (Village Land Act 1999; s. 30) permits sale but only to other village members. Sales to non-members of the village only with approval of the village council and if the buyer makes a deposition that will reside or work in the village and will undertake an activity that will benefit the village (VLA 1999; s. 30 (2))
ZANZIBAR	NO LIMITATION But emphasises that selling only the interest in the land not the land itself, held by President (Land Tenure Act 1992: s.3 (2) & s. 18). Trees specifically owned separately from land right and may be freely sold (s. 19 & 21).
KENYA	SOME LIMITATION No transfer of agricultural land legal unless approved by the Land Control Board, which is to rule by criteria set out in the Land Control Act, Cap. 302; applicant may be refused permission to buy a second plot because it is perceived that he has sufficient agricultural land already (s. 9 (1) (c)). Or, permission may be refused, where the price to be paid is considered ‘unfair’ or ‘disadvantageous’ to one of the parties (s. 9 (b) (iii)). Sub-chiefs and chiefs through whom applications are channelled to the Board, have been known to use the law to both positive and negative effect, the latter favouring a certain buyer/seller.
RWANDA	LIMITATIONS FOR RURAL MAJORITY Sales of unregistered land (customary) permitted only with permission of state and if it leaves owner with at least two hectares (Decree, 1976).
ERITREA	LIMITED Not permitted in respect of Lifetime Usufructs but may lease out the land (Article 27) or may convert farming usufruct to lease right, which may be sold (Article 18 (3)).
ETHIOPIA	SOME LIMITATION Constitution Article 40(3) prohibits sale of land by state or communities. Rights in land may be sold (Federal Rural Land Administration Act, s.2 (3)). State may lease out land for a premium (‘fee’ or ‘charge’)
ZAMBIA	LIMITED FOR RURAL MAJORITY Not permitted in the customary sector but permitted in exchange of leasehold titles.
ZIMBABWE	LIMITED FOR RURAL MAJORITY Not permitted in the customary sector through Traditional Leaders Act, section 28 (2) (ii) which prohibits the selling of land in the communal areas. Once land has been ‘designated’, it can not be sold, leased or otherwise disposed of except in accordance with written permission of the responsible Minister (Land Acquisition Act, section 14 (1)). Freehold Tenure – Permitted, but state has the first right of refusal for any farm being sold. Such land can only be sold to non-state actors when a certificate of no present interest has been issued against the land by the government.

MOZAMBIQUE	LIMITED 1990 Constitution forbids sale, transfer, mortgage or seizure of land. Land Act, 1997 permits sale of improvements in land, but cannot use land as collateral for loans. In practice sales occur, especially in urban plots even where no buildings on the land.
SOUTH AFRICA	NO LIMITATIONS
LESOTHO	LIMITED Land may not be sold in Lesotho but widely occurs. Most official reviews and reports for Government strongly advocate actions to free up and also more firmly regulate land market.
SWAZILAND	LIMITED Sales of freehold permitted. Swazi National Land may not be freely bought and sold, but in some areas it occurs, particularly peri-urban areas.

