IMPROVING TENURE SECURITY FOR THE RURAL POOR

MOZAMBIQUE – COUNTRY CASE STUDY

Simon Norfolk and Christopher Tanner

2007

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Support to the Legal Empowerment of the Poor (LEP)
Improving tenure security for the rural poor –
with the financial assistance of Norway under a Programme Cooperation Agreement

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Photograph by Margarida David e Silva
(Safari hunting operator handing over the community share of revenues
to the community leaders in the Macossa – Coutada 9)

This paper was prepared under contract with the Food and Agriculture Organization of the United Nations (FAO). The positions and opinions presented are those of the author alone, and are not intended to represent the views of FAO.

Most of the world's poor work in the "informal economy" – outside of recognized and enforceable rules. Thus, even though most have assets of some kind, they have no way to document their possessions because they lack formal access to legally recognized tools such as deeds, contracts and permits.

The **Commission on Legal Empowerment of the Poor** (CLEP) is the first global anti-poverty initiative focusing on the link between exclusion, poverty and law, looking for practical solutions to the challenges of poverty. CLEP aims to make legal protection and economic opportunity the right of all, not the privilege of the few. (see http://legalempowerment.undp.org/)

CLEP has identified specific tenure issues, including i) how to make property rights accessible to all, especially poor and marginalized communities, groups or individuals and ii) how to ensure that property rights of the poor function as means of achieving economic and social empowerment, particularly in the context of gender equity and those affected by HIV/AIDS.

There is growing empirical evidence that giving legal recognition to informal property rights in urban areas brings positive results. However, a similar body of evidence does not exist for the empowerment of people in rural areas. Instead, the signs are mixed, resulting in a largely sterile and divisive debate on formalization of rights.

FAO, with donor funding from Norway, has undertaken a set of activities for "Improving tenure security of the rural poor" in order to meet the needs of FAO member countries and, in turn, support the CLEP. This work falls within the FAO corporate strategy on "Sustainable rural livelihoods and more equitable access to resources". Recognizing that secure access to land and other natural resources (forests, water, fisheries, pastures, etc.) is a crucial factor for eradication of food insecurity and rural poverty, FAO's cross-departmental and cross-disciplinary work focused 2005-2006 activities on sub-Saharan Africa which has the world's highest percentage of poor and hungry people.

This paper is part of FAO's effort to inform the CLEP through its working group on property rights. It was prepared for the regional technical workshop on "Improving tenure security of the rural poor" held in Nakuru, Kenya, October 2006, at which issues relating to property rights were reviewed and actions were initiated to develop common strategies for improving the protection of rights to land and other natural resources of the rural poor.

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LIST OF ACRONYMS

ASL	-	African Safari Lodge and Rural Development Programme
AWF	-	African Wildlife Foundation
CBNRM	-	Community-Based Natural Resources Management Programme
CFJJ	-	Centre for Legal and Judicial Training
DINATEF	-	National Directorate of Land and Forests
DUAT	-	*direito de uso e aproveitamento da terra* (state-granted land right)
FAO	-	Food and Agriculture Organization of the United Nations
MITUR	-	Ministry of Tourism
NGO	-	non-governmental organization
ORAM	-	Rural Association for Mutual Support
PARPA	-	*Plano para o Alivio da Pobreza Absoluta*
PROAGRI	-	National Programme for Agricultural Development
SPFFB	-	Provincial Wildlife Services
SPGC	-	Provincial Service of Geography and Cadastre
TPSGC	-	Technical-Professional School of Geodesy and Cartography

GLOSSARY

DUAT - The *direito de uso e aproveitamento da terra* (state-granted land right) is currently Mozambique's single form of land tenure right. It is exclusive, inheritable and transmittable (subject to state approval). Irrespective of the means through which it is acquired, the resulting DUAT right is exactly the same.

DUATs can be acquired by:

1 *recognition of long-standing occupancy*
- *a) customary (traditional) occupation:* the occupation of land by individual persons and by local communities, in accordance with customary norms and practices, so long as these do not contradict the Constitution;
- *b) good faith occupation:* the occupation of land by individual national persons who have been using the land in good faith for at least ten years;

2 *award on a concessionary basis*
- *c) award:* new rights to land, awarded with the authorization of an application submitted by an individual or corporate person (renewable 50-year state leasehold).

EXECUTIVE SUMMARY

Introduction

Ever since Mozambican independence in 1975, property in land has been vested in the state. Despite the political and economic shift to a multiparty system and market economy since the 1990 Constitution, this underlying principle has remained in place, and no land may be sold, mortgaged, or otherwise encumbered or alienated.

Local traditional land management systems meanwhile have retained a robust role as the *de facto* land management system of Mozambique. These systems – and the rights they attribute to rural people – were formally recognized in the 1995 National Land Policy and subsequent 1997 Land Law. The Land Policy includes the following basic principles that were incorporated into the new law and its implementing instruments:

- land belongs to the state and cannot be sold, alienated or mortgaged;
- customary land systems and the rights allocated through them are recognized;
- private investment in land is to be promoted with guaranteed secure rights;
- women and men have equal rights over land;
- land access and use must obey principles of sustainable use;
- land access and use must promote principles of equity.

