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Stream: Multiple Commons

THE LEGAL AND THE POLITICAL IN MODERN COMMON PROPERTY MANAGEMENT

Re-making communal property in Sub-Saharan Africa with special reference to forest commons in Tanzania

Abstract

The argument of this paper is that the outstanding challenge facing community property management is to find institutional frameworks which both secure community tenure of those resources into the next century, and provide a workable, and forward-looking operational basis for their management. Without this success, individualising and centralising strategies which have so successfully undermined communal property over the last century will gain yet more, and final, ground.

The findings of this paper are hopeful. The author identifies two forces in modern sub-Saharan Africa which are, intentionally or otherwise, prompting the very kind of institutional development that is necessary to encompass and sustain local common property. The way in which one sub-Saharan state, Tanzania, is making progress in this regard, is explored. The author posits that this success is possible largely because a statutorily-defined institutional framework for common property management is already well-established at the community level and able to be brought into play. Ultimately, other sub-Saharan states will need to develop comparable socio-legal institutions to support working common property into the next century.

I THE CONCEPTUAL SETTING

Undermining the commons through individualisation

The perspective of this paper is African. As has been the case elsewhere in the developing world, the de-communising of common properties has been both cause and effect of century-long social transformation, an anticipated and directly-sought corollary of effective penetration of capital and commoditisation of property relations.

The prominent instrument, individualization of land ownership, has been copiously documented and needs no recounting here; academics and practitioners are familiar with the theologies of agrarian change which rationalise and further encourage privatisation of common property into the hands of individuals (or corporate entities), and of the less directed imperatives of population growth which 'eat away' at vestigial group-held resources.

Undermining the commons through state co-option

Less widely-acknowledged has been a contrary force which nonetheless has its origins in the same transformations and (British) colonial state-making in particular. Two statist phenomena have borne the process. The first has seen the relocation of communal properties in many sub-Saharan states as Crown and later, State or Public Lands. In this way, customary owners become tenants at will of the State [or previously, the Crown].

The second has seen environmentally-significant resources (forests, wildlife-rich areas, water catchments) removed from the [assumedly 'irresponsible'] hands of local community into those of the ['responsible'] state through the making of Reserves and National Parks.

From community to state, from local closed to national open access

Arguably, the former public lands-making forces brought to fruition the very ills of open access conventionally attributed to communal tenure, in turn generating the standard tragedy of the commons thesis and - *inter alia*, prompting further support for individualization. As arguably, Reserve-making of the last sixty or so years did not so much disband communal property as reconstruct it at a wider level; ownership and management moved from the periphery to the centre, from village as community to nation as 'community'. In a number of sub-Saharan states, colonial and post-colonial land laws reinforced the notion of nation as property-holding community through vesting root title trusteeship in Governors and then Presidents - a construct that remains common today [e.g.; Mozambique, Zambia, Tanzania, Ethiopia, Eritrea].

The commons in crisis

The effect of both strategies has been the same; the dislocation of workable ownership and management of resources which were under local community jurisdiction for good reasons and which frequently remain unsuited to individualised tenure today.

Dispossession has of course been the hallmark of both processes. In virtually all states where governments have secured root title and controlling authority of 'public lands', desirable areas of those estates have been reallocated to individuals. Rarely are these members of the original, local owner-community; at first they were commonly European settlers, then so-called 'progressive' African farmers, and today 'investors'.[1] Over the last half-century the function of state trusteeship itself has slipped inexorably into landlordism, payments for property accruing to the state.[2]

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[1] The examples of this process are myriad. To cite only a few examples: in the State Lands of Botswana, traditionally-occupied and owned San lands have given way to private freehold and leasehold Tswana ranches [Wily, 1994; Ng'ong'ola, 1997]. In Mozambique, foreigners have steadfastly been able to secure properties without local permission [Kloeck-Jenson, 1997]. In Uganda, a new form of freehold tenure, *Mailo*, evolved directly out of the British Government 'giving' local lands to selected Chiefs in the 1900s, rendering original owners their tenants [MISR & Land Tenure Center, 1989; Republic of Uganda, 1993]. Since then, public lands throughout the country have been steadily co-opted by the state and reallocated as freeholds to individuals wanting to establish ranches [Kasfir, 1988]. All this is aside from the more dramatic alienation of vast tracts of locally-held land through settler tenure in South Africa, Zimbabwe, Namibia, and to a lesser extent, Kenya [Juma & Ojwang (eds.), 1996]. For a useful literature review of current land-related issues in Eastern and Southern Africa, see Palmer, 1997.

