After a century of demise, the traditional capacity in Africa to hold rural lands in common is seeing a wave of unexpected recognition in revised national land laws in eastern and southern Africa, a development which could signal a dramatic turning point in the future of common properties.
Reconstructing the African Commons
Liz Alden Wily

Eastern and Southern Africa is seeing a wave of land law reform. While the motives may be more political than developmental, the extent of real change ultimately possibly limited, and realization of new law in practice another prospect altogether, certain striking positive changes are appearing. This paper focuses upon one of the more important to the majority of rural citizens in the region—the status of their common lands.

What is occurring is this: after a century of suppression and demise, customary tenure regimes are beginning to find a place in state laws as a perfectly legal way to acquire, hold, and transfer land. In the process, the traditional capacity to hold land in common is acquiring new status and even being supported are constructs of statutory commonhold, a form of tenure which could well compete in the future with individual-centered regimes.

The impact of these developments upon rural common property resources is potentially enormous. At least in law, citizens in a growing number of states are finding their unregistered common rights over pasture, forests, woodlands, and wildlife range accorded a security not seen before. This signals a dramatic reversal of fortune for remote rural poor who have seen these commons steadily slip into the hands of the state or be subject to the subdividing pressures of individualization, at least partly in default of viable legal means to retain these properties as local commons. Exploring this legal transformation is the subject of this article.

Introduction

Common property has not fared well in Eastern and Southern Africa over the last century. For all intents and purposes it has been in steady demise, both as a class of property and as a notion as to how land may and may not be held in ways that are statutorily binding. At the turn of the century, common property existed in abundance, but often only through shortfall
in the reach of stronger tenurial regimes and without the support of clear state law.

particularly in those cases where misuse of the [land] law has demonstrably accompanied its use, and in circumstances where what is customarily legal has itself been in flux, the focus upon national law must be queried. Does what state laws say make any difference to the way in which people own land? The question is all the more pertinent given the generally limited access to statutory law by ordinary rural citizens, who may be expected to be those most concerned with the status of common properties, such as grazing areas, swamps, and forests.

The argument of this paper is that national law (or the lack of it) does make a great deal of difference to the status of common property in Africa. Indeed, it may be the single most influential factor in its poor status and demise over the past century, and now, its possible revival as a perfectly acceptable way to hold land resources in the coming century. Unlike the statements of politicians or even formalized policy, once new strategies reach the point of entering law, the terms are more gravely debated, and once entrenched, less easily reversed. By its nature, legal provision is more precise, and justiciable, and provides a stable platform upon which opportunities may be drawn. Shifts in the law are arguably the most tangible measure of such transformation as may or may not be occurring in a nation-state.

This is not to say that the extent to which new law is made accessible is not important: it is, and this article will close with comments on that issue in respect to new land law. However, as Lavigne Delville has shown in respect to Francophone West Africa, the fact that [tenure] legislation “is rarely, if ever, applied does not prevent it having an impact” (2000: 101). Both individuals and the state will opportunistically use the law to further their own interests. Defensive case law may also accrue.

The Status of the Common Property in the Late Twentieth Century

Looking back over the last century, three main forces appear to have driven the handling of common property in the region (and indeed in Africa as a whole). The first is that complex of factors that make up the social transformation that has occurred through the penetration of capital, nation making, and the europeanization of precapitalist African society. A critical element has been the commoditization of land as the core means of production, provisions for which have been central to the substance of introduced national land legislation (Alden Wily 1988).

Integral has been the consistent thrust of colonial and postindependence tenure ideology toward the individualization of landholding, realized through adopted European modes of entitlement, and concomitant failure to make statutory provision for the incidents or exercise of non-European
regimes of landholding. Customary African tenure as a whole has been regarded as a paradigm from which modern society should depart, and the holding of lands in common especially. This has been oftentimes misunderstood as a regime, not of tenure at all, but of access, and worse, one with no sociospatial boundaries—that is, a regime of open and public, not closed and private, access [Alden Wily 1988].

Third has been the steady appropriation of many of the most valuable local common properties by colonial and then postcolonial governments as estates, such as forest and wildlife reserves under their direct tenure. This trend has been integral to the command and control strategies that dominated governance in the region over the course of the twentieth century. More specifically, in this case, it has been a function of the assumption that the state is the only proper guardian of such properties, and the rightful primary beneficiary of their values [such as deriving from timber, wildlife, and tourism] [Alden Wily 2000b]. Again, this has been aided by the weakly tenured character of commons in law. Through this process alone, many millions of hectares of prime common property have been lost to citizens. This has particularly affected those who hold virtually their entire estates in common, such as hunter-gatherers and pastoralists, or to those who are, simply, the institutionally weak, remote rural poor [Alden Wily and Mbaya 2001].

The character of government lands has itself gone from strength to strength in the region, steadily encompassing a host of properties which the state controls more often as landlord than trustee, and underwritten by widespread postindependence entrenchment of the state as overlord [Alden Wily 2000a]. However, here too, as outlined shortly, the turn of the century is seeing modification in these positions, with significant reining in of state powers over both classes of government land and landholding in general.

In the interim, the effects of twentieth-century land relations remain considerable. Customary rights in land—including those in which land is held in common at local group, community, or tribal levels—have for most of the last century been tolerated rather than provided for, and admitted into national statutes only in the most permissive of terms. The general expectation has been that over time, through market forces and with the help of programs of tenure conversion, these rights and the regimes which sustain them would disappear, absorbed into modern statutory forms, and into those providing absolute and individual rights in particular. Without recognition or the incentive to maintain and build upon regimes of common property tenure and management, commons have indeed frequently taken on the character of public lands, pending their entry into “real” ownership as defined in state law [Alden Wily and Mbaya 2001].

