

**MAKING PROGRESS - SLOWLY
NEW ATTENTION TO WOMEN'S RIGHTS IN NATURAL RESOURCE LAW
REFORM IN AFRICA**

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Summary

Statutorily supported rights to land and other landed resources are accepted as crucial in agrarian society and no less so to women than to men.

Critical shifts are affecting rural resource rights in Africa at this time through widespread reform in land, forestry and other laws. The cutting edge of transformation affecting women is in emerging new provision for wives to hold family property as co-owners with their husbands, a provision that could play a main role in revitalising smallholder agriculture in the continent. Recognition that equity in domestic land relations may ultimately be a prerequisite to the modernisation of subsistence agriculture in agrarian economies is the thesis underlying analysis of legal texts here.

More pervasive improvement in women's resource rights is emerging though indirect changes in law and particularly those that alter the balance of authority over land and landed resources between state and people, with broadly democratising effect. Important for women is the greater accessibility to tenure administration, dispute resolution machinery and resource management functions occurring through devolution of centres of control from centre to periphery. Also important is the changing status of customary rights in land under new laws coupled with clearer constitutional restriction upon practices which discriminate against women's land rights and through which family and group tenure may in future be secured.

Although these developments are still new in law and far from widespread in implementation, the 21st century opens with opportunities for rural women to secure tenure over local resource that were not even hinted at a mere decade past. Making the most of these opportunities and promoting them further will be the main challenge of this first decade of the new millennium.

¹ CTA: Technical Centre for Agricultural and Rural Cooperation, The Netherlands. GOU: Government of Uganda.

I THE CONTEXT

The failures of 20th century natural resource law in Africa to sustain, secure or retrieve the rights of women to land and landed resources is all too well known and hardly needs recount here.² In summary, it is accepted that the capitalist transformation of society this last century and the commoditisation of rural land relations in particular, have been to the acute disadvantage of customary rights in land and to those traditionally awarded to women in particular. Statutory titling processes, founded upon highly individualised European tenure regimes, have been routinely identified as a common cutting edge of female dispossession, in their failure to account properly for secondary rights or the conventions of domestic land relations, both past and modern. In the process a good deal of reconstruction as to the exact constitution of a land right of a wife, widow or daughter has occurred, almost always towards diminishment in the eyes of state law. Custom itself has come under critical re-examination, and if not found wanting in its past exercise, found to fail the human rights and needs of women in a modern world.

Arguably, it has mainly only been through inheritance legislation, not land legislation, that state law has delivered any positive redress as to the relative rights of men and women in land. Even in these cases, this has often been achieved only by court interpretations or administrative directive.³ The upshot is that in many countries in Africa today, should they argue their case forcefully in informal or formal courts, wives *may* prevent sales of land critical to household sustenance and widows *may* secure the right to continue residing and farming household lands – ad hoc successes which do not necessarily bespeak any real alteration in statutory domestic land relations.

Land Reform

Nonetheless, legal cognisance of women's rights in land is significantly improving at this time. This arises not only through new provisions directly targeting gender relations in tenure, but through quite dramatic reshaping of the context within which land relations as a whole are being posed. The context for this is a veritable wave of land reform on the continent, a process that is still in the earliest stages and so far delivering a good deal less than the formal policy deliberations that precede the laws ultimately enacted, promise. Nonetheless, important change in land relations among all sectors of society is widely afoot.⁴

² The literature is abundant and mainly country-specific. For general studies, refer Hafkin & Bay (eds.) 1976, Were (ed.) 1985, Lastarria-Cornhiel 1997, Migot-Adholla & John 1995.

³ Islamic customary law is considered fairly generous in matters of female inheritance but succession laws in many countries (e.g. Ghana 1985, Zambia 1989, and more recently the current draft new Domestic Relations Bill in Uganda and Bill for the Amendment of the Customary Law of Succession in South Africa), give or intend to give good account to the rights of widows. Kenya provides an example of administrative guidance in its directives to chiefs and later local land control boards (1990) to disallow sales that leave wives and children without land. Litigation relating to contradictory customary and statutory control over inherited land is considered one of the main sources of the enormous backlog on land cases in Kenya (RoK 1994:103), and leads to diverse rulings.

⁴ Refer Toulmin & Quan (eds.) 2000 and Alden Wily & Mbaya 2001 for reviews of African land reform.

The Democratising Context

Of general interest here is the overriding tone of these reforms and the links they share with wider current processes of transformation in society. This transformation may be termed democratic in character, in the way in which sharp alteration is being seen in the relations of governments with their people and in the nature of governance itself (Alden Wily 2000a).

Through one means or another, ordinary citizens, men or women, are being given new opportunities to play a greater role in the management of society and its resources. The change is uneven, hesitant, contentious and contradictory, but nevertheless underway and likely to gain in force in coming decades. In this transition, the rights of women, and prominently including rural poor women, are seeing substantial and positive alteration, directly or indirectly.

These changes are moreover, seeing delivery in the terms of new state law and across of host of sectors of which TABLE 1 gives a glimpse.

TABLE 1: EXAMPLES OF NEW LEGAL TEXTS DIRECTLY AFFECTING WOMEN'S RIGHTS TO NATURAL RESOURCES IN EASTERN & SOUTHERN AFRICA

COUNTRY	NEW CONSTITUTIONS	NEW LOCAL GOVERNMENT LAWS	NEW LAND LAWS	NEW FOREST LAWS
Eritrea	1996	1996	1994, 1997	
Ethiopia	1992	1992	1997	1994
Sudan	1993	1991 <i>UR</i> *	1994	1989
Kenya	<i>UR</i>	<i>UR</i>	<i>UR</i>	Bill 2000
Uganda	1995	1997	1998	Bill 2000
Tanzania	<i>UR</i>	(1992,1999)	1999	Bill 2000
Zanzibar ⁵	1992	(1992,1999)	1992	1996
Rwanda	<i>UR</i>	1999	<i>UR</i>	1988
Malawi	1994	1999	<i>UR</i>	1997
Zambia	1991		1995	1999
Zimbabwe	1980 (2000)	1998 ⁶	1992 <i>UR</i>	<i>UR</i>
Namibia	1990		1995, Bill 2000	Bill 2000
Mozambique	1990	1997 ⁷	1997	1999
South Africa	1996	5 (1993-2000)	8 (1994-97)	1998
Madagascar	1992 (1995)			1997
Swaziland	<i>UR</i>	-	<i>Policy 2000</i>	<i>UR</i>
Lesotho	1993	1997	<i>UR</i>	1999
Botswana	(1966)	<i>UR</i>	<i>UR</i>	1968 (1990)

* *UR* – Under review, normally with a formal policy proposal in hand

⁵ Although a member of the United Republic of Tanzania, Zanzibar makes its own land and forest laws.

⁶ Traditional Leaders Act 1998, altering their role in governance but not a local government law per se.

⁷ In parenthesis because the law provided only for municipal councils, not rural councils.

Of course, law does not necessarily translate into action, especially in a continent where neither literacy, access to legislation, nor enforcement may be assumed, and where adherence to the law has a chequered record in especially recent decades, including on the part of governments and courts themselves.⁸ Nonetheless, amidst the plethora of new policy-making and other declamation, of which national gender policies and poverty alleviation plans are now a routine part, new laws do provide the more precise measure of where new thinking has reached in any one state or sector. So too they provide a platform from which new strategies may be fairly safely advanced and windows of opportunity used.

New Constitutional Commitment to Women

Firmer legal expression of this democratisation is expectedly in the wave of new constitution-making on the continent. No clearer indication of the level of socio-political transformation being seen in Africa at this time is found than in the fact that the vast majority of nations have promulgated entirely new constitutions over the last decade or plan to do so. TABLE 1 illustrates the case for Eastern and Southern Africa.

These new constitutions set out new political regimes and relationships between executives, judiciaries and legislatures and prominently include expanded bills of rights for citizens. Women are, without exception, mentioned as a sector deserving attention, with routine reference to their equality with men in the eyes of the law and the illegality of actions that discriminate on the basis of gender. Some laws provide for affirmative action in their regard, also due other sectors of society now recognised as underprivileged or as having endured discrimination of one form or another. BOX ONE illustrates the case in the Constitutions of Malawi and Mozambique and BOX THREE for South Africa and Uganda where women's rights are more fully addressed. Later, we will examine where constitutional reform specifically impacts upon the land rights of women.