Less obvious co-option has occurred in respect of reserved lands, a good proportion of which remain intact national estates today, if somewhat diminished in size and degraded in quality. However, even in their respect, a pervasive shift has occurred in the understanding of the state's role as guardian and management authority towards one of outright ownership, the rigorous juridical intent of state trusteeship notwithstanding. The orthodoxy is respect of Forest and Game Reserves or Parks is that the Government owns these, even where it is clear in national land laws that what has been awarded the state is authority, not tenure.[3]

In the interim, the local institutional basis of community ownership has weakened. Without legal force, and without the resources to own, protect, and manage, the identity and self-management capacities of the group have diminished - and at the very time, when pressure upon resources and social change would almost certainly have prompted positive evolution of those capacities, had it been so encouraged.

This is not to say that devolution and decentralization has not occurred in modern sub-Saharan Africa. On the contrary the latter in particular is a common modern public policy throughout the sub-continent. However, the target has rarely been the local community or village as such, but the district, with District Local Authorities the most common form. These, and the central state, remain nonetheless distant government, removed from local community. The resources local and central government control (forest and wildlife reserves, public lands) have over time taken on the nature of un-owned property, free-for-all belonging to everyone and no one. Characteristically, Governments in the region are finding it difficult to manage such resources or to restrain their invasion and over-use. From time to time, officials are themselves party to their disappearance.

The challenge

This then is the challenge. As the century draws to a close, there is recognition that the individualization of landed resources may not after all, always be appropriate. There is also

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[2] The creation of rent-seeking bureaucracy is the main criticism levied against those Governments which have chosen to retain radical title in the President; see for example, URT 1992 and Shivji, 1997.

[3] A *Draft Bill for the Land Act* was prepared in late 1996 for the Tanzanian Government by a commissioned group of officials and lawyers, is one of the few in sub-Saharan Africa to draw a clear distinction between 'reserved land' as a land management category, and as a form of tenure, in requiring the state to secure Titles for those Reserves it wants to own itself [URT, 1996].

recognition that the state [or organs of state] may not, after all, be the ideal owner or guardian of such properties. Wherefore to move? This paper explores the two main thrusts from which constructive change is emerging on the sub-Saharan continent. The two are closely linked, but driven by different concerns.

Land reform

The first, arising through a widespread process of new land law-making, is being forced to delve directly into the question as to if, and how local level communal property should exist in the future. This is integral to debate as to the future of customary regimes in general, of which the construct of common property has to date been normally part.

Upwards of ten sub-Saharan states have embarked upon land reform over the last decade.[4] With the exception of South Africa, Namibia and Zimbabwe, where restitution and redistribution of land are driving forces, there is striking commonality in the intentions of African government to 'modernise' tenure in direct support of economic growth.[5] More specifically, a clear objective in most new policies and laws is to hasten availability of land in the market-place. Not surprisingly, a main target for change is those areas where tenure has continued to be governed by local tradition [customary law] rather than Parliamentary-derived common law [statutes], and wherein most remaining communal property is found. The tendency has been for drafts of new land laws to ignore their existence or provide for their transformation through accelerated individualization. However, in a growing number of states, resistance, unease, and practicality, are prompting reconsideration, and modern statutory provision for the continued existence of common property. Conceptually, common property has undergone a sometimes extraordinarily swift transformation from 'no one's land' to *group private property*. These states confront however, a singular problem, how should the 'community' or the group be defined, and with what socio-legal basis?

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[4] South Africa, Namibia, Mozambique, Swaziland, Zambia, Zimbabwe, Tanzania, Uganda, Burkina Faso, Mali, Ghana, Cameroon, Eritrea, Ethiopia, among others.

[5] Two useful books which tackle the modernization orthodoxy's facing sub-Saharan land tenure are Platteau, 1992 and Bruce & Migot-Adholla (eds.) 1994.