Subordinating Customary Lands to State Ownership or Control

In the interim, majority spheres of unregistered African landholding were to be afforded a blanket protection-cum-supervision of sorts through their des-
ignation as native reserves and homelands, or later, trust lands (Kenya), customary lands (Malawi, Zambia), communal lands (Zimbabwe, Namibia), unregistered lands (Rwanda), or simply public lands (Uganda, Tanzania). It is in this class of virtual government lands that the subordination of the land rights of millions of Africans is most tangible and ultimately most pernicious in its effects. For whereas in the past, these constructs could be seen [at their most positive] as a function of misplaced colonial beliefs surrounding the nature of traditional rights in property, their persistence after Independence is less justifiable. In a host of states from Eritrea to South Africa, postindependence governments chose not to recognize local lands as owned by their inhabitants, but vested the ownership of these lands variously in presidents, the state, or local government authorities. Customary owners, individually, as households or as communities, occupy and use their land as but tenants of state or state agencies, their property directly vulnerable to reallocation.

Thus, in Zimbabwe, for example, the *Tribal Land Act* (1979) was repealed after Independence in favor of a *Communal Lands Act* (1982), which not only vested ownership of communal lands in the President, but dropped the proviso that he holds these in benign trust for the inhabitants (Section 4). As a consequence, local rights amount to no more than permissive occupancy—and strictly for residential and agricultural purposes (§ 7–8). Rights to occupy and use land such as forests or pasture, or to hold these in common, is simply not availed (§ 9).

In Namibia, the first Constitution (1990) declared all untitled lands owned by the state (Schedule 5 [1]), and has recently confirmed, rather than removed, the principle in its National Land Policy (1998: § 3.1), and within the *Communal Land Reform Bill* (2000: § 17[1]). Unlike Zimbabwe, these new documents at least emphasize the trusteeship function of the state, a declaration not present in the original constitution. Again, recognition that land within these spheres may be held in common in registrable ways is not provided.

In Kenya, the 1963 Constitution and *Trust Land Act* (Cap. 288) restructured a long-existing arrangement in which ownership over native and now trust lands was vested in local governments (county councils). The Commissioner of Lands, accountable only to the President, is made the agent of the councils in matters of land, and has virtually a free hand to deal in trust lands, including for “government purposes” which remain undefined (Constitution § 118 (2), Cap. 288: § 7 [1]). County councils themselves may reallocate customarily occupied lands for purposes which they consider “may prove beneficial to the residents” (Constitution § 117 (1,2), Cap. 288: § 13).

Needless to say, a good deal of land has been lost to Kenya’s customary owners. In earlier years this tended to be for the public purpose of creating settlement schemes, national parks and reserves, or to meet the land needs of the plethora of parastatals established in the 1970s. The trend since has
been steadfastly toward the reallocation of these lands to private businesses and individuals (Akech 1999; Okoth-Ogendo 1999).

The driving force however has been to transform customary rights into statutory freeholds, through a program of compulsory adjudication and freehold entitlement, widely presented since the 1960s as the first land reform of Africa (Bruce and Migot-Adholla 1994). Even this supposedly benign intent has, in the event, resulted in considerable loss of property of especially the poor, and prominently affects lands held in common, which have been subdivided in the process. The *Land Adjudication Act* (Cap. 284) makes no provision for retaining lands held in common, and the tendency has been for the better of these estates to be co-opted by county councils or the central state as public or reserved areas under their authority (Alden Wily and Mbaya 2001).

The fate of pastoral commons has been especially salutary, with some millions of hectares ultimately subdivided into smaller and smaller private plots, held by a decreasing proportion of the community. This process has been frequently aided by unchallenged loopholes in the law and its more blatant abuse, to which the dispossessed have not yet found recourse in the courts (Galaty 1999; Simel 1999). This is a matter of growing dispute, and the cause of important amendments to be drafted since overtaken by the creation of a Presidential Commission of Inquiry into Land Law Matters in 1999 (Alden Wily and Mbaya 2001).

It was, however, in Kenya where the first state law attempt was made in the region to enable people to continue holding their land in common. This was a purpose in practice undermined first by the reconstruction of this right as available only in the context of modern ranching (*Land [Group Representatives] Act* 1968), and second, by the administrative suspension of this law in 1979 through Presidential Directive in favor of subdividing the 302 group ranches so created among the listed member owners. This action not only put paid to pastoral land use in these areas with expected ill effects, but also revealed the acute shortcomings in the membership formation process, through which thousands of poorer pastoralists found themselves excluded while nontraditional members of the clan have somehow found their names onto lists (Simel 1999; Alden Wily and Mbaya 2001).

In South Africa, the homeland construct was but a more severely exercised version of all the above. Since the Native Land Acts of the 1930s, more than thirteen million customary landowners have occupied these lands only by increasingly notorious Permits to Occupy, which could be [and frequently were] withdrawn at any time. Moreover these “rights” were repeatedly overridden through the arrival of several million newcomers, evicted from their own lands at the whim of the apartheid state (Claassens 2000). As described later, the status of land rights in these exhomelands remains undecided more than five years after a Constitutional commitment to address the issue promptly.
Changing Property Relations at the Turn of the Century

Frustration with the failure of time, neglect, the market, and titling programs to see the end of customary regimes represents one of the impetuses toward national land reform in Eastern and Southern Africa at this time (Alden Wily 2000a). There have been other prompts. These have ranged from a desire to make land sales legal and more available to foreign investors, to more local commitments to restore lands lost to populations through racially discriminatory laws (Namibia, South Africa, Zimbabwe), and to give some order and accountability to processes of corrupted or inefficient land administration (Kenya, Tanzania, Uganda, Zambia).

