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**Land, People and Forests  
in Eastern and Southern Africa.  
A Study of the Impact of Land Relations upon Community Involvement in  
Forest Future**

**A Summary of Findings  
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The full review will shortly be published by IUCN.

This paper represents an un-referenced summary of a lengthy study which will be shortly published by IUCN as part of its regional and global programme to document and promote community involvement in forest management. The study is lengthy at 300 pages, fully documented, and includes a large array of factual information on current initiatives involving local communities in forest management, and the overriding processes of land reform and forest reform in the eastern and southern Africa region.

**SUMMARY**

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 somewhat lesser degree, Botswana and Swaziland. Only occasional reference is made to Rwanda, Eritrea, Ethiopia, Sudan, Somalia and Madagascar. Burundi, Angola and Sudan are not mentioned.

## **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*. As this paper elaborates, difficulties associated with common ownership of properties 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 and to the detriment of community rights in forests.

## **COMMUNITY**

'Community' and what is defined in this paper as 'forest-local community' is the social sphere of interest. Forest-local communities include those living within or next to forests. These social groups are generally rural, poor, and dependent upon forests as integral to their 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 20<sup>th</sup> century interest to involve such communities in the management of forests arises from recognition of the failure of central states 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 protection (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. In different measure, each state opens the 21<sup>st</sup> century with a commitment to involve these people in the processes of securing and sustaining forests – referred to in this study as 'forest future'.

Community involvement in forest management [hereafter 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 considerable influence. The more recent initiatives in sub-Saharan Africa are nonetheless home-grown in their impetus and approach. In matters of forest tenure and community formation, the emerging experiences of some states (Tanzania and The Gambia prominently among them) advance the pivotal South Asian approaches in important ways. Borrowing of strategies internal to the region is widespread, particularly among southern African states, which 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 primarily discreet initiatives, begun and supported mainly with foreign project aid. In extent these range from a handful of initiatives in Uganda, Kenya, Madagascar, Malawi, Namibia and South Africa to a plethora of initiatives in Tanzania, Lesotho and Mozambique. Whilst few projects are underway in Zambia, one project embraces some 800,000 ha of woodland. In Zimbabwe, innumerable villages are linked to (if not responsible for) woodland management in the 25 districts where Campfire operates. In Tanzania, over 500 villages autonomously manage forests in 18 districts.

### **Benefit-sharing paradigm**

Significant distinctions emerging in the approaches towards CIFM in the region. Two main paradigms are being delivered. The first, most apparent in southern Africa, is less forest-centred than product-centred and dominated by the use of one forest resource, wildlife. Communities are involved largely as legalised local users and/or as beneficiaries of a share of revenue being generated by mainly externally-operated commercial users of the forest. This approach seeks less to transform the way in which a forest is managed than to secure the co-operation and sometimes, supporting inputs of forest-local inhabitants, to the plans of government or private sector interests. The commonest input is to report illegal users to the Foresters.

### **Power-sharing paradigm**

A second approach seeks to involve forest-local communities as actors in management with a view to thereby reducing the management burdens of the state or local governments and to provide a more effective and lasting platform for forest future. This power-sharing paradigm is most marked in initiatives in Lesotho and Tanzania and in less pronounced ways in emerging developments in Malawi, Namibia, Uganda and Madagascar. The approach is broadly characterised by devolution of authority (to varying degrees) over the forest from state to forest-local community, and may include transfer or confirmation of local ownership of the forest itself [Tanzania, Lesotho, Namibia].

The former paradigm poses forest-local people as mainly forest users and the latter, as primarily guardians of the forest, building upon and developing a sense of custodianship. Whilst both hold local livelihood interests as crucial, benefit-sharing approaches are more concerned with immediate returns to communities and power-sharing approaches with enabling the community to determine and regulate access and product benefit and over a longer-term horizon.

### **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 in particular, are able to enforce them. This ranges from non-existent to considerable in correlation with the extent to which the community is involved as mainly beneficiary and user, or as forest manager.

### **Tenure rights as integral to approaches**

Also expected is the finding that levels of local jurisdiction 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 formal or informal owner of the forest land (or at least as its custodian) directly shapes the kind of role it will be permitted and encouraged to adopt in the management of that forest. A main exception is emerging in South Africa where communities who will re-secure state forests through restitution claims are being encouraged to lease these back to Government or private sector agencies to manage on their behalf.

## **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 concerns.

However, the study finds the power-sharing paradigm altogether more powerful than the benefit-sharing paradigm, which tends to signal only minor alternation in the actual mode of forest management and may even increase management costs. Product-centred and revenue-sharing developments in particular tend to be 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. A persistent ‘tug of war’ over shares may underlie projects where access rights are the medium of the relationship. Over-use of the resource to meet the ‘needs’ or demands of the local partner may threaten sustainability.

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 protection, or because they are so degraded – circumstances which may encompass the majority of forests and woodlands in the region.

These 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 of which are now looking to ways to root local benefit upon a more secure platform of community-based jurisdiction and tenure.

## **THE POSITION OF THE STUDY**

As authors, we leave no doubt as to our biases lie. For the underlying hypothesis of this study is that community involvement in forest future [CIFF] is not a matter of social correctness or a means to improve local livelihoods but a fundamental and urgent necessity for forest security - upon which livelihood, environmental support and other aspects in turn may more reliably depend. As the last century all too painfully illustrates, natural forests in the region are unlikely to survive the 21<sup>st</sup> century without a significant level of forest-local community jurisdiction.

To elaborate, our contention is that 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 first instance.

### *Devolving authority the critical factor – making communities custodians*

Devolving control to those with the most immediate and sustained vested interest in seeing the forest sustained – forest-local communities – combines with the logic of devolving control to the most local level possible, in order to secure the cheapest, most ‘owned’, most active and therefore most sustainable regime of forest protection and management.