Improving conservation management

The second force for change in respect of common properties derives from recognition that the conservation estates of the sub-continent [Game Parks and Forest Reserves] are threatened, and that new strategies for their management are required. Like South Asian states before them, an emerging response in sub-Saharan Africa is to turn to those communities who live within or next to the threatened estates, as a source of more effective and sustainable guardianship.[6] Often the reserved estates were integral to the common land of one or other adjacent community. Even where they were beyond the aegis of local property, management at the local level, is increasingly appealing to Governments, as practical, effective, and cheap.

Both developments face a single outstanding requirement, the need to identify or develop a modern *institutional framework* within which local community may hold and/or manage communal property resources. 'Management' is not mentioned lightly. For in practice, the ability to manage, to administer and regulate the common property is, in the late twentieth century an important concern of governments and communities themselves. Owning the resource, and being recognised as the owner, may not be enough. Certainly there are few governments which will readily surrender valuable natural resource estates [such as forests] to communities unless they have an assurance that the community is able to manage it to the level of regulation required. It would be a misreading of conventional communal property tenure to assume that authority automatically applies, particularly in modern sub-Saharan Africa where centralising policies have undermined such authority systems as may have traditionally existed. As Lawry observes, local communities tend to have difficulty *moving beyond the minimum definition of common property, to establishing and enforcing rules and procedures governing resource use* [1990: 409].

The task of this paper is to examine how a useful conjunction of democratising forces, institutional development and the law may be brought into play to support the evolution of modern communal property management which is acceptable to Governments,

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[6] Literature on 'community forestry' is as abundant as that upon land tenure change in the developing world. A wide range of agencies including The World Bank, FAO, and IUCN report regularly on progress, as do a wide range of journals [*Forests, Trees and People*, *Rural Development Forestry Network* of the Overseas Development Institute, the *Asia Forestry Network*, *Society and Natural Resources* Journal, etc].

and sustainable and effective in the resource-strained late twentieth century. The East African state of Tanzania is used as the focal example, and within this, the manner in which the vast and important forest and woodland resource may come to managed as communal property, and through this, strengthen the construct of communal tenure in the 21st century as a viable form of resource management.

II FORESTS IN TANZANIA AS A TARGET OF MODERN COMMUNAL PROPERTY MANAGEMENT

The forest estate

Tanzania is a large, agrarian state, with a growing population [currently around 30 million people]. Larger and larger areas of the country are being brought under cultivation, frequently through clearing of natural forest. Nonetheless, the forest estate of Tanzania remains considerable - some 44 million hectares, or upwards of 40 percent of the total land area. Ninety percent of this 'forest' is *miombo* woodland. Although generally dry, and sometimes of only medium height and unevenly-closed canopy, *miombo* is nonetheless famed throughout the southern half of the African continent for its valuable hardwood timbers, multiple use values, and its functional integration in the livelihood of several thousand million people.[7]

An insignificant proportion of Tanzania's forest estate is privately-owned by individuals. The greater proportion [two-thirds] is within 'public lands' (c.31 million ha). The remaining third is 'reserved' (13 million ha), and includes all the moist montane forests and other forests with water catchment functions. In terms of tenure, neither category - public lands, nor reserved lands - are straightforward.

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[7] Campbell (ed.) (1996) provides a comprehensive review of all aspects of miombo in Africa.

Forest reserves

Forest Reserves were largely established during the British colonial period [1920-1961] under a Forest Ordinance still in effect today.[8] Reservation draws a forest out of the public sector into the protective authority of the state. Customary tenure and use rights are not necessarily extinguished through this process, but in practice are terminally constrained.[9] Nor, contrary to popular belief, does establishment of Reserves in Tanzania impart state ownership. What it confers, is jurisdiction. No Title is issued to Government for the area. In a strict interpretation of the law, the land of the forest reserve remains vest in the President as titular trustee for the national community. For all practical intents and purposes however, the shift in the locus of authority from local people to state is viewed as a shift in tenure; 'Parks and Reserves belong to Government'.