While these and other drivers are interesting in their own right, space does not allow their exploration. They are subject in any event to the more general fact that early impetuses are proving unevenly sustained, tending to give way to modified and even quite different objectives once the ubiquitous commissions of inquiry into land matters get underway (Palmer 2000; Alden Wily and Mbaya 2001). Moreover, provision for customary tenure regimes to continue operating have no where been an early objective. Such rationalization as to their existence that is emerging proves a largely unexpected consequence of the need to find practical ways forward and of the implications of the wider context within which such reforms are evolving in the first place.

A Democratizing Trend

This context is indisputably colored by wider changing sociopolitical relations in each state, seen in the wave of new independence or political regimes over the last decade emergent in Namibia, South Africa, Mozambique, Zambia, Malawi, Uganda, Rwanda, Eritrea, and Ethiopia (Alden Wily 2000a). The supreme legal manifestation of these changes is constitutional law, with entirely new constitutions drafted in an astounding fourteen states. Their content uniformly reflects substantial shifts in the relations between state and civil society, with the balance largely in favor of the latter, awarding citizens fuller and more exact “bills of rights,” and a greater role as decision makers in governance and development.

These kind of changes directly affect the positioning of the state in matters of land distribution and regulation, as continuing and piquant an issue in modern agrarian societies as in old. As one aspect of land relations after another comes under scrutiny, commitments to overhaul the whole have tended to evolve; at the turn of the century some fourteen countries in the eastern and southern half of Africa have formally embarked upon land reform. Indeed, it is mainly only those nations at civil war (Burundi, Angola, Democratic Republic of the Congo) which have not set out to do so. Enactment of new land laws marks the culmination of some years of policy planning usually articulated eventually in formal national land policies, and the start of what invariably is proving the burdensome and
more complicated task of implementation, a process which rapidly exposes
the shortfalls of the largely nonparticipatory policy and lawmaking pro-
cesses that are underway, and frequently resulting in early amendments
to new laws to improve their workability.\footnote{If there were an outstanding
common characteristic among the different land reforms of each state,
it is in the fact that each national government has found—often to its
dismay—that land reform is a good deal more time-consuming, expensive,
difficult, and contentious than originally envisaged, and yet a process, once
entered into the public domain, that is not easily reversed. Popular demand
and opinion begin to play a larger role, forcing government and politicians
to address areas they would have rather left alone or resolved according to
their own agenda (Alden Wily 2000a; Palmer 2000). The very way in which
new land policy and laws are made comes increasingly under attack. A
common response of the state has been to seek to delay legal change (South
Africa, Swaziland, Zimbabwe, Lesotho), or to delay implementation of new
laws (Tanzania, Uganda, Eritrea). Ultimately, this is to no avail. The right
to land is simply too important to the majority to let the issue go (Alden
Wily and Mbaya 2001).}

\section*{Land Tenure Reform}

Now, even with less than a decade of reform in the region underway, it may
be seen that alteration in the way in which a right to land is recognized in
the first instance, exercised, regulated, and upheld in law, relatively quickly
centers the agenda. At the risk of overgeneralization, this has two foci: first,
the relative right of state and people to own the land itself and/or rights
in land, and second, attention to the tenure security of that multitude
of people who hold land in legally tenuous, informal, and unregistered
ways, a group which usually constitutes the majority in any state. Both
matters have prompted reconsideration of customary tenure, and through
this, changing political and legal perception of the right of people to hold
property in common continues to emerge.

\subsection*{Owning the Land Itself or Interests over the Land}

Reassessment of state-people land relations has its roots in the peculiar his-
tory of land tenure in Africa, in which the mainly English feudal notion of
ultimate or radical title was significantly reconstructed through colonial-
ism in ways which conjoined sovereignty with material land ownership.
This rendered governments of the day virtual landlords, and occupants
mere holders of increasingly subordinate freehold, leasehold, or customary
interests in land (Shivji 1998; Alden Wily and Mbaya 2001). On indepen-
dence, new governments sustained the arrangement, and even where not
explicitly effected, made a point of vesting root ownership of at least certain
classes of land in themselves, such as in respect of homelands, communal
lands, and trust lands as outlined above. The apex of these developments may be seen in Idi Amin’s 1975 *Land Decree* in Uganda, which extended state ownership to all lands in Uganda and rendered customary occupancy in particular as at sufferance only (§ 3).

Now, at the turn of the century, the locus and character of radical title has become an explicit issue, particularly in those countries where citizens have found the state overzealous in the use of the privileges this primary ownership has been permitted to yield [Zambia, Tanzania, Uganda, Kenya, Malawi]. Not least of these has been the use of the power to appropriate land (the power of eminent domain) to an almost wanton, and seemingly increasing, degree [Shivji 1998].