While the new law had to respect basic constitutional principles, the legislators also had to develop a law appropriate for a market economy. The land policy therefore seeks to protect existing rights, while also promoting private investment and, to this end, seeks to provide secure land rights for investors as an essential condition for this.

The legal framework established by the Constitution and the 1997 Land Law contains several innovative approaches to achieving these goals. These include:

- establishment of a single form of land tenure right, the DUAT, irrespective of the means through which it is acquired;
- recognition in law of DUATs obtained through customary and good faith land occupation;
- protection in law of DUATs obtained through customary and good faith occupation of land without the need for their formalization and registration;
- provision of a flexible approach to proving and spatially defining DUATs acquired through customary and good faith occupation;
- establishment of the right (and obligation) of local rights holders to participate in land and natural resources management and land rights allocation processes.

Land rights can be transferred between third parties, but only when linked to the sale or transfer of standing assets. The Constitution recognizes the right to private property and that any improvements and constructions made on or to land over which a private person or firm has a DUAT are the private assets of that person or firm. These assets can be bought and sold, while the underlying DUAT is administratively transferred to the new asset owner.

Customary and good faith occupation continue to be the principal means by which the rural poor obtain access to land. While these acquired rights enjoy full legal recognition as equivalent to the state DUAT, they do not have to be registered unless circumstances demand. Thus in spite of *de jure* formalization through legal recognition, protecting these rights in practice and making them work in favour of an equitable and sustainable model of development remains a challenge and takes on new urgency as demand for land by investors continues to rise.

Acquiring land use rights

Through Article 12, the Land Law recognizes the *de facto* occupation of land by two categories of people: those occupying land according to customary norms and practices (either as individuals or as part of a group of people) and those who occupy land in good faith for at least 10 years. These rights are recognized as formal, legal rights and, in most respects, are the same as awarded rights.

In order to identify rights acquired through customary occupation without having to codify them, policy-makers developed the "local community" concept. The "local community" holds a single state DUAT in its own name (thus also acquiring legal personality), and is responsible for the internal allocation and management of land rights through its own customary system. Lower order rights acquired by families and individuals in this way are also equivalent to a state DUAT and do not need to be registered.

The legal definition of the "local community" is wide ranging:

> *… a grouping of families and individuals, living in a circumscribed territorial area at the level of a locality or below, which has as its objective the safeguarding of common interests through the protection of areas of habitation, agricultural areas, whether cultivated or in fallow, forests, sites of socio-cultural importance, grazing lands, water sources and areas of expansion*.

Article 12 also provides a third route for securing a *new* DUAT – by request to the relevant state body. These DUATs are granted on a 50-year state leasehold, renewable for another 50 years. Those requesting new rights must carry out a consultation with local communities to ensure the land is free or determine the conditions by which local rights are given up in favour of the newcomer. Awarded rights *must* be registered.

The DUAT that results from any of these three situations enjoys exactly the same level of protection in law. In all three cases, it is a private right and holders can exclude third parties.

The framework for formalization

The official framework for formalization in this context then takes various forms, including:

- formal recognition in law of a range of informally acquired rights (customary and good faith occupation),
- formal recognition of the role played by a "local community" in administering land and use rights within its own area, as well as its right to participate in land management and decision processes regarding the allocation of new rights awarded by the state,
- formal recording and registration of land rights – obligatory for awarded rights, not obligatory for those acquired through customary and good faith occupation formally recognized in law but still administered informally and largely invisible to the formal systems of rights registration.

The national cadastre

Overall responsibility for land administration lies with the National Directorate of Land and Forests of the Ministry of Agriculture, working through a range of provincial and district services. This structure is still very weak in terms of higher level staff and its local-level coverage, and approaches to land administration are still very conventional and poorly adapted to the innovative challenges of the Land Law.

The Land Law also establishes that the constitution, extension, modification, transfer and termination of the DUAT are subject to registration within the Public Property Registry of the Ministry of Justice. This institution is even weaker than the land administration, with offices only in the provincial capitals and a very few of the larger municipalities. Yet legal registration is essential if land rights holders – private or local by occupation – are to secure bank credit and enter into contracts where their security of land access is a major issue.

Very limited public resources are allocated to the community and occupation aspects of the Land Law, with most attention being given to facilitating and recording DUATs awarded by the state to investors and others not eligible via the occupation routes. The result is a cadastre that is very incomplete, and contains mainly information on a very small percentage of all the land rights recognized by law. Meanwhile, and in the context of rapidly rising demand for land from investors and others, DUATs by occupation remain invisible on official maps and are vulnerable to expropriation and "capture". There is thus a growing need to formalize these rights using available technical and legal instruments.

Formalizing local DUATs by occupation

The Land Law allows for verbal testimony and other technical means to prove existing DUATs and to establish their borders. The principal technical instrument for doing this is "delimitation", through which a community DUAT is proven and its limits recorded on official cadastral maps. To date, only some 185 communities have been delimited in this way, leaving the vast majority of legally recognized local rights still invisible and "unofficial" in terms of cadastral registration.

Nevertheless, the delimitation is a powerful participatory instrument that can raise local awareness of rights in law and build community-level capacity to manage their affairs and engage with the outside world. It also results in a more effective protection of rights through formal registration in official maps and databases.