### *Custodianship ideally founded upon ownership*

This will be all the more effective if local authority is itself founded upon local ownership of the forest itself, not least because it removes the forest from the ills of open access and diffuse responsibility which public property has come to imply. Where operational responsibilities for a forest are de-linked from a sustainable foundation of authority, commitment to forest protection is constrained and conflicting objectives appear.

### *Devolution of custody and where possible forest land ownership, the key to forest security*

Therefore, provision for forest-local custodianship is, we posit, 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.

It is our argument that the extent to which the disappearance of forests over the coming century may be slowed, and the extent to which forests will be effectively managed over the coming century, depends first and foremost upon the extent to which governments devolve their jurisdiction - and ideally ownership - over these estates to the local level, albeit on terms which prevent the conversion of forest to non-forest purposes.

## **PROPERTY RELATIONS AS THE FRAMEWORK**

It is no surprise therefore that this study takes land and land relations as its starting point.

Discussion centres upon four key concerns:

- *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. Even customary rights to forest resources are determined by the provisions of state (statutory) law.. Strategies and practices in the field are secured (or de-secured) by law and changes in strategies and practices are reflected in changes in the law. The main foci are constitutional, land and forest laws.

## **THE CONTEXT**

### **Democratisation**

Main attention in this study is placed upon *changes* that are occurring in both land and forestry sectors. The study finds and explores how these do not exist in isolation but are part of wider range of movement in the region, most characterised by a shift in the relationship of the central State with civil society. The wave of new constitutional law in the region most sharply illustrates this socio-political transformation. The shift is overall to the benefit of society, enabling ordinary citizens to play a larger role in managing society and its resources.

Whilst it would be rewarding to identify this as steadfastly towards devolution, with the rights of especially the rural poor accruing, the reality is more ambivalent, with a good deal of concentration of interests and powers also being secured by the central entities of State. The result is that the paths being carved out towards improved local tenure security are erratic and still partial.

Still, such 'democratising' reforms are not easy to recall once embarked upon, and practical changes launched upon their basis, tend to promote the trend further. This is already demonstrably the case in respect of community forestry interests: as illustrated in this volume, 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 state-people relationship, and central to this, the identity and authority of the community itself. Such developments are not easily surrendered.

### **Commonality**

A further general finding needs remark: this is that as a whole, there is more commonality than difference among states as to the nature of changes taking place. This ranges from the kind of concerns that each country faces to the manner in which resolution is being sought and achieved. As opportunities are realised, two important founding requirements are beginning to clearly emerge:

- *First*, the need for ‘community’ itself to gain stronger social and legal form, together with the endowment of powers to act in legally-enforceable ways. It is no mistake that a main finding of this study is that most development in community-based forest management is being observed in those states where rural community has most developed institutional form and governance powers [Tanzania]; or that where new opportunities in law are being least adopted is in those states where local community still has a very minor role in formal governance and where the very identity of ‘community’ has been most subject to demise [Mozambique, South Africa].
- *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.

### **Changing ideology**

A third contextual change may be noted: that in the process of changes which are underway in the region, shifts in very meaning of many core constructs, conventions and processes are occurring. This directly affects notions of tenure and notions of forestry. Templates of ‘private property’, ‘communal land tenure’, ‘ownership’, ‘customary land tenure’, and ‘forest reserve’ in particular are seeing quite dramatic new meaning and implication. The lexicon of the 21<sup>st</sup> century will look different from the 20<sup>th</sup>. The changes reflect a general gain to the interests of the rural poor.

### **PRESENTATION**

The study is presented in five chapters with a good deal of factual information and examples annexed. PART ONE, comprising two chapters, provides the setting, with a review of the forest resource, current initiatives where forest-local communities are participating in forest future, and a review of the legal framework through which land rights are determined and sustained. The part closes with examination of the kind of changes which are occurring in that sphere.

PART TWO comprises the discussion, in three chapters. Chapter Three explores both the constraints and opportunities that directly affect the right of forest-local communities to secure forests and woodlands as their own. Building upon new potential identified, Chapter Four looks at the effect of forestry strategies upon local rights and then turns to examination of just how far emerging new policies and laws in that sector are providing for communities to play a real role in forest security and future. Chapter Five presents conclusions.

What follows below is a narrative of some of the general findings.

### **LAND OWNERSHIP**

Land ownership in eastern and southern Africa is, at the turn of the century, very 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, ownership of the soil 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 and the terms upon which it is held, varies widely. In some states, at least those persons who hold registered and absolute interests in land (such as in freehold tenure), feel their tenure 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. The outstanding trend in the region has been towards the co-option of attributes of material land ownership by the central State and steady attrition in the definition of subsidiary rights in land which may be held by citizens, accordingly. As the 21<sup>st</sup> century opens, the fact that 'land is owned by the state' has unusual force in particularly these countries particularly; Eritrea, Ethiopia, Tanzania, Zambia, Malawi and Mozambique.

Elsewhere comparable forces are apparent, although generally centred upon certain spheres of land. This is illustrative in the unusual strength of the construct of Government or State Land in the region, into which a great deal of property has been inappropriately retained or consistently drawn, often with minimal compensation and sometimes for purposes which are distant from public needs.

### **Government and virtual Government Lands**

Particularly pernicious for many citizens of the region has been the persistent retention (and exaggeration) of the colonial-derived construct native areas, for all intents and purposes 'virtual state lands'. These operate today as the Trust Lands in Kenya, the Communal Lands of Namibia, Zimbabwe and 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 (Councils), who or which are able to appropriate, allocate or reallocate these lands with minimal real constraint, the protective clauses of (some) Constitutions notwithstanding. Extraordinarily for the year 2000, millions of Africans occupy these lands as but tenants of government in one way or another. The impact this has upon local rights to secure and sustain forest and other common properties, is profoundly negative.

