Democratising the Commonage
The changing legal framework for natural resource management in eastern & southern Africa with particular reference to forests

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Abstract

Forests represent a substantial natural resource in Eastern and Southern Africa and one which supports other important resources including water and wildlife. Whilst originally largely the property of local communities, forests are increasingly owned by the state or subject to individualisation. Those that remain in community hands are held in ways weakly supported in national law. Loss of local forest commons continues apace, with not-unrelated loss of area, values and environmental support.

The legal frameworks through which forests are retained and sustained are undergoing widespread change at this time. A common thrust is new provision for forest-local communities to play a greater role in these processes. Concurrent shifts in land relations in the region are proving influential, in particular those reflecting changing attitudes to customary interests in land. Through this arises new legal respect for the traditional capacity of communities to hold resources such as forests, in common. Evolving community-based approaches to forest management encourage and give substance to this development. In the process, 'community' itself is gaining stronger, and sometimes new, form and force.

I. Introduction

Forests represent an immense and invaluable natural resource in eastern and southern Africa (hereafter 'the region'). As they disappear and their values are better understood, national governments are beginning to alter their strategies for securing and sustaining the resource (Alden Wily, 2000a). A critical common element is in changing attitudes towards forest-local communities, long regarded as a main source of forest degradation, but now being increasingly endowed with both the right and responsibility to secure and manage forests.

Facts and figures about the forest resource (ninety-five percent of which is woodland), and the nature of the changing role of forest-local communities in their management, have been extensively covered elsewhere (Alden Wily & Mbaya, *in press*). Of special note is first, the fact that these changes are not occurring in isolation but arise within wider democratising shifts occurring in the region at this time (Alden Wily, 2000b). Critical elements for forestry relate to the improved role in governance being given to ordinary

citizens, mainly through local government reform, and the greatly improved status in the land rights of the rural poor, a main focus of this paper.[i]

Second, these changes are finding tangible expression in both policy and new law. The latter is self-evidently the more indicative given that legislation tends to be formulated as a consequence of new policy and by its nature is more precise, as well as binding, in its terms. At the same time it is worth recording that in respect of community participation in forest management, new policies themselves, and now new laws, are being significantly driven by changing practice in the field (Alden Wily, *forthcoming*).

Whilst this wave of forest law reform in the region will be addressed, this paper takes as its starting point the highly influential matter of forestland, and its changing status through concurrent land reform. For it is the argument of this paper that whilst changing strategies to community involvement in the future of natural resources have by no means always derived from this source, alteration in rural land rights is proving increasingly central to their strategic and legal foundation.

This in turn has roots in improving provision for common property. For forest-local communities, the legal status of commons is crucial. For forests, like many other natural resources, are arguably natural common property, spaces not well-suited to subdivision and individualisation, or indeed the removal of regulatory authority to remote central agencies.

II. Common Property in the late 20th Century

Unfortunately for people (and forests), the legal notion of common property has not fared well in eastern and southern Africa over the last century. For all intents and purposes it has been in steady demise, either as a class of landholding and as a notion as to how land or landed resources may or may not be held in statutorily binding ways.

Several forces have operated, generally well understood in the literature and beginning to find place in the sub-text of national land policies (GoZ, 1999, GoM, 2000), and need only cursory note here. First, local landholding systems faced denigration and restructure through subordination of local land rights to those of the metropolitan colonial state. Related have been the steady capitalisation of economies and the commoditisation of land in particular. Third has been the common thrust of colonial and post-colonial tenure ideology towards the individualisation of landholding, realised through adopted European modes of entitlement - and concomitant failure to make statutory provision for the incidents or exercise of non-European regimes of landholding.

Customary African tenure as a whole has been held in poor regard, and the holding of lands in common, especially. This has been oftentimes misunderstood as a regime not of tenure at all, but of access, and worse, one with no socio-spatial boundaries; that is, a regime of open and public, not closed and private, access. A frequent source of confusion has been

undue conjunction of the community reference within which customary regimes typically operate (communal tenure) with material group ownership of definable tracts of land that may accrue through those systems (commons), and to the indisputable jeopardy of the latter (Alden Wily, 1988).

An additional factor has been accumulating appropriation of many of the most valuable local common properties by the state as government lands. This has been undertaken as integral to the command strategies that have so dominated governance in the region over the 20th century, and upon the assumption that the state is the only proper guardian of such estates and the rightful primary beneficiary of their values (timber, wildlife and tourism, etc.) (Alden Wily & Mbaya, *op cit*.). The weakly-tenured character of commons in state law has aided and abetted this position. Millions of hectares of prime forest, pasture and other commons have been lost to citizens through this means (*ibid*.).

The construct of government land itself has gone from strength to strength, steadily encompassing a host of properties which the state itself controls as more landlord than trustee. Whilst the locus of radical title is not the central matter of concern (especially in states where all landholders are subjected to the same conditions in this sphere), the recreation of this standard construct in European and especially English land law beyond the boundaries of symbolical guardianship towards material land ownership in Africa has greatly assisted public policies which reduce citizen tenure to rights of occupation and use.[ii]

The effects have been most pernicious in spheres where entitlement into European regimes has not taken place, or has not been allowed to take place: areas which remain today as little different in legal status from the native territories of the colonial period, and little different either from the class of state/government lands. Thus, for example, neither Malawi nor Namibia chose to liberate the ‘communal lands’ from state ownership at Independence.[iii] In Uganda and especially Zimbabwe, post-independence land law rendered local occupation even less secure than previously, by removing the caveat that heads of state own these lands as but trustees.[iv] The ex-homelands of South Africa have proven but more severe versions of this subjugation of local rights (Claassens, 2000).

Even in Kenya, where trust lands were retained as but a holding framework whilst entitlement processes were undertaken, a great deal of local land has been lost as both the commissioner of lands and trustee landholding county councils have over-used their controlling authority over local property provided them by post-Independence law.[v] The conversionary processes themselves induced further losses as commons were subdivided, or the better of these secured by councils or the central state (Alden Wily & Mbaya, *op cit*.). Hunter-gatherers and pastoralists, who own virtually all their land in common, have been particularly ill-affected. In practice their losses have been exaggerated through abuse of legal procedure (ibid.). To add yet further to ills, in 1979 the President of Kenya directed the abandonment of the first state law in the region enacted in 1969 to avail at least pastoralists the opportunity to retain their property as group-held land, ordering these ‘group ranches’ to be subdivided among the members of the group.[vi]

III The Reform of Customary Land Tenure

Frustration with the failure of time, neglect, the market and titling programmes to see the end of customary regimes, represents one of the impeti towards national land reform in the region at this time, a process in which only the DRC, Burundi and Angola are not participating (Alden Wily, 2000b). There have of course been other prompts, and the process as a whole is receiving a great deal of descriptive and analytical comment.[vii]

As cursory background, areas in land relations which are seeing pervasive change of relevance here, include those which affect the way in which rights in land are administered and disputes resolved, the role and powers of the state in both the ownership and regulation of landholding, and more diversely-expressed matters of land distribution. In all these spheres democratisation dominates, if highly unevenly so, and with no reference here as to how far new laws are actually being implemented, and with what degree of 'modification'. Redistribution has always been a feature of land reforms but in this case, is not being achieved through the classical abolition of landlordism that characterised those of the 20th century, but through indirect means; these include dramatically increasing the security of informal rights in land and constitutional commitments to restore property lost through racially discriminatory laws to minority sectors. The last is obviously most prominent in Zimbabwe, Namibia and South Africa. Redistribution objectives are visible elsewhere in the pervasive restrictions now being placed upon land ownership by foreigners, the imposition of new limitations upon the size of holdings and the conditions under which land may be retained (Alden Wily & Mbaya, *op cit*.).