Thus far, only one country in the region, Uganda, has gone so far as to do away altogether with the distinction between radical title and interests in land by conjoining the two in the (citizen) landholder (Constitution: Article 237, *Land Act* 1998: § 3). Elsewhere, new constitutions and land laws are proving yet more explicit as to the state’s ultimate tenure (Eritrea, Ethiopia, Mozambique, Tanzania, Zambia). At the same time, this is being relocated more definitively as trusteeship, and (with the prominent exception of Zimbabwe) bound by more rigorous limitation upon the right of the state to appropriate land in which interests, registered or unregistered, are held. This in itself has given impetus to new evaluation of what constitutes a justiciable interest in land, and which sooner or later brings questions of common property to the fore.

Finding Ways to Secure Weaker or Unregistered Land Rights

Tenurial concerns are also arising in respect to the expanding millions of urban squatters, who represent perhaps the most important new sphere of property relations this last century and one for which neither traditional nor modern tenure regimes has provided well. As the new millennium dawns, so also does resigned acknowledgement that this category of occupants is neither temporary nor effectively handled through repeated eviction and reallocation of their plots to those who have the means to secure entitlement. The fact that many are made landless squatters through encroachment of urban sprawl into their rural properties fuels concerns. Accordingly, new land laws are beginning to offer priority schemes of regularization for the “untenured urban poor” as they are increasingly termed. Several of these new laws notably include the right of these citizens to establish claim on the basis of customary rights, and to become landholders in common.

Similarly, new legal attention is turning to the status of tenants, often rendered such through patently unjust laws, which vested their land in others, or reallocated them with undue cause. Such is the case of mailo tenants in Uganda, who lost their land one hundred years ago when the colonial administration awarded land ownership of some nine thousand square miles to selected Buganda chiefs and notables [Government of Uganda 1993]. Now the new *Land Act* [1998] makes owners of these millions of tenants in all
but name, on payment of annual rent of less than one US dollar (§. 31–40). In South Africa, the long-standing occupancy of farm workers and tenants, who have been paid in use rights to the farmland, now gain protection in the law and opportunities for resettlement grants, with steady if small success [DLA 1999].

A more widespread shift in land relations is affecting the rights of women. Mostly, this is more declamatory than real, with minor provision being made for women to secure land beyond constitutional declarations of their equal right to do so, and some offer of affirmation action in the form of priority access to land grants, improved female representation on tenure-related committees, and exhortations for land administrators to account for their needs in their decision making. More effective steps are seen where it is being made illegal for family land to be sold, leased, or mortgaged without the permission of all spouses, a provision already having striking impact in Uganda [Ovonji-Odida et al. 2000].

However the most dramatic transformation in domestic land relations is being effected through making women outright owners of the land they till, either through obligatory allocations independent of their fathers or spouses (Ethiopia, Eritrea), or as co-owners of primary household land (Tanzania). In Uganda, where the issue has been under heated public debate since its initial exclusion from the Land Act [1998], the proposition is for spousal co-ownership to be an irrebuttable presumption of the law [Ovonji-Odida et al. 2000]. Should this be enacted, it is expected not only to alter domestic land relations, but to transform a stagnant smallholder agriculture sector, where wives have long served as the labor force on their husbands’ farms, with no incentive to invest in it themselves [Ovonji-Odida et al. 2000]. Regulations drafted under Mozambique’s Land Act [1997] offer widows security of tenure for their lifetimes [Annex to Regulations 1999: Article 8].

Other states have noted these developments, and recommendations for land tenure policy in Malawi, Zimbabwe, and Swaziland declare that they will find ways to give wives (and sometimes daughters) guaranteed equitable ownership over primary household land (Government of Zimbabwe 1998; Government of Malawi 1999; Government of Swaziland 1999). How far this shall be realized in concrete legal provisions remains to be seen.

The Fundamental Reform: Remaking Customary Tenure

Each of the above in its own way has helped prompt reassessment of the role of customary tenure regimes and the rights which they deliver. The facts are these: despite a century of purposeful penetration of noncustomary tenure ideology and legislation, as outlined earlier, unregistered, customary tenure not only persists, but also is by far and away still the majority form of tenure in the region. None of the strategies adopted to ignore or diminish it have been successful.
Even where early efforts to consider customary rights in national law were made, these tended to refashion those rights into forms acceptable to dominant European norms. Thus, the much-admired integration of customary tenure into statute in Botswana through the *Tribal Land Act* (1968) failed to incorporate the most critical element of agropastoral tenure, commonage. This lacuna has plagued land relations in that country since (White 1998), and was about to be visited upon the lands of the black majority in Namibia through the *Communal Lands Reform Bill* (2000), but has since been withdrawn.10

To add affront to the designs of officialdom, many of the attributes of traditional tenure regimes have made their way into transfer mechanisms of modern titled property, engendering a plethora of dispute particularly in matters of inheritance, and for which the current range of enactments provide unsatisfactory resolution. This has proved especially the case in East African states where registration processes are ineffective, with backlogs of several decades, and growing concern as to accountability of process and reliability of title deeds (Okoth-Ogendo 1999).

Meanwhile, the majority of citizens throughout the region remain technically landless under the terms of twentieth-century law, having failed to secure the kind of entitlements necessary to denote their property as private and subject to the protection routinely afforded private property in constitutional law.

It is not surprising therefore that a new approach to the status of customary land rights is emerging in the land reforms in the region. Response has however been various. In several states, the decision has been to get rid of the very idea of customary rights in land altogether, and to start from scratch with an entirely new regime through which rights in land may be acquired, held, and disposed of. This has been the case in both Eritrea and Ethiopia, where new tenure forms of lifetime usufructs have been introduced.11 While these borrow aspects from customary norms, they revoke fundamental notions of what is customary in both the incidents of the land right and in the manner through which it is secured and regulated. One loss is to the recognition of common property, the Eritrean laws in particular focusing in a dated way upon individual entitlement, leaving natural common properties, of which there are an abundance throughout the rural areas, in a vague legal condition. As is currently the case in Kenya and Malawi, the *Land Act* (1995) of Zambia recognizes customary tenure in principle, but weakens this through provision to register customary holdings only through their conversion to leaseholds (§. 7–8).