### **Conversionary processes**

A corollary constraint upon local tenure security over forests and other resources has derived from the steady reconstruction of land as a commodity and the relocation of acknowledged land relations into a narrow range of European-derived forms and processes; changes which have been integral to the state-making of the last century of which the capitalist transformation of society was in turn integral.

The central thrust of these changes for landholders has been dominant individualisation of land, a process which on its own has done much to reduce forest lands through subdivision and to undermine local forest ownership.

### **Failure to recognise customary rights as delivering 'property'**

The above have been driven by the notion, continuing up until the present in all but a handful of states that traditional regimes of landholding and the actual rights to land which they deliver amount to less than land ownership and are unworthy of the same level of legal support and protection routinely awarded regimes with non-local origins in national laws.

The uniform declaration of the sanctity of private property in the Constitutions of the region simply do not really apply to customary rights in a meaningful way. Nonetheless, this is how land is possessed by the majority of citizens at the turn of century. Moreover this is a form of possession which holds strikingly pertinent logic and utility and are supported by notions and regimes which have accordingly proven remarkably tenacious.

There is very little evidence that majority landholding in the region has been granted any kind of real security over the last century. If any security has been afforded at all, 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 itself that is 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 tenure security. This mainly (but not entirely) includes those who acquire, hold and transfer land through customary mechanisms. Their land interests in the year 2000 are vulnerable and made more so with the direct assistance of tenure policies and laws.

This may manifest in different ways. In Kenya for example, customary rights in land permissively exist, pending programmes of 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 (and now Namibia in pending proposed communal land law) ownership of grazing lands is ignored, with only customary residential and agricultural plots provided the opportunity to be privately owned through customary mechanisms. In Zimbabwe, the wholesale ownership of all untitled land by the President allows certification of ownership of only lands used for purposes of business or service developments. In Tanzania at this time the occupancy of land by 20 million people exists in a peculiar legal limbo-land, with neither customary nor statutory land ownership currently having force. Almost similar situations exist in Eritrea and in South Africa in respect of the ex-homelands.

The end result overall is the same: if the land is customarily or informally held it has limited recognition under the law, and even should recognition be sought, the avenues for this are currently limited, largely requiring conversion into regimes which do not necessarily embody customary characteristics.

### **Failure to recognise communal landholding**

Failure to give customary regimes and land rights 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 certain tract of land. Nor has socio-legal development in the region this last hundred years seen alternative provision under other tenure regimes, for such constructs to be developed.

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 a recurrent category.

A main conclusion of this study is that it has been the lack of clear notion and construct of commonhold tenure in the region which has most undermined local forest tenure – and most symbolised the very real shortcomings of legal land relations this last century. Indeed, we would go so far as to say that its absence has been the most disabling factor in tenure security to date.

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 landholding capacities which prevented the early integration of African land regimes into national law. This in turn was underwritten by misunderstanding of communalism in land relations, that is, extraordinarily, only now beginning to be unravelled in official thinking as shortly described. 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.

### **The reconstruction of communal land tenure**



Later, it will be explored how in the wave of new legal and socio-political thinking current in the region at this time, communal land tenure is seeing new understanding and redefinition, and its emergence as a tenure denoting property privately owned by a group of persons.

This is being achieved through a long-deserved clarification of two levels of communalism; the first being largely symbolical in holding that ultimately all land belongs to the tribe (or even to 'humanity'). This is a notion which has more in common with European notions of dominion and even radical title than with tangible land ownership, and which is most important not for the kind of property it delivers but for the obligation it places upon members of the community to act in respect of land resources with responsibility to the greater group.

The second is altogether more material in its implications, and simply holds that it is quite possible for a group of people to own an area of land together. In practice, this is the more common meaning of communal land and results in definable areas of commons and identifiable groups of owners. Millions of hectares of forests, woodlands, swamps, pasture, wildlife range and mountains have been owned in this way in eastern and southern Africa.

### **The effect on local ownership**

Meanwhile the long failure of state law and policy to recognise, provide for and entrench these estates has been a critical factor in their demise. Failure to acknowledge commons as owned and own-able has also opened the way for the central state to appropriate those of most value and utility to itself, often in the form of Reserves. Those of perceived lesser value tend to be owned by states or presidents in trust for the traditional owners, or to have succumbed to the subdividing and individualising forces of freehold or leasehold entitlement processes, in the absence of viable legal means for customary owners to retain these as commons.

In all cases, significant local proprietary rights over forests have been extinguished, or at most diminished to rights of forest product *access*, these themselves only permissively applied. A main task of forest laws throughout the 20<sup>th</sup> century has been to first provide for such forests to be removed from the local sphere as Government property and then to regulate how these Reserves could thereafter be used. One-time local owners who generally live next to the forest are most favoured; they may usually collect headloads of fuelwood from 'their' forests for free.

## **LAND REFORM**

Fortunately, for the remote rural poor and citizenry in general, the right to property, as defined in national policy and law, is currently under dramatic change in eastern and southern Africa, and, as will be shown, in ways that are proving advantageous to their interests – and to the interests of forest future in general.

The extent of land reform in the region is remarkable. In fact, it is only Angola, Somalia, Sudan, Congo and Burundi which have *not* embarked upon a land tenure reform of some sort – all countries at civil war. Even Kenya, which has long claimed to have 'reformed' land relations (from 1955), has now created a new commission of inquiry into land law matters with a view to comprehensive reform (1999). Botswana, another country in the region which also significantly altered the framework for land tenure (1968), has also tentatively indicated an interest to re-examine its land policies.

As we shall see below, commitments to explore or effect reform, do by no means readily materialise in change.