A mid-way return of jurisdiction from center to periphery has gained ground in recent decades, with the designation of autonomous local governments [elected District Councils] as the responsible management agency of Forest Reserves.[10] Nearly a third of Tanzania's 580 Forest Reserves are today *Local Authority Forest Reserves*. As the Forest Ordinance and central government foresters remind local authorities however, these forests do not 'belong' to them, and may be withdrawn from their care at any time, and returned to the central state.[11]

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[8] Forest Ordinance of 1953, Chapter 389 of the Laws of Tanzania, United Republic of Tanzania [URT].

[9] Section 9 (3) of Cap 389 [URT].

[10] This was first introduced in 1962 with Gazette Notice No 478, amending the Forest Ordinance {URT].

[11] Section 12, Forest Ordinance [URT]. Central government in this case, is the Chief Conservator of Forests, who heads the Forest and Beekeeping Division, Ministry of Natural Resources & Tourism.

Public land forests

'Public Lands' in Tanzania is a complex category as a result of its diverse meanings. Land law designates *all* land in Tanzania as public land, vest in the President on behalf of the nation[12]. The more common meaning of 'public land' is an administrative, not legal, category, and embraces a range of tenure systems in that it covers all land not owned under statutory titles, and not within reserves. Such public land is predictably the greater proportion of the national estate, for only a tiny proportion of the population have applied for, or received title deeds, issued under national land laws [statutory tenure]. Concentrations of titled tenure are found in urban areas.

The vast majority of citizens are rural dwellers and hold their land under customary tenure, and within the socio-institutional framework of village communities. Today, villages serve as the main locus of customary tenure authority. Lands which fall beyond the aegis of individual village settlements fall by default to the guardianship of District Councils. Thus, it is practical to talk of public land in Tanzania being broadly divided into *village lands* and *district lands*. Unreserved natural forest falls mainly within this last category - hence the common naming of unreserved forest in Tanzania as *'public land forests'*.[13]

Community-based forest management

The last five years have seen a slow but steady (and now accelerating) emergence of instances of community-based forest management in Tanzania. Around twenty *Village Forest Reserves* have now been declared in village lands[14] A growing number of 'public land forests' are being brought under the legal management authority of adjacent local communities.[15] Most recently, areas of forest within the boundaries of gazetted national Forest Reserves have been placed under local community protection, working in partnership

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[12] The much-amended but still operating Land Tenure Ordinance, No 3 of 1923, Cap. 113 of Laws of Tanzania [URT]..

[13] An up-to-date review of tenure as relevant to forestry in Tanzania is provided by Wily, 1997.

[14] Mainly in Arusha, Singida and Tanga Regions. The first natural forest to be subdivided and placed under the jurisdiction of Villages, was Duru-Haitemba Forest in Babati District, a 9,900 ha miombo woodland which Government had surveyed for gazettement as a Forest Reserve. For details see Sjoholm & Wily, 1995 and Wily & Haule, 1995.

[15] The first public land forest to be formally mandated to five adjacent Villages, was Mgori Forest in Singida Region, a 44,000 ha miombo woodland. For details see Wily, 1996.

with the government Forestry Department.[16] Today, a new *National Forestry Policy* [1998] reflects these developments in its declared objective to promote community-owned and managed forests in public lands ['Village Forest Reserves'], and collaborative state-people management regimes in respect of Local Authority and Central Forest Reserves.[17]

Time does not allow detail of how community-based forest management has come about in Tanzania, nor how these practical experiences have contributed to enlightened new national forestry policy[18] The focus here will be upon the singular feature which has made community-based forest management possible in law and sustainable in practice - and which allows for an easy reconstruction of traditional communal property into a modern and sustainable legal form. This facility is found in the institution of the Tanzanian 'village'.

The Tanzanian village as corporate entity

If the rural village remains probably the commonest social-spatial form in the world today, its character is as various. In modern Tanzania, 'village' has a special meaning. On the one hand it is an evolved traditional form which has much in common with villages throughout sub-Saharan Africa, an agglomeration of often related people, living, socializing, and farming in a recognizable vicinity. On the other, the modern Tanzanian village is a deliberate structural creation of post-Independence 'socialist' policy, which sought to lodge local community as the institutional foundation of modern development, with principles of village-based self-reliance, self-management and co-operation [*Ujamaa*] paramount.[19]
Thus in the 1970s, such settlement as existed in the rural areas was reconstructed into an official and legal corporate form, which integrates and regulates social, spatial and institutional attributes of 'community'. A quarter century later, the core of Tanzanian society, and the grassroot level of government, remains the *Kijiji [plu: Vijiji]*, the 'Village'.