This self-definition approach is also well suited to a country such as Mozambique, where numerous cultural and geographical contexts determine how land occupation and use happens in any given place. Indeed, many different community or group forms are possible under the local community formulation. They can be traditional units based on clans or chieftainships, extended families or simply a group of neighbours.

The consultation instrument provided in the Land Law also ensures that local rights are not ignored and "captured" by investors and others seeking to use local resources. This process is also a form of formalization, as it recognizes the existence of local rights through meetings and documents that record the outcome of the *consulta.* The consultation process requires the following:

- Defining occupation – the consultation must establish where communities have legal rights acquired through occupation even if the land is not currently used (this can often be over large areas, if the legal local community definition is fully understood by all concerned).
- Setting the partnership discussion – the *consulta* must be seen as a negotiation over how one party can gain access to land legally occupied by another. It is not simply a "no objection" hurdle to be jumped by the new land claimant on his or her road to gaining a new land right.
- Giving credence to community opinion – the law requires that all community members participate in the *consulta*, and while it does not say the community opinion is binding, in a *de facto* sense it is, if local people understand their real rights and how to exercise them.

A well implemented consultation process can ensure that local DUATs are not ignored and can result in local people getting real economic benefits from the deals struck with investors over ceding land rights. Recent research shows that most consultations are poorly carried out and have little real impact. Nevertheless, *all new DUAT requests* are now accompanied by a consultation. Whether this is well done or not, investors are taking note of local rights.

Local communities are also legally empowered to participate in natural resource management (including defining their own borders) and the allocation of new DUATs, as well as in conflict resolution. This participation is another form of *de facto* formalization that is distinct from the registration of DUATs by occupation.

In these various contexts, the ways in which local community interests are defined and represented to the state become critical. Article 30 of the Land Law calls for further legislation to clarify who represents the local communities, but this has never been fully addressed. Recent decrees approved in the context of the decentralization programme are seen by many as responding to this need, especially Decree 15/2000 which recognizes community authorities who are defined as "people who exercise a specific form of authority over a specific community or social group." These "authorities" may have some role in land use issues, but do not necessarily represent the group of private individuals who collectively hold local community land rights in co-title. Mixing the public and private roles of community leaders in this way is leading to many instances of incorrect practice, as individuals in communities are endowed with representative tasks and powers not attributed to them by the Land Law.

Opting out by local individuals

The Land Law Regulations contain explicit provisions for the subdivision of land held under community titles, which means opting out of community control and securing an individual title in the cadastral service. This is important because it provides a way for individual members of groups to define where they have individual tenure rights, and a legal route to formalize these rights. In this way individual investment and capital accumulation can occur at local level.

Land rights for women

The Land Law is a double-edged sword for women. Most rural women get their rights through customary norms and practices defined by their relationships to men. These rights are less secure than those of men and are particularly at risk when discriminatory traditional practices prevail in the unhappy context of the HIV/AIDS pandemic. The 1997 law does offer women new forms of protection by explicitly making customary norms and practices subject to higher constitutional principles, and by giving women full rights to participate in all land related decisions, including the right to opt out and register their title individually.

Together these provisions offer considerable protection for women *viz a viz* the often discriminatory aspects of customary land administration. To date however, there is no known case of a woman or women using these provisions to defend their rights, in spite of the growing evidence of abuse and injustice as HIV/AIDS impacts ever more deeply on rural social and economic relationships.

Implications for formalizing DUATs and how they can be used

Should local rights be formalized?

Three case studies are presented to discuss the need to formalize local communities and individual land rights acquired by occupation. In the Canhane case, a delimitation exercise has lead to a community lodge project and strong community capacity to deal with the outside

world. The land formalization process followed the legal process in a straightforward way, pre-empting a situation of growing demand for local land in an area about to boom with the creation of the new Limpopo Park.

The Chipanje Chetu case also underlines the need to formalize rights. In this case, a productive agreement with a safari sports hunting operator was cancelled by stronger external interests, but the community had proven and secured its rights and has gained a capacity to challenge what is happening. This case, however, does illustrate the vulnerability of *any* land right in Mozambique, where state power to intervene and overturn even successful initiatives in favour of other "preferred" interests is always a threat under the surface.

The Coutada 9 case illustrates how *formalization through other means* can be effective if those involved show good will and are willing to experiment. In this case, formalized agreements are based on the recognition by a tourism operator that local people have historical rights within the *coutada* (an official hunting reserve within which DUATs are not allowed by law). Although there are questions over whether these rights can be formalized (registered), the successful commercial agreement between both sides has prompted state agencies to rethink their conventional positions and support this important experiment in revenue sharing.

Together these three cases show that formalization takes different forms. Formalization is not necessarily just about demarcating and registering DUATs and the limits to which they extend. They show how an informed population can participate both in the formalization of its land rights and in subsequent development activities. The overall result is a change in attitudes, increased confidence and a general ability to engage more effectively with the outside world.

Decision-making on rights: participation, representation and accountability

The implications of new policy and legislation for the interaction between customary, elected local structures and state local administration remain unclear, especially in terms of their source of authority and legitimacy. The Land Law recognition of representative and adjudicatory bodies at community level does ensure the reinforcement of *existing* local practice and institutions. Thus:

- the local community functions as a community in terms of the use and management of land and natural resources,
- the local community has its own customary institutions and rules that regulate access to land,
- the management institutions and their representatives are those the community recognizes as existing and functioning.