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Refer Alden Wily & Mbaya *op cit.* for examples in the land tenure sector.

BOX ONE
ATTENDING TO THE RIGHTS OF WOMEN
IN NEW CONSTITUTIONAL LAW IN MALAWI & MOZAMBIQUE

MALAWI, 1994

Section 13

The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals--

(a) Gender Equality

To obtain gender equality for women with men through-

- (i) full participation of women in all spheres of Malawian society on the basis of equality with men;
- (ii) the implementation of the principles of non-discrimination and such other measures as may be required; and
- (iii) the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property.

Section 24

(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right-

(a) to be accorded the same rights as men in civil law, including equal capacity-

- (i) to enter into contracts;
- (ii) to acquire and maintain rights in property, independently or in association with others, regardless of their marital status;
- (iii) to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing; and
- (iv) to acquire and retain citizenship and nationality.

(b) on the dissolution of marriage-

- (i) to a fair disposition of property that is held jointly with a husband; and
- (ii) to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.

(2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as-

- (a) sexual abuse, harassment and violence;
- (b) discrimination in work, business and public affairs; and
- (c) deprivation of property, including property obtained by inheritance.

MOZAMBIQUE, 1990

Article 57

1. The State shall promote and support the emancipation of women, and shall provide incentives to increase the role of women in society.
2. The State recognises and shall honour the participation of Mozambican women in the national liberation process.
3. The State recognises the value of, and shall encourage the participation of women in the defence of the country and in all spheres of the country's political, economic, social and cultural activity.

Article 66

All citizens are equal before the law. They shall enjoy the same rights, and shall be subject to the same duties regardless of colour, race, sex, ethnic origin, place of birth, religion, educational level, social position, the legal status of their parents, or their profession.

Article 67

Men and women shall be equal before the law in all spheres of political, economic, social and cultural affairs.

**BOX TWO
ATTENTION TO WOMEN'S RIGHTS
IN NEW CONSTITUTIONAL LAW IN SOUTH AFRICA & UGANDA**

SOUTH AFRICA, 1996

Founding Provisions

1. The Republic of South Africa is one sovereign democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Equality

- 9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

UGANDA, 1995

National Objectives and Directive Principles of State Policy

VI. The State shall ensure gender balance and fair representation of marginalised groups on all constitutional and other bodies.

XI. The State shall give the highest priority to the enactment of legislation establishing measures that protect and enhance the right of the people to equal opportunities to development... In furtherance of social justice, the State may regulate the acquisition, ownership, use and disposition of land and other property, in accordance with the Constitution.

XV. The State shall recognise the significant role that women play in society.

XIX. The family is the natural and basic unit of society and is entitled to protection by society and the State.

Article 21

All persons are equal before and under the law ... and a person shall not be discriminated against on the grounds of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability.

Article 31

- (1) Men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.
- (2) Parliament shall make appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights over their children.

Article 33

- (2) The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.
- (3) The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.
- (4) Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.
- (5) Women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.
- (6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.

New Participatory Governance

Constitutional law is however, its referential supremacy aside, largely declaratory in character. We need to look to sectoral law for more tangible realisation of changing socio-political relations in general and the rights of women in particular.

In this, the current wave of local government reform stands as highly instrumental. New local government acts, of which there are many on the continent, are putting in place new local institutions of governance, virtually all to be established through democratic electoral processes. Particularly in Francophone Africa but also in Anglophone and Lusophone Africa, these are being located mainly at the municipal and (rural) district level, where these were not formed during earlier waves of reform (the late colonial period and early post-independence period).⁹ The lacuna of such bodies up until the present is actually quite striking.¹⁰ Where county/district councils have existed for some time, new laws are increasing their fiscal self-reliance and decision-making powers.¹¹ ‘Gender balance’ which may in practice amount to token female representation, is increasing obligatory in these elected bodies.

Much more significant for the overall devolutionary thrust of transformation at this time is the extension of local government machinery to the local community level. For most of the 20th century, it was only in Tanzania where statutorily defined governments existed at the village, empowered *inter alia* to promulgate statutory Village By-Laws. Adoption of diverse versions of such devolutionary governance is slowly but significantly in evidence, delivering a gathering range of powers directly to the grassroots.¹² By virtue of their locality, it may be assumed that in principle at least such agencies are directly accessible and accountable to the men and women who comprise their constituencies and offer them radically new levels of control over decision-making affecting their lives, services and environments. Indeed, it is not impossible that locally elected village governments, rather than plural political parties, may come to form the bedrock of 21st century democratisation in Africa. The relevance of this to women’s control over land and other natural resource developments will shortly become apparent.

Reform in Land and Other Natural Resource Rights

As tangible again in its implications for women’s rights is the widespread reform also underway in the natural resource sector itself. There may be no doubt that the centre ground of this change is the above-mentioned land reform movement on the continent, and upon which this paper will focus.

However, concurrent alteration is widely occurring in the laws that govern control over, access to and management of minerals, wildlife, water, pasture and forests and again share the broadly democratising intent. Later changing legal relations in forest management will be outlined as an example; woodlands and forests representing one of the more widespread and

⁹ Refer Ribot 1999 for examples from Francophone Africa and Alden Wily 2000b for examples from East and Southern Africa.

¹⁰ Such as in South Africa and Mozambique; new councils are only now being put in place and in Mozambique, only at the urban municipal level thus far.

¹¹ A good example of this is found in Tanzania’s Local Government Laws (Amendment) Act No. 8 of 1999 and in legislation in draft in Kenya designed to enhance the revenue-generating powers of county councils.

¹² See footnote 9 above.

important natural resource assets of rural communities, and upon which water and wildlife resources in turn often depend.

Whilst legal reform is occurring throughout Africa (and beyond),¹³ this paper will focus upon changing gender relations as being evidenced (or not being evidenced) in first the new land laws and then new forest laws of Eastern and Southern Africa.

The Issue: From Security of Access to Security of Tenure and Making Tenure a Production Issue

The question of women's rights in rural land has a public history of some thirty or so years, commonly rooted in the landmark study of Ester Boserup in 1970, and generating a plenitude of research and advocacy.

This has ultimately denoted women's rights as a fundamental concern of human rights. Throughout this period issues of land *access* have tended to centre examination and policy, with, I would argue, less outright demand that women share the titular ownership of land with their husbands.

Inherent in this stance is an assumption that for *as long as women access land, they will produce*. The importance of women as the main productive force in agriculture is itself undisputed. Security of access rather than security of tenure have thus dominated the field, and where the latter is sought, encouragement has been mainly towards helping women acquire land of their own. Bina Agarwal's catalytic study entitled '*A Field of One's Own*' articulates the thrust precisely (1994).

However, the fact that women and men are in reality throughout most agrarian society land users in a familial context of one manner or another remains the dominant reality (rising rates of divorce in Africa aside). So too, is there widespread recognition that in today's modern world, access is an inadequate foundation upon which to deliver optimal production. However, this has been an acknowledgement which *has not extended to women's rights* but rested primarily within the debate as to how far informal or customary rights should be entered into statutory law and regimes – regimes which at once are highly individualised in their approach and have traditionally denoted the owner as a single person. In this way, women as a whole in agrarian society have been caught between the individual and the familial, the customary and the statutory parameters.

Now however, with the opening of the 21st century there are signs that a new perspective may shortly take root. This posits that land relations that *deprive the main productive force* in agriculture not from secure access but from ownership of the family farm, constitute a *fundamental constraint not only upon human rights but also upon agrarian production itself*. In short, for as long as women all over Africa do not own or part-own the rural holding, peasant and smallholder agriculture may be expected to stagnate. The argument is that future policy and law must promote and assure modern African women farmers shared ownership with their husbands of the means of their production, land.