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16 Certain national forests [Territorial Forest Reserves] in Tabora, Arusha and Tanga Regions are now under working joint management by Government and Village Partners. A pivotal example is Shume-Magamba Forest Reserve in Lushoto District, Tanga Region.

17 June 1997, approved by Cabinet in March 1998, shortly to be gazetted.

18 For details see Wily, 1998 [forthcoming].

19 A great deal has been written about 'Villagization' in Tanzania, especially in the 1970s. Very little is written on the subject today. For prominent studies, see Hyden, 1980, and Fortmann, 1980. For treatment of the village in respect of tenure, see Wily, 1988.

All rural citizens - and they are the majority in Tanzania, some 25 million people - live within one or other of the 9,000 or so registered Villages.[20]

Once a community is registered as a Village (and today new Villages are registered as a result of sub-division of Villages which have grown to an unworkably large population), it is a legally recognized social group of name-able households living within a defined physical area, and which thereafter has certain self-management rights and responsibilities.[21]

The Village Area

For our purposes here, a most important attribute is that the Village has a defined perimeter boundary, described at the time of registration. Jurisdiction over the total area is given in law to the elected representatives of the social community. These representatives, elected by the adult population every three years, form the government of the village [Village Council]. This Council has the attributes of a legal person, able to sue and be sued, own property, and act in a full range of ways, on behalf of its electorate.[22] The Village Council is in addition the grass-root level of formal decentralized government. It has both the right and duty to 'govern' its constituency, in accordance with powers and responsibilities awarded it in law.[23] That same law renders the Village Council accountable in many respects to the overriding government of the area, the District Council, similarly made up of elected representatives.[24] Depending upon viewpoint (and the issue at stake), the Village is thus either an instrument of state, or potentially the smallest democracy in the world, with an unusual level of organized self-management. In either case, the *institutional ability to act in common* is

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[20] Villages were first regulated in law through the *Villages and Ujamaa Villages (Registration, Designation and Administration*) Act, No 21 of 1975, superseded by the *Local Government (District Authorities) Act* No 7 of 1982, introduced to formalize decentralized government. Important supporting laws include the *Local Government Finances Act*, No 9 of 1982, and an *Amendment of Local Government (District Authorities*) *Act*, No 8 of 1992 [URT].

[21] Concerns of size are integral [and indicative of] the nature of Villages as self-managing units in many respects. A Village may not be registered unless it has 150 households. 350 is considered in national settlement policy to represent a workable size for effective self-governance. The 1992 Amendment to the Local Authorities Act [No. 8 of 1992] also provides for sub-villages, with the elected head of each sub-village automatically a member of the Village Council.

[22] Section 26 of No 7 of 1982 [URT].

[23] Section 142 of No 7 of 1982 [URT].

[24] Although administrative law does not state this, the fact that District By-Laws have more weight in the law than village by-laws, and the fact that the latter must be approved by the former, renders this practically the case.

considerable. This has acute bearing on the management of common property, as set out below.

The Village as a Framework for Community Jurisdiction over Land and Communal Property Ownership

Firstly, the Tanzanian Village provides a logical socio-legal opportunity for statutory ownership of traditional and current common property. There are two levels to this, which on the whole truthfully reflect the customary paradigm, in which at one level, the community is the arbiter and authority over all property in the area (whether individually or communally owned), and which at another, it may directly own resources in common. In declaring its Village Area, the local community (or more precisely, the governing Council it elects to act on its behalf), is thereby in effect the *controlling authority* over the area. Usually, a good deal of the land within the village boundary is private farms, owned by custom. Remaining resources are recognized as the communal property of that village. Water sources, grazing land, swamps and forests are typically regarded as *common land* by villagers. Decisions as to their use, management and future, lie with their elected representatives [the Council] which nonetheless must make direct reference to the total community, referred to in administrative law as the Village Assembly and 'the supreme authority' in the Village.[25]

New national land policy [1995] and draft new land law [1996] has been able to build directly upon the unusual socio-legal attributes of local community in Tanzania.[26] This is particularly so in respect of the handling of customary rights in national law. Thus, one of the most important articles of new policy is to formally endow the village level with comprehensive jurisdiction over land, through the designation of the elected Council of each village community, as *Land Manager*.[27] Whereas other sub-Saharan states have increasingly lodged land administration authority at the district level [often through District Land

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25 Section 141, No 87 of 1982 [URT].