In other words the basis for the evolution of land management institutions has been grounded in what exists presently, rather than in something new and unfamiliar.

Land rights delimitation vests ownership in the "community", which is governed internally through the principles of co-title, specified explicitly in the Land Law and with reference to relevant sections of the Civil Code. Opting out of community jurisdiction and leaving the "common hold" also provides a new alternative route away from the constraints of both local and state power.

The case study situations of extensive land areas locally understood as communal property, being used for low intensity activities such as eco-tourism or hunting, show how an approach that deals with the group is enabling "local communities" to negotiate access to land with private sector users in return for benefits that accrue to the group as an entity.

This does, however, introduce a level of complexity that is much higher than the simplicity and freedom of choice implied in the formalization of rights at a lower level. Benefits that flow to a group as a result of newly formalized property rights bring with them responsibilities for citizens, members of groups and the institutions that represent them. These require new rules to be developed or for existing rules to be maintained by institutions that have local legitimacy and are legally recognized. In some contexts, it might require the forging of new institutions that can guarantee that benefits do not serve to increase marginalization and internal conflict or create new elites at a local level. This involves risks and costs and can take a long time.

New challenges to implementation

Land demand and concentration

The major challenge to implementation of the community and local farmer dimensions of the Land Law is the rising demand for land resources, especially those areas with good soil, or those close to markets, good roads or coastlines where world-class beachfronts are available to investors at very little real cost. There are real signs of land concentration in many areas, with the majority of land *area* allocated to relatively few new DUATs.

New projects are not preceded by delimitations or any other exercise to determine what land is already covered by customarily acquired and good faith DUATs, and the cadastral services focus solely on the community consultation as a device to secure a new DUAT for the investor. Consultations do not promote a process of partnership in which both sides gain and the poor can use the capital value of their land to begin to rise out of poverty. Local DUATs remain unregistered and invisible, and vulnerable to "capture".

Mozambique is thus facing "a European style enclosure movement", in which "many counteracting forces … are taking the Land Law and using its more progressive aspects to justify and give a veneer of credibility to … the occupation and fencing off of local land, and brings very few real benefits to the communities who are ceding their rights over very large areas".

Make consultations work

Consultations are an important formalization process in their own right, resulting in clear recognition of local rights and documents detailing agreements between local people and outsiders. They need to be carried out properly, ensuring that all members of local communities participate in some way, and that the agreements reached do indeed bring benefits to local people.

The need to educate

Access to information is a critical for ensuring that services from a state to its citizens are delivered and standards met. When it comes to rights and entitlements, information is a *sine qua non* since a right loses its force completely if the rights holder does not know that it exists. People need to know what their entitlements are in order to claim them.

Bureaucratic actors not only participate in constructing systems of rights and entitlements but can also impede the implementation of rights. A 2004 conflict study by the CFJJ also revealed that, although there is a basic awareness of the rights attributed by the land and other natural resources laws, local people still lack a real understanding of what these mean in terms of their relationship to the state and other powerful groups who seek to occupy their land.

Serious efforts are needed to raise awareness of rights, but more than that, to teach people how to use them in practice. In the absence of registration, effective use is another road to formalization.

Access to justice

Communities also need to know how to defend their rights, and how to ensure that agreements made with investors and the state are respected. In this context, the question of access to justice comes to the fore. Most local communities have some knowledge of rights, but little or no idea of how to defend them using the judicial and other options that are legally open to them. The 2004 conflict research conducted by the CFJJ revealed that the judiciary rarely intervenes and virtually no one knows how to use it anyway.

Grievances are first aired with local administrators and the cadastral service, but these agencies are often part of the problem and are unable or unwilling to intervene objectively on the side of injured local parties. Cases then pass up public administrative steps to the provincial governor, as political power is still seen as the location of all decision making.

Even with better access to judicial systems, the courts and public prosecution services are spread thin and are often a great distance away from the community itself. Only a small proportion of the 127 districts in Mozambique have resident judges and public prosecutors. Mozambique does however have a range of laws guaranteeing the right to petition and to protest, and legislative proposals for "popular action". Citizens aware of these options can exercise their rights more effectively.

Serious institutional reform and re-training

The land administration requires serious reform including attitude changes and sustained capacity building to bring it into line with the 1997 Land Law. "Formalization" in this case means recognizing the relevance and legitimacy of customary land management, accepting and applying available instruments such as delimitation, and investment in appropriate surveying equipment, vehicles and fuel budgets. This will not only bring services closer to the majority of land occupiers and users, it will break the dependence of public servants on "clients" who are able to pay these costs, and level the playing field *viz a viz* communities who cannot.

Conclusions

The law gives significant protection to local people who have rights by occupation, either customary or good faith. The non-registration provision also protects their rights if, for one reason or another, local people cannot or fail to register them. The fact is that in a new world of land pressure, rapid economic growth and government fast-tracking of private investment, DUATs acquired by occupation – which are the vast majority certainly for the rural poor – remain invisible on the maps and vulnerable to expropriation and "capture". There is a growing need to formalize and register them as part of a broader push to integrate secure tenure within more participatory local development models.

The new resource tenure frameworks developed in the last few years are not being introduced and implemented within an historical and social vacuum. Most rural populations still have low levels of trust in the authorities and may not be willing to take risks or incur the costs of taking new institutional opportunities.