Whilst some might argue that this constitutes no more than yet another manipulation of women's rights in service of capitalisation of agriculture, it may as well as seen as a stance

¹³ For example note the rural land law reforms in China (1981), Vietnam (1993), Lao PDR (1994), Philippines (1990) and with a Land Ownership Bill in draft even in Indonesia (2000).

which, at long last, positions women as central to modern agrarian society. Opportunistically, it also takes advantage of emerging new recognition by international agencies and national governments alike that smallholder, family-based agriculture may reasonably form the backbone of modern African society, and that past drives to replace it with large-scale farming no longer have validity in development policies. It is just such positions that are finding a place in new national plans for the modernization of agriculture, the preparation of which are increasingly a condition of international and bilateral lending programmes.

For women themselves, the issue has more than casual pertinence. This is clearly articulated in a short study conducted in Uganda that discussed with rural women farmers the impact legal presumption of spousal co-ownership of the family farm would have upon production (Ovonji-Odida et al. 2000). The results were stunning. The majority of women interviewed declared that farm production would sharply increase should they gain clear co-ownership of the property. Knowing they were legal co-owners of the family home and farm would directly change the way they made their labour available on the farm; their commitment to the farm; their decision-making such as in choice of crops; and most pervasively of all in the investment that would deliver to the farm (tree planting, soil conserving measures, tool and machinery purchase, etc.) (see ANNEX 1).

Currently, they argued, knowing they did not own the land, meant they could be evicted in the event of a crisis (divorce, death and even marital disputes) and frequently were. In addition, knowing that their husbands by virtue of their sole ownership of the property were readily able to retain farm income – and again, routinely did so – meant that over time many of them reduced their input of labour and money, redirecting this to more personal or more secure investments (personal clothing, children's education). As co-owners, they argued, their own attitudes and investment patterns and those of their husbands, would surely alter. Women pointed, as did district agricultural staff, to the greater productivity of farms run by single or divorced women in their vicinity (*ibid.*).

These kind of considerations focus our interest here. We shall take these concerns of land ownership, not land access, as our point of departure, examining new land laws not for the degree of access they propose to award women but the degree of ownership they promise and provide. Women's rights in land, that is, is a fundamental structural concern of development, and one of central concern to the modernisation of agrarian states.

II THE LAND RIGHTS OF WOMEN IN NEW LAND LAWS

The Constitutional Context

Again, we need to return to the provisions of new National Constitutions. Whilst these have traditionally made reference to matters of property this has in most cases been limited to declamation of protection of private property including land, almost always immediately conjoined with the declamation of the right of the state to appropriate private property in service of public interest. Rarely made explicit in these articles is the fact that private property is, for all intents and purposes, taken to be those estates held under statutory entitlement, thereby making the vast majority of citizens who hold land in customary or other informal ways, vulnerable to un-compensated appropriation.¹⁴ Public interest itself has been given wide latitude, in practice increasingly including actions in reality more attuned to political or private interests.¹⁵

Newer Constitutions in general make a good deal more reference to land matters than older versions. Sometimes tenure matters constitute one of the more central parts of the new law. This is the case for example in South Africa and Zimbabwe where land restitution is a central commitment. What is in effect an entirely new tenure policy is set out in the new constitution of Uganda. TABLE 2 overviews a sample of core new constitutional clauses in the region.

Rarely, however, are women's land rights specifically mentioned in these new laws. Nonetheless, the new paradigms for land holding expressed therein lay the foundations for changes which do affect them, such as in decisions to devolve the machinery for tenure administration and land dispute resolution to more local levels and in new recognition for plural rights.

National Land Policies and Laws

Such matters are predictably more fully elaborated in new land acts and in the new National Land Policies that generally precede the drafting and enactment of land laws. As summarised in TABLE 3, attention to gender land rights in the policies is mixed and more declaratory than practical in the frequent absence of described mechanisms through which improvement in women's rights may be secured. More important is the extent to which such promises that are made in new policies are then entrenched in law and in precise and workable ways. In this respect interesting differences among states arise; in some cases, intentions have been significantly diluted.

In **Mozambique** for example, the 1996 *National Land Policy* was quite clear as to the importance of women's rights in lands and there was substantial lobbying and support towards this in the drafting of the new land law (Quadros 1999).

¹⁴ Fully explored in Alden Wily & Mbaya *op cit*.

¹⁵ See footnote 18 above.

TABLE 2: CORE CLAUSES ON LANDED PROPERTY IN NEW CONSTITUTIONS IN EASTERN & SOUTHERN AFRICA

COUNTRY	CONSTITUTIONAL ARTICLES ON LAND OWNERSHIP
UGANDA	<p>1995 CONSTITUTION Chapter 15 of 1995 (Articles 237-244) gives founding policy on tenure:</p> <ul style="list-style-type: none"> - democratisation of root ownership from state to people - devolution of tenure administration to district Land Boards - recognition of four tenure systems (customary, freehold, leasehold, mailo) - creation of Land Tribunals independent of state or judiciary.
TANZANIA	<p>1977 CONSTITUTION (12 Amendments by 1995). <i>Under Review.</i></p> <p>General Article 24 on rights to property and Article 27 stating duty to protect public, communal, and other people's property.</p>
KENYA	<p>1969 CONSTITUTION (18 Amendments by 1997) <i>Under Review.</i></p> <p>Tenure relations directly provided for only in respect of Trust lands which vests ownership of original native areas in County Councils as Trustees for the <i>occupants</i>, with powers to allocate and 'set aside' for their own purposes. State also able to co-opt for unspecified government purposes (Chapter IX; sections 114 – 120). Sanctity of private property provided in general protection of private property (i.e. not just land) clause s. 75. Constitutionality of eviction of owners during land clashes because not of local ethnic origin questionable (1990s Land Clashes) and demonstrates contradiction with Ch. IX above. Commitment to draft new Constitution (Act No 13 of 1997) delayed by heated political debate as to who should control and implement the task, still not begun in early 2001. Review of property relations is part of the planned review (s.10 (d) (vii)).</p>
RWANDA	<p>POST-INDEPENDENCE CONSTITUTION IN EFFECT SUSPENDED since Civil War 1994. Commitment made to establish a Commission to draft a new Constitution. In the interim, so-called 'organic law' operates (mixture of old Constitution, Arusha protocols and some new laws).</p>
ERITREA	<p>1996 CONSTITUTION</p> <p>Article 23 under Fundamental Rights does not guarantee or protect private property but permits any citizen to acquire, own and dispose of property, individually and in association with others. Also states that '<i>all land, water and natural resources below and above the surface belong to the State. Usufruct rights of citizens will be determined by law</i>' (Article 23 (2)).</p>
ETHIOPIA	<p>1992 CONSTITUTION</p> <p>Article 40 entrenches Land Proclamation of 1975. Provides for rights of all Ethiopians to land, collective root ownership, ban on sale of land, but ability to lease out.</p>
MALAWI	<p>1994 CONSTITUTION</p> <p>Article 28 articulates the right of every individual to acquire property alone or in association with others. Declares all lands vested in the Republic (Article 207) but gives Government title to all rights in property vested in the Government (Article 208) which has created elements of contradiction. Safeguards existing interests in property in general (Article 209).</p>
BOTSWANA	<p>1966 CONSTITUTION</p> <p>Article 8 provides for protection from deprivation of property except through compulsory acquisition for public interest or 'to secure the development of the property for community benefit', or for mineral development (s. 8 (4)).</p>
ZAMBIA	<p>1991 CONSTITUTION</p> <p>Does not expressly protect the right to land, only the right to property in general. Appropriation provided for in Article 16.</p>