TABLE FOUR: NON-CITIZEN ACCESS TO LAND

COUNTRY	RIGHT OF NON-CITIZENS TO OWN LAND OR INTERESTS IN LAND
UGANDA	PERMITTED – <i>but only through leasehold</i> , but these are up to 99 years and in absence of restrictive clause, potentially these are renewable. Existing freehold or mailo non-citizen owners may retain ownership (Land Act, 1998;s. 41)
TANZANIA	PERMITTED – <i>but with limitations</i> only for investment purposes and with the approval of the Tanzania Investment Centre (Land Act, 1999; 2.20); only in those classes of land managed by the state (General Land and Reserved Land); only through Granted Rights of Occupancy which are limited to 99 years not renewable (s.22). <i>Non-citizens are not permitted to acquire land in Village Land (Village Land Act, 1999; s.22) but may lease land in villages and with no period specified (s.29)</i>
ZANZIBAR	PERMITTED BY LEASE ONLY Grants of land only to Zanzibari citizens of 18 years+ (s.24 (1), Land Tenure Act, 1992). But non-citizens may lease from Government for renewable 49 year periods (Part VI).
KENYA	PERMITTED. Right to sell agricultural land to a non-citizen is subject to permission upwards to the Commissioner of Lands through Provincial Control Boards, an arrangement which results in largely unfettered sale to foreigners if usually for a 'fee'.
RWANDA	PERMITTED <i>but only through leasehold and new purchases only for investment purposes</i> For example, a foreign company, Madhivan Group, recently bought the only sugar factory and related sugar estate from government.
ERITREA	PERMITTED Article 8 of No. 58 of 1994, provides for non-citizens to obtain usufruct, lease or other rights only by special permission of the President.
ETHIOPIA	PERMITTED <i>only through leases</i> of maximum 30-50 years in duration.
ZAMBIA	PERMITTED <i>only through leases and for investment purposes</i> , with the President's consent.
ZIMBABWE	PERMITTED <i>only through leases</i> or through joint ownership of land with local entrepreneurs for foreign investors whose projects are approved by the Zimbabwe Investment Centre.
MOZAMBIQUE	PERMITTED, <i>may acquire right in land provided resident for minimum five years.</i>
MALAWI	PERMITTED but new policy proposal suggest limitations.
BOTSWANA	PERMITTED but under the Land Control Act, 1975, Ministerial approval is required, and must be gazetted 90 days before the intended date of transaction to allow for objections, and those objecting may be given priority to purchase the land.
SOUTH AFRICA	PERMITTED without restriction.
NAMIBIA	PERMITTED but only with the express permission of the Minister, (Agricultural (Commercial) Land Reform Act).
LESOTHO	NOT PERMITTED The 1979 Land Act bars non-Basotho from acquiring rights and interests in land. The Land Policy Review Commission, 1987 recommended that naturalised citizens should only have access to sublease titles.
SWAZILAND	PERMITTED, only with the approval of the Land Speculation Control Board. Draft National Land Policy proposes relaxation, to allow commercial/industrial freehold and leases only for agricultural and residential land.

ANNEX G: The Right of State to Appropriate Private Property

COUNTRY	STRENGTH OF EXPRESSION OF RIGHT OF STATE TO APPROPRIATE LAND
UGANDA	<p>STRONG</p> <p>Through compulsory acquisition (compensation) Articles 26 & 237 (2) (a) of the <i>Constitution (1995)</i> and the <i>Land Act 1998</i> (s.43) provide for compulsory acquisition <i>in public interest (public use, defence, safety, order, morality, health) at 'fair market valuation' and with payment of compensation and costs of disturbance (s.42 (7)).</i> Owner not required to vacate the land until all these payments made (s. 42 (7) (a)).</p>
TANZANIA	<p>STRONG</p> <p>Through compulsory acquisition (compensation) but with detailed procedure favouring occupier and with significant inclusion that full, fair and prompt compensation must also be paid 'to any person <i>whose right of occupancy or recognised long-standing occupation or customary use of land</i> is revoked or otherwise interfered with to their detriment by the State.' (<i>Land Act</i>, s. 3 (1) (g)).</p>
ZANZIBAR	<p>STRONG</p> <p><i>Land Tenure Act, 1992</i>, s. 56 provides for right of Government to terminate a right of occupancy as long as has 'clear and convincing reasons' and pays market value compensation for the land itself and any un-exhausted improvements on the land. When the termination is because of failure to exercise good husbandry only improvements are paid for (s. 63-64).</p>
KENYA	<p>STRONG</p> <p>Through compulsory acquisition (compensation). <i>Constitution (Article 75), Government Lands Act Cap. 280, Trust Lands Act, and especially Land Acquisition Act, Cap. 295.</i> President empowered to acquire any land, not subject to vetting by any other authority (Cap. 295, section 3). Makes public land (government land) and trust land especially vulnerable to compulsory acquisition and re-sale for private rather than public purposes (Cap. 280 and Cap. 288).</p>
ERITREA	<p>STRONG</p> <p><i>Land Proclamation, No 58 of 1994</i> provides for state to expropriate for 'various development and capital investment projects' and enforceable only with approval of the Office of the President, and subject to payment of compensation (Article 50).</p>
RWANDA	<p>STRONG</p> <p>Through <i>1960 Decree</i> bringing all unregistered (untitled) land under state domain. Provides for compensation if rights expropriated. In current post-war situation, state control over land virtually total with ownership of untitled land especially in abeyance pending new law (anticipated in 2001; not yet drafted).</p>
ZAMBIA	<p>STRONG</p> <p>Through <i>Land Acquisition Act, 1970</i>, provides for Government to compulsorily acquire land for <i>public purposes</i> through the Ministry of Lands. Compensation is due in cases where the acquired land was in use. In the case of underdeveloped or un-utilised land, no compensation is due.</p>