The situation is, in practice, not a great deal better in South Africa, where limited progress has been made to honor the commitment of the constitution (1996) and the terms of new land policy (1997) toward securing the rights of customary and other informal right-holders in variously classed state lands. The initial response was strong, with interim legislation providing protection of informal land rights until such time as a more permanent plan was devised.12
It is in the working through of the latter that problems have arisen, particularly in reference to the exhomeland and trust lands where inhabitants continue to be tenants of state and to occupy land in often conflicting ways (Claassens 2000). Through years of apartheid policies, community identity and organization, through which rights might be organized, have also been undermined, or conflict either with the designs of revitalized Tribal Authorities or the supposed mandate of still inchoate local governments (Ntsebeza 1999).

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

Liberation from such subordination of land rights is a main objective of the proposed National Land Policy of Zimbabwe (1998–1999), its discussion since upstaged by the issue of retrieving white settler lands for reallocation at no cost to government. Should the Policy eventually return to the agenda and be approved, this would launch a completely new pattern of tenure in Zimbabwe; land would be divided into statutory and customary spheres, governed respectively by state and local customary laws, “all equal in status, and interests under each of them, enjoying adequate security of tenure under law” (Government of Zimbabwe 1998). Customary regimes would operate in villages, where individuals, families, or any other recognized body would secure Certificates of Customary Title. Primary title over state-administered lands would be vested in an autonomous National Land Board and customary lands in village assemblies, comprising all adults in the community, both entities holding land only as trustees.

The Malawi Commission of Inquiry on Land Policy Reform advised similar new respect in state law for customary rights (Government of Malawi 1999). The proposal is that land will be classified as public, customary, and private, and control over those lands will be vested respectively in the Government, Traditional Authorities, and private landholders. Traditional Authorities will hold customary lands in common trust, operating through a village-based system for tenure administration. Customary rights will be registrable and evidenced in Customary Title Deeds. In its draft National Land Policy, still not approved after more than a year, Swaziland has adopted a similar community-based regime of tenure regulation and upgrades customary rights as legitimate registrable interests (Government of Swaziland 1999).
Leading the Way

However, the clearest lead toward the changing place of customary tenure in state law is being given in Uganda, Tanzania, and Mozambique in new land legislation put in place since 1997. In different ways, these reforms take the obvious but historically extraordinary step of simply recognizing customarily obtained properties as legally tenured as is, in whichever form and with whatever characteristics they currently possess. Thus, for example, where custom recognizes a land right as being potentially held in perpetuity, then state law endorses this. This renders customary rights the superior form in countries like Tanzania, where the only other way to secure occupancy is to be granted limited term rights by the state. Such changes represent a pleasing reversal of fortune for the rural majority (Alden Wily 1998).

By definition, recognition gives customary rights equivalency in state law with rights arising from other regimes so embedded (freehold, leasehold, etc.), and irrespective of whether they have been registered or not. This is most explicitly stated in the Tanzania Land Act (1999: § 6). At the same time, a main purpose of each of these new laws is to provide for the registration and entitlement of customary rights in order to enhance their security.

Devolving Tenure Administration and Dispute Resolution Machinery

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

As a matter of course, customary regimes largely operate at the local level and through informal mechanisms. The certification process itself therefore has to change in law. It may be verbal and verbally endorsed (Mozambique). The community itself may conduct the adjudication, recor- dation, and entitlement process (Tanzania), and the whole located in new devolved regimes. In Uganda, this has been achieved in the law through the creation of Land Boards at the district level. These are to be fully autonomous of government and supported by some 4,500 local-level parish land committees; a program of such scale that an amendment to stagger their establishment is shortly to come before Parliament (Government of Uganda 1999). The Land Act also removes land dispute resolution from the courts into localized civil tribunals, again not yet in place.

New tenure law in Tanzania both bypasses the district level and avoids problems associated with creating new institutions, by designating the long-existing elected governments of each rural village community (village council) as the manager of land within the range of its respective village area. Adjudication, registration, entitlement, and land dispute resolu-
tion will all take place within, and by, each community, following the procedures set out in the *Village Land Act* (1999), which are precise but at the same time oblige customary law to guide decisions (Alden Wily 1998). Comparable devolution of tenure administration is planned in Namibia, Zimbabwe, Swaziland, and Rwanda (Alden Wily and Mbaya 2001).

**The Reconstruction of Common Property**

Changes in the political and legal perspective on customary tenure must inevitably affect the status of the traditional right to hold land in common. For again, once customary tenure is recognized as an indefeasible way to hold land, so too does the right to hold land in common become a legitimate form. New law in Uganda thus for the first time includes recognition of customary land ownership beyond the individual, as extended households, groups, clans, or otherwise, and provides for its entitlement as such (*Land Act* 1998: §. 4–5). It also provides for Communal Land Associations to be formed to own and manage tracts of land, a route available not only to customary landowners but to those who hold property in freehold, leasehold or *mailo* regimes (§. 16: 24–7). While, as noted above, creation of the local agencies needed to support such developments is proving extremely slow, Ovonji-Odida et al. found that rural communities do feel their commons are now more secure (2000). One community has even taken steps to seek retrieval of commons appropriated as a Game Reserve, using the provision of the *Land Act* (§. 45[6]) permitting a community to demand a review of the status of parks and reserves (Alden Wily and Mbaya 2001).

