Africa's big question

Can the continent find solutions to its colonial land-ownership legacy?

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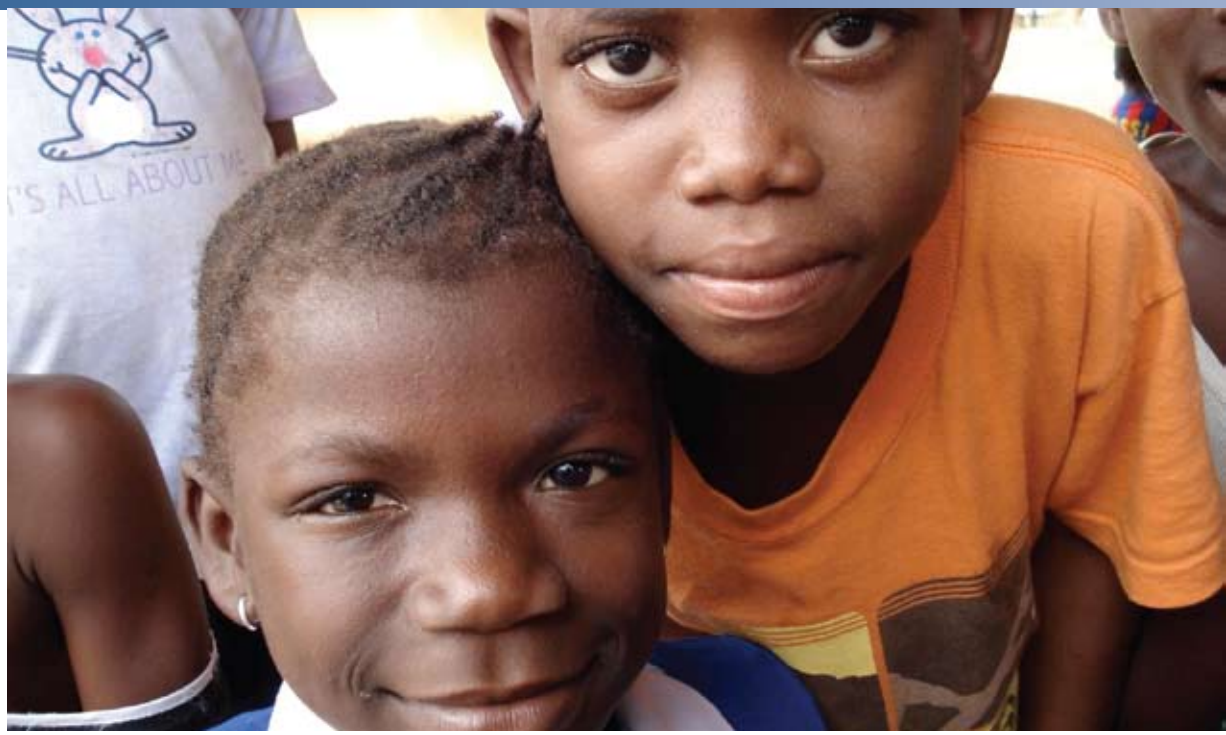

Inheritance: Africa's colonial past is still affecting the lives of ordinary people *Photo: E. Mansur*

What is happening to forest ownership in Africa? Something is happening, but not nearly fast enough.

The change being seen is a steady devolution of forest ownership from state to people. This change is of profound importance to every rural community in Africa—irrespective of whether it defines itself as an autonomous nationality, as a tribe or part thereof, or as a village community. For the trend relates not just to forest and woodland resources but to any property which a community traditionally owns in common, be it a pasture, a wetland, or a mountain top.

The shift in forest tenure is not confined to Africa: it is a global trend that started in Latin America in the 1980s. Table 1 shows that change on this front has been under way in Africa for some time.

Globally, the transition from state ownership is occurring through Indigenous land claims (mainly in Latin America); through legal change in the status of customary rights (mainly in Africa); and through the restitution of state-captured rights to private-property collectives in former nationalized regimes (eg Angola and Armenia).

Despite considerable progress, changes in the status of customary rights, including those affecting forest tenure, are not happening very rapidly, in Africa or elsewhere. Three-quarters of the world's forests and over 95% of Africa's forests and woodlands are still owned—legally or *de facto*—by governments. Moreover, the devolutionary trend is most strongly expressed in increasing ownership in the private sector rather than by rural communities.

In Africa, most of the change that has occurred so far has been in eastern and southern Africa. Curiously, the Congo Basin region is farthest behind—or perhaps not so curiously given the high commercial values of the Basin's forests and the rent-seeking this engenders. Yet it is precisely those high values that make it desirable for timber-rich states to now take the lead.