The government land administration and state authorities remain largely managed and staffed by administrative and technical cadre. They have been trained in top-down management processes, and still feel more comfortable with the old rules and in the old uniform of command and control.

Formalization, therefore, must consider more than just the mapping and registration of land rights. It requires a careful process of civic education, community capacity building and, perhaps most importantly, showing things working in practice – real results and benefits accruing to local people. These issues of trust are of critical importance, given that administrative discretion remains a key element in the implementation of land legislation and that the main methods of delivery are through government sector agencies and actors.

The Mozambique cases demonstrate how important elements of formalization can come about through the creation of "appropriates space[s] where legitimate claims [can] be acknowledged". However, Mozambique also shows the importance of having the right policy and legal framework in place, especially if it is the result of a broad consultative and participatory process that gives it legitimacy and support in wider society.

The framework then provides an "appropriate space" within which claims can be acknowledged and pursued. The formal and legal *redefinition* of rights and status – i.e. negotiated changes to the framework – may come later through using these opportunities and appropriate spaces to test the Land Law implementation in practice and develop any changes empirically.

The process begins with an open and participatory policy and legislative process, leading to an imaginative law with a high level of legitimacy that allows many flexible routes to formalization. It is followed by the use of this philosophical and legal space (by NGOs, communities, local people and their private sector partners) to pursue new economic initiatives that, in themselves, bring about formalization and create the space for the more conventional rights registration. This happens as a result of the other activities, not as a condition for them to happen.

Nevertheless, this process is taking place within a context of rising demand for land, enclosures, and signs of land concentration in which local rights in many places are not being used "imaginatively". Far more efforts and resources are needed to get invisible legal rights into official maps and records. Our argument does not disguise this need. Rather, it underlines the fact that registration is just part of a broader package of formalizing measures and strategies that can secure tenure for the poor and promote the equitable process of land occupation and use foreseen in the original 1995 Land Policy.

1 INTRODUCTION

All land in Mozambique was nationalized at Independence in 1975 under a basically socialist Constitution. Those who wished could convert their freehold rights into a *direito de uso e aproveitamento da terra* (DUAT) through which the state grants rights for land use and benefits. This post-Independence DUAT was more a reflection of the principle that land belongs to he (or she) who works it, than a recognition of some private hold over land.

Colonial land users abandoned their farms, larger estates became state farms, and a cooperative and villagization programme was introduced. Many of those who had supported the struggle for independence felt dispossessed by the new government although their deep ties to the land persisted (Tanner, 1993). State farms slowly failed, while the rural economy was systematically brought to its knees by a bitter civil war that began after Independence and lasted until 1992.

The story since has been an emergence of private agriculture, the disposal of state assets to private operators, successful macro-economic reforms, high rates of economic growth, and the formal rehabilitation and restoration of community authorities (including traditional leaders) within a serious but carefully controlled decentralization programme (Tanner, 2002; CTC, 2003; Kyed and Burr, 2006).

The underlying principle of property as land vested in the state has remained throughout. Despite embracing multiparty politics, freedom of expression and other basic pillars of a liberal market economy, the 1990 Constitution was unequivocal in stating that the right of ownership is vested in the state and that no land may be sold, mortgaged or otherwise encumbered or alienated.[1]

In spite of these upheavals, local traditional structures and land management systems remained intact. Their continuing role as the *de facto* land management system of Mozambique has been well documented (Carilho, 1994; FAO, 1994a/b; Myers, *et al*., 1993a/b; Tanner, 1993). The 1995 National Land Policy and the subsequent 1997 Land Law[2] signalled the formal recognition of customary land systems and the rights they attribute to rural people (Tanner, 2002).

Customary and good faith occupation are still the main ways in which the rural poor get land rights (TIA, 2005). Under the 1997 Land Law, these rights are legally recognized as equivalent to a state DUAT. However, recognizing rights is one thing; protecting them in practice is another.

In spite of enjoying strong legal protection and political assurance that access to land is a basic condition for poverty reduction,[3] local rights remain vulnerable to surging demand for land from investors. Indeed in areas of high demand, classical enclosure processes are underway, especially in fertile areas or where there is high tourism potential (Tanner, 2007a).

This indicates that DUATs acquired through customary occupation by the rural majority must be made visible and real through forms of formalization other than their legal recognition. This paper looks at how this is happening in Mozambique, and if the measures discussed can help the 1997 Land Law reach its full potential.

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1 Article 46 (i) and (ii) [Constitution]

2 Law 19/97 of 1 October (Land Law) [Boletim da República (BR) № 40 - 3rd Supp., Series I – 7 October 1997].

3 *Plano para o Alivio da Pobreza Absoluta* (PARPA), Mozambique's poverty reduction strategy, is now in its second phase.

1.1 Current policy and legal framework of land tenure rights

The state ownership of land was reasserted in the new 2004 Constitution, and indeed some argue that subtle changes in the text have made this principle, and the restrictions on the sale and mortgaging of land, even stronger (Calengo, 2005). However, the 2004 revision did not radically change the foundations of the 1997 Land Law. It "maintains the same principles and matrices laid out by the 1990 Constitution" (Calengo, 2005). Thus the use and enjoyment of land shall be the right of all the Mozambican people[4], while the state retains the right to determine how citizens may exercise this right.