ZIMBABWE	<p>1980 CONSTITUTION (16 Amendments by 2000)</p> <p>Through the protection from deprivation of property clause provides a detailed framework for the contrary process, the compulsory acquisition of land for redistribution and settlement programmes (s. 16). Several key amendments early 1990s to this clause, widening right to appropriate (settler) lands. Last (16th) Amendment in 2000 makes former colonial power responsible for payment of compensation. Important amendment in 1987 relating to restriction of residence within Communal Land of persons who are not tribes-people in cases where this would be deemed to be contrary to the interests of tribes-people or their well-being (Article 22).</p>
MOZAMBIQUE	<p>1990 CONSTITUTION</p> <p>Article 46 vests ownership of land in the State and declares that land ‘may not be sold, mortgaged, or otherwise encumbered or alienated’. Article 47 directs the State to determine conditions for use of land, grant this to individual or collective persons’ and must take into account ‘its social purpose’. The law shall not permit domination or privilege in land access to the detriment of the majority. Articles 48 and 87 recognise land inheritance.</p>
SOUTH AFRICA	<p>1996 CONSTITUTION</p> <p>Article 25 addresses property matters:</p> <p>Makes provision for the enactment of laws to ensure that citizens have access to land on an equitable basis</p> <ul style="list-style-type: none"> ▪ Makes provision for the restitution of rights in land (individual or communal), previously prejudiced as a result of racially biased laws ▪ Recognises various forms of tenure, including freehold tenure and customary tenure; ▪ Provides for land reform to proceed whilst at the same time safeguarding existing property rights; ▪ At same time saves right appropriate for equity and redress of wrongs; <p>Recognises the customary status and role of traditional leaders and of customary law (Article 211).</p>
NAMIBIA	<p>1990 CONSTITUTION</p> <p>Article on property, (Article 16) does not make specific reference to land. Schedule 5 (1) to Constitution vests all land previously owned or ‘controlled’ by the pre-Independence Government in Government of Namibia; this places communal land under state. Article 100 vests ‘land, water and natural resources’ in the state ‘if ‘not otherwise lawfully owned’ with same effect (given interpretation of ‘lawful’).</p>
LESOTHO	<p>1993 CONSTITUTION</p> <p>Vests ownership in the Basotho nation. (Article 107). The power to allocate land, revoke grants or rights vested in the King (Article 108) and in effect fully legitimises the gender discrepancies in customary law. Allows Parliament to make laws on allocation (Article 109) and resulting Land Act 1979 contradictory to Article 108, including in its demand for gender equity in allocation.</p>
SWAZILAND	<p>NO CONSTITUTION</p> <p>1968 Constitution repealed in 1973 but with three land clauses saved (Cap VIII: section 93-95):</p> <ul style="list-style-type: none"> ▪ Section 93 provides for Government to make grants, leases or other dispositions as it sees fit; ▪ Section 94 confirms all land vested in the Ngwenyama in trust for the Swazi Nation shall continue to be so; and these rights may not be vested in any other person or authority. However, open to compulsory acquisition for public purposes; ▪ Section 95 deals with mineral and mineral oils. <p>Constitutional Review. Commission sitting.</p>

TABLE 3: ATTENTION TO WOMEN'S RIGHTS IN NEW NATIONAL LAND POLICIES

COUNTRY	EXTENT TO WHICH NATIONAL LAND POLICIES (NLP) DIRECTLY ADDRESS LAND RIGHTS OF WOMEN
KENYA	Draft new NLP required as output of Commission of Inquiry into Land Law Matters, established in 1999 and due to submit report in 2001. Requires attention to gender matters.
UGANDA	No NLP drafted prior to Land Act 1998 and gender concerns not highlighted in early planning documents.
TANZANIA	Direct addresses rights in NLP 1995, Policy 4.2.6, directing that women's access to land would be enhanced but that 'inheritance or clan or family land will continue to be governed by custom and tradition'.
ERITREA	No NLP. Policy integral to new law which is directly supportive of women's rights.
ETHIOPIA	No NLP. Policy integral to new law which is implicitly supportive of women's rights.
RWANDA	NLP Draft 2000. States under proposed principles that 'a woman, either married or not, must not be excluded from the process of acquiring land' but does not elaborate mechanisms.
ZAMBIA	No NLP although early draft in 1998 which included Strategy 4.2.8 as an intention to address 'gender imbalance in landholding' and the need to 'sensitise women and administrators to help women acquire land'.
MALAWI	NLP 2000 implies development of co-ownership and emphasises that surviving spouses and children both male and female shall hold land in trust for each other in equal shares with intention to amend inheritance laws (Ch. 5).
ZIMBABWE	Draft NLP 1998/99 still in draft in 2001. Proposed that customary certificates of land bear both names of spouses and gives high attention to gender representation in decision-making land tenure bodies.
MOZAMBIQUE	NLP 1996; gender rights a main issue of contention with main concern that widows should be first in line to inherit land, ultimately not delivered in law.
SWAZILAND	Draft NLP 1999 (still in draft in 2001). Declares 'gender equity' an objective and the removal of legal impediments to gender equity (1.4.6). Concretely proposes that allocated rights should be regarded as the joint property of both parents or potential parents' (2.1.1.c).
LESOTHO	Although planned for last decade, NLP likely to be drafted only in 2001. Gender issues already earmarked for direct attention given current discrimination against women in both customary and statutory land laws, despite fact that majority of households are female-headed.
BOTSWANA	Various LP (1975, 1978, 1993) none dealing with gender. May arise in current drafting of a new National Rural Development Policy 2001.
NAMIBIA	NLP 1998. Section 1.5 provides that 'women will be accorded the same status as men with regard to all forms of land rights either as individuals or as members of family land ownership trusts. Every widow (or widower) will be entitled to maintain the land rights she (or he) enjoyed during the spouse's lifetime'. However little provision for co-ownership with emphasis upon individualised holding and inheritable by immediate family (s.3.4).
SOUTH AFRICA	NLP 1997 includes 'gender equity' as one of the eight listed Fundamental Principles but in effect only says 'the land reform programme must bring about equitable opportunities for both women and men' and more importantly 'this means giving priority to women applicants'.

A main constraint to just land relations was agreed to be the customary practice of disallowing women to hold land in their own right and the fact that widows were routinely bypassed as successors, their husband's land being transferred automatically to sons. However, by the time the Land Decree was enacted in 1997, an original clause providing for the spouse, not children, to be first in line for inheritance, had been dropped. The winning argument was that this was an inheritance issue and should be dealt with in a new law of succession. This has proved a not uncommon avoidance tactic, adopted more recently in Uganda as described below, and one exercised despite willingness of the same politicians and legislators to breach the conventional boundaries among bodies of law in other areas.¹⁶ More positively, subsequent regulations drafted under the Land Decree took the opportunity to rule that *'in the case where the two co-titleholders are spouses, in the event of the death of one of the spouses, the surviving spouse shall remain as the co-titleholder* (1998 Regulations: Art. 8 (1)). Whilst heirs may contest this (Art. 8 (2)), they may in effect only contest that share of the land that has been held by the deceased.

Shortfalls are also being experienced in **South Africa** where constitutional and land policy commitments to gender equity were substantial as illustrated in the approval of a *Land Reform Gender Policy* (1997) and the establishment of a Land Reform Gender Unit in the lead Department of Land Affairs.

The programme for restitution, and resettlement, with land provision through grant-aid has not met expectations however in respect of promised positive discrimination.¹⁷ Nor has the urgent and fundamental issue of land rights of the millions of men and women living in the ex-homelands been addressed, people who continue to occupy those lands as tenants at will of the state; work on a crucial Land Rights Bill was suspended by the Mbeki Administration in mid 1999 (Claassens 2000). In any event, in respect of women, the draft law had merely declared that women *'should not be discriminated against'* (s. 8a), and provided that *'only where practicable'*, should one of the names registered in family holdings be that of a woman (s. 27 (2)). More usefully the same proposed law did require that *'the majority of family members'* would have to agree to the sale, mortgage or lease of land (s. 14 (4)).

Proposed new National Land Policies in **Rwanda** (2000) and especially **Swaziland** (1999) and **Zimbabwe** (1999) promise extensive delivery of gender equity in land holding and plenty of opportunity for the emergence of co-ownership, already delivered in the case of Zimbabwe in respect of land accessed through settlement schemes.¹⁸ However, all of these draft policies are having difficulty reaching final approval and may see dilution towards this, and yet further dilution in their transposition into legally binding documents. Marked improvement in the law is particularly important for Swazi women who are, like their sisters in **Lesotho**, disallowed not only to own land customarily but constrained to do so through the processes of statutory entitlement.¹⁹

¹⁶ Best demonstrated in the Tanzanian land laws of 1999 which blatantly integrate land and public administration law.