ZIMBABWE.	<p>STRONG</p> <p>A main clause of the <i>Constitution</i> (s. 16) and much amended to facilitate appropriation of settler land, now through May 2000 Constitutional amendment, not necessarily due compensation, laid at door of 'former colonial power'.</p>
MOZAMBIQUE	<p>STRONG</p> <p>1990 <i>Constitution</i> (Article 86) and Land Act, 1997 (Article 15 (b)) allows 'the revocation of the right of land use and benefit in the public interest and subject to the prior payment of a just indemnification and or compensation'. The Act does not define 'public interest'. July 1998 regulations did not explain public interest or procedures for compensation, remedied in 1999 Annex to Regulations, but in general terms only.</p>
BOTSWANA	<p>STRONG</p> <p>1966 <i>Constitution</i> stresses the need for the appropriation to be 'valid' The <i>Tribal Land Act, 1968</i> provided for compulsory acquisition of tribal land for public purposes. The Act did not address compensation fully, dealt with by the 1993 Amendment to the Act. View widely held that remains at inadequate rates.</p>
SOUTH AFRICA	<p>STRONG</p> <p>Article 25 of 1996 <i>Constitution</i> makes expropriation a public purpose for the needs of equitable land reform and to redress insecurity and land loss as a result of racial discrimination. Strategy delivered in the White Paper on South African Land Reform is to acquire land on a willing-seller, willing buyer basis. Government reserves the right to expropriate land in cases where 'urgent land needs' cannot be met through land market acquisition. Instrument of expropriation is the Expropriation Act No. 63 of 1975.</p>
LESOTHO	<p>STRONG</p> <p>Through the <i>Land Act of 1979</i>, the Minister of Local Government is empowered to use <i>Special Area Development Orders</i> to acquire any land for residential and infrastructural purposes. The Minister of Agriculture is authorised to invoke <i>Agricultural Orders</i> to set aside any land for agricultural purposes. Whilst in theory compensation should be paid in accordance with the 1979 Land Act, the concept of agricultural land as publicly owned limits assessment of fair compensation, resulting in much complaint.</p>
SWAZILAND	<p>STRONG</p> <p>The state may compulsorily acquire land for a limited range of <i>public purposes</i>, as defined in the <i>Acquisition of Property Act, No 10 of 1961</i>. Compensation is provided under this statute, and additional compensation headings provided under the <i>Roads and Outspans Act No 40 of 1931</i>. Both statutes are up for review through the draft National Land Policy and the former especially rarely used, leading to controversy</p>

ANNEX H: Reconstructing Pastoral Tenure

The Land Cases of the Illoodariak & Mosiro Maasai in Kenya

THE SETTING

Since the land reforms of the 1950s, the policy of the Kenyan Government has been to bring all land under statutory entitlement, available as freehold and leasehold interests. The objective has been to include land held under pastoral tenure – over half of land area of the country. These regimes do not provide for the layering of rights such as is common in pastoral tenure regimes, whereby several clans may share rights to certain resources within an area otherwise acknowledged as owned by one clan or tribe. Nor, more important, does it provide for groups of people such as a clan to hold land in common.

Pastoralist societies in Kenya are many, from the Boran, Turkana and Rendille in the north to the Maasai in the south. Maasai occupy parts of the country which have come into most contact with agricultural societies and urbanisation. With the post-Independence Constitution, pastoral lands, along with all ‘native reserves’ became Trust Lands, administered under the *Trust Land Act (Cap. 288)*, an act with origins in 1930s Native Areas legislation. This and the new *Land Adjudication Act (Cap. 284)* provide for the President to declare and property in Trust Land an Adjudication Area. This launches a process of compulsory registration of land interests geared to individualised entitlement of property. This has been a main cause of loss of commons throughout wetter areas of Kenya, where today limited spheres of common property exist.

In the late sixties another law, the *Land (Group Representatives) Act (Cap. 284)* was enacted to provide a group form of tenure more useful to pastoralists than outright subdivision. This law provided for a group of pastoralists to register their names as co-owners of a discrete area.