The informal land rights of sectors which have been traditionally weakly tenured in state law are slowly but surely finding greater acknowledgement and opportunities for formalization. This includes the land rights of the ever-growing multitude of untenured urban poor ('squatters'), tenant worker/farmers, and women; all with potentially radical effect (*ibid*.). As Ovonji-Odida et al. ponder (2000), the effect upon peasant agricultural will be immense, should Ugandan women for example, be awarded promised co-ownership of primary household property, a provision already in new law through in different ways in Tanzania, Eritrea and Ethiopia.

The above gain greatly from a fundamental shift in legal attitude towards customary tenure and the kind of interests in land that these regimes deliver. And it is from this source that the status of common property is seeing such profound change.

Although gathering force in new policy and law, this is a change that is still far from widespread in the region (TABLE 1). In several states new law has in fact endorsed rather than altered the 20th century commitment to conversion of customary rights into freehold/leaseholds (Zambia), or done away with customary tenure altogether by introducing an entirely new regime through which rights may be recognised or acquired – the case in both Eritrea and Ethiopia. In these states the new

tenure form of 'lifetime usufructs' borrow aspects from customary norms, but revoke fundamental notions of what constitutes a customary right and the manner in which it is supported and regulated. A main loss is to recognition of common property; the new land laws of Eritrea in particular (1994, 1997) focusing in a rather dated way upon individual entitlement and rendering this legal only through a process of entitlement which in turn relies upon new Land Administration Bodies, yet to be put in place.

The situation is in practice not a great deal better in South Africa where limited progress has been made to honour the commitment of the Constitution (1996) and new land policy (1997) towards securing the rights of customary and other informal right-holders in variously-classed state lands. The initial response was strong with interim legislation protecting these until as a more permanent plan is devised (TABLE 1).

It is in the working through of the latter that problems have arisen, particularly in reference to the ex-homelands where some thirteen or so million inhabitants continue to be (or have become) tenants of state. A common source of problem is contradictory rights that pertain as a consequence of these areas being used as the depository for several million persons evicted from their own areas over the last fifty years (Claassens, *op cit*.). Through years of apartheid policies, community identity and organisation through which rights might be organised, have also been undermined, or conflict with the designs of revitalised tribal authorities or the supposed mandate of still-emerging new local governments (Ntsebeza, 1999).

Work began on a Land Rights Bill in 1997/1998, which settled upon a strategy of securing current occupancy as Protected Rights with provision for voluntary conversion into an open-ended range of absolute rights. This plan did not meet with the approval of the Mbeki Administration which suspended work on the Bill and has indicated a preference for devolution of title to tribal authorities (Didiza, 2000); a solution which might do little more for occupants than change their landlords.

Liberation from such subordination of land rights is a main objective of the proposed national land policy of Zimbabwe (1999), its discussion since up-staged by the issue of retrieving white settler lands for reallocation to black citizens.[viii] Should the policy return to the agenda and be approved, this would launch a completely new pattern of tenure in Zimbabwe with land divided into statutory and customary spheres, governed respectively by state and local customary laws *"all equal in status, and interests under each of them, enjoying adequate security of tenure under law"* (GoZ, 1998). Customary regimes would operate in villages, where individuals, families, or any other recognised body, would secure Certificates of Customary Title. Primary title over state-administered lands would be vested in an autonomous National Land Board and customary lands in the community membership ('village assembly'), also acting as trustees (*ibid*.).

The Malawi Commission of Inquiry on Land Policy Reform advised similar new respect in state law for customary rights (GoM,

1999). The proposal, now put into a draft policy (GoM, 2000) 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 private landholders. Traditional Authorities will hold customary lands in 'common trust', operating through a village-based system for tenure administration. Customary rights will be registrable and evidenced in Customary Title Deeds (*ibid*.).

In its draft national land policy, Swaziland adopts a comparable community-based regime of tenure regulation and proposes the upgrade of customary rights as legitimate registrable interests (GoS, 1999).

Leading the way

However, the clearest lead towards the changing place of customary tenure in state law is being given in Uganda, Tanzania and Mozambique in new land legislation already in place (1997-1999).

In different ways, these reforms take the obvious but historically extraordinary step of simply recognising customarily-obtained properties as fully legally tenured 'as is', in whichever form and with whatever characteristics they currently possess. Thus, for example, where custom recognises a land right as being potentially held in perpetuity, then state law endorses this. In Tanzania where the only other way to secure tenure is through rights granted by the state which have limited term and are subject to premia and rent, customary rights are thus rendered the superior form of tenure, a pleasing reversal or fortune for the rural majority (Alden Wily, 1998).

By definition, recognition gives customary rights equivalency in state law with rights arising from other regimes so embedded (freehold, leasehold, etc.), and irrespective of whether they have been registered or not, a principle most directly stated in the Tanzanian law (Land Act 1999:s.4 (6)). At the same time a main purpose of all the new legislation is to encourage and provide for the registration and entitlement of customary rights, in order to enhance their security.

Devolving tenure administration and dispute resolution machinery

The implications of these changes are considerable. One of note is the impact upon the regulation and administration of land relations. For as soon as customary rights are recognised as legal, so too are their supporting customary regimes empowered, and provision must be made for them to be exercised.

As a matter of course these largely operate at the local level and through informal mechanisms. The certification process itself therefore has to change in law. It may be verbal and verbally endorsed (Mozambique). The community itself may conduct the adjudication, recordation and entitlement process (Tanzania), and the whole located in new devolved regimes. In Uganda, the law seeks to achieve this through the creation of

autonomous land boards at the district level, supported by some 4,500 community-level parish land committees. This is proving difficult to implement and the law already subject to planned amendment to stagger the approach (Alden Wily & Mbaya, *op cit*.).

New tenure law in Tanzania both by-passes the district level and avoids problems associated with creating new institutions by designating the long-existing elected governments of each village community as the land manager of all land within the range of its respective village area. Adjudication, registration, entitlement and land dispute resolution will all take place within, and by, each community, following the procedures set out in the Village Land Act 1999, which are precise but at the same time oblige land managers to adhere to customary law (Alden Wily, 1998). Somewhat different but in ways comparable devolution of tenure administration is planned in Namibia, Zimbabwe, Swaziland and Rwanda (Alden Wily & Mbaya, *op cit*.).

IV The Reconstruction of Common Property

All the above add grist to totally new attention to commonage. For again, once customary tenure is recognised as an indefeasible way to hold land, so too does the right to hold land in common, become a legitimate form.