¹⁷ DLA, 1999 reports for example that only 13% of households benefiting from projects were female-headed households by November 1999.

¹⁸ Through the Traditional Leaders Act 1998 which provides for settlement permits to bear the full names of all spouses (s. 24) and also provides for land-related institutions to ensure 'adequate representation of women' (s.22), a law which has not however been fully implemented.

¹⁹ Especially in the case of the Lesotho Deed Registry Act 1967.

However it is also the case that new land acts may retain intact the parameters laid down in new policy towards the rights of women and other parties. **Namibia** is a case in point. There, the 1998 *National Land Policy* eschews promise of co-ownership, preferring to secure women's access to land through limiting inheritance of individual rights to family members (Section 1.11, s.3.4). This entered the proposed Communal Land Reform Bill 2000 as a lifetime customary grant to be inheritable '*by the surviving spouse of the deceased person or in the absence of a surviving spouse to a child of the deceased holder of the right*' (s.26). The law also makes provision for four of the twelve members of the proposed new Land Boards to be women, '*two of whom are women engaged in farming operations in the board's area, and two are women who have expertise relevant to the functions of a board*' (s. 4 (1)). Although ultimately not approved by the second legislative house, the law is expected to return to parliament in 2001 and without amendment to these particular clauses.

Moving towards spousal co-ownership

Actual improvement via new law may also be achieved. This is the case in **Tanzania** where the *National Land Policy 1995* declared that '*ownership of land between husband and wife shall not be the subject of legislation*' (s.4.2.6) and which provoked surprisingly little comment.²⁰ It is one of the more fortuitous developments that the drafters of the new land laws ignored this directive and proceeded to introduce consideration provision for equitable gender interests among spouses as outlined in BOX THREE.

The core provision is a presumption that spouses hold their property in common as joint occupiers - unless they take steps to register it as otherwise (Land Act 1999 s.161). The latter will in fact be difficult given the reiterated requirement that land managers take account in processes of acquisition, adjudication, registration and transfer of lands of the needs of women.

A different outcome to domestic land relations has emerged in **Uganda**, where the issue of spousal co-ownership has generated an unusually high level of public contention. As in Tanzania, issues of women's rights were not closely considered during the early formulation of a new basic land act (RoU 1993). As drafts of the proposed law emerged in the public arena, the failure to redress massive discrepancy in land ownership by men and women was seized upon by women lobbyists, generating a great deal of public debate (RoU 1999, McAuslan 1999). The President himself took part in a public discussion as to how the new land law should support women's rights.²¹

²⁰ Women's lobby groups played little role in inquiry or policy formulation (URT 1994, Manji 1998).

²¹ Parliamentarians Workshop on the Land Bill, Kampala, April 1998, sponsored by DFID with the Ministry of Water, Land and Environment.

BOX THREE

PROVIDING DIRECTLY FOR WOMEN'S INTERESTS IN LAND IN LAND LAWS

Tanzania

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

Principles:

- The equal right of women and men to hold and deal with land (LA s.3 (2)).
- Customary rules void if they deny women access to ownership, occupation or use of land (LA s.20).
- The law presumes co-ownership among spouses. The law presumes that unless the certificate explicitly states that only one spouse is owner, then both or all spouses will be registered as joint occupiers. Even when the land is the name of one spouse only, if the other spouse or spouses contribute by their labour to the productivity & upkeep of the land, they shall be deemed to be joint occupiers (LA s.161 (2)).
- Purchasers, mortgagors, lessees of land are obliged by law to enquire if the consent of the spouses has been given and if they have been misled, the disposition will be void (LA s.85, s.112).

Procedures:

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

Representation:

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

Uganda

Land Act 1998

Principles:

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

Procedures:

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

Representation:

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

During the final debate in parliament in June 1998, a clause was approved pending some alterations which declared that it would be an irrebuttable presumption of the law that the home and farm land upon which a family immediately depends ('primary land') would be co-owned by spouses. In circumstances that remain confused, the clause did not appear in the final text of the law, since referred to commonly as 'the lost amendment'.²² An amendment to reinsert the clause was immediately proposed but removed from the larger Draft Land (Amendment) Bill by the political cabinet in early 2000, a Bill which is in any event still to be read in Parliament two years after it was first drafted.²³ Many Ugandans regard this as not only a step backwards but a breach of good faith, given that both the President and Government had publicly determined to ensure the co-ownership clause entered law. There is also concern that without such a provision the Land Act defeats the provisions of the Constitution in this area.²⁴

Meanwhile, a provision that did enter the 1998 law to the effect that household-relevant land may not be sold without the consent of both/all spouses, is beginning to have effect, with many districts reporting a decline in cases where husbands sell off land on which their families depend, and an increase in affected women taking such actions to authorities or courts (Ovonji-Odida et al. *op cit.*).

Independent spousal land ownership

A different route to equitable land rights among men and women, husbands and wives, is provided for in the new land acts of **Eritrea** and **Ethiopia**.

Both states do this not through a legal presumption of co-ownership but by making it a matter of law that both men and women will receive equal land allocations in their own right, which they may then farm together or individually as these prefer.

Such an approach is possible where customary rights are in effect invalidated in their entirety and therefore current occupancy patterns with them, and where new allocation according to the new rules, is the order of the law. Guaranteeing every rural person access to land is the main objective along with assurance of relative equity in landholding size. The Federal Rural Land Proclamation 1997 of **Ethiopia** in fact rules that allocation must take family size into account (s.6 (5)). Implementation has in practice been slow, with customary norms defying women's rights towards maintenance of the status quo.²⁵ Nor is separate land allocation to each spouse always practical. Still, some women have been able to rent out their plot allocations for income.²⁶

In **Eritrea** there is choice as to where each spouse is allocated farmland. In addition, each spouse is entitled to a house plot in their home village, irrespective of where the couple resides and farms (Land Proclamation 1994, Art. 15). On divorce, all rights in land are

²² Refer Ovonji-Odida et al. *op cit.* for documentation on the handling of this clause.

²³ The cabinet's position was that gender issues of tenure should be handled in the proposed Domestic Relations Bill. This is an important new law originally drafted more than a decade past and given the many contentious issues it arouses other than those relating to landed property, no longer expected to reach parliament in the near future.

²⁴ As set out in Articles 26, 31, 33 and 34; refer BOX TWO.

²⁵ As a country report presented to this CTA Workshop of February 2001 indicated, in many parts of Ethiopia, it is taboo for women to plough or plant.

²⁶ As reported in the country report mentioned above in footnote 28.

retained (Art. 16). Implementation of this law, awaiting the creation of Land Administration Bodies at the local level, has been limited thus far.²⁷

Other routes to protecting women's land rights

Whilst direct ownership or co-ownership of land must become the centre ground of change, there are other ways through which new laws are improving the position of women in this area. TABLE 4 lists ten significant indicators other than a presumption of co-ownership or independent allocations, by which progress may be assessed.

The first of these is perhaps least material in its effect, where gender equity is iterated in the law as a working principle. The Ethiopian federal law orders new regional land laws drafted under its direction '*to confirm the equal rights of women in respect of the use, administration and control of land as well as in respect of transferring and bequeathing holding rights*' (s.5 (4)). The Tanzanian law not only includes the right of every woman to acquire, hold, use and deal with land to the same extent as men but presents this with special emphasis as a separate sub-clause of the listed 'fundamental principles of national land policy to which all persons exercising powers under, applying or interpreting the law shall have regard to (Land Act 1999 s. 3).

Other provisions are more exact and exacting, such as in those cases where new land laws specify that widows are to be first in line to inherit land (such as proposed in the Communal Land Reform Bill of Namibia), makes the transfer of household land subject to the approval of both/all spouses (Uganda, Tanzania and proposed in Zimbabwe, South Africa, Namibia, Swaziland, Rwanda), or provides for divorcees to retain a share of land (Eritrea, Tanzania).

Using six already promulgated laws as an example, TABLE 4 assesses the extent of direct support being provided to women's land rights at this time.

²⁷ Personal communication; P. Dewees, World Bank 2000.