The 1995 National Land Policy, still in force today, started from the basic premise that land belongs to the state. However it also responded to the newly emergent market economy. Thus it "assures the rights of the Mozambican people over land and natural resources [and] promotes new investment" through a mix of post-independence socialist ideology, market principles and concerns for social equity and sustainable use. Its major feat, later incorporated into the 1997 law, was recognizing the legitimacy of customary land management systems whereby all local or customarily acquired land rights are *equivalent to the state DUAT.* The policy underlines the need to provide investors with guaranteed secure rights. The investment process is not without conditions however: it must be *sustainable* and *equitable.* Furthermore, the land rights of men and women are equal (National Land Policy in Serra, 2004).

The subsequent legal framework provided by the Constitution and 1997 Land Law contains several innovative approaches to securing property rights. These include:

- establishing a single land tenure right, the DUAT, which applies to both customary and newly requested land occupation and use;
- recognizing DUATs obtained through customary and good faith land occupation (thus formalizing customary rights by law);
- providing secure rights for investors through a renewable 50-year state leasehold;
- requiring investors to consult with local people to determine if the land they want is occupied and, if so, establishing through the consultation (*consulta)* the conditions for the investor to take over the community's DUAT;
- formalizing participation of local people in land and natural resources management (as in the consultation process above);
- maintaining a flexible approach to approving and spatially defining DUATs acquired through customary and good faith occupation.

It is critical to note here that DUATs obtained through customary and good faith land occupation are recognized and protected by law – they do not have to be registered. The drafters recognized that local people had neither know-how nor resources to handle a registration process. They also knew that public land services were (and still are) unable to manage the workload of registering thousands of newly recognized customary land rights. Mandatory registration would simply cause most holders of customary DUATs to lose their newly legalized rights.

These admirable principles and the consultation mechanism should protect local rights, guarantee local livelihoods and generate new resources for local development when investors negotiate with communities over their land rights. However, implementing this progressive and optimistic model has not been easy. With a rural economy starved of credit, powerful voices are

[4] Article 46 (iii), Constitution

arguing that land privatization would generate credit for investment and growth. Still, government statements continue to indicate quite clearly that privatization is *not* on the agenda because of concerns that privatization would lead to the massive displacement of rural poor by stronger economic groups.[5]

It is unwise to read too much into this apparent altruism on the part of policy-makers. For Mozambican investors, the *status quo* makes sense. They can still gain access to land without needing large amounts of capital, and they can compete for land rights with stronger international groups. Once they have secured their DUATs, the privatization bandwagon is likely to roll again.

Already, subtle changes in the 2004 Constitution have weakened safeguards for equity in land access and use. The 1990 Constitutional stipulation that "no DUAT can favour economic domination … to the detriment of the majority of citizens" was removed in 2004. This and the addition of "economic ends" as a reason for holding a DUAT (the 1990 Constitution talks only of "social ends") opens the way for future Land Law revisions to be unimpeded by awkward Constitutional principles.

For customary and good faith DUAT holders, the exemption from registration is important. They lack the means and know-how to undertake this more formal step. However, it is now ten years on from the 1997 Land Law, Mozambique has a more mature market economy with its stage being set for an eventual shift to privatization. If this is the case, leaving customarily acquired rights unregistered becomes a high risk option for the rural poor who may want to expand and modernize their own farms or use their land rights as bargaining tools to secure new livelihoods opportunities (Tanner and Baleira, 2006).

2 THE NATURE OF LAND RIGHTS

In this section, we examine the concept of state ownership of the root title to land and the forms of user rights that are recognized and protected in law.

2.1 The state land use and benefit right

The DUAT under the 1997 Land Law differs markedly from earlier legislation, insofar as it provides a private and exclusive right, inheritable and, subject to state approval, transmittable between third parties. However, it remains subsidiary to the state's ownership of land. The right of the state remains paramount, manifest through its control and regulation of rights acquisition by non-occupants, transmission and other forms of rights alienation (Garvey, 2001). Nevertheless in practice, the DUAT is treated as if it were akin to freehold, especially by many new title holders – once you have it, the land is "yours".

In reality, the DUAT is a form of state leasehold, subject to conditions based upon how it is acquired. If these conditions are met, the DUAT provides tenure security and enough time for an investor to expect a good return on capital. It also provides local people with the legal security they need.

Although they cannot be bought, sold or mortgaged, DUATs can be transferred between third parties. The Constitution recognizes private property and that improvements and constructions on land are the private assets of the person or firm holding the DUAT. These assets can be

[5] *Noticias, 29/0506:* Citing President Armando Guebuza at opening of VI Private Sector Conference, Maputo, May 2006.

bought and sold with the original DUAT transferred by the state to the new asset owner, at his or her request. While selling land is technically illegal, placing a value on a rudimentary hut or trees provides a fungible legal backdrop to an unregulated but increasingly vigorous land market. However, the lack of an open market keeps real prices down, and obtaining a new DUAT[6] involves very low real costs, especially for land in areas of high demand.