Similarly, new law in Tanzania provides for the first time for common property to exist in national law and to be registrable. Repeated reference is made to the landholding and registration capacity, of not just individual persons, but—

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\ldots \text{a family unit, a group of persons recognized as such under customary law, or who have formed themselves together as an association, a primary cooperative society or as any other body recognized by any law. (Village Land Act 1999: §. 22)}
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As with customary rights in general, these will be “in every respect of equal status and effect” to the Granted Rights issued by Government to noncustomary tenants. They too may hold land in groups of two or more citizens (*Land Act* 1999: §. 18–9).

The new Tanzanian laws do more than recognize common property as a legal and registrable form of ownership—they directly encourage this. The *Village Land Act* requires the members of each village to identify, agree, and register those lands which they currently hold in common or intend to hold in common (§. 13). Adjudication for individual, household or group entitlement may not begin until these commonholds have been
recorded in the Village Land Register. While the law is not yet commenced, a growing number of village communities in Tanzania are making direct use of this strategy, securing local woodlands as private commons or group property (Alden Wily 2000b).

The *Land Act* (1997) in Mozambique also provides for communities or groups of persons to hold land in a statutorily recognized manner, and to “observe the principles of cotitle” [Article 7]. The title to a local community “shall be issued in the name chosen by the local community” [Article 10 (4)]. Community is defined as—

a group of families and individuals living within a geographical area at the territorial level of a locality or subdivision thereof, and which seeks to safeguard its common interests through the protection of areas for habitation or agriculture, including both fallow and cultivated areas, forests, areas of cultural importance, pasture land, water sources, and areas for expansion. [Article 1]

Again, the absence of paper title will not prejudice the legality of such holdings [Article 10 (2)]. Verbal testimony will have the same value in terms of the law as a title deed (*Land Regulations* 1998: Article 14 (2)). Procedures for entitlement are set out in a Technical Annex (1999), already being used by specially donor-funded projects seeking to assist rural citizens secure forest and wildlife range against allocation to entrepreneurs (Alden Wily and Mbaya 2001). Such developments seek to overcome common constraints resulting from an absence of local governance systems through which widespread implementation might be organized; competing loyalties among chiefs, deriving from years of population dislocation as a result of war; and conflicting jurisdiction of traditional authorities and politicoadministrative representatives of the central state (Kloeck-Jenson 1999).

The need to provide for commonhold tenure is beginning to penetrate the land reform processes elsewhere in the continent most notably in South Africa, which faces constraints comparable to those in Mozambique. In 1996, the *Communal Property Associations Act* was enacted to enable people to acquire and manage property as groups. This has not been widely adopted by groups in practice, mainly because of the paperwork involved, and the fact that many groups are formed only in order to secure sufficient critical mass needed to receive grants and purchase a farm (DLA 1999). Where traditional tribal authority is well entrenched, the shift from chief-led cooperation to community-based initiatives is also proving difficult (DLA 1999; Ntsebeza 1999). The need to provide for the holding of property in common has nonetheless become more, not less, clear to policy makers, and was an important provision of the now-aborted draft *Land Rights Bill* (1999: § 37, 45).

The intention to provide opportunities toward commonhold tenure is inherent in the above-mentioned draft land policies of Zimbabwe, Malawi,
and Swaziland, although so far, these have not been fully worked through in formal policy. The absence of a clear mechanism to enable communities to retain and hold commons in registrable ways was one of the reasons why the Communal Lands Reform Bill (2000) was rejected by legislators, as reported in The Namibian on 12 May 2000 in an article entitled, “National Council Rejects Land Bill.” Instead, such lands were to be secured through individualized leaseholds, available to all citizens, not just local inhabitants, raising the specter of continued enclosure and land-grabbing by noncustomary owners. Meanwhile woodland-centered programs are generating community-owned reserves out of local commons in northern Namibia, from which the revised Communal Lands Reform Bill is expected to gain clearer direction [Alden Wily and Mbaya 2001].

**Shifting Meanings of Property**

Important change in the notions and constructs which underwrote twentieth-century land relations emerge out of these developments. Even the centerpiece of twentieth-century African tenure transformation, entitlement, is of necessity being remade. Previously, adjudication, registration, and the issue of evidential documentation (titles) were inseparable from the individualization of the ownership of that property and the elimination of other rights which might pertain. Now, the link has been broken. While certification remains an impregnable objective toward land security throughout the land reform movement in the region, it is no longer posed as necessarily for the purpose of individualization. Nor does it necessarily have the effect of eliminating other levels of rights in the land, such as might be customarily exercised as seasonal access rights. Nor with new legal respect being afforded uncertified rights—a logical consequence of recognizing customary tenure—will the espoused sanctity of title deeds have the same resonance in the law or in the courts. Routinely provided constitutional commitments toward the sanctity of private property take on new meaning.14

These changes, including willingness to recognize customary regimes in the first instance, have gained force from growing loss of confidence in the economic efficacy of entitlement.15 However, it also gains from new respect being given to community landholding, as being prompted through trends toward community-based natural resource management, and as a means of slowing the ills of open access implied through state tenure [Alden Wily and Mbaya 2001]. Ultimately, there are many estates in land—and forests, woodlands, swamps, and wildlife range prime among them—which are just as unsuited to individualization, or the removal of regulation to remote national centers today, as they were one hundred years past. Interestingly, awareness of this has entered new forest management thinking, with provisions for community forests made out of local commons widely entering new forest law throughout Africa [Alden Wily 2000b].
Corollary moves in the region toward greater devolution of governance add force to such developments, slowly providing local government the machinery through which such trends may be concretely expressed (Alden Wily 2000a).