TABLE 4: PROMOTION OF WOMEN'S RIGHTS IN NEW LAND LAWS**

INDICATORS OF DIRECT SUPPORT FOR WOMEN'S RIGHTS & INDIRECT CONDUITS OF SUPPORT	Eritrea 1994	Zam. 1995	Ethiop. 1997	Mozam. 1997 & 1998*	Ugan. 1998	Tanz. 1999
1. Makes equal rights with men a matter of stated principle of the law	Art. 4-4, Art. 11-3	-	s.5-4	-	-	LA s.3-2 VLA s.3-2
2. Makes any customary action which deprives women of rights illegal	N/A	-	N/A	1998 Art 11-1	s.28	LA s.20 VLA s.20-2
3. Makes any administrative act which discriminates against women illegal	Art. 4-4	-	s.6-1		s.6-1g	VLA s.23-1, s.30-4, s.53-3
4. Provides positive female discrimination in matters of application for settlement schemes etc.	-	-	-	-	-	-
5. Provides for improved or equal female representation in land administration bodies	-	-	s.6-10	-	s.48-4 s.58-3 s.66-2	LA s.17-2 VLA s.53-3
6. Provides for improved or equal female representation in land courts/tribunals	-	-	s.6-10	-	-	VLA s.60-2
7. Makes any transfer of household land subject to spouse's approval	N/A	-	-	-	s.40-1	LA s.112-3, s. 161-3 VLA s.30-4
8. Provides for widows to be first in line to inherit with/without children	Art. 12-3	-	-	1998- Art. 8-2	-	LA s. 161
9. Provides for land to be inherited in equal shares by male/female children	Art 12-4	-	-	Art. 13-1	-	-
10. Provides for divorcees to retain share of land	Art. 16	-	-	-	-	LA s.161-2 VLA s.22-1
11. Presumes spousal co-ownership of household's primary land needed to survive (house & farm), or, provides for equitable allocation to each spouse	Art. 4-4, Art. 6, Art. 11, Art. 15	-	Art. 6-1	1998 Art. 8-1	-	LA s.161
INDIRECT SUPPORT						
12. Devolves tenure administration procedures to local level and/or with local actors prominent	Art. 10		-	Art. 21	s.57-69	VLA s.8
13. Devolves dispute resolution machinery and into civil hands or with local civil role prominent	Art. 44	-	-	Art. 21	s.75-90	VLA s.60-62
14. Recognises customary rights as fully legal and registrable	-	-	-	Art. 1b	s.3-4	VLA s.22-47
15. Provides for family & group tenure in registrable form	-	-	-	Art. 7	s.4	s.22

* 1998 Regulations under the Land Act 1997. The nature of Lusophone law means that Regulations tend to include the detail and often, new substance.

** Laws referred to: Eritrea Land Proclamation No. 58 of 1994; Ethiopia Rural Land Administration Proclamation of the Federal Government No. 89 of 1997; Zambia The Lands Act No. 29 of 1995; Uganda Land Act No. 16 of 1998; Tanzania Land Act No. 4 of 1999, Village Land Act No 5 of 1999.

Indirect Legal Support for Women's Land Rights

There is in addition a range of ways through which women's tenure security may be enhanced indirectly through the land reforming movements around the continent. These possibilities centre upon the democratising trends in these laws mentioned earlier.

Democratising processes and powers

Main among these are the steps being taken to devolve the *control and administration of tenure* matters to more local levels. This is particular developed in the enacted laws of Tanzania and Uganda but is also one of the central proposals of the new National Land Policy of Malawi (2000) and the draft policies of Swaziland (1999) and Zimbabwe (1999).

In **Tanzania** each of the country's, 10,120 elected Village Councils is to be designated Land Manager, responsible for creating committees to investigate, adjudicate, register and title all land held in the village, in accordance with criteria set out in the law. These, as observed above, repeat at every turn the need to assure that the rights of women and children are not damaged in the process, together with a presumption that household property will be co-owned. In **Uganda** the law makes provision for District Land Boards, to operate entirely autonomously from either District Councils or central Government, and to be assisted by more than 5,000 Parish Land Committees, in whose hands most of the functions of determining rights will be vested. So too in these and other states, *land dispute resolution* is seeing devolution, and into civil hands (Alden Wily & Mbaya *op cit.*) In theory at least, these developments should enhance civil access and participation in land holding processes, and through this, heightened attention to local rights and needs. The remote rural poor, including women, should gain. A similar trend is underway in West Africa, most tangible in Ivory Coast's new land law and in a less directed way, in Niger and Mali (Stamm 2000, Lavigne Delville 2000, Ribot *op cit.*).

Giving a place to customary rights in state law

In close association with such developments is the dramatic new respect being awarded by some new laws to customary or other informal classes of land holding (Alden Wily 2000a, Lavigne Delville *op cit.*). This arises with resigned recognition that 20th century efforts to subordinate or convert customary tenure has broadly failed and that many of the tenets of imported European regimes are inappropriate to modern agrarian regimes. New attention to human and related resource rights add weight to the case that existing customary or other long-standing land occupancy should simply be recognised 'as is' and the socio-administrative machinery it uses to operate, made legal and enhanced.

To the forefront of this movement are the new land laws of **Uganda, Tanzania, Mozambique, Ivory Coast** and **Niger**. The new *National Land Policy* of Malawi (2000) and draft policies in Swaziland, Rwanda and Zimbabwe suggest this approach may ultimately be adopted quite widely on the continent. This will not occur of course without a good deal of hesitation and nervous consideration of the implications, itself aptly indicative of the sizeable transformation suggested in such changes. An immediate implication is the new security statutory recognition of customary regimes gives to millions of rural citizens, and to both their household property and the land they may share with other members of the clan or community. Of direct importance to rural women is that in the course of recognising customary tenure and providing for its registration and entitlement, so too will existing

customary patterns of landholding be given a place in national law. Thus families, clans and groups may hold property in common.

Restraining inequitable aspects of customary rights

It is in this area that significant opportunities and constraints are delivered and as a consequence, cautionary instructions being embedded in these laws. For, as outlined earlier, in many societies, customary rights of women are considered not to have extended beyond access rights to land, and even then only in certain defined circumstances. To generalise, women have accessed land mainly as wives. Daughters who have married, divorcees and widows, tend to lose even these access rights.

Now however, those laws which give customary regimes full statutory protection in new laws, at the same time *demand that these regimes may operate only in so far as they do not defeat the human rights of women, children or other conventionally disadvantaged sectors of society*. So too, do these same laws provide directly for property to be held by more than one person such as a couple and by a family. BOX FOUR examples these important developments in the new land laws of Uganda and Tanzania.

Through such direct and indirect means, African women are beginning to make gains through the process of land reform, a process clearly far from complete and which will deliver. Returning to the examples given in TABLE 4, it is encouraging that only the new land law of one country (Zambia) fails to meet any of the identified indicators of positive change in domestic land relations. Should they be approved and produce new law, the land policies of Swaziland, Zimbabwe, Malawi and Rwanda promise marked improvement in the possibility for women to be landowners to equal degree to men. Of course, just how far this promise is realised in practice, remains to be seen. By the same token, each positive provision is likely to provide a foothold to demand for further provision.

BOX FOUR

**INDIRECT ROUTES OF SUPPORT FOR THE RIGHTS OF WOMEN
IN THE UGANDAN & TANZANIAN LAND LAWS**

Uganda Land Act No. 16 of 1998

Section 4 (1)

Customary tenure is a form of tenure –

(e) applying local customary regulation and management to individual and household ownership, use and occupation of, and transactions in, land

(g) in which parcels of land may be recognised as subdivisions belonging to a person, a family or a traditional institution...

Section 28

Any decision taken in respect of land held under customary tenure, whether in respect of land held individually or communally shall be in accordance with the custom, traditions and practices of the community concerned; except that a decision which denies women or children or persons with disability access to ownership, occupation or use of any land imposes conditions which violate articles 33, 34 and 35 of the Constitution on any ownership, occupation or use of any land shall be null and void.