New law in Uganda thus for the first time includes recognition of customary land ownership beyond the individual, as extended households, groups, clans or otherwise, and provides for its entitlement as such (Land Act 1998, s.4-5). It also provides for Communal Land Associations to be formed to own and manage tracts of land, a construct available not only to customary landowners but to those who hold property in freehold, leasehold or mailo regimes (s. 16, 24-27).

Similarly, new law in Tanzania 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).

As with customary rights in general, these will be *"in every respect of equal status and effect"* to the Granted Rights issued by Government to non-customary tenants. They too may hold land in groups of two or more citizens (Land Act 1999, s. 18-19).

The new Tanzanian laws do more than recognise common property as a legal and registrable form of ownership; they encourage this. The Village Land Act requires the members of each village to identify, agree and register those lands which they currently hold in common or intend to hold in common (s.13). Adjudication for individual, household or clan entitlement may not begin until these commonholds have been recorded in the Village Land Register.[ix]

The 1997 Land Act in Mozambique also provides for communities or groups of persons to hold land in a statutorily-recognised manner and to *"observe the principles of co-title"* [Article 7]. The title to a local community *"shall be issued in the name chosen by the local community"* [Article 10 (4)]. 'Community' itself is very broadly 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].

Again, the absence of paper title will not prejudice the legality of such holdings [Article 10 (2)]. Verbal testimony will have the same value in terms of the law as a title deed (Land Regulations, 1998, Article 14 (2)). Procedures for entitlement are set out in a recent annexe to regulations under the (1999). In practice, use of the law is hindered by the absence of local governance systems through which implementation might be organised;[x] often competing loyalties between chiefs, deriving from population dislocation and changing settlement patterns through years of civil war; and as frequent conflicting jurisdiction of traditional authorities and political/administrative representatives of the central state (Kloeck-Jenson, 1999). Nonetheless, donor-funded forestry projects in particular are proving quick to explore the opportunities (Alden Wily, *forthcoming*).

The need to provide for common-held tenure is beginning to penetrate the land reform processes elsewhere in the continent; most notably in South Africa where the 1996 Communal Property Associations Act enables people to acquire and manage property as groups, a construct that in the event has been only mildly popular, mainly because of the paperwork involved and the fact that many groups are formed only in order to secure sufficient critical mass needed to receive grants and purchase a farm (DLA, 1999). Where traditional tribal authority is well entrenched, the shift from chief-led co-operation to community-based initiatives has also proved difficult (*ibid*.). The need to provide for the holding of property in common has nonetheless become more, not less, clear in the much-debated land reform process and was an important provision of the now-aborted draft Land Rights Bill, 1999 (s. 37, 45).

Although yet to be fully developed, the intention to provide opportunities towards common-held is explicit in the above-mentioned draft policies of Zimbabwe, Malawi and Swaziland, although only well-developed as a construct in the first. The absence of a clear mechanism to enable communities to retain and hold commons in registrable ways was allegedly one of the reasons why the Communal Lands Reform Bill, 2000 was finally rejected by legislators in Namibia (Maletsky, 2000). Instead, such lands were to be secured largely through individualised leaseholds, available to all citizens, not just local inhabitants, raising the spectre of continued enclosure and land-grabbing by non-customary owners.

This is in fact precisely what is provided under Botswana land law, where, innovative though it has been in many respects, still fails to provide for local people to hold grazing or

other commons in registrable customary regimes, a provision amply provided for in respect of individual house and farm plots. Instead, there too, a 1993 Amendment to the Tribal Land Act of 1968 provides for individual members or sub-groups of the customary landholding group, and also any citizen, to secure these lands as their own private leaseholds. Despite the unpopularity of the Zambia Land Act 1995 for precisely this (and a host of other) respects, early steps towards new National Land Policy formulation (1998) show only signs of increasing rather than decreasing the availability of commons to individual and not-necessarily locally-originated leasehold tenure.

V. Changing Notions of Tenure

These exceptions aside, the more pervasive alterations suggested above signal alteration in the notions and constructs which underwrote 20th century land relations. Even the centrepiece of 20th century African tenure transformation, entitlement, is of necessity being 're-made' in such states. Previously, adjudication, registration, and the issue of evidential documentation (titles) were inseparable from the individualisation of the ownership of that property and the elimination of other rights that might pertain. Now, the link has been broken. Whilst certification remains an impregnable objective towards land security throughout the land reform movement in the region, it is no longer necessarily for the purpose of individualisation. In addition, a land right may itself represent a bundle of rights of different kinds in the same property – a long-standing characteristic of most customary tenure regimes. Nor with new legal respect being afforded un-certified rights – a logical consequence of recognising customary tenure – will the espoused sanctity of title deeds have the same resonance in the law or in the courts. Routinely-provided constitutional commitments towards the sanctity of private property take on new meaning.

This change - and willingness to recognise customary regimes in the first instance- has gained acceptance in governments from growing loss of confidence in the economic efficacy of entitlement, and issue of central concern to advising international agencies, whose role in the land reform movement in Africa is all too apparent.[xi] However, less obviously, these changes gain from new respect being given to community landholding, as being prompted through the necessity to halt the ills of open access and continuing degradation and loss of landed spaces. As I have elaborated elsewhere and will touch upon again later, changing strategies for forest management in particular, encourage just these kind of tenurial shifts. In turn they help make them real in practice.

The modernisation of communal tenure

There is however a less tangible movement in paradigm which is important here for us to note. That is, that the very meaning of 'communal tenure' is transforming, and arguably, modernising in the sense that it is being reinterpreted in practical and demand-led ways of immediate utility. This alteration is being accomplished through a natural separation of core notions into logically distinct ideas. First, the

notion of shared heritage in property now becomes a construct along the lines of dominion, influentially articulated by Nyerere as 'land is owned by God, available to endless generations' (1966) and increasingly bearing the connotation of the unreconstructed radical title as used in English law if not the re-made English land laws of Africa.

At a more tangible level, communal tenure becomes the community-based reference system in which landholding customarily operates, now being increasingly catered for in new state law. Yet more tangible again, communal tenure becomes common property, discrete tracts of land which are able to be owned by nameable groups of persons, who hold the land as private group property. Above I have shown how these may now be supported in statutory commonhold forms, forms, which will over time; compete well with the more individual-centred regimes of freehold and leasehold.

After years - or rather a century - of obfuscation, these shifts arrive as most welcome modernisation of communal tenure, and a rather surprisingly delivered rescue of what must now seem to many an official and legislator, an obvious and useful construct, and one which should have entered state law many a decade ago. No other development in the current land reforms bespeaks such a resurgence of what has been quite definitively, the suppression of an African character to modern property relations on the continent.

Altering the ethics of customary land tenure

A good degree of reconstruction of traditional norms accompanies this development. First, is the subordination of customary tenure much more definitively to natural justice and in particular to constitutional principles, themselves being more rigorously defined in the wave of concomitant constitutional reform in the region.[xii] Sectors of society which customary law does not always respect, and particularly women, are gaining in the process.