Although initially posed to meet tenurial concerns, its formulation ultimately centred upon the Ministry of Agriculture’s concurrent determination to see pastoralists settle down and adopt a ranching mode of livestock-raising. A decade later, 1979, a *Presidential Directive* ordered the subdivision of group ranches into discreet holdings of individual members. For all intents and purposes the process of identifying group interests in the land and then subdividing these up into ten hectare holdings became one.

The case of Illoodariak is just one of many instances where the process of adjudication, registration, entitlement and subdivision has first, proved agro-economically inappropriate to pastoralism, and second, been effected through unjust and corrupt procedure. These have tended to involve officials and politicians, assisted by poorly-framed law (such as relating to time period, processes of adjudication), compounded by perfectly ‘legal’ loopholes for malfeasance to occur as outlined below (*Registration of Titles Act* in particular).

In the 1960-1980s most Maasai were illiterate, especially the majority poor. In addition, their lack of knowledge of legal procedure meant they were unable to halt unjust procedure until too late. The overall picture has been one of state-endorsed and indeed directed dispossession, with main loss to the majority

poor. Further reallocation of Maasai pastoral lands, including the creation of urban centres, has seen a dramatic transformation in the pattern of tenure and land use, to the benefit of business, urbanisation and the wealthy. Commentators believe that all but one or two of the 300+ group ranches created out of Maasai and other pastoral lands since the 1960s, have faced similar problems as described below, to one degree or another (Kenya Human Rights Commission, 1996, 1997, Akech, 1999, Pander, 1996, Okoth-Ogendo, 1999b, Galaty, 1999, Ole Simel, 1999, Ole Karbolo, 1999).

ILLOODARIAK

Illoodariak is an area of Maasailand in Kajiado District (Olkejuado) among the earliest earmarked for adjudication and conversion of all customary rights into registered titles. The process began in 1979 and lasted until 1990. However, in accordance with the Presidential Directive hastening individualisation of pastoral lands, group ranches were not formed. This stage was bypassed towards immediate subdivision of the land area. The legal instruments were the Adjudication Act (Cap. 284) and the Registration Land Act (Cap. 300).

In accordance with the procedures of the former, an Adjudication Committee was established (s. 20) to implement the process, with Government officials supervising. The law gives the Adjudication Officer considerable powers (s. 10 - 12).

Government and local records now show that members of the Committee, made up of local leaders, were corrupted by local officials and/or did not understand the process (GoK, 1991). A later investigation confirmed that not only were 1,200 legitimate residents and landowners of the area (mainly poorer persons) *left off the Register*, but 364 persons who did not belong to the clan and were not even from adjoining areas, had their names put on the Register as part-owners of the land (Kapila, 1994, Tobiko, 1995). This included Government officials who put their own names and those of relatives and friends, on the Register. Several politicians not from the area also became members, eligible for plots.

In due course, as the excluded members of the clan found out they were 'squatters' on their own land, they presented complaints to the County Council, politicians, the Ministry of Lands, and eventually in 1987, to the President. He directed the District Commissioner to investigate.

By 1 March 1989, no action had been taken, and the Adjudication Register, in accordance with procedure, was published and declared final (Cap. 284, s. 28). The dispossessed again petitioned Government and the issue was discussed in the public press (1991). The Vice-President responded by appointing a Probe Committee in 1990, which presented its report in August 1991 (GoK, 1991). The Report recorded only 190 persons as outsiders who should not have obtained a share of the land in the ranches. It recommended these persons surrender their land for redistribution. Local people declared the investigation a 'white-wash' and a delaying tactic to enable the other wrongful named persons to sell on their shares in peace. They pointed out that the Vice-President's relatives had been among wrongful beneficiaries, not identified among the 190 outsiders.

In 1991 the dispossessed Illoodariak residents filed a case in the High Court (Civil Case No. 312) seeking to have the original adjudication cancelled and a new exercise ordered. This was upheld by the High Court but overturned by the Court of Appeal (Civil Case No. 85 of 1992), on the grounds that the Register had been closed and these objections were being recorded outside the time limit stipulated in the Adjudication Act.

In 1992, the Illoodariak people again marched to the President. Again, he directed that an investigation be undertaken. Again, no action followed. In the meantime those registered as owners 'by fraud or mistake' were fully protected by the law, for the *Registered Land Act, Cap. 300* not only provides for titles 'to not be able to be defeated' once registered, but disallows the courts to 'rectify the Register' in the case of a first registration (s. 143 (1)) – an unusual provision in land registration law, and originally inserted as protection for white settler occupancy.