26 URT, 1995, 1996. The Draft Bill for the Land Act is shortly to be gazetted in the form of two proposed Land Acts, one covering general land [The Land Act 1998 Bill] and the other dealing only with Village Land [The Village Land Act 1998 Bill]. These are not yet publicly available. However, the content remains the same as the 1996 Draft Bill for the Land Act, and reference is made to that document.

27 Articles 4.1.1, 42.2, 4.2.28 of National Land Policy, 1995.

Boards], Tanzanian policy confers upon the Village Council *'the functions of land management'* as trustee, and *'affirms the occupation and use of the village land by the villagers under and in accordance with the customary law applicable to land in the area'*.[28] The intention is that Land Registries, and even one level of Land 'Courts' (a Mediation Panel), will exist in every Village. In this way, land tenure and land administrative will be operated from within, and by the local community.

By statute, not custom nor administrative policy, the land within the Village will be registered as either held in common [*Communal Village Lands*], by individuals, or by any form of group or association that is acceptable within the village. Each holding will be registered as a discreet *Customary Right of Occupancy* , with owner or owners recorded, and conferring upon owner/s full propriety [owned in perpetuity, able to be transferred at will, etc]. These rights as set out in the draft law are equivalent to those obtainable through other tenure regimes governed by national law. Any change in the status of Village Communal Land will be subject to full community approval.

There is no doubt that in some cases, the modern Tanzania Village does not coincide with the traditional socio-spatial organization of pre-Independence 'community'. However, the vast majority of Villages were formed around existing villages or hamlets. Furthermore, when it came to identifying the Village Area of the new, statutorily-defined community, this was undertaken by the membership, and through a process of agreement with neighbouring communities. As a result of the determination of district administrations to subdivide their entire area into 'Village Area', many settlements actually gained estates over which they had previously only seasonal, weak, or even previous rights. In a very large number of cases, the size of such areas within the Village Area may exceed the settled and farmed parts of community's area many times over.

Moreover, it was the practice of new Villages and their superior District Administrations to include Reserved lands within the Area of one or other Village. Thus, the authority of the state over Forest Reserves is today usually overlaid by a level of local jurisdiction, if not tenure. In short, whilst the state is recognized as the ultimate authority,

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[28] Section 57 (7) of Draft Bill for The Land Act, October 1996, Ministry of Lands, Housing and Urban

Villages nonetheless regard tracts of the Reserve adjacent to their settlement, as 'our own', an understanding which the state does not deny, but uses to demand local cooperation. This perhaps more than any other factor, has provided a working basis for the involvement of Reserve-adjacent Villages as Management Partners, if not co-owners of the Reserved forest area.[29]

The Village Council as Corporate Entity

Secondly, the existence of the Village as tangible institutional form and legal person, provides the local community with a related range of opportunities to take over ownership of additional properties outside its immediate area, and to be regarded as a legally-accountable agency of management or trusteeship.

Thus, already in existing administrative law, there is provision for a District Council to delegate any of its own functions to a particular Village Council.[30] A Local Authority could, for example, designate a Village Council as the responsible manager of a public land forest, or a gazetted *Local Authority Forest Reserve*. Because of its liable legal basis, even the President is able to delegate '*any of his own powers, or those of central government'* to a community, through the same route.[31] In principle therefore, it is possible for a Village or Villages to be designated Manager or even owner of a strategic national Forest Reserve.

The Village as Governing Agency

Thirdly, there is the governance function of the modern Tanzanian Village, and the concern that communal property resources are subject to workable communal authority, commented upon earlier.

For better or worse, elected Village Councils have been actively 'governing' their village constituencies and land areas for some twenty-five years. During this period,

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Development.

[29] As a result of a 1984 Agricultural Policy, Villages were for a time encouraged to apply for Title Deeds over their Village Areas. Less than a quarter of Villages secured such deeds. In all cases, Villages which included part of a Reserved Forest within their Village Area, found that area excluded from the Deed. The new National Land Policy [1995] limits Village control over the Village Area to one of jurisdiction, not ownership.