Tanzania Village Land Act No. 5 of 1999

Section 20 (2)

Any rule of customary law and any decision taken in respect of land held under customary tenure, whether in respect of land held individually or communally, shall have regard to the customs, traditions and practices of the community concerned to the extent that ... rule of customary law or any such decision in respect of land held under customary tenure shall be void and inoperative and shall not be given effect ... to the extent that it denies, women, children, or persons with disability, lawful access to ownership, occupation or use of any such land.

Section 22 (1)

A person, 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 which permits that body to be formed, who is or are villagers, or if a married person who has been divorced from or has left for not less than two years his or her spouse, was prior to the marriage a villager, and all of whom are citizens, may apply to the village council of that village for a customary right of occupancy.

Section 23 (2)

In determining whether to grant a customary right of occupancy the village councils shall –

(c) treat an application from a woman, or a group of women no less favourably than an equivalent application from a man, a group of men or a mixed group of men and women; and adopt or apply no adverse discriminatory practices or attitudes towards any woman who has applied for a customary right of occupancy.

III WOMEN'S RIGHTS TO FORESTS IN NEW LAW

Whilst for most rural women in Africa the house plot and farm represent the pivotal land sphere, rights over local forest and woodland, swampland and pasture are also of concern to them. These spheres are often dismissed in farm-focused planning (and also Poverty Action Plans) but are known to provide significant proportions of both subsistence and cash income for millions of households throughout Africa.²⁸ Nor does it surprise foresters and villagers that poorer households, and women across households, represent the primary groups of forest dependents.²⁹ Fortmann and Bruce (1993) and Clarke et al. (op cit.) provide important concrete evidence of the latter, expectedly identifying fuelwood, plant use for food, medicine, fodder and thatching, and polewood for house construction as primary interests of women; findings mirrored over much of Africa, and even beginning to be reflected in National Poverty Action Plans.³⁰ How forests and woodlands are owned in Africa and by whom, is expectedly a matter of interest to them. This interest has heightened into concern as 'better' forests/woodlands have continued to be co-opted by the state to create national parks and reserves, and as remaining local resources diminish (Alden Wily & Mbaya *op cit.*).

The extent of loss and incapacity of forestry departments to secure even those forests brought under their own jurisdiction has forced virtually all states in Africa to re-examine and reconstruct their forest management strategies, strategies that ultimately must attend to matters of forest tenure. Indeed forest reform is currently even more widespread than land reform on the continent, and like that transformation, is reaching into the very terms of law and notions of ownership. Again, this development is not confined to Eastern and Southern Africa (see TABLE 1) but the case elsewhere on the continent³¹ (and indeed beyond).³²

And again, the overriding trend of these new laws is democratic, with very concrete changes in state-people forest relations indicated, to the broad benefit of the latter (Alden Wily 2000b). TABLE 5 summarises significant elements of this (strikingly common) trend in a sample of eleven new forest laws in eastern and southern Africa. Whilst these are not necessarily targeted to women, they, along with rural men, gain.

Most National Forestry Policies do however note the special interest of adjacent women in forest resources. For example, the 1998 *Tanzania National Forestry Policy* makes it a matter of policy that extension packages to private and community forestry activities '*will be designed in a gender sensitive manner*' (Policy Statement 7) and that '*clearly defined*

²⁸ Campbell (ed) for example suggests that *miombo* woodlands alone contribute to the livelihood or virtually all 40 million inhabitants who live in those zones (1996) and Clarke et al. (1996) calculate the extraordinary values, an exercise now routinely undertaken in forest use studies. Cavendish has provided good empirical evidence that forest products may account for a third of total household income in rural Africa (1999), a fact that does not surprise foresters and is routinely now inserted in modern forest management policies (Alden Wily & Mbaya *op cit.*).

²⁹ Cavendish (op cit.) for example finds that the poorest 20 percent of households use three to four times the quantity of forest goods used by wealthier households.

³⁰ For example in Tanzania's *Poverty Reduction Strategy Paper*, 2000, Cht. 2.

³¹ These other states in Africa have enacted significant amendments or new forest laws within the last decade; Cameroon (1994), Benin (1993, 1996), Burkina Faso (1997), The Gambia (1998), Cape Verde (1998), Algeria (1990, 1991), Central African Republic (1990), Equatorial Guinea (1997), Guinea (1999), Guinea Bissau (1991, 2000), Mali (1995), Niger (1993, 2000), Mauritania (1997) and Senegal (1998, 1999). Chad and Togo have new laws in the pipeline.

³² For example in Asia, new forest acts have been recently promulgated in the Philippines (1996), Laos PDR (1997), Vietnam (1991, 1999), Nepal (1993) and Indonesia (1999).

forestland and tree tenure rights will be instituted for local communities, including both men and women (Policy Statement 39).

To some extent this kind of declamation is carried over into the text of new forest statutes, although mainly within the context of meeting livelihood needs overall; thus the Zanzibar forest law of 1996 requires that the National Forest Resources Management Plan *'be distributed in draft to those most dependent upon forest resources'* (s. 12) and each local plan must *'take account of local dependence'* (s.30). The South African act makes it an objective to *'advance persons disadvantaged by unfair discrimination'* (1998 s.3 & s.31), which in the South African constitutional context surely includes women. Civil participation in forest management in Zambia is to involve *'local communities, traditional institutions, non government organizations and other stakeholders which will be based on equitable gender participation'* (1999 s. 5(2)).

As crucially, pursuant to new respect for customary resource rights, new forest acts on the whole now make it a matter of principle that access to forests for extraction of products needed for daily household survival will be permitted. Thus, for example, the draft Kenya Forests Bill 2000 states:

Nothing in this Act shall be deemed to prevent any member of a forest community from taking, subject to such conditions as may be prescribed, such forest produce as it has been the custom of that community to take from such forest otherwise than for the purpose of sale (s. 21 (2)).

Other new forest laws make similar provision.³³ In addition, 'fair gender balance' is to be ensured on committees to be established at especially local levels for forest management functions.³⁴

A Community Focus

Taken as a whole the pronounced focus of new forest legislation is not upon women per se or even the poor, but upon the forest-local *community*. By far the greatest alteration in forest strategy at this time, and greatest evidence of improved resource rights, accrues in this context (Alden Wily 2000b). No where is this more evident than in the now widespread provision for people living next to forests to first, play a role in managing the forest lands already co-opted by the state as Forest Reserves or Parks, and second, to have the opportunity to set aside and declare their own local forest reserves out of as yet unreserved lands as 'community forest reserves'.

Legal provision for this and promotion of the development is a clear objective of forest laws in Zanzibar, Lesotho, Malawi, South Africa and Mozambique. It is even more precisely developed in the draft Bills of Namibia, Uganda and especially Tanzania. A more oblique opportunity to create a community forest is availed in Zambia in so-called open areas although only with the state attaining a possibly dominant role as to management. It is in fact only in Ethiopia and Kenya where new forest laws make no provision at all for local people

³³ For example: Ethiopia No. 94 of 1994 s.4(5), 5(2e), 9(3); Malawi No. 11 of 1997 s.3, 50; South Africa No. 84 of 1998 s.4; Zambia No. 7 of 1999, s. 20.

³⁴ National and district committees in Kenya must include at least one woman (Bill 2000 s. 8 & 13) as must the national advisory committee and village forest committees in Tanzania (Bill 2000 s. 12 (2) & s. 40(2)), and the National Council of South Africa (1998 s. 33).

to create and declare their own forest areas.³⁵ Although not directly stated in any one of these laws, provisions for the creation of community forests could well apply to women's groups and/or be orchestrated and managed by women, anxious to secure forest lands in their vicinity. This has already been exercised for example in Tanzania where a number of women's groups have established so-called *ngitiri* (Alden Wily & Dewees 2001).

Some states extend devolution to the extent of making full legal provision for government-owned reserves to, in effect, be 'returned' to their customary owners. This is the broad thrust of forest policy in The Gambia and Lesotho, a commitment that absorbs a substantial part of their new forest laws.³⁶ In The Gambia, implementation is well underway. In South Africa, where the post-apartheid constitutional commitments to land restitution have special force at this time, recognition that many State Forests may be lost to claimants is fully accounted for in the terms of the National Forests Act 1998. Constraint is also placed upon the creation of new government owned and managed Forests, with several laws going so far as to oblige the minister to be convinced that the forest could not be better conserved and managed as a Community Forest prior to proceeding with such a proposal. This is the case, for example in the proposed laws of Tanzania and Namibia.