The law provides three ways to prove the existence of a DUAT:

- presentation of the title document that is received when a DUAT is registered;
- oral evidence provided by local community members (a major achievement of the 1997 law, as most local rights have no accompanying documents); or
- other technical means permitted by law (*peritagem).*

The acquisition and transfer of use rights were addressed in the 1998 Rural Land Law Regulations.[7] The 2000 Technical Annex to the Land Law Regulations[8] dealt with identifying and recording the rights of local communities and good faith occupants (discussed in section 4.3.2). At this point, however, it is useful to look in more detail at each of the three routes through which land rights are obtained.

2.2 Acquiring land use rights

Article 12 of the Land Law sets out three routes in which a DUAT may be acquired:

A. DUAT acquired by traditional occupation – the occupation of land by individual persons and by local communities, in accordance with customary norms and practices, so long as these do not contradict the Constitution;
B. DUAT acquired by occupation – the occupation of land by individual national persons who have been using the land in good faith for at least ten years;
C. DUAT acquired by award – the authorization of an application submitted by an individual or corporate person.

Thus, DUAT rights are either acquired through the recognition of long-standing occupancy rights (A and B) or awarded on a concessionary basis through a form of long leasehold (C). In either case, the resulting DUAT is exactly the same.

2.2.1 *Routes A and B – Rights acquired through occupation*

The Land Law recognizes DUATs as rights acquired through the occupation of land by two categories of people: A) those occupying land according to customary norms and practices, either as individuals or as part of a group and B) those who openly occupy land in good faith for at least 10 years. As with all DUATs, these are ultimately subject to state discretionary control. However, these rights are private and allow holders to exclude third parties. They are deemed mainly for personal and subsistence use and are, therefore, held in perpetuity and exempt from taxes and other administrative fees (unlike the (C) or awarded DUATs, explained further in section 2.2.2).

[6] at the request of the owner of the fixed assets on the land plot

[7] Decree 66/98 of 8 December (Rural Land Law Regulations) [Boletim da República (BR) № 48 - Supp., Series I – 8 December 1998]

[8] Ministerial Diploma № 29-A/2000 signed 7 December 1999 (Land Law Regulations -Technical Annex for the Demarcation of Land Use and Benefit Areas) [Boletim da República (BR) № 11, Series I – 17 March 2000]

DUATs acquired by occupation also are inheritable and can be transmitted indirectly to third parties through the investor-community consultation process. If a community agrees to give up its rights, the DUAT is effectively taken back by the state and reallocated to the investor. Thus communities and local smallholders have legally secure and lasting tenure rights although, as with other DUAT holders, their freedom to transmit their rights directly – definitively or temporarily – is subject to varying levels of state discretion and intervention.

Customary tenure systems still account for 90 percent of land tenure rights and the vast majority of everyday transactions involving ordinary rural people. Mozambique's numerous customary tenure regimes differ markedly from location to location and are shaped by factors such as population density, kinship organization, inheritance patterns (matrilineal or patrilineal), land quality, markets and historical experience.

The policy-makers responsible for developing the Land Law searched for a legal and flexible means to identify rights acquired through customary occupation that would not require them to codify all of the systems.[9] The other innovation was recognizing a "local community" as a DUAT holder in its own right, with community rights acquired by customary occupation allocated and managed by the community's customary structures (section 4.3.1 explains in more detail). In this way, the law recognizes and protects customary rights held both collectively and individually by widely varying community groups and members.

Thus, a local community holds a single DUAT and acquires a legal personality through its title. This means local communities can enter into contracts and open bank accounts in their own names. This principle is not accepted by everyone, especially banks, and is still a point of debate and even confusion when it actually comes to implementing and *using* this DUAT.

The law also stipulates that DUATs held collectively should be managed according to principles of co-title,[10] meaning that all members of the group have an equal voice and must participate in decisions over their common assets. However, most important is the provision that DUATs acquired through occupation do not have to be registered. This means that unless they are surveyed in some way and their borders put on a map, they remain invisible to outsiders, including land administrators who help investors find land.

2.2.2 *Route C – New DUATs awarded by the state*

A new DUAT can be acquired by applying to the relevant authority. This authority can be a municipality or the provincial or national government, depending on the location and extent of the land in question. The request must include a development plan approved by the relevant line ministry. Initially, the authority awards a provisional DUAT that only becomes definitive once the plan is implemented and land taxes are up to date. A DUAT can be revoked either on grounds of public interest, in which case compensation must be paid, or if the holders have not paid taxes or abused their rights in some way.

Definitive DUATs have a 50-year limit, renewable for a further 50 years. No one has yet reached this stage, so it is impossible to say how this works in practice. Non-Mozambican citizens are only allowed this type of DUAT. They must implement their development plans within a two-year provisional period while nationals are allowed five years.

The state retains discretion in awarding new DUATs, which are also subject to a legally required community consultation process (explained in detail in section 4.1). This discretionary power is

[9] For further information see Tanner (2000) and Quadros (2002).
[10] Co-title is defined by a section of the Civil Code referred to in the Land Law Regulations.

especially critical when private assets are transferred and a new DUAT requested because it is always possible that the state may *not* agree to DUAT transfer. Nevertheless, set against the legal guarantees of the Land Law and assuming recourse to an effective judicial system, these provisions provide investors with a relatively secure basis to secure a return on capital.

All awarded DUATs must be registered through a process defined by the Land Law Regulations. They are subject to rigorous surveying and boundary-marking rules defined by the Land Administration. This titling process (*titulação)* results in a title document (*título*).