The new tenure laws of Uganda, Mozambique and Tanzania, are emphatic, for example, that whilst customary tenure may freely and legally operate in accordance with the customs and practices of the community concerned, those which deny women, children or the disabled their rights in any way, will be null and void.[xiii] Procedures set out in the last law in particular, repeatedly oblige the administrator to be vigilant as to the rights of these sectors (Alden Wily, 1998). In both the Ugandan and Tanzanian laws, clear provision is made for spouses to prevent the transfer of household land, either on their own behalf or in respect of the future rights of their children.[xiv]

Inter alia, these encourage change in a wider range of law, most notably those dealing with inheritance; such as arising in the Domestic Relations Bill of Uganda (Ovonji-Odida et al. op cit.) and proposed amendment to the Customary Law of Succession in South Africa (The Mail & Guardian, 2000).

From customary to community-based tenure

The more dramatic reconstruction is seen in the socio-institutional framework in which customary tenure may operate. For what is really being brought into the realm of state law is not (just) customary tenure, but interests in land, which derive from local regimes that may or may not have a clear foundation in custom, or its law.

Tanzania provides perhaps the clearest case of the transition from customary to community-based tenure that has been occurring, and which is now embedded in new state law. There, the village-making strategies of the 1970s served to relocate traditional patterns of settlement and land use and with this, traditional patterns of tenure regulation, into a new village-based framework (GoT 1994). Many customary land rights were lost, whilst others were retained, by default or direction (*ibid*.). New elected village governments (Village Councils), also set up in the process, mainly comprised (and still to an extent comprise) elders, who administer land in the village area largely on the basis of customary norms.[xv]

Strictly speaking however, what existed after 1975 was not customary tenure or rights in land at all, but village-based tenure and village-based land rights. Nonetheless, following a long legal tradition in that country, these are named 'customary' in the new Village Land Act, 1999 and registrable as Customary Rights. Village Councils, who as observed earlier will now serve officially as the Land Managers of tenure within their respective village areas, are bound to attend to local customary rules and norms, albeit with the kind of constitutionally-induced provisos noted above.

A comparable way forward is provided in the institution of parish land committees in Uganda's Land Act, 1998, an institutional creation founded upon modern community formation, especially since 1986, rather than customary land law, and through which what is customary in tenure matters will surely be reshaped within the boundaries of that new socio-spatial and legal context. As is already the case in Tanzania through the creation of discrete village areas, it may be safely expected in many if not all circumstances, that the community will chose to retain as commonholds, certain local lands in their vicinity which have previously, without the support of land law, seen steady attrition. Quite aside from the continuing high use values of such residual commons to a host of members in the community, in highly land competitive circumstances, no one is keen to see such lands fall to another.[xvi]

Whilst a good deal less developed, the Mozambican Land Law suggests a similar potential, through subordinating customary norms and practices not to codification and the dictates of traditional leaders, but to the identification of socio-spatial community. In situations where, as noted earlier, a range of conflicting customary norms may apply as a consequence of disturbed settlement patterns, this provides an especially pertinent way forward. Even a mere decade or so past, the solution to conflicting customary law would almost certainly have been to subject the whole to individualised leasehold entitlement. Instead, today, rural Mozambicans have the opportunity to regulate local landholding using such norms as they wish, taking such amount of what is customary as applies – and in the process likely to chose to retain

appropriate estates as owned by themselves in common, with direct encouragement of the law.

Whilst aborted – at least for the interim – South Africa's draft Land Rights Bill 1999, suggested the same manner of transformation was being sought; releasing land ownership in the ex-homelands not only from individualisation but from the constraints of custom being determined by traditional authorities rather than by resource-related requirements and the decisions of community members. Again, should this law have reached enactment, the retention and registration of commons as private group property, would almost certainly have gained, if only in the reluctance of community members to see certain kinds of land resources accrue to a limited number of individuals.

In these ways, it may be seen that not only are legal marriages of customary and statutory tenure finally, if hesitantly and unevenly, being made, but the whole is being transformed in the process. Customary tenure itself is not only being given new life, it is being reconstructed as a regime which is more resource and community-centred than tradition-centred. The trend is surprisingly democratic.

How far the tenurial changes to commonage will be made real on the ground, remains to be seen. A main route for this will of necessity be through supporting shifts in the legal frameworks and practices of those sectors that deal most directly with commons in the region, prominently including livestock, wildlife, water and forest management. It is to the changing legal framework of local interests in forests and woodlands, arguably the most expansive sphere of local commons, that we may now turn.

VI. The Impact of new Land Law on Community Forest Rights

To recap, the tenurial relationship of forests and communities has been stressed to say the least over the last century. Recognition that communities may even possess interests in forest land has been slight, and effected only in default of more powerful interests (Alden Wily & Mbaya, op cit.).

The most powerful of these has been the state itself, in its steady appropriation of local forest lands as reserves in service of national concerns and interests. The dominance of individualising 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, subdivision of the estate and conversion of its purposes from forestry to agriculture, settlement and commerce.

Now however, we are seeing the new century open with a striking increase in opportunities for forest land to be secured by local people through recognition of local and particularly communal rights in land as legitimate and justifiable. How far, we must now ask, is this being reflected in the strategies of the forestry sector, which exerts so much influence upon the status of forests and woodlands in each state?

The question gains special pertinence at this time, as these administrations themselves are, in the face of their own managerial limitations, more positively concerned to admit forest-local communities into the determination of forest future, and are themselves placing their forest policies and laws under review (TABLE 2).

Emerging devolution in forest management

The main thrust of this development is institutional, characterised by significant lessening of the state's authority, generally through creation of semi-autonomous commissions or more usefully, advisory bodies which include representation from civil society.[xvii] There has been concomitant rise in opportunities for the private sector, non-government agencies, and forest-local communities to participate in the operational management of forests.

The changing template of 'reservation'

In the process, legal notions as to who owns (or may own) forests and who manages (or may manage) forests, is seeing alteration. This finds most immediate expression in the process of forest reservation, conventionally one of the main tasks of forest enactments.

Reservation, or the act of 'setting aside', demarcating and dedicating an area of land to the purposes of forestry, has been the core construct of forest management strategies throughout the region. The output has been Forest Reserves, Forest Parks or Demarcated Forests, of which there are some one thousand in the region today and absorbing more than 100 million hectares of prime forests (*ibid*.). Although rarely represented in a title deed issued to the Government, the practical effects of gazettement has been land appropriation, the withdrawal of what was as often as not informal local common property into the supposedly protective hands of the central state (*ibid*.).

By century-end, the strategic failure in this centralising approach had come to roost, with the state's ability to protect these estates widely thrown into question.

The results are proving interesting. Whilst the strategy of setting aside forest for its protection remains uniformly the core framework of forest management, important shifts in meaning are occurring, not least in the removal of an assumption that reserved land always belongs to government. In Tanzania, for example, the Land Act is clear that reserved land is a land management, not land tenure category, and within which a range of state, private or community tenure may accrue (Land Act 1999: s. 22, Village Land Act 1999: s. 18). Through simply widening the basis upon which forest land may be reserved, a growing number of other states establish the same disassociation.

Democratising the right to create reserves

Communities are prominently among those who may now in new forest laws, create and manage their own forest reserves. This

is most developed in Tanzania, Namibia and Lesotho where each new bill/law introduces these as a main new class of reserve. South Africa provides for the same in principle if not name and Malawi revives a long-existing class of Village Forest Areas. Mozambique limits this opportunity to forests created for socio-cultural purposes (TABLE 3).