## **AN UNSETTLED AND UNSETTLING PROCESS**

The impetus to change land relations are diverse country to country. Nonetheless, in practice there is marked 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).
- ❑ Classically, land reforms tend to centre upon intentions to redistribute property towards equity and to eliminate landlordism. Whilst land redistribution is an explicit objective in one or two reforms, the context within which it is being posed is very different and most cases is being advocated in the first place largely in conjunction with a more profound political commitment to retrieve for the populace lands lost to white settler populations. South Africa and Zimbabwe are the obvious cases. Nonetheless, in a much less directed way, some of the changes emerging out of the reforming processes, suggest that some rather significant shifts in patterns of land distribution may well result, should these reforms actually come to pass. The most widespread source will be through constraints upon continued polarisation in landholding, and from the dramatic increase in security that could be awarded those who currently hold land in informal ways.
- ❑ Land *tenure* reform – changing the way in which land is understood in law as owned or held – is also not everywhere an early intention of the land reforms but in virtually all cases inevitably entered the agenda. This is again of direct importance to all those who hold their land in unregistered or informal ways, including the vast customary sector.
- ❑ The process of land reform is proving more complicated, time-consuming and contentious than any Government initially imagined. Despite most beginning the process up to a decade or more ago, only Uganda, Ethiopia, Mozambique, South Africa and Zimbabwe have begun to implement the reforms in notable ways and are themselves only in the very earliest stages of this.
- ❑ Early intentions as to what is to be changed and how, tend to alter dramatically as planning gets underway. For example, countries like Tanzania, Zambia and Mozambique which began with the intention to make land more freely available in the market place, have to some extent ended up increasing rather than relaxing limiting regulation. Uganda's first intention to create a single uniform system of land ownership resulted in legal recognition for four quite distinct regimes of legal ways to own land. Emphases everywhere shift; for example, from commercial to communal lands in Namibia, from urban and industrial sector land needs to rural, in Kenya, from tenure forms to tenure administration in Eritrea, from statutory to customary concerns 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 or as urged by international donors - and for reasons which more often than not political. The process itself is proving to be dogged by stops and starts, as political will wavers. As a result, founding new policies may take years to be finalised or approved (Zimbabwe, Malawi, Lesotho, Namibia, Zambia, Rwanda), and 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 official commencement date left hanging (Tanzania). The substance of a new law may be quickly modified by amendment or regulations (Uganda, Mozambique), or announcement made that a new policy is anyway 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 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 in some respects Mozambique outstanding among them), land reform is being State-driven and delivered, popular participation sought mainly in the vein of consultation, and consultation itself sometimes deliberately limited (Rwanda, Ethiopia, Tanzania) or the results ignored (Namibia, Zambia).

- The costs of this failure are beginning to be experienced, with plans emerging as unworkable or too costly (Uganda), or simply not accepted, and forcing the return of new laws 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 'popular' changes, increases.

One effect is that the way in which law itself is made is beginning to come under scrutiny, an important development given that law-making is arguably one of the more entrenched bastions of top-down and centrist approaches to social change. So far the impact has been 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 original and simplified form and sometimes in translation (Uganda, Tanzania, South Africa, Mozambique). Within the law itself, conventional boundaries among different bodies of law show signs of being breached with matters of public law and administration and traditional issues of family law beginning to appear in the land law.

- If, as noted earlier, land reform arises out wider changes at this point in time, so also is it serving to reinforce those changes and to more directly prompt change in other sectors, and in ways which gain only gather pace over time. Linked changes are evident in laws of governance (and the development of local government in particular), forestry and other natural resource sectors. The wave of 'forest reform' identified in this study, gains a good deal of direction and impetus from changes in property relations.

### **The central concerns of the right to land and the relative rights of state and people**

- There are certain issues which each state is ultimately have to deal with. A good number of these are matters of the land market, and a good number of others are asked and decided upon the general question of how far the central state is willing to bear the cost of altering patterns of landholding or rights itself.

However the more fundamental centre first upon the question as to what should constitute a right to land and second, what should be the relation of state and people in this area. Common issues therefore 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?
- 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 far should the land use regimes of hunter-gatherers and pastoralists be held as tenure and accounted for?
- how should the informal occupancy of the still-growing millions of urban poor be dealt with?
- how critical after all 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**

Whilst each nation is dealing with the above in its own way, there is – again at the risk of over-simplification and generalisation – a good deal of common direction in resolution, at least among certain groups of states. Broad trends include –

### **State-people land relations**

- The making of land law reform an objective in its own right, with a common drive towards the eventual formulation of not only a single basic land act but one which is genuinely national in its character, independent of colonial-derived and associated metropolitan laws. Both objectives are proving difficult to achieve, with the new land law of Tanzania arguably coming closest to reaching this;
- Uneven development in respect of powers of state over land, with some countries embedding rather than releasing their ultimate powers over property (Tanzania, Eritrea, Ethiopia, Mozambique, Zambia) whilst others, following the bold lead of Uganda, increasingly contemplate devolving fundamental ownership from state to people (radical title). How far this will be realised is yet to be seen (Malawi, Rwanda, Kenya, Zimbabwe, South Africa)

Meanwhile, tangible powers of state over land have by no means been diminished, and there has been no reduction of the grounds upon which any state in the region may appropriate private property. Zimbabwe excepting, the main improvement being seen is in the rates of compensation payable and in some countries, a marked improvement in the procedures through which land may be appropriated. In several states (South Africa, Uganda, Mozambique, but most fully in Tanzania), recognition of unregistered customary land rights as private rights due compensation has received new and important emphasis in the law and spheres of customary occupancy given a new level of protection not seen before.

- A highly significant democratising trend towards devolving the administration and regulation of tenure both outside the executive and towards the grassroots; a move most strikingly seen in the creation of fully autonomous land boards and supporting parish land committees in Uganda and whose work is not complicated and potentially compromised by also having the ownership of land vested in them (as is the case in Botswana);

Whilst the Commissioner of Lands retains powers over certain classes of land in Tanzania, elected village governments (Village Councils) will be designated as the Land Managers, charged with carrying out adjudication, registration and entitlement of lands within their respective village areas. Variations of this trend are under consideration in Malawi, Swaziland and Zimbabwe (and in much less developed way in Lesotho and South Africa), again in reference to certain spheres of landholding. Taken as a whole, these developments bespeak a potential marked increase in the participation of civil society in tenure decision-making, in accessibility to machinery and procedures, and accountability.