[30] Section 144 of the Local Government (District Authorities) Act No 7 of 1982 [URT].

amendments to administrative law, and new policies have altered the way in which Villages operate.[32] On the whole however, the 'authority' of the Village Council in a range of areas has grown, not lessened, and the existence of Villages and their elected Councils is indisputably rooted as the grass-root agency in virtually all areas of development and social management. There has of course been diversity in success. Villages vary greatly in the amount of effort they put into road, water, education and health developments, and the regard with which their elected leaders are held. Overall, the role of the Village in national governance has grown, and the capacity of the membership to act in concert, has consolidated. There is little doubt that an important stimulus has been the recurrent inability of the central state [or even the local District Councils] to meet adequately basic infrastructure, social service and investment needs over most of the country. Village level self-reliance has benefited from this shortfall.

At the same time, it is also a fact that few Villages have fully utilized the instruments of social change and local management available to them, in the law, and in national policies of decentralization. The legal capacity of a Village to make By-Laws on virtually any matter of community interest is, for example, an especially pertinent facility, especially when combined with the right to levy fines upon those in breech of its By-Laws.[33] In short, the Village not only has the institutional basis, but the necessary tools, to render communal authority effective.

Forests as a target of modern local communal property management

In such ways, the governance experience and potentials of the Tanzanian Village render it an obvious and viable locus for devolved authority, a known and appealing option to officials who see the need for practical management actions to be applied to a certain area of land or

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31 Section 144 of No 7 of 1982 [URT].

32 At one time, for example, their main function was to organize communal farming, cooperative shops, and adult literacy classes. More recently, Villages have been exhorted to take action to support teaching staff, build more secondary schools, and establish saving plans available to individual households. There have also been significant political changes in the nature of the Village; for example, the 1992 Amendment to the Local Authorities Act removed any political party function in Village Council leadership. Whereas in the past, District Councils tended to provide Villages with Executive Secretaries, now most Villages recruit and pay their own administrative staff [Secretary, Treasurer].

33 Section 118,163,166 of No 7 of 1982, and the Local Government Finances Act No 9 of 1982 [URT].

resources. It is these factors that have made it possible for communities to become legal owners, guardians or managers of forests in Tanzania in recent years.

In many cases, the local community was traditionally the owner or guardian of such resources, but through the state-making and centralizing policies described earlier, lost those rights to the centre, and through this, the incentive to protect and manage those resources, still useful to themselves. Now, as interest in community involvement in natural resource management heightens, the function of the Village as institutional form and legal person has been able to be brought into play, and provide a tangible home for the movement of control from center to periphery to occur. Thus, since 1995, a growing number of Villages have been able to resist the absorption of local forests into the government estate, precisely on the grounds, that they have the institutional and legal basis to manage these themselves, their tenurial claims notwithstanding.

Initially the first affected forests were within Village Areas, reinforcing their claim. Since 1996 however, a number of forested areas outside the immediate aegis of registered Village, within what this paper earlier referred to as district public lands, have been successfully subject to such claims. Again, it is mainly because a Village is a legal person in Tanzania, that national forestry management has felt comfortable designating Villages as their main partner in the management of National Reserves.

In most of these cases, Villages have [sometimes for the first time] formulated very specific Village By-Laws to encompass both their authority, and their forest management systems. Once approved by the District Council, such By-Laws also serve to bind not only villagers, but outsiders, to the regulations therein stated.[34]

Thus, when it comes to valuable natural resources, the traditional strategy of conserving and/or administering them through the standard withdrawal from the local community into the hands of the state [local or central government], has lost currency as the

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[34] It may be necessary to note here that although a Village By-Law is usually drafted by the Village Council, it must by law be discussed by a meeting of the full community, the Village Assembly, prior to submission to the District Council [section 163, 164 of No 7 of 1982 [URT].

conservation strategy of choice. Experience has shown in Tanzania [as in most other sub-Saharan states] that Government ownership of Reserves is hardly a guarantee of good management and may indeed be tantamount to 'open access'. It is no accident that the new *Tanzania Forest Policy* sets out so definitively an intention to involve Villages as the main partner in Reserve management, and to encourage and assist them to establish their own Village Forest Reserves in village and adjacent district public lands.[35]

Remaking communal property as modern corporate tenure

Similarly, the fact that local community has legal form in Tanzania is arguably doing more than any other factor to facilitate positive modernization, rather than diminishment, of communal property ownership into the 21st century.