The main spheres where such new reserves will be created are in the currently unreserved woodlands of the region. In most countries these in fact represent the greater proportion of the nation's total forest resource, reservation having been more concerned until recently to secure moist and closed canopy forests than those of the drier woodland classes (Alden Wily & Mbaya, op cit.).

An opportunity to retrieve forests

A handful of the new laws go further, in making it possible for forest-local communities to re-secure the ownership of forests which have been lost to them. In South Africa this arises out of the above-mentioned constitutional commitment to land restitution, which directly affects a number of State Forests. The new Forestry Act of Lesotho makes the divestment of (Government) Reserves its prime objective, most of which were however small plantations established by community labour in the first place. Possibly inadvertently as the clauses are directed mainly towards the private sector, Zambia's new Forest Act permits communities to apply, at least in theory to own a State or Local Forest or part thereof. In Tanzania the Forest Bill states quite simply that the Minister may re-categorise a National or Local Authority Forest Reserve as a Village Land Forest Reserve (TABLE 3). Pursuant to provisions in the Land Act which permit communities to demand the review of reserved lands (1998: s.45 (6)), new forest law in Uganda will almost certainly have to provide the same kind of opportunity.

Re-locating the meaning of state tenure

There is a corollary shift occurring in the terms upon which Governments will themselves retain and manage Forest Reserves. This is driven in part by increasing restatement of state ownership of the radical title in land as but trusteeship in national land reforms, and more directly, through the reining in of state powers over government land, relocating this class as lands held in trust for the nation rather than the estate private of governments (*ibid*.).

It is also driven by the desire to halt sometimes rampant excision of Forest Reserves and conversion of their purpose for arguably private rather than public end-use (*ibid*.). In Kenya, where this has been most severely the case, the Forest Bill seeks to way lay this by vesting Forest Reserves directly in the proposed Forest Service thus removing the power the Commissioner of Lands to alter their boundaries. The Forest Service itself will be limited as to the reasons why it might alter the boundaries of a Reserve (cl. 44). In Uganda, the terms of the Land Act 1998 now preclude the lease, sale or alteration of the boundaries of Reserves (s. 45), although as noted above, their ownership may be devolved.

Restraining the co-option of the commons

Procedures for creating new Government Forests are also becoming more constrained at least in law. This is partly in line with the greater respect being accorded customary land rights as now justiciable private rights and as such due proper compensation if appropriated, and in circumstances where the basis upon which rates of compensation are to be calculated are being greatly expanded (Zimbabwe excepting).[xviii] It is also partly a result of greater support for community-created protected areas.

The draft Forest Bill of Tanzania, for example, not only makes it quite clear that local rights will have to be fully accounted for and compensated in the process of new reserve creation, but requires the Minister to justify why the forest will not be better sustained and managed as a Village or Community Forest Reserve (cl.30-31). Namibia's Forest Bill makes similar provision, in an environment which has in practice seen four vast communal woodland areas originally surveyed and demarcated as State Forests, redesignated as Community Forests.

Through such shifts, it is not unreasonable to suggest that the greater proportion of new owners of protected forest areas in the 21st century will be local communities, given that new reserves will be created out of currently unreserved and usually customarily-held lands. Given the more limited trend towards the devolution of the existing reserves from centre to periphery, the main distinction among reserved forests in the region will be between those held by the state and those held by citizens.[xix] Looking yet further ahead, this may not be a trend which lasts indefinitely; as the involvement of forest-local people in the management of state-owned forests gathers pace, this will itself become a force towards further devolution and for which legal frameworks may be slowly refined.

Communities as forest managers

New legal support for communities to be party to the management of forests is somewhat more fulsome than for their emergence as forest owners. However, this is again mainly in respect of the undeclared forest resources. When it comes to forests important enough to have been already designated as Government Forest Reserves, community participation is more erratically posed in new policies and laws.

In the region overall, Tanzania and Zanzibar are positioned at one extreme in this respect, and Zambia at the other. In the former states (land and forest are not union matters and therefore distinct laws are promulgated), direct provision is made for communities to *autonomously* manage Government Reserves (TABLE 4). Slightly less generous opportunities for this are provided in new forestry legislation of South Africa, Lesotho and Mozambique.

More widespread provision is made for communities to *participate* in the state's management of reserves. Again, this is most developed in Tanzania where definition of forest-local involvement is made obligatory (cl. 17-22). Only in Zambia's

Forest Act is local involvement precluded in National Forests, and even in respect of Local Forests is to occur through Joint Forest Management Committees, more notable for the dominance of Government officials in their prescribed membership, than for the minority local representation (s.26).

Nor, when it comes to Community Forests, may the autonomy of local management be assumed. Whilst this is explicitly assured in Tanzania and is legally possible in Lesotho, Zanzibar and South Africa, it is more broadly the case that communities will manage even local forests only through agreement with Forestry Directors, many of whom retain the right in new laws to set conditions, dictate regimes, and handle offences, fines and the issue of permits in these areas.

The power to manage

This is mirrored in the level of powers granted local communities to manage. Differences in legal provision reflect how local interest in forests is perceived in the first instance, in turn strongly influenced by operating paradigms (Alden Wily, *forthcoming*). Where benefit-sharing rather than power-sharing has been dominant, the institutional basis for community involvement being provided in the law is shaped around this objective.

Thus, proposed *Joint Management Committees* in Zambia, *Local Resource Management Councils* in Mozambique, and *Management Authorities* in Namibia, are largely charged in new laws with allocating access rights and/or distributing benefits among the local population. This is similarly the case in respect of Zimbabwe's *Resource Management Committees* in its very few pilot schemes of proclaimed co-management.

It is less pronouncedly the case in respect of Malawi's *Natural Resource Management Committees* or Kenya's proposed *Forest Associations*, where there is suggestion that these agencies could take on more direct management roles. In all these cases however, the extent to which these bodies may gain real powers beyond this role is vague. Sometimes these may only accrue through the designation of a local person as an Honorary Forester (Namibia, Kenya) or through rule-making which requires the formal approval of Ministers or Directors.

This tasking could not contrast more strongly with the way in which the Tanzania 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 (cl. 40) but lodged as sub-committees of Village Councils, in order to access the latter's governance and enforcement powers (cl. 41), granted them as formal institutions of government by the Local Government (District Authorities) Act, 1982.

Following refined pilot practice since 1994, these Village Forest Committees are charged by the law to plan and execute forest management in all its parts, from demarcation and protection to regulation of access and the handling of offenders (cl. 20, 40-41). With obligatory reference to community membership (cl. 40 (2)), they may determine the scope of the managed forest, which parts may and may not be used, seasonally or otherwise, and what level of products may

be extracted and by whom (cl. 17-20). They gain the right to exclude outsiders, set and collect fees, issue permits, and levy and use fines from those who break the rules (cl. 47, 56).