Similarly, more and more states are beginning to remove land dispute machinery fully or partially from the judiciary into local civil tribunals to speed up resolution, remove enormous backlogs and improve accountability to clients.

### **A regulated market in land**

- Marked ambivalence as to how far the market in land should be promoted and how far such a market should be regulated, with increased legal right to sell property in principle but often only the improvements to the land (Tanzania, Ethiopia, Eritrea, Mozambique, Zambia, Zimbabwe, Rwanda, Namibia), and subject to permission of the land administration authority, whose powers to impose conditions are widely heightened. There is also 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 only to lease land from the State and are therefore excluded from accessing customarily or village-held lands. These same new laws carefully maintain the right of the State to itself withdraw property from the customary sector, and to reallocate it, often with a view to making it available for foreign investment purposes. States also retain firmly the right to issue concessions and licences over most classes of land, which demonstrably has the effect in some countries of undermining local tenure, including local forest tenure (Zimbabwe and Mozambique).

### **Strengthened use-centred conditionality**

- Despite little evidence that conditions have been adhered to in the past, many new land policies and laws are heightening requirements for occupancy and use of lands as a means to inhibit land hoarding, speculation and absentee landlordism [Tanzania, Mozambique, Botswana, Eritrea, Ethiopia, Namibia, Lesotho]. Proposed land policy in both Zimbabwe and Malawi are emphatic that both customary and freehold rights should depend ‘not upon title, but upon actual use’;
- Ceilings on the size of holdings are also being imposed in the laws of Tanzania, Eritrea, Ethiopia, Zambia, Botswana and Lesotho. Even Kenya, famous for the strength of its commitment to the unbridled rights of private property has announced that a tax on vacant or under-utilised lands is likely to be one of the first tenure ‘reforms’ to be introduced. Imposition of taxes and stringent planning regulations affect freeholders in South Africa, Zimbabwe and Swaziland in increasing, rather than decreasing, degree;

### **New recognition of the rights of weakly-tenured sectors**

- Dramatic new attention in policy and law to the landholding of previously weakly tenured sectors of society is emerging. This prominently includes legal provision to regularise and register the occupancy rights of farm workers of long-standing who have been paid with land use rights (South Africa) and a degree of emancipation for certain types of tenants (Uganda). More widely, there is clear shift in policy and law towards recognising (the often long-standing) occupancy of urban poor as the basis of land rights and providing for these to be awarded through various regularisation schemes, thereby paving the way for turning millions of citizens from landless ‘squatters’, subject to legal eviction, into tenured urban dwellers;
- Similarly, there is increasing attention to the land rights of women, extending in one or two countries to providing for full gender equity in household landholding (Eritrea, Ethiopia, Tanzania), and under consideration in Uganda in a proposal to introduce an irrebuttable presumption of co-ownership of primary household property (normally the family home and farm as the source of livelihood). Namibia, Zimbabwe, Swaziland and Malawi have comparable proposals to hand at least in respect of customarily-owned properties.

Should these materialise (still much in doubt), then the change they signal to domestic land relations will be immense and with likely dramatic effect not only upon social relations by those of agricultural production: as co-owners rather than the primary labour force on the farms of their husbands, one of the major impediments to the rapid modernisation of smallholder agriculture could well be removed.

## **THE FUNDAMENTAL CHANGE: NEW RECOGNITION FOR CUSTOMARY RIGHTS**

In all the above spheres, the right to land is definitely seeing elaboration and refinement if in still hesitant and insecure ways.

The much more certain transformation is in the legal handling of customary rights in land as a whole, and which in turn drive changes in the above sectors, both in the substance of rights and in the local and ways in which they will in future be regulated.

With exceptions (Botswana), customary tenure has been only permissively recognised in state law, and not provided statutory machinery to operate. As outlined above, the broad assumption has been that it would disappear on its own with commoditisation of land and/or through forcible conversionary processes, and/or that it did not amount to land ownership in any event. The latter in particular has been used to justify the subsumation of all customary occupancy to State title and control.

In 2000, the persistence of customary rights in land and the regimes which uphold them (customary tenure laws) is having to be recognised by policy and law makers. Decision has to be made whether to maintain the status quo with the massive tenure insecurity implied, 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 which 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 areas such as those listed earlier. 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 as necessarily equivalent in the eyes of the law to those which may derive from more formal and statutorily-defined regimes. Without such recognition, the landholding of the majority will remain unsecured, a condition long recognised as unhelpful to society or economy.

All sorts of implications proceed from this. Which rights in land are recognised and recorded, and where and how this is effected, are undergoing dramatic change and a main force driving the devolutionary trends in tenure administration observed earlier.

### **Leading the way**

The source of new legal recognition for customary land rights is in the new land laws of Uganda, Tanzania and Mozambique. These explicitly recognise customary land rights as a fully legal form of landholding, equivalent in security to other regimes, and provide fully for their exercise 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. 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 indicated 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 most important of all, without loss of the potential for community reference to provide the evidence and legitimacy of these rights.

### **A still fragile development**

It would be incorrect to suggest this development as yet widespread. Indeed, when given the opportunity to adopt this strategy both Zambia in its 1995 law and Namibia did not chose this route; the former assures customary landholders security only through converting their rights to leasehold, as does Kenya and Malawi. Namibia's proposed communal land law (in fact returned to the Government for redrafting), follows the Botswana model of providing registrable rights for a limited range of customary holdings, excluding the all-important common properties which will be available to leasehold entitlement and by outsiders. 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) and which in the case of the former, are only 'legal' once registered, a programme still far from underway.