Titled rights began to change hands. Some of those considered outsiders used their titles to secure mortgages or to charge the land against substantial loans (Tobiko, op cit.).

MOSIRO

Faced with a similar problem, the people of neighbouring Mosiro, where Group Ranches had been created, lodged a claim in the High Court to have the register of names under the Group Ranches revoked on the basis of being highly inaccurate, excluding names of rightful owners and including names of strangers with no clan or residential claim to a share of the land. The Mosiro complainants won the case (1991).

ACTION

In April 1994, the first significant action was taken by Government to deal with the mounting number of cases of corrupted registers and consequent wrongful allocation and dispossession of poorer Maasai. The Chief and Registrar placed restrictions against all land titles within the Illoodariak and Mosiro Adjudication Sections.

The victory was short-lived. In October 1994 one of the wealthier but legitimate residents, with the support of those considered wrongful members of the group, filed an application to have the restrictions removed (Civil Appeal No. 1248 of 1994). The Court found in his favour on the grounds that Government had 'incompletely' filed papers justifying the restrictions in the first instance. The original registers were to hold. First-titled owners were again to be protected under the terms of the *Registered Land Act, Cap. 300*.

Finding another route to justice

Land in both areas continued to change hands as it did in many other subdivided group ranches. Defeated, the involved Maasai, now with support from local Maasai organizations, and with legal advice, determined upon a new course (1994).

Initially they sought to have the offending clauses of the *Registered Land Act* repealed which protected first title deed owners, irrespective of how land so registered and titled is obtained (s. 143). The Attorney-General informed them

he would not support amendment of the Registered Land Act, Cap. 300. With legal advice, the Maasai determined upon a new, if lesser tactic, the amendment of the *Land Adjudication Act*, focusing upon improvement of its procedure.

In due course, this came about, the intentions eventually gazetted on 28 May 1999 in a *Land Adjudication (Amendment) Bill, 1999* – four years after it was drafted.

The Bill seeks to redefine ‘ordinarily resident’ to more effectively exclude those not recognised locally as members of the group; to improve the process of adjudication including an increase in the period within which an appeal may be made; and to empower the Minister to delegate the hearing of appeals – more than 7,000 were pending in 1998 (GoK, 1998a, 1998b).

The amending bill also provided for any persons to lodge a complaint as to the content of the Adjudication Register once published, on the grounds that the adjudication was improperly conducted and ‘*consequently certain persons have been or might thereafter be mistakenly or fraudulently or otherwise improperly registered as proprietors of land on first registration in such adjudication section*’. The bill sets out how the Minister shall then stay all action pending a special investigation, and pending the results, enabling the Register to be ‘rectified’ or the whole Register made null and void.

Finally, the amendment seeks to nullify registered individual titles under the Illoodariak and Mosiro Land Adjudication Sections and register the names of the four Group Ranches from which they derive as first registrations. Compensation will be paid to those who lose their interest in land accordingly – but not to anyone who is shown to have obtained the title by fraud or other breach of the law.

The Status of the Proposed Change to the Law

Important as this proposed Amendment is, it remains un-read in Parliament. Indeed, interested parties report that there was never an intention to have the Bill read – a fate many a gazetted Bill has suffered in the Kenyan Parliament in recent years (e.g. the amending bill to the Government Lands Act). It is likely that the Presidential Commission of Inquiry into Land Law Matters sitting in 2000, will recommend on this matter. However, recommendations from Commissions tend not to be implemented as has been experienced recently in respect of commissions on education, judicial and local government reform.

Meanwhile, twenty years have passed since these Maasai first lost their land – partly through ‘due’ process of what is now officially acknowledged as inadequately protective law. As one of the complainants of the Illoodariak case opines ‘*we have fought hard, most of us have sold our last cattle for justice. Still we are homeless. But so far we have only learned only one bitter lesson; that justice is a most expensive and rare commodity in matters of land in our country*’ (Mainyoto Pastoralists Integrated Development Organization, 1999).

Individualism versus group interests

The situation described above is complicated by first, inter-clan rivalries and second, the changing interests of Maasai themselves, and in ways which reinforce the emergence of diverging wealth strata in the society.