Should such offenders fail to pay the fine, they may be taken to court, and the court is obliged to uphold the terms of the village by-law promulgated by the village council to embed the community's management regime; an enactment under local government law which also binds the community members themselves to their declared management commitments and which has already been used in one or two cases to this end (Alden Wily *forthcoming*).

The central construction of 'community'

The above points to the fundamental role of community formation in the construction of its role in natural resource management in the law. 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 how it may be used. For this to be workable, the rules must have weight beyond those that customarily, or for modern social reasons, community members themselves adhere, and in ways which are justiciable in the courts. These are automatically assumed powers of government forest managers. For communities to operate successfully as forest managers, they too need these powers.

Tanzania examples the fact that the extent of existing community-based governance powers plays a significant role in how far new strategies and now new laws, provide for this capacity (*ibid*.). To achieve this end, many other state laws have to create new institutional entities such as committees and associations and to (hesitantly) endow them what are generally lesser powers. The more strongly community is socio-legally defined; the more strongly it is being posed as a significant actor in management in the first place. Where it is not, the paradigm in new forestry law tends to introduce communities as more forest users than forest managers.

Still, a great deal of progress has been made in what amounts to a widespread devolution of natural resource management authority from centre to periphery, gradually being reflected in new forest law. Changing land relations, also being delivered in new (land) law, support this trend, as the (very slowly) changing frameworks for (local) governance may do over coming years. Whilst still fragile, it may be expected that this democratising trend will continue, and increasingly on the basis of local practice and demand. Ultimately, a significant transformation in the legal framework for resource management will be seen to have taken place. In the process, community itself will gain in identity and force – and sometimes new form. So too, will the long disavowed forest commons come to form an important bedrock of natural resource management. With hindsight it may well be remarked, that turn-

of-the-century efforts to more seriously involve communities in natural resource management, played a catalytic role, breaking new ground in the organization and management of society as a whole.

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TABLE 1

NEW LAND LAWS AND THEIR PROVISION FOR CUSTOMARY LAND RIGHTS

COUNTRY	NEW TENURE LAWS	RECOGNITION OF CUSTOMARY TENURE IN STATE LAW AS FULLY LEGAL	PROVISION FOR COMMON PROPERTY AS LEGAL & ABLE TO BE REGISTRABLE STATUTORY ENTITLEMENT
Eritrea	Land Proclamation, 1994 Registration Act, 1997 Regulation on Allocation Legal Notice, 1997	PERMISSIVE ONLY Abolished 1994, permitted to operate only until new laws and Land Administration Bodies in place	NO No provision. Article 48 hints at permitting customary usage of commons (pasture & woods).
Ethiopia	Land Proclamation, 1975 Federal Proclamation 1997 on Land Re-distribution.	NO Reconstructed by No. 89/1997 into lifetime usufructs	LIMITED Possible by implication in S. 6 (6) of 1997.
Kenya	[Commission of Inquiry into Land Law Reform Matters launched late 1999]	PERMISSIVE ONLY Pending entitlement programme, begun 1950s: Constitution s.115 & Trust Land Act, Cap. 288; s.8	NO Although de-activated Land (Group Representatives) Act 1968 did provide basis for pastoral communities to be registered as group landholders.
Tanzania	Land Act, 1999 Village Land Act, 1999 [National Land Policy, 1995]	YES One of two regimes, Granted Rights (Land Act) and Customary Rights (Village Land Act)	YES Both in customary lands (Village Land Act, 1999: s.12-13, 22) including registration of all commons, and in non-customary lands through Granted Rights (Land Act, 1999: s.19)
Zanzibar	Commission of Land and Environment Act, 1989 Land Adjudication Act, 1990 Registered Land Act, 1990 Land Tenure Act, 1992 Land Transfer Act, 1994 Land Tribunal Act, 1994	NO Landholding only legal via registration and entitlement from Government since 1992 Land Tenure Act	YES Via creation of Trust where 10+ are joint interest holders (Land Tenure Act, 1992) but main thrust of law is towards individual entitlement
Uganda	Land Act, 1998	YES Constitution, 1995 (Article 237 & Land Act, 1998. One of 4 regimes: freehold, leasehold, mailo, customary	YES Land Act, 1998: s.4 & 5 recognises group holdings and provides for entitlement. Section 16, 24-27 provide for Communal Land Association, applicable to customary or other

			tenure regimes
Rwanda	Directive of Villagisation, 1997 [Land Policy and Bill in draft]	SUSPENDED Pending new policy/law	NO
Zambia	Lands Act, 1995 [DRAFT National Land Policy, 1998]	YES Land Act, 1995;s.7 But entitlement only through conversion to leaseholds; s.8	NO Although recognises that may exist [Land Act,1995: s.7]
Malawi	[DRAFT National Land Policy, 2000]	PERMISSIVE ONLY Under current Land Act 1965 & Customary Land (Development) Act, Cap 59:01, which allowed voluntary conversions and state allocations into freeholds & leaseholds. Draft Policy proposes full recognition with statutory entitlement potential	NO But draft Policy favours development of registrable customary commonhold.
Zimbabwe	Land Acquisition Act, 1992 Traditional Leaders Act, 1998 Constitution of Zimbabwe Amendment Act, 2000 [DRAFT National Land Policy, 1999]	PERMISSIVE ONLY Under Communal Lands Act, 1982. Draft Policy proposes full recognition with statutory entitlement potential	NO Draft Policy proposes that joint interests be registrable.
Mozambique	Land Law, 1997 Regulations, 1998 Technical Annex, 1999	YES Land Act 1997; Article 7	YES Land Act Article 7 provides for co-title and encourages community entitlement using name of choice on title
Botswana	Tribal Land Amendment Act, 1993 [Proposal to review land policy]	YES Tribal Lands Act, 1968	NO Provides only for individual entitlement, and of fields, homes, with commons either to remain unregistered or subject to individual entitlement, and open to non-local applicants through 1993 Amendment
Lesotho	1987 Land Review Commission, no action, re-gazetted, 1999	NO Land Act, 1979 voided customary regime but likely to be re-instated through new Policy/Law	NO Pasture and woodlots in effect held communally but not registrable
Swazilan	Swazi	YES	NO

d	Administration Order, 1998 [DRAFT National Land Policy, 1999]	Operates within/through kingship regime in Swazi National Lands. 1998 Order endorsed chiefly authority. Policy proposes statutory entitlement potential	As above, although Draft Policy will permit registrable commonhold
South Africa	Provision of Land and Assistance Act, 1993 Development Facilitation Act, 1995 Restitution of Land Rights Act, 1994 Interim Protection of Informal Land Rights Act, 1996 Land Reform (Labour Tenants) Act,1996 Communal Property Associations Act, 1996 Extension of Security of Tenure Act, 1997 Transformation of Certain Rural Areas Act, 1998 Draft Land Rights Bill,1999 [National Land Policy, 1997]	YES In principle via Constitution 1996 (Article 211) & Policy 1997 and in law in interim way via Protection Act, 1996, Extension of Security of Tenure, 1997, & Transformation of Certain Areas, 1998 ('coloured' areas). Full development of regime awaits restart of Land Rights Bill, drafting suspended 1999.	YES Provided only through formation of Communal Property Associations (Act of 1996). More direct entitlement of commonhold proposed in aborted Draft Land Rights Bill, 1999
Namibia	Agricultural (Commercial) Land Reform Act, 1995 The Communal Land Reform Bill, 2000 [rejected] Land Tax Bill, 2000 [National Land Policy, 1999]	PERMISSIVE ONLY Ownership vested in state and promotion of conversions. Aborted Communal Lands Reform Bill, 2000 proposed recognition and entitlement for certain categories.	NO Communal Bill proposed homes & farms as registrable customary entitlements, with commons held in unregistered ways or subject to individual entitlement, including to outsiders.