Policy proposals in 1998-1999 in Zimbabwe to liberate communal lands from presidential tenure through recognition of customary tenure and provision for its entitlement at and by the village level, now looks unlikely to occur, with the current preoccupation with white settler landholding. The bold intentions of a drafted Land Rights Bill in South Africa to provide clear opportunities for customary tenure as a voluntary basis of legal rights in land, appear to have been suspended, whilst the Mbeki Administration debates whether it might not rather simply divest itself of the problem by vesting title in Tribal Authorities, a route which might do no more for ex-homeland occupants than change the name of their landlord. Important policy proposals relating to customary tenure by the Malawi Land Commission, 1999, remain undecided as do those of Swaziland, but both seriously contemplate recognising giving customary rights in land the full weight of law and providing for their devolved administration, along general lines suggestive of those provided for already by Tanzania and Uganda.

### **GIVING LEGAL FORM TO COMMON PROPERTY RIGHTS**

Where new recognition for customary land rights has been afforded, it carried with it a most dramatic transformation in the status of common property rights, and therefore the status of these common properties.

For in the act of recognising what is customary, state laws as a matter of course are also recognising as perfectly legal the customary capacity to hold property in common.

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 may be recognised as owning land, and able to register this fact in justiciable form. Certificates of Customary Ownership, A Customary Right of Occupancy, and a Right of Land Use and Benefit, may therefore be entitlements held by a family, a clan, a community, a tribe or indeed any other customarily-defined identity.

The opportunity this provides for the recognition of common properties as owned is enormous. Indeed the construct is of such obvious utility that the Uganda and Tanzanian laws make it possible for even persons who do not hold property customarily in this way, to readily secure such group entitlement through their own regimes. This is a capacity noted for Granted Rights of Occupancy in Tanzania and through the creation of a Communal Land Association in Uganda. Earlier new land law in South Africa provided a similar construction with the Communal Property Association.

An additional helpful provision to enter these new laws 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. Tanzania's new tenure law in particular widens the interests upon which ownership of rights may be founded, to explicitly consider patterns of tenure previously unaccounted for, such as those that apply in pastoral regimes or in the land relations of pastoral and agricultural groups.

The advantage in these developments is not only to community or to forest, but to property relations and appropriate land use management as a whole. The lack of such a simple provision in modern national statutes – and one which has throughout this period had long-standing recognition and validity in the customary sector – has been to the loss of sound tenure administration. Its benefit is likely to be widely felt in coming decades – and not least in the urban as well as rural sector, where the construct of co-ownership of estates among especially poorer residents, is already acknowledged in new land policy in Namibia as a necessary provision.

For rural landholders and those who have tenure interests in forests, woodlands, wildlife range and pasture in common, this simple land right is now secured – at least in law.

## **CHANGING NOTIONS OF TENURE**

Through the above innovations, the very notions of tenure underlying land relations are seeing alteration and perhaps most definitively represent the kind of ‘reform’ that is actually, if uncertainly, underway in the region.

### **Redefining the place of individual ownership**

Several main changes can be seen. First, the very conventions of titling which underpin the history of ‘modern’ tenure, are beginning to be re-made in the region. Previously recordation, registration, and the issue of evidential documentation [titles] were inseparable from the individualisation of the ownership of that property. 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 very notion of what constitutes ‘private property’ has begun to expand its conventional boundaries to embrace a simple – and traditional – idea that spouses, families, clans, groups and communities may also own private property, as private, legal persons in the eyes of the law – a facility provided in the past mainly in the form of trusts, companies, and other associations more suited to corporate property, and invariably linked to freehold or leasehold entitlement. Now, the idea is coming into use that it is not the owner who must be an individual but that it is the ownership and its evidence, the title, that is discrete and individual.

The process of certification is seeing revision. 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 (with limitations) be in accordance with their local preference (Uganda). Of note is the right endowed by all three laws for customary rights in land to be potentially held in perpetuity. In Tanzania, this makes customary rights in land superior in term to those available through direct grant by the state, a pleasing reversal of majority rural fortune.

### **Modernising communal tenure**

Noted earlier were the instructive shifts in the meaning of ‘communal’ land tenure, now clarified and given concrete and registrable form as material private group property. After years - or rather a century - of obfuscation of ‘communal land’ in an environment of contradictory tenure norms and



ideology, this arrives as a most welcome maturation of common property, and a rather surprisingly delivered rescue, of what now must seem to many a modern law-maker, 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 so aptly represents a resurgence of what has been quite definitively, the suppression of an African character to modern property relations on the continent. However, it should also be observed that in the process, a certain amount of reconstruction of traditional notions has been effected, rendering this important development as much 'modernisation' of communal tenure as its recognition.

### **Reconstructing customary tenure as community-based tenure**

This relates to an equally subtle alteration in meaning as to customary land tenure itself. For in particularly the case of Tanzania and Mozambique, what is really being brought into realm of state law is not (just) customary tenure, but tenure and interests in land which derive from local regimes of tenure recognition and sustenance, and which may or may not have a clear foundation in custom or its rules and laws.

This takes into account the fact that in many rural communities in Mozambique population dislocation has been such that several layers of 'rights to land' may exist and be broadly upheld – or now need to be clarified and upheld in law – and through mechanisms which focus less upon traditional leadership-driven or customary norms than upon the endorsement of the modern rural community, in whatever form it may today exist.

A similar situation exists in the ex-homelands of South Africa, leading drafters of the pending Land Rights Bill to give comparable flexible frameworks to the recognition of local rights.

In Tanzania, 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. Many customary land rights were lost, whilst others were by default sustained. Whilst in practice the regimes adopted by village governments to allocate and regulate tenure matters have been largely founded upon customary norms and practices, strictly speaking, what exists today is not customary tenure or customary rights in land at all, but village tenure and village land rights. Nonetheless, following a long legal tradition in that country, these are named customary and registrable as Customary Rights. Village Land Managers themselves are bound to attend to local customary rules and norms.