The Modernization of Communal Tenure

The meaning of communal tenure itself is changing in these developments. This is arising mainly through clearer separation of logically distinct but conventionally blurred ideas. First, the notion of communality as shared heritage in property now becomes a construct along the lines of dominion, influentially articulated by Nyerere as “land is owned by God, available to endless generations” (1966).

Second, at a more tangible level, communal tenure becomes the community-based reference system in which landholding customarily operates, now being increasingly catered for in new state law. Third, yet more tangible again, communal tenure becomes common property, discrete tracts of land which are able to be owned by nameable groups of persons, who hold the land as private group property, now as we have seen, being supported as such in national land laws.

After years—or rather a century—of obfuscation, these shifts arrive as a most welcome clarification (and in reality, modernization) of communal tenure, and a rather surprisingly delivered rescue of what must now seem, to many an official and legislator, an obvious and useful construct, and one which should have entered state law many a decade ago. No other development in the current wave of land reform signals such a resurgence of the suppressed African character in modern property relations on the continent.

Altering the Ethics of Customary Land Tenure

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

The new tenure laws of Uganda, Mozambique, and Tanzania are emphatic, for example, that while customary tenure may freely and legally operate in accordance with the customs and practices of the community concerned, those which deny women, children, or the disabled their rights in any way will be null and void. Procedures set out in the Tanzanian law are especially rigorous in spelling out where and how tenure administrators are to be vigilant as to the rights of these sectors (Alden Wily 1998). In both the Ugandan and Tanzanian laws, provision is made for spouses to prevent
the transfer of household land, either on their own behalf or in respect of
the future rights of their children. Such terms are grist to changes in
a wider range of law, most notably those dealing with inheritance, such
as those arising in the Domestic Relations Bill of Uganda (Government
of Uganda 1998) and the proposed amendment to the Customary Law of
Succession in South Africa, as reported in the Mail & Guardian on 22

From Customary to Community-Based Tenure

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

Tanzania provides perhaps the clearest case of the transition from
customary to community-based tenure that has been occurring, and which
is now embedded in new law. There, the village-making strategies of the
1970s served to relocate traditional patterns of settlement and land use, and
with this, traditional patterns of tenure regulation, into a new village-based
framework (Government of Tanzania 1994). Many customary land rights
were lost, while others were retained, by default or direction. New elected
village governments, established in the process, mainly comprise [and
still to an extent comprise] elders, who administer village land relations
significantly on the basis of customary norms (Alden Wily 1998).

Strictly speaking however, what existed after 1975 was not customary
tenure or rights in land at all, but village-based tenure and village-based
land rights. Nonetheless, following legal tradition in that country, these
are termed customary in the new Village Land Act (1999) and are to be
registrable as “Customary Rights.” Village land managers are bound in the
law to attend to local customary rules and norms, albeit with the kind of
constitutionally induced caveats noted above.

A comparable way forward is provided in the institution of parish land
committees in Uganda’s Land Act (1998). These are institutions founded
upon modern community formation rather than customary land law, and
through which what is customary in tenure matters will surely be reshaped
within the boundaries of that redefined sociospatial context. It may be
expected that many communities will choose to retain common lands as
registered commonholds rather than release these to further individualiza-
tion. These are lands which, up until the new Land Law of 1998, were neither
recognized in state law as owned, nor provided with mechanisms through
which they could be registered as other than individually held properties.
Neighboring Tanzania also provides a well-advanced model of community-
controlled areas, comprising both properties owned individually and prop-
ties held in common, a status which the new Village Land Act (1999) now
endorses and provides routes toward registration of both classes.
While less developed, the Mozambiquan *Land Act* (1997) suggests a similar development, in subordinating customary norms and practices—not to codification and the dictates of traditional leaders—but to the formation and dictate of the sociospatial community. In situations where, as noted earlier, a range of customary norms may apply as a consequence of extensive population movement and resettlement, this provides an especially important way forward. Even a mere decade past, the solution to conflicting customary norms would almost certainly have been to subject the whole to individualized leasehold entitlement. Or, as is the case in Niger at this point, to return to the prominent colonial strategy of codifying what is customary prior to real legal opportunity to secure those rights (Lavigne Delville 2000). Instead, today, rural Mozambiquans have ample opportunity in the law to regulate local landholding using such norms as they wish, taking such amount of what is customary along with them as applies. In the process, those many forested and other typically communal estates will likely be designated as the shared private property of the community members, if in some cases, only to sidestep the contentions that may surround determining to whom they might be individualized.18

While currently on hold, South Africa’s draft *Land Rights Bill* (1999) suggests the same kind of transformation was being searched for: releasing land ownership in the exhomelands, not only from the dictates of European forms of individualization, but from the constraints of custom being determined by traditional authorities rather than by the resource-related requirements and the decisions of community members. Had this law reached enactment, the retention and registration of commons as private group property would almost certainly have gained, if only again through reluctance of community members to see certain kinds of resources accrue to a limited number of individuals.