TABLE 2

FOREST REFORM IN EASTERN & SOUTHERN AFRICA, 2000

COUNTRY	NEW FOREST POLICY	NEW FOREST LAW	CLASSES OF RESERVES NOW PROVIDED FOR
Uganda	Forestry Policy, 2000 [FINAL DRAFT, Sept]	To be drafted in 2000 to replace Forest Act Cap. 246 (1964)	Central Forests Local Forests Private Forests **Village Forests** **Community Forests**
Kenya	Forest Policy,1999	Forestry Bill April 2000 (third draft Aug.) to replace Forests Act Cap. 385 (1962)	State Forest Reserves Local Authority Reserves Arboreta Recreation Parks Mini-Forests Private Forests
Tanzania	National Forest Policy, 1998	Forest Bill Jan 2000 (fourth draft Aug.) to replace Forest Ordinance Cap 389 (1957)	National Forest Reserves Local Authority Reserves **Village Land Forest Reserves** **Community Forest Reserves** **Village Forest Management Areas** Private Forests
Zanzibar (*forestry & land are not union matters)*	Forest Policy, 1995	Forest Resources Management and Conservation Act, 1996	Forest Reserves Nature Reserves **Community Forest Management Areas**
Ethiopia	Draft Federal Forest Policy, 1998	Forest Conservation, Development & Utilisation Proclamation 1994	State Forests Regional Forests Private Forests
Malawi	National Forest Policy, 1996	Forestry Act, 1997	Forest Reserves **Village Forest Areas**
Zimbabwe	Forest Policy [draft]	Forest Act, Cap. 19:05	Demarcated Forests Nature Reserves Private Protected Forests
South Africa	Sustainable Forest Development In South Africa, 1996	National Forests Act, 1998	Forest Nature Reserves Forest Wilderness Areas National Parks Provincial Reserves State Forests Private Forests
Zambia	National Forestry Policy, 1998	Forestry Act, 1999	National Forests Local Forests **Joint Forest Management Areas**
Lesotho	National Forestry Policy, 1997	Forestry Act, 1999	Forest Reserves Private Forests **Community Forests** **Co-operative Forests**
Namibia	Draft Forest Policy, 2000	Forest Bill, 2000	State Forest Reserves **Community Forests** Nature Reserves
Mozambique		Forest & Wildlife Act, 1999	National Parks National Reserves **Areas of Historical & Cultural Value**
Swaziland	Forest Policy [draft] 2000	Forests Preservation Act, 1910 Natural Resources	Indigenous Forests Private Forests

		Act, 1951 Private Forests Act, 1961	

TABLE 3

THE POTENTIAL IN NEW OR DRAFTED FOREST LAWS FOR COMMUNITIES TO SECURE OWNERSHIP OF FORESTS

COUNTRY	**CURRENTLY GOVERNMENT FOREST RESERVES**		**FORESTS OUTSIDE GOVERNMENT LAND**	
COUNTRY & LAW	**DIRECTLY PROVIDED FOR IN THE LAW**	**INDIRECT OPPORTUNITY EXISTS IN THE LAW**	**DIRECTLY PROVIDED FOR**	**INDIRECT OPPORTUNITY EXISTS IN THE LAW**
TANZANIA Draft Forest Bill 2000	NO	YES via change of land status from state to village land (cl.36) or long lease (cl. 27)	YES VLFR will be owned by village community and CFR by group in community (cl. 4, 39, 49)	
ZANZIBAR Forest Resources Management & Conservation Act 1996	NO	NO	NO	YES Via Community Forest Mgt Areas (Part V)
UGANDA ***[Draft Policy, Sept.2000]***	NO	(YES) via Land Act; s.45 (6)	YES In construct of Non-Government Permanent Forest Estate	
KENYA Draft Forests Bill, 2000	NO	SLIGHT Via lease only; s. 34(2) and limited to plantations in Local Forests	NO Removal of 'Community Forest' class in final draft	NO
ETHIOPIA ***[Draft Policy only]***	YES		YES	
ZAMBIA Forests Act 1999	NO	YES Via s.15 (1) & 23	NO	YES s.25
MALAWI Forestry Act 1997	NO s.21	NO	YES Village Forest Areas in customary lands (s.30)	
LESOTHO Forestry Act 1999	YES Main objective is transfer to be implemented via binding agreement allowing for revocation (s.11)		YES Main objective is to encourage further Community & Co-operative Forests (s.17)	
MOZAMBIQUE Forest & Wildlife Act 1999	NO [Art. 3 Land Act 1997]	NO	YES Via creation of Areas of Historical & Cultural Value (Art.10) under customary tenure	
SOUTH AFRICA National Forests Act 1998	NO But in Restitution of Land Act 1993. Privatisation of plantations to business & community main objective of For. Policy 1996 & recognises restitution.		NO Because does not deal with forests outside State Forests but this is provided for in land laws and Communal Property Associations Act in particular.	

NAMIBIA Forests Bill 2000	NO But likely that only new Reserves will be Community Reserves	YES Main objective of Bill is creation of Community Forests out of communal land (cl. 12)

TABLE 4

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]**	
COUNTRY & LAW	**PROVISION FOR AUTO-NOMOUS MANAGE-MENT BY COMMUNITY**	**And/or PROVISION FOR SOME INVOLVE-MENT**	**PROVISION FOR AUTO-NOMOUS MANAGE-MENT BY COMMUNITY**	**And/or PROVISION FOR SOME INVOLVEMENT**
TANZANIA Draft Forest Bill 2000	YES May apply to manage cl.34 & 46 and declared 'Village Forest Management Area'	YES to be involved in all Reserve mgt (cl. 17-19, 22) as partners or aut. Managers	YES Autonomy as managers guaranteed, cl. 41 (6) but may also, if wish, enter JMA with Director (cl. 43)	
ZANZIBAR Forest Resources Management & Conservation Act 1996	YES Through declaration as a Community Forest Management Area [CFMA] (s.36-39)		YES Through declaration as a CFMA (s.36-39)	
UGANDA ***[Draft Policy, Sept.2000]***	POSSIBLE Through agreement	YES Likely	YES	YES
KENYA Draft Forests Bill, 2000	UNLIKELY But could occur by designating local Forest Association the Manager via JMA (cl. 45)	YES Via Forest Associations (cl. 45-46)	NO No provisions for unreserved forest management except Private Forests	NO
ETHIOPIA ***[Draft Policy only, 2000]***	YES Some could be assigned to individuals, organisations, associations (Strategy 3.1.4)	YES Via JMA (3.1.4)	YES Main objective to encourage creation managed local forests (3.4.1)	
ZAMBIA Forests Act 1999	NO	YES Local Forests only (not National Forests) and via JMA and declaring forest as Joint Forest Management Area (Part V)	NO Only via JFMA with Co. which includes heavy non-community and govt. representation (s.25-26)	