Moreover, these are to be observed only in so far as they do not transgress parameters established in the law and the bill of rights of modern Constitutions, all of which contain marked departures to customary practice, most observable in the handling of the land rights of women.

Of such developments legal marriages are being made, not only of customary and statutory law, but of traditional and modern community-based tenure regimes. The vigour that is being given is to 'custom' but to the operation of localised, community-based regimes of tenure. Through this alone, the identity and future of community is being empowered.

### **THE IMPACT OF NEW LAND LAW ON COMMUNITY FOREST RIGHTS**

They may be no doubt that issues of land rights directly influences and indeed controls 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 we have seen is the State itself, in its steady appropriation of local forest lands as Reserves in service of national concerns, demands and interests. 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, 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 to be secured by local people at the local level, through recognition of local and particularly communal rights in land as legitimate and of necessity, to be upheld as such in disputes. How far, we must now ask, if this changing situation, still limited though it is, being reflected in the strategies of the forestry sector, which exerts so much influence upon the status of forests and woodlands in each country.

The question gains special pertinence at this time as these administrations themselves are generally more positively concerned to admit forest-local communities into the determination of 'forest future'.

## **FOREST REFORM**

Again, in examining this matter, we are confronted with a wave of 'reform' at the turn of the century.

Within the space of less than a decade, Malawi, Zambia, Lesotho, Mozambique, Ethiopia, Zanzibar and South Africa have made new policies and enacted new forest ordinances, disposing of those with strongly colonial origins. New forest legislation is in draft in Namibia, Tanzania and Kenya. Uganda and Swaziland are formulating new National Forest Policies as prelude to drafting of new forest acts.

### **The beginnings of devolution in forest management**

The main thrust of this development has been institutional, and with a main trend towards lessening the concentration of authority over forests and decision-making; generally into semi-autonomous commissions or with advisory bodies comprising prominent civil society representation. 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.

Without exception, the last group of citizens are identified as a likely key player in future forest management, and potentially the major player (Namibia, Lesotho, Malawi), most clearly articulated in those states which more widely favour devolutionary approaches, and now embed these in new forest policies and law (Tanzania).

## **THE CHANGING TEMPLATE OF 'RESERVATION'**

Integral to these shifts, legal notions as to who owns forests and who *may* own forests, who manages forests, and who *may* manage forests, is seeing marked change. These find 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 (forest) land to the purposes of forestry, has been the common and core construct of forest management strategies throughout the region. 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 mainly acts of land appropriation, the withdrawal of what was as often as not informal local common property into the supposedly protective hands of the central state.

This was premised upon a view of Governments as the (only) fit guardian of these important resources and the only logical guardian in view of the assumed incompetence of customary tenure to hold these properties. Loss of millions of hectares of forest from people to state, has inexorably followed and within a nation-building environment which has found this largely acceptable or at least, unavoidable.

In the process, local people not only lost land and resources but the tenurial-based incentive to upgrade and develop in accordance with increasing pressures, much-needed locally-based regimes of forest protection and management. Indeed, in most cases, the new Government Forest Reserve was marked out as for all intents and purposes, a public resource to be used by those of the public with the proximity or means to do so, illegality and the mild constraints of ineffective state policing notwithstanding.

By century-end, the strategic failure in this position had come to roost, with the state's ability to protect these estates widely thrown into question. Especially where the very integrity of state authority over forest has come under scrutiny (in East African states in particular), powers of state over forest and forest land in the first place, have begun to be queried.

The results are proving interesting. Whilst the strategy of setting aside forest for its protection remains in the year 2000 firmly and uniformly the centre-piece of forest management throughout the region, important shifts in the meaning of 'reservation' have begun to occur and to be expressed in new policy and forest law. After decades of popular assumption which equated a Reserve with State ownership, the two are being firmly and sometimes explicitly de-linked in law.

Thus in Tanzania, for example, the Land Act 1999 established reserved land in general as a land management, not land tenure category, a class which says nothing about who may own a reserved estate, and indeed makes it clear that ownership may accrue through granted or customary rights. Other tenure and/or forest laws in the region mirror the same disassociation in explicit or implicit ways.

### **GIVING COMMUNITIES THE OPPORTUNITY TO CREATE THEIR OWN RESERVES**

The prompt for this development is common, in the widespread provision in the wave of forest reform for individual persons, households, groups and communities and any other form of association or agency, to be able to create, own and manage their own Forest Reserves.

This is most developed in Tanzania with constructs of Village Land and Community Reserves on land definitively owned by groups or whole village communities and in Lesotho, where Community and Co-operative Forests have been established as the main class. Although less well developed in a proprietorial sense, just as clear opportunity for Community Forests is made in the new forest laws of Malawi and South Africa and in the Forest Bill of Namibia. Mozambique provides for a less open-ended category of reserve, confining these to those needed for social or ritual purposes.

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 most countries actually represent the greater proportion of the nation's total forest estate, reservation having been more concerned until relatively recently, to secure moist and montane high and closed canopy forests, than those of the drier woodland types.

### **AN OPPORTUNITY TO RETRIEVE FORESTS**

A handful of the new laws go further, in making it possible for forest-local communities to secure the ownership of forests which have been lost to them. In South Africa this arises out of the constitutional

commitment to land restitution, which directly affects the status of many State Forests. The State Forests Act (1998) takes this reality on board and provides guidance for its implementation. The new Forestry Act of Lesotho (1998) makes the divestment of (Government) Reserves a prime objective and sets out the procedures. Less direct opportunities for forest-local communities to re-secure ownership of reserved forests currently held by central or local Governments, is provided for in the new forest law of Zambia (1999) and the draft Forest Bill of Tanzania. Following on from provisions in the Land Act 1998, which provides for local people to seek the review of the status of such reserves, new forest law in Uganda will almost certainly provide the same kind of opportunity.