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

How far these changes will continue to evolve, and how far they will be adopted by citizens to embed in written law or reshape their local land relations, remain accounts for the future. At this point, the signs are ambivalent at this very early stage in regional land reforms. As we have seen, by no means have all states adopted devolutionary tenure strategies with alacrity, and even those which have tend to hesitate on the brink in their execution. Uganda, for example, has yet to put in place the administrative and quasi-judicial frameworks needed from which such developments may gather pace. Tanzania, identified above as perhaps the most developed in its legal thinking toward reconstructed custom and commons, has yet to declare its important new laws commenced, and despite the fact that it has
the advantage of having the critical institutions at the community level already in place.

Meanwhile, for reasons which reach mainly into the domain of how far central states are prepared to release their political authority and powers over landholding, Zimbabwe, South Africa, Swaziland, Zambia, Lesotho, and to a lesser extent, Namibia, hover uncertainly at this time, delaying the approval of important new policies or laws while the implications are reconsidered, not least of which include the extent to which local rural society may determine their forms of tenure and the space which will be given in state law to common property. Even Kenya, it might be noted here, has set aside a crucial amendment to land law, which, had it been presented to Parliament and approved, would have given members of already formed group ranches the option not to continue with the subdivision of their estates after all.19

How far such crises in confidence will materialize in revisionist strategies and return tenure development to the paradigms of the twentieth century remains to be seen. Wider democratizing forces, toward stronger local-level governance and the steady emergence of revolutionary strategies in land resource sectors generally [and forestry most notably], suggest the democratizing elements of tenure reform may become less easy to halt, and in directions which support the modernization of common property in law and practice. Moreover, with Uganda, Tanzania, and Mozambique already releasing the “genie from the bottle” in highly significant ways, the exciting idea of commonhold tenure is quite likely to take root.

This will be aided by growing interstate consultation on matters of tenure through regional workshops and donor-supported networking, and the use of the same core of African and European experts (Toulmin and Quan 2000). It is no coincidence, for example, that the drafted policy of Zimbabwe mirrors already-adopted new legal paradigms in Tanzania, that the drafted land policies of both Malawi and Swaziland clearly borrow from the thinking of the land acts of both Uganda and Tanzania, or that the construct of Communal Land Associations in Uganda mirrors [with much improvement] the Communal Property Associations of South Africa.

And while driven mainly for reasons of practicality and accountability, the uniform thrust of new land law in the region, toward the devolution of tenure administration, carries with it a dramatic increase in local access to the law, which will over time support greater local decision making as to state law norms and practices. Such developments go hand in hand with a striking rise in new land law in procedural provision for local land administrators to follow—so much so that some jurists have complained that the conventional boundaries between private and public law, land and administration law, are being breached.20 Not only new tenure law, but new forms of law, may well result. Already popularization of new legislation through dissemination campaigns is becoming de rigueur. For the moment, these developments are new, fragile and untested—but underway.
NOTES

1. As documented or acknowledged for example in Tanzania (Government of Tanzania 1994; McAuslan 1998); Malawi (Government of Malawi 1999); Kenya (Okoth-Ogendo 1999); Uganda (Government of Uganda 1993); Zambia (Hasungule 1998); Lesotho (Kasanga 1999).

2. The Communal Lands Reform Bill was passed by the National Assembly in February 2000 but rejected in May 2000 by the Second House (National Council), and returned to the Attorney-General’s Office for redrafting to lessen the insecurity implied through the opening up of these lands to leaseholding by nonlocal occupants.

3. New Constitutions enacted as follows: Mozambique, 1990; Namibia, 1990; Zambia, 1991; Lesotho, 1993; Malawi, 1994; Ethiopia, 1994; Uganda, 1995; South Africa, 1996; Eritrea, 1996. These countries have their Constitutions under review; Kenya, Zimbabwe and Tanzania. Swaziland and Rwanda have suspended their Constitutions pending the drafting of new documents.


5. In its search for legal means to avoid paying compensation to white settlers, the Sixteenth Constitutional Amendment of Zimbabwe (2000: No. 5) makes this voluntary (§. 3), in direct contrast to the terms of new laws elsewhere which, inter alia, significantly widen the range of circumstances in which compensation must be paid and the rates payable. Statutory Instrument 148A of 2000 under Presidential Powers (Temporary Measures) Act (Cap. 10: 20) enacted at the same time gives the President complete and unconditional powers to appropriate any agricultural land required for land resettlement purposes.


7. Refer to Alden Wily and Mbaya 2001 for a country by country analysis of legal provisions.


10. Refer to note two above.


14. At the same time, it should be noted that constitutional clauses which protect private property, whether they embrace customary properties now or not, are usually posed in juxtaposition to equally strong rights of state to appropriate that private property in certain circumstances. Examples include the 1963 Constitution of Kenya (§. 75); Constitution of Zimbabwe (1980: §. 16); Constitution of Uganda (1995: Article 237); Constitution of South Africa (1996: Article 25).
15. To summarize, increasingly documented findings are that title has not generated available credit to smallholders, titled smallholdings are not generally accepted as collateral, and that the extent of inputs and improvements to farms do not correlate with freehold/leasehold versus customary. The promised reduction in land disputes through titling has also not materialized, nor does customary landholding necessarily inhibit market transactions (Bruce and Migot-Adholla 1994; Deininger and Binswanger 1999).


18. Like new resource management laws in several other states, new forest and wildlife law in Mozambique as a consequence takes the opportunity to provide for a whole new class of community-created reserves in order to entrench such forest commons (Alden Wily 2000b).


20. For this debate, refer to Alden Wily 1998; McAuslan 1998; and Shivji 1998.

REFERENCES CITED