MALAWI Forestry Act 1997	NO	YES Via Joint FM Plans (s.25)	YES in principle but NO in practice as even local management of declared Village Forest Areas will be with agreement of Director (s.31 and subject to agreement (s. 50)	
LESOTHO Forestry Act 1999	YES S. 21 provides for transfer of management by written agreement. No direct provision for co-management although likely to be possible.		YES Law encourages creation new private, community & co-operative forests in which Govt may or may not be involved (s. 17)	
MOZAMBIQUE Forest & Wildlife Act 1999	YES Via delegation of powers to varying degrees (Art. 33), or via issue of 'simple permits' or concessions (Art. 15 & 16)		NO Although in practice possible in communal areas	YES 'Participation' is a main aim of land and forest laws but developed only in respect of Areas of Hist. & Cultural Value (Art. 10)
SOUTH AFRICA National Forests Act 1998	YES May apply to manage jointly with an organ of State or alone (s. 29 (1)) via agreement (s.30)		NO Because does not deal with forests outside State Forests but this is provided for in land laws and Communal Property Associations Act in particular.	
NAMIBIA Draft Forests Bill 2000	NO	YES Possible, through designation of a local community as Management Authority, charged with certain roles (cl. 15)	YES But only through making a local person/body the Honorary Forester to handle licences & fines (cl. 9)	YES Through management plan which includes local roles (s.15)

ENDNOTES

[i] Both constitutional and local government reform are critical nests for these legal processes. Whilst space does not allow elaboration, it may be cursorily noted that these countries have promulgated new constitutions since 1990, and which include significant alteration in the status quo among the central executive, legislative and judicial arms of governance on the one hand and a commitment to create devolved governance to one degree or another (local government) upon the other: Namibia, Mozambique, Zambia, Malawi, Ethiopia, Eritrea, South Africa, Uganda, Lesotho (and these countries have their constitutions under review: Rwanda, Swaziland, Tanzania and Kenya). New local government legislation has been promulgated since 1990 in Uganda, Lesotho, South Africa, Malawi, Rwanda and Zimbabwe and with significant amendments to standing law in Tanzania. Significant change in regimes of local governance are also 'under consideration' in new policy-making in Swaziland, Kenya and Zambia and official intimations that this might be necessary evident in Namibia. Other spheres of reform in natural resource management being realised at least in new law which are not covered in this paper are seen in the comparable wave of law reform in wildlife and water, and with the introduction of a new body of law, dealing with overall environmental management. As I have explored elsewhere (Alden Wily & Mbaya op cit.) the last tends to stand apart from the thrust of most other new law is its highly centralised and regulatory character in an environment which is generally more flexible and devolutionary in the strategies it embeds in law.

[ii] The issue of both the locus of radical title and its meaning is a complex issue but one of steadily increasing pertinence to African land relations (excluding a handful of southern African states who have other ways to found their possessory policies) as those holding primary title have increasingly behaved like landlords; refer GoT 1994 and Alden Wily & Mbaya op cit. for treatment of the issue.

[iii] As through the Land Act, 1965, still in force in Malawi, re-enacting the Land Ordinance, 1951, itself largely a re-enactment of the British Central African Order in Council of 1902. The first Constitution of Namibia, 1990, declared all untitled lands owned by the State (Schedule 5 (1)), and with no indication of this being as trustee, now indicated in the 1998 National Land Policy. For this and following endnotes, refer Alden Wily with Mbaya, op cit. for details.

[iv] In Uganda, Idi Amin's Land Reform Decree, 1975 rendered customary owners not just tenants on public land but 'tenants at sufferance' whose permission was no longer required for their removal (s.3). In Zimbabwe, the post-independence Communal Land Act, 1982 replaced the Tribal Land Act, 1979, with similar effect (s.4).

[v] Kenya Constitution, 1963; s. 118 (2) and Trust Land Act, 1968; s. 7 (1).

[vi] Reference is made here to the Land (Group Representatives) Act, 1968, its use suspended by Presidential Directive in 1979. Refer Alden Wily with Mbaya op cit.: Annex J for documentation and analysis.

[vii] Among others, Alden Wily with Mbaya, op cit., Palmer, 1997, Toulmin & Quan (eds.), 2000, with a great deal of country-specific review, as variously referenced in all the above.

[viii] This is an issue which has reached legal conclusion with the presumption by the President of absolute powers to expropriate property without necessarily paying compensation; this, a Constitutional Amendment declares is the responsibility of the colonial state (Section 3 of 16th Constitutional Amendment, Act No. 5 of 2000, with Statutory Instrument 148A of 2000 under Presidential Powers (Temporary Measures) Act, Cap. 10:20).

[ix] The commencement date on Tanzania's new land laws has not yet been set, awaiting both the completion of Regulations under the acts and translation of the laws into Kiswahili. A less worthy reason for delay is suggested as being political, commencement to await the results of the October 29 2000 national elections.

[x] The only semblance of local government so far is in the recently-created municipal councils. An intention to create rural local government has been frequently stated but not yet delivered.

[xi] To summarise, increasingly-documented findings are that title has not generated available credit to smallholders, titled smallholdings are not generally accepted as collateral, and that the extent of inputs and improvements to farms do not correlate with freehold/leasehold versus customary (Bruce and Migot-Adholla (eds.) 1994, Deininger and Binswanger 1999). The promised reduction in land disputes through titling has also not materialised, nor does customary landholding necessarily inhibit market transactions.

[xii] Refer endnote 1.

[xiii] Mozambique Land Act, 1997: Article 13 (1); Uganda Land Act, 1998: s. 28; Tanzania Village Land Act, 1999: s. 3 (2), 20 (2).

8 Uganda, Land Act, s. 40; Tanzania Land Act, s. 23 (1c), 30 (4c). In Uganda, where the law is commenced, this is one of few clauses which have seen widespread use (Ovonji-Odida et al. op cit.).

[xv] There are other important elements of continuity and change which have occurred in this transformation of traditional to modern community, such as the way in which the reciprocity which typical underwrites a pre-village community is retained, but given political edge, and amounting to a situation where it is still in the individuals self-interest to be a member of the community and to act as such in relations to certain aspects of life, including resource use. See Alden Wily (in prep.).

[xvi] This is a matter I have discussed at length in the evolving dynamics of community-based forest management in Tanzania, where one incentive for retaining commonage is often expressed as a view that even the environmental and existence values of the forest (i.e. quite aside from their product use

values) are greater than could ever be gained through allocation or even sale of the forest to a handful of individual members of the community (Alden Wily *forthcoming*).

[xvii] Space does allow elaboration but note that a strong argument could be made for the mirage of devolution the wave of parastatalism represents in the region (in fact a second wave, given the literally thousands of semi-autonomous bodies created in eastern Africa in particular in the 1970-80s, many of which are now being dismantled as failures.

[xviii] See endnote 8 above.

[xix] And in South Africa, those held privately.