Thus, if in largely indirect ways, rural women are beginning to see unexpected new opportunities to secure along with men, or in some cases, independently, important local common forest property resources as their own. Land law provisions which provide now for common properties to be registered and titled as group private property, will obviously play an important role in realising this in formal entitlements. Such provisions are most explicitly made in the new land laws of Uganda, Tanzania and Mozambique, and upon which their new forest laws build (Alden Wily & Mbaya *op cit.*).

Added to this are the important new openings for women to secure a share of household home and farm property outlined previously. Taken together, the 21st century opens with a surprisingly encouraging environment for African women and their property rights. Interestingly, it will be evident by now that this is being driven less from gender-specific advocacy than from a more general and still tentative democratisation state to state, wherein the principles by which civil society is structured and human rights assured, is being quite dramatically restructured – at least in law. Perhaps now, more than at any time before, African women will find themselves fighting for socio-political and resource security not just for themselves but for the ordinary and usually very poor, rural African family. Of such developments, gender advocacy itself, may enter a welcome, new phase.

³⁵ Refer Alden Wily & Mbaya *op cit.* for very detailed analyses of new forest laws in eastern and southern Africa as relating to community rights.

³⁶ The Gambia (1998 s. 58ff), Lesotho (1999 s.11ff).

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TABLE 5: DEMOCRATISING FEATURES IN NEW FOREST LAWS IN EASTERN & SOUTHERN AFRICA OF INDIRECT IMPACT UPON WOMEN'S FOREST RIGHTS

ATTRIBUTE IN NEW LAW IMPACTING UPON WOMEN'S FOREST RIGHTS	ETH 1994	ZANZ 1997	MAL 1997	RSA 1998	LES 1999	MOZ 1999	ZAM 1999	NAM BILL 2000	KEN BILL 2000	TAN BILL 2000	UGA BILL 2000
Provides for civil society input into national level decision-making		X		X	X			X	X	X	X
Devolves all/some decision-making, planning & control	X			X		X	X		X	X	X
Declares civil and especially community involvement an objective	X	X	X	X	X	X	X	X		X	X
Makes local consultation obligatory in creation forest parks & reserves	X	X		X	X			X		X	X
Limits power of state to create reserves out of customary lands		X		X	X			X		X	X
Makes community involvement obligatory in local planning		X			X	X	X	X		X	X
Makes local subsistence use a right or critical consideration	X	X	X	X	X	X	X	X	X	X	X
Commits to/makes arrangements for revenue-sharing to communities	X		X			X	X				
Provides for communities to manage government forests autonomously		X		X	X	X				X	X
Provides for communities to manage government forests as partners		X	X	X		X	X		X	X	X
Provides for community forests to be created out of locally-owned lands		X	X		X	X		X		X	X
Decentralises procedures for declaration of community reserves										X	X
Provides legal opportunity for local retrieval of state forests				X	X		X			X	
Recognises existing local institutions or provides new frameworks		X	X				X	X	X	X	X
Enables communities to make rules which courts must uphold		X	X	X						X	X
Introduces joint/management agreements		X	X	X	X		X	X	X	X	X
Provides statutory funding mechanisms to support community mgt		X	X	X	X				X	X	
Encourages NGO roles in forest management			X	X				X	X		
Encourages private sector roles in forest management	X			X		X			X	X	X
Enhances opportunities for private forests (sometimes with incentives)	X		X	X	X				X	X	X
Recognises private ownership of trees on farm or in private forests			X		X					X	X

Laws referred to:

Ethiopia: A Proclamation to Provide for the Conservation, Development and Utilization of Forests No. 94 of 1994

Zanzibar The Forest Resources Management and Conservation Act No. 10 of 1996

Malawi: Forestry Act No. 11 of 1997

South Africa: National Forests Act No. 84 of 1998

Lesotho: Forestry Act 1999

Zambia: The Forests Act No. 7 of 1999

Mozambique: Forest and Wildlife Act 1999

Namibia Draft Bill for a Forest Act 2000

Kenya: Draft Forests Bill September 2000

Tanzania: A Bill for a Forest Act October 2000

Uganda: Draft for The Forestry Act December 2000

ANNEX 1

Two tables extracted from Ovonji-Odida et al. 2000.

Table 8: Views on the impact of absence of co-ownership on social relations

FACTOR INDICATED IN SAMPLE VILLAGE in these Districts	MPIGI	BUSHENYI	MBARARA	LIRA	ARUA	MBALE
Women feel insecure in husband's home	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Women become submissive not to alienate their husbands and risk being sent home	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Women oppressed and dominated by in-laws for fear of being sent away	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Marriages characterised by suspicion and mistrust. Women suspect men are about to take another wife. Men suspect women to be secretly investing at their natal homes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Land-related disputes which lead to violence against women in the homes common	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Women live in constant fear of being sent home, replaced by second wives, losing land to second wife, being evicted if their husband dies	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Daughters are considered as being temporary in their father's homes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Women considered as visitors in their matrimonial homes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Insecurity in matrimonial home leads to low social esteem by women	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Widows often evicted after death of their husbands	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Women leave with nothing upon divorce/separation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Families hasten, arrange and coerce their daughters into marriage to get bride wealth	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
If a marriage fails, brothers will not allow their back to their home for fear of (a) re-paying back bride price, (b) giving away part of their land	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rights of 1 st wife not secured because they are forced to share their land when a man brings a new wife/concubine	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Women regarded as property by husbands with or without payment of bride price	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
It impedes adoption of new farming technology	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Widows have problems inheriting their husbands property	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Women withhold their labour	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Women shun investing in the land because they will lose their investments	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Women are traumatised and stressed	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
In poor households, land rights of women more likely to be trodden upon	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

KEY:

 YES NO

Table 9: Majority views expressed by women in sample villages as to likely impact of co-ownership

MAJORITY VIEWS EXPRESSED BY WOMEN AS TO LIKELY IMPACT OF CO-OWNERSHIP	MPIGI	BUSHENYI	MBARARA	LIRA	ARUA	MBALE
Women will feel more secure in their husbands homes	<input type="checkbox"/>					
Women will feel more respected in their husbands homes	<input type="checkbox"/>					
Children will respect their mothers more in their father's homes	<input type="checkbox"/>					
Tensions which cause domestic violence will reduce	<input type="checkbox"/>					
First wives will suffer as they will have to give land to other wives	<input checked="" type="checkbox"/>					
Women will be more honest; they will not have to be secret in their ways	<input type="checkbox"/>					
Co-ownership will protect the children	<input type="checkbox"/>					
Women will work harder on the farm	<input type="checkbox"/>					
Women will be willing to put their savings into the farm	<input type="checkbox"/>					
Women will plant fruit trees, shade trees, and trees for fuel and poles	<input type="checkbox"/>					
Women will listen more to the extension officers	<input type="checkbox"/>					
Women will build schools for their children on our land	<input type="checkbox"/>					
Women will be more willing to use fertilisers on their farms	<input type="checkbox"/>					
Men will be more careful about taking new wives	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Men will not be so quick to send their women away	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Men will try to avoid situation that lead to marriage break-up	<input type="checkbox"/>					
Fights will reduce. LCs will see less disputes to deal with	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Men will not accept the idea of sharing their land with their wives	<input type="checkbox"/>					
Women would be more willing to grow cash crops like coffee	<input type="checkbox"/>					
It will bring an end to the injustice done to women through culture	<input type="checkbox"/>					
Polygamy will begin to decline	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
It will protect the rights of the 1 st wife to family land	<input type="checkbox"/>					
It will undermine the tradition of paying exorbitantly for bride price	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
It will create short-term negative effects. It positive effects will be in future	<input type="checkbox"/>					
It will protect women's land rights at divorce, separation and widowhood	<input type="checkbox"/>					
It will change people's attitudes. Men will have to respect the law	<input type="checkbox"/>					
It will be an incentive for men and women to get properly married	<input type="checkbox"/>					

KEY:

 YES NO