Tanzania has made most progress in adopting a workable legal regime for customary rights—inclusive of collectively

Table 1: Recognition of customary rights in policies and laws, Africa

Extent of rights	Country, and date of law or policy
Recognize customary rights as property rights in constitution and/or land law	Botswana (1968); Ghana (1986, 1992); Niger (1993, 1997); Mali (1996, 2002) Mozambique (1997); Uganda (1995, 1998); Tanzania (1999); Côte d'Ivoire (1998, 1999); Namibia (2002); Angola (2004); Southern Sudan (2009)
Proposed in policy or draft law	Malawi (2002, 2003 draft law); Lesotho (2003 policy); Sierra Leone (2005 policy); Benin (1994, 2005 draft law); Burkina Faso (2007, 2009 draft law); Kenya (draft constitution and land policy)
Mixed or ambivalent provision	Zambia (2008 policy); Swaziland (2006); The Gambia (1990); Togo (1964); South Africa (1996, 2004); Sudan (2005); Burkina Faso (1996, 1997); Senegal (1972); Liberia (1949 and 2008, 2009 through forest legislation)
Abolished customary rights but replaced with village community rights	Ethiopia (1997—now about 6 million entitlements including community forests lands as collective property in Amhara state); Eritrea (1994); Rwanda (2004); Senegal (1972)
State retains ownership of customary property and retains colonial provisions for no more than permissive occupancy and use of public/government lands	Mauritania (1983); Chad (1967); Democratic Republic of the Congo (1967, 1973, 1980, 2006); Cameroon (1974); Egypt (1992); Nigeria (1978); Zimbabwe (1982); (Greater) Sudan (1970, 1984, 1995)
Insufficient information	Guinea; Guinea Bissau; Equatorial Guinea; Central African Republic; Republic of the Congo (1983, new law?); Gabon (1963, 1982, 1987, new law?)

held property rights, such as over woodlands and pastures. Most countries have more mixed provisions, limiting, for example, the recognition of customary rights as property to houses and farms and retaining state ownership of even unreserved forest lands, or acknowledging customary ownership only at registration, which is difficult for the majority to achieve. Few countries include forest parks and reserves in their reforms, retaining the unnecessary idea that a forest can only be protected if it is removed from local jurisdiction. Experience has shown that there is no reason why a community cannot be an owner of a national park or a reserve, or even of a biosphere reserve, subject to protection regulation.

The issue is not only between state and people. Within communities, customary norms may be or—over the last century—have become undemocratically structured. We have seen, for example, chiefs subverting the notion of trusteeship for their people to outright ownership and then behaving more as landlords than as trustees or managers of communal properties.

The shift from state ownership to ownership by people does not exist in isolation; it is central to democratization, inclusive governance and citizen empowerment. The shift has implications for how the state itself is constructed: it is widely recognized today that many governments have become almost states unto themselves, rather than servants of the people.

While the forest sector can go some distance alone in transforming forest governance, eventually it must join hands with the land sector in reform. Why? Because, ultimately, good forest governance depends on the single question: 'Who owns the forest?'

Therefore the story of what is happening to forest tenure and good governance of forests in Africa (and the world) is primarily a land story. It is a process of giving national law acknowledgement to customary rights as property rights so that the possession by rural families and communities of the lands they have lived on and used for a very long time is secure and is given the equivalent legal support given to rights acquired under imported tenure regimes, such as English freehold tenure.

But it is a story that is taking too long to unfold. I say this because a failure to acknowledge customary rights as property rights:

- *sustains* an increasingly intolerable abuse of human rights and particularly of the poor;
- *tests* too far the tolerance of citizens to continuing mal-governance by their governments, who generally shy away from such reforms for out-dated reasons and in service of state rent-seeking interests. We have already seen the Madagascar government overturned partially because of wrongful proposals to lease out vast lands which are rightfully the property of communities. We will see more such uprisings;
- *keeps the door open* to yet further wrongful theft of especially communal properties such as pastures, woodlands and forests. This now has a sharper edge because some of the leases being proposed are 'state to state' leases and, to an extent, will be protected by international law. Communal properties throughout Africa are at great risk, such as the many millions of hectares of Sudanese community lands allocated to Middle Eastern governments and China (a similar process is under way in Ethiopia and Democratic Republic of the Congo). Such a process damages efforts to restructure governance in ways in which citizen rights are upheld; and
- *removes* a prime opportunity for governments to deal with climate change in the forest sector. They could start by acknowledging that, until community forest-tenure rights are properly acknowledged in forest governance, we cannot expect forests to play their full role in contributing to carbon emission reductions. There is simply not the incentive. We also know that a forest controlled and managed by a community has a greater chance of being sustainably conserved than it has in the hands of remote government officials or logging companies.