In all cases, the mechanisms for devolution would be implemented on a case by case basis and conditional to 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 Forest Reserves. In conjunction with land reform, the grounds upon which the State owns such properties is being slowly but surely relocated within the ambit of the doctrine of trust, manifest in increasingly offered positions that the State in general holds all land and/or Government Land not as estates private but in trust for the national community. Thus the Uganda Government is warned by the Land Act 1998 not to sell or lease reserved properties and the policy proposals in Malawi and Zimbabwe seek constitutional amendment to put this into effect. The Forest Bill of Kenya aims to make it no longer possible for the Commissioner of Lands to alter the boundaries of a forest reserve (or revoke it) for any purpose or to any degree which undermines the role of the forest as dedicated to forest development or the protection of flora, fauna biodiversity or catchment functions.

### **LIMITING THE POWERS OF APPROPRIATION**

Similarly, it is through land reforms that limitations upon the power of state to appropriate yet further property at the local level into its own sphere is seeing clear constraint in new forest legislation, mainly as a result of new recognition of customary rights 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.

This is being reflected in much more cautious procedures for reserve creation. This is most developed in the draft forest Bill in Tanzania which not only makes it quite clear that local rights will have to be fully accounted for but require the Minister to constantly consider whether the forest may be better sustained and managed, not as a Government Forest Reserve at all, but as a Village Land or Community Forest Reserve. Namibia's Forest Bill provides a similar provision;

### **THE FUTURE PATTERN OF RESERVES**

These provisions, and those relating to community forest creation in particular, are not casually provided for in many countries they build upon concrete if still new developments in these areas, as noted early in this paper, and to which they now give a legal foundation. Looking ahead, it is likely that by far the greater proportion of new forest reserve owners will be local communities, given that new reserves will be created out of currently unreserved and usually customarily-held lands. In view of the more limited trend towards the devolution of the existing reserves from centre to periphery, the main distinction among reserved forests in the future will be between those held by the State and those held by the people. 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 slowly accrues, this will itself become a force towards devolution.

### **COMMUNITIES AS FOREST MANAGERS**

Support for communities to be party to the management of forests in the region is a good deal more fulsome and widespread than for their emergence as forest owners. However, this is again, mainly in respect of the 'lesser', 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 policy and law.

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 Lesotho and South Africa and Zanzibar. A similar potential is provided in the draft Forests Bill of Kenya and in the draft Forest Policy of Uganda.

In these and all other countries in the region (including Ethiopia) new policies and laws directly encourage the active participation of communities in the management of Government Forest Reserves. The most common frameworks offered for this in the laws are (Joint) Forest Management Plans and Joint Forest Agreements. In Tanzania, definition of how forest communities will be involved is obligatory and where not provided for, has to be justified. Only in Zambia, is local involvement precluded in respect of National Forests, and local involvement in the management of Local Forests is to be through Joint Forest Management Committees which are more notable for the prescribed membership of numerous Government representatives than for the minor local representation required.

Nor, when it comes to Community Forests, may autonomous local management be assumed. Whilst this is assured in the draft Forest Bill of Tanzania and the creation of the Reserve registrable at the district level, in most other cases, such areas are to come into being only through and with the agreement of Government Forestry Directors. To one extent or another, the regimes envisaged are those of State-people co-management of these local resources.

### **THE POWER TO MANAGE**

This is mirrored in the type of powers which local communities may obtain in order to manage or co-manage forests. Differences in legal provision reflect the view as to how local interest in forests is conceived, in turn strongly influenced by operating paradigms. 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, and Management Authorities in Namibia, are fashioned largely around the task of allocating access rights and/or distributing benefits among the local population. This is similarly 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 and Kenya's proposed Forest Associations. 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 of those Governments' powers to act and enforce. They 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 not to be used at all and what level of products 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 and, should they fail to pay the set fine, taken to court, which in turn is obliged to rule in accordance with the terms set out in the Village By-Law promulgated by the Village Council to give the management regime a foundation in law. The Council may itself 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 tends to be conservative, closing degraded areas to use, and limiting access to the remainder to manageable levels.

### **THE CRITICAL POSITION OF 'COMMUNITY' IN SOCIETY AND GOVERNANCE**

The above points to the fundamental role of community formation in the construction of its role 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 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, the members of the community itself 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 existing in the construction of community already will greatly influence 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 local 'community' is socio-legally defined, the more strongly it is being developed and supported in new forest law as a significant 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.

There may be little doubt that the extent of local Government development lies behind the extent to which 'community' has socio-institutional and legal form. Where it is most developed, so also is community gathering pace as real entity to be considered and partnered.

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 'native authorities'.

Whilst these structures consult and link often with traditional authorities, real representation of institutions of governance are not 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 of which are likely to evolve over time into organs of governance. Uganda adopted a new local government law in 1997 which makes provision for Sub-County Councils below the district level and provides village councils with at least some local powers to regulate. Swaziland and Zimbabwe contemplate land policies which 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.

Still, these constructions are not enough. In most cases they do not of themselves embrace or reflect or give form to the local community, or em-bound its membership to the plan of action being made in respect of a local common resource. At the end of day, a construction is needed which gives the community itself legal personality and power. 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. This development is itself driven by

serious intent to involve ordinary citizens more directly in the management of land and resource relations.

In conclusion, there can 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 that mere ten years past, a study such as this would have examined forest policies and forest laws, for the extent of access to the forest they granted local people. As implied earlier, the state's generosity could have been safely measured in the comparative number of bundles or fuelwood headloads permitted.

In 2000, 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 strength, and a tangible function in the 're-made' society. With hindsight it may well be remarked, that the turn-of-the-century efforts to more seriously involve communities in forest future, played a catalytic role, breaking new ground.