Maasai are no longer a homogenous group but highly stratified by wealth, political power and institutional capacity. A good deal of the problems described above have involved powerful Maasai as their agents, including those holding political and administrative office. Underlying this is a strongly emerging conflict as to views as to the future use of Maasai lands. There is a small but powerful group which strongly favour individualisation and the chance this might afford to alter current land use towards urban and industrial development sites or for ostrich farming and even flower farming and such activities, As Galaty has explored, group versus individualistic ethics are strongly emerging. In 1999, he concluded:

'Even faced with massive corruption and malfeasance in the allocation and distribution of group lands, and the high rate at which titled land is sold by impoverished Maasai pastoralists, many Maasai still support subdivision and privatisation. They do so for three reasons: one, out of a desire for individual gain; two, in order to avoid outsiders taking land left insecure without individual owners; and three, to establish the basis for evicting squatters, who, although illegally resident on group lands, seem to hold acquired rights due to the length of time the government has allowed them to stay, rights which are hard to transgress while land is held collectively. The Maasai in Kenya are now faced with two equally unpalatable and risky options: (1) retain group holdings and risk appropriation by locals, outsiders and the state; or (2) dissolve and subdivide group holdings and see land taken though corruption or sold piecemeal to individual or corporate interests' (1999)

Sources of Information:

Government of Kenya, August 1991a, 1991b, 1998a, 1998b, 1999d, Kapila & Company, 1994, Bennett, 1994, 1995, Tobiko, 1995. Civil Application No. 124 of 1991 in the Court of Appeal, Galaty, 1999, Ole Simel, 1999, The Weekly Review, May 24 1991, Kenya Times, May 16, 1991; Daily Nation, May 15, 1991. Acts referred to include Cap. 284, 287, 288, 300, and the Land Adjudication (Amendment) Bill, 1999. Personal communications, Mainyoto Pastoralists Integrated Development Organization, 1999, Loodariak Community and Development Programme, 1999.

IUCN - Eastern African Regional Programme

IUCN established the Eastern Africa Regional Office (EARO) in Nairobi in 1986. EARO facilitates the implementation of the IUCN Programme in Sudan, Eritrea, Djibouti, Somalia, Kenya, Tanzania, Comoros, Seychelles, Uganda and Ethiopia. Through its technical group, established in the early 1990s, the IUCN Programme assists members and partners in the region with capacity building through the implementation of programmes and projects, networking, and technical advice. Specific areas of expertise include: protected areas, ecosystem management, biodiversity conservation, environmental planning and strategies, and support to environmental NGOs.

IUCN – Eastern African Tree Dominated Landscapes Programme

EARO's Forest Conservation Programme evolved as a discrete theme in 1993, as part of IUCN's global Forest Conservation Programme, to assist the conservation and forest authorities in the region, and address some of these needs by building on the expertise of the Union and its membership so as to contribute to the overall regional programme. The programme focuses on practical methods for conserving forests and promoting sustainable forest use and management. Through this IUCN hopes to help in influencing, encouraging and assisting the countries of Eastern Africa to conserve the integrity and diversity of forest resources and to ensure that the use of these resources is equitable locally, nationally and globally. This will be done through partnerships cooperating to address the priority themes of forest conservation and sustainable management in the region.

Tree-dominated landscapes play an important role in the provision of goods and services to local resource users, communities, and countries in the region. IUCN will work with members and partners to develop the knowledge base about these ecosystems, their importance for both biodiversity conservation and in the livelihoods of rural people. Within conservation areas, sustainable use of trees will continue to be explored through collaborative forest management. Lessons about balancing sustainable use with biodiversity conservation, will be used to inform and influence both conservation and livelihood policy processes in wider and more integrated land use.

IUCN – Eastern African Programme on Social Perspectives in Conservation

It is only recently that IUCN in Eastern Africa has become more programmatically involved in work with social issues. The range of social issues are being integrated into the IUCN portfolio of projects as part of implementation and this will enable lessons to be learnt in different ecological and social systems in the region. Such issues will include, gender and stakeholders, participatory processes and tools, tenure of land and resources, economics (implemented by the Economics and Biodiversity Programme), capacity building for addressing social issues, and the integration of social issues into conservation and natural resource management in the region.

Increasingly conservation has to be seen as a component of land and landscape planning. If this does not take place, conservation resources and areas are likely to be further excluded from mainstream national and local land use planning and land use. Local people and resource users need to have greater responsibility for their natural resources, and not be in conflict with natural resource managers. To achieve this they must benefit from, and have some degree of proprietorship for such resources.

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