Most of all, however, the transition in national law recognition of customary rights as property rights needs to be much faster to put an end to the great public lands scandal of Africa. The scandal began in formal terms in 1885 with the agreed refusal of colonial representatives in Berlin to acknowledge that the Africa they wanted to carve up was already occupied and owned. It was much cheaper for them to deny this. Thus, in subsequent state laws Africa became an un-owned continent and millions of Africans became, in effect, squatters on their own lands, tenants of the state. The fact that every village owned its own area, some of which it shared with neighboring villages or permitted nomads with animals to use in certain seasons, was suppressed. Not just tribal sovereignty but also territorial, communal and family tenures were rendered no more than *permissive occupancy and use* on lands which, now 'ownerless', fell to government control and often legal ownership as 'public lands'.

Arguably, the even greater tragedy was that post-colonial governments sustained these norms, treating all unregistered lands as un-owned and thus falling to the state.

Clarifying customary and Indigenous rights

How do customary rights differ from Indigenous rights? They do not. Both are community-based systems where land rights are defined and upheld by local rules and consensus, not national laws. Often these rights are rooted in long-held traditions, although such traditions may change over time in accordance with changing needs, and particularly in respect of permanent farms and homes. There are always variations in the way in which modern communities hold land, but many share:

- a village-based operational framework and authority;
- family ownership of houses and farms (usufruct or permanent customary freehold);
- collective ownership of resources used in common, like forests, pasture & wetlands
- root ownership of the soil—'our land', 'our place'; and
- nuanced distinctions between the rights of members of the community and the often seasonal access rights of outsiders, such as nomadic pastoralists.

Changing relationships: Community forest ownership has many benefits, including for women and class relations *Photo: A. Sarre*

Table 2: The benefits of community forest ownership

Conservation	'If it is ours we will look after it'
Management	On-site; communities know who is using what; cheap, and therefore sustainable protection and management
Empowerment	Helps the rural poor get organized
Governance	Encourages inclusive governance
State reconstruction	Helps forest departments restructure roles to be more democratic and more advisory, rather than landlordist and rent-seeking
Poverty reduction	Owners have more control over benefits
Social relations	Women play a key role in forest committees and ensure subsistence and family interests. Class relations are also altered: an inclusive tenure approach includes those who are most poor and whose only property may be their shareholding in the community's common properties

Arguably, the even greater tragedy was that post-colonial governments sustained these norms, treating all unregistered lands as un-owned and thus falling to the state. The best evidence of this is that, in many countries, when government acquires land today it does not pay for the property but only for the loss of houses and crops. Rights to communal resources—forests, pastures and wetlands—are ignored. Continuing to deny ownership of rural citizens to their lands and especially to their common properties is convenient and cheap and enables governments and elites to capture these areas for their own purposes.

Once customary rights are recognized as property rights, the security of tenure of communities over their commons, and the need for governments to purchase those lands at open market rates, come into play. This is the case, for example, in Tanzania. Such change not only helps to address longstanding injustices, it also has a wide range of benefits for communities and for the wider society (Table 2).

Best-practice attempts at tenure-based forest reform (e.g. in Mexico, Tanzania, Sabah and Sarawak, and The Gambia) tend to build on the following three legs:

- recognize ownership as the foundation;
- build on existing/new democratic community institutions; and
- fully empower the community as manager, including by granting the right to issue commercial-use licences, fine offenders, enter contracts and limit concession interests. The community should also be able to lease out the forest, or part of it—even back to government.

Use rights are not enough; management authority is not enough; buffer zones and benefit-sharing are not enough; joint forest management is not enough.

The key lesson from experiences so far in devolving land back to communities is this: use-rights are *not* enough; management authority is *not* enough; buffer zones and benefit-sharing are *not* enough; joint forest management is *not* enough. Community ownership should provide all the rights of ownership—such as the right to license and fine and to decide use in the first place, the right to be the primary beneficiary, and the right to be compensated properly when land is taken for public purpose. Ownership protects interests.

In principle 'Indigenous land rights' and 'customary land rights' are generally the same—the ownership of pre-state communities of their territories and their right to administer its allocation and use themselves. 'Indigenous' is, however, not an easy term on the African continent, for all Africans are Indigenous, although some groups have a much longer history in a particular area, and today their rights are frequently suppressed or overlaid with the interests of incoming groups who have settled there. These institutionally weaker groups need and deserve special assistance to ensure that their rights are not done away with in the process, and restored as necessary. Compromise is necessary.

Liz Alden Wily's response to a question from the floor