In 1998, the holding of resources as a group is not seen in Tanzania as a disappearing form, but an important construct for the present and the future, the major departure from the socialist policies of the 1970s notwithstanding. In short, a Village-based framework for tenure is too real and too appropriate to do away with, and whilst the socialist policies of the seventies have been dismantled over the last decade, their institutional foundation has been retained and consolidated. Today a new thrust towards devolution of Government, marks the Village as yet more firmly a starting point.

As observed in the first half of this paper, there is emerging recognition in sub-Saharan African land reform processes going on at this time, that the holding of property in common may not, after all, be inappropriate or un-modern. However, few land policy planners have found it easy to identify a workable socio-legal form to carry such tenure, and in a manner which allows it to be equivalent to the conventions of individually-held property rights in national law. There has been a general tendency to focus on the *conversion* of customary individual holdings into statutory forms [freeholds, or leaseholds]. In some new law, the holding of property in common has in fact proved so difficult that draft Bills simply ignore its existence, thereby signaling its demise as a recognized legal tenure.[36] Under

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35 Policy Statements 3 & 4; page vii-viii, URT, 1997.

36 For example, the Zambian Land Act of 1995 pointedly avoids any mention of group holding of property and only provides for individual persons to register and convert their customary rights. All drafts for the Uganda Land Bill, up until the final 1998 draft, similarly made no provision for more than an individual or corporate legal person to hold

pressure, emerging laws in other states have been forced to promise recognition of group holding, but have adopted various complicated stratagems for this to evolve. In South Africa a new law promises the creation of Communal Associations with their own constitutions, although the White Paper on Land Policy recognizes such arrangements will be complicated.[37] In Uganda, the Land Bill [1998] proposes a trustee system, in which the community may delegate certain person/s as the holders of their land on their behalf, a regime which may be easily abused.[38] In contrast, the new Land Act of Mozambique [1997] makes direct provision for the holding of land rights by local communities in equal measure to the rights able to be held by individuals and corporate persons[39] - as does the Draft Bill for the Land Act for Tanzania.[40]

III CONCLUSION

This paper has argued that the future of communal property as a viable land management form, does not rely solely upon policies or laws of land tenure. Concomitant modernization of the institutional basis of community in the Tanzanian case, has served (perhaps uniquely on the sub-continent) to provide a much-needed basis for locally-based, and forward-looking communal property management. The argument may now be made in Tanzania that the modern 'Village' is of such legal and socio-spatial form, that it may positively support the retention and entrenchment of communal property resources at the local level, a safe route for the democratisation of nationalised common property, and an opportunity through which progressive regimes may evolve.

The degree of commonality in the institutional form of rural village in modern sub-Saharan agrarian states is such that the Tanzanian model might be usefully scrutinised by other sub-Saharan states willing to entertain the evolution of communal property regimes

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property, and on the contrary provided for District Land Boards to take over such common lands [Drafts for the Land Bill, 1993, 1996, 1997, Ministry of Lands, Housing and Physical Planning].

[37] Communal Property Associations Act No 28 of 1996, and White Paper on South African Land Policy, 1997 [Department of Lands].

[38] Section 6 of The Land Bill No 4 of 1998, Ministry of Lands, Housing and Physical Planning, Republic of Uganda.

[39] Article 7 (1,2,3) of Land Law 1997, Republic of Mozambique.

[40] Sections 20 (1), (2), 59, 61, 69, 109-116, 223 of Draft Bill for The Land Act, shortly to fall within the Village Land Act 1998 Bill, to be presented to Parliament for a first reading in June 1998.

into the next century, rather than their elimination. As has been the case with Tanzania, a possible first line of intervention in this area, may ironically not be those lands which communities already hold, albeit in statutorily unsupported ways, but lands which the state holds, such as Wildlife and Forest Reserves, and which the state is finding difficult to secure, and looking around for ways to divest itself of the burden.

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