3 PUBLIC LAND ADMINISTRATION AND REGISTRATION

Overall responsibility for land administration lies with the National Directorate of Land and Forests (DINATEF) of the Ministry of Agriculture. DUAT documents are issued by the general (rural) or urban (municipal) cadastre services.[11] For rural land, the main operational level is the Provincial Service of Geography and Cadastre (SPGC).

The Land Law legally requires the National Land Cadastre to operate as a multilayered cadastre for integrating information on the use of land and related resources rather than a mere repository of land access information. Thus far, this has not happened. At this point, the Cadastre's main function is maintaining information on land occupation and use rights.

Despite recent reforms,[12] public land services need a major overhaul. Most staff left at independence. Over the next decade, the cadastral services relied on expertise from socialist countries. These experts left suddenly in 1991 when the Soviet system collapsed and, by 1996, the staff had decreased from 477 to 326. In 1998, one province had just eight staff members handling cadastral services, none with high-level training (Fourie, 2003).

In addition, the profession has long been a male preserve. A gender programme was initiated in 1996 and by 1998, 40 percent of students at the Technical-Professional School of Geodesy and Cartography (TPSGC) were women. By 2000, 32 percent of all staff members were women although this dropped to 13 percent at professional and management levels and 15 percent at provincial and district levels.

After a decade of capacity building, fewer than 20 public- and private sector professional surveyors have university degrees, and they are heavily influenced by conventional surveying and registration approaches after training in foreign universities and institutes. TPSGC, the only national training facility, provides basic cadastre and land administration training, supplying technicians for SPGC offices, municipalities and other organizations. All offices lack transport, communication and basic materials – even fuel – for providing adequate cadastral services down to local level.

3.1 The registration of real property rights

Full registration of DUATs in Mozambique requires both cadastral title registry, through the Ministry of Agriculture, and property registration, through the Ministry of Justice. The law states that the constitution, extension, modification, transfers and termination of the DUAT are subject to legal registration which, according to modifications to the initial Land Law

[11] Article 13 [Land Law]

[12] Previous National Directorate of Geography and Cadastre (DINAGECA) merged with the National Directorate of Forestry and Wildlife to form DINATEF.

Regulations,[13] is now the responsibility of the Public Property Registry (*Conservatórias do Registo Predial*).

The *Registo Predial* essentially guarantees land rights by making them public, i.e. recognized by the state, and protects land rights holders against claims by third parties. In essence, this registration guarantees the i) authenticity, ii) security and iii) efficacy of all legal acts related to a piece of land, including willing transactions between parties (*inter vivos*) or those resulting from death and inheritance (*causa mortis*) (Garvey, 2001).

Although this registration is available, it remains voluntary, i.e. it is not compulsory under the amended regulations. In the case of DUATs held by occupation, the lack of legal registration does not affect the enforceability of the occupancy right.

However, it still is important to register in the *Registo Predial*. Although the DUAT holder cannot own the land, he or she can own any fixed assets on that land such as houses, buildings, infrastructure, trees or other improvements. No matter how they are acquired, DUATs are recognized by Mozambican law as real rights to a plot of land, urban or rural, and they are transmissible as part of transactions involving the fixed assets upon the land in question.[14] However, for these real rights to be recognized and, thus, transactable, they must be registered in the *Registo Predial*. This has important implications from the perspective of the formalization of rights.

- DUATs by award – cadastral registration and mapping are not sufficient evidence of state lease rights if someone else goes to court with a title for the same land that has been legally registered in the *Registo*.
- DUATS by occupation – a registered customary right is not any stronger legally than an unregistered one.
- Any DUAT – cadastral registration does not provide sufficient documentary evidence to allow these rights to be transactable. Legally, transactions require a notarized process (*escritura publica*) which is only possible in respect of registered legal instruments.

3.2 Implications for rural land occupiers

The Cadastral Department of DINATEF and the SPGC maintain the same basic structure they had when they served the needs of colonial interests who wanted to occupy – and register – land belonging to indigenous groups. It fact, it still mainly serves a similarly restricted, urban-based and elite group, whose needs are very much the same.

In theory, as the repository of data on land access and use, the cadastre should contain information regarding all DUATs within the national territory, be they acquired by customary occupation or state award. Yet, as shown, although new DUATs by award have to be demarcated and registered, registration is not mandatory for rights acquired through customary or good faith occupation.

Ironically, it seems that one consequence of this important decision in favour of local people is that the state land administration considered itself relieved of the obligation to engage actively in the community rights context, avoiding the necessity of assembling a huge staff of land professionals – surveyors, property conveyancers, government land officers – to oversee registrations.

[13] Decree of the Council of Ministers 01/2003 from 18 February, 2003

[14] There are important differences in the way in which estates in land (*prédios rústicos)* and estates in tenement (*prédios urbanos*) are treated.

Thus, although the 1995 Land Policy called for a reformed institutional framework, the already weak cadastral services were able to carry on without improving their technical surveying approaches that would have been ill suited to the challenges of the Land Law (Fourie, *et al.*, 1996). DINATEF and its provincial-level services still focused on the needs of a very small minority of land users, those getting DUATs through award.

The result is that the official public database on land use and access is woefully incomplete. It basically only contains information on DUATs acquired by investors and others formally requesting them of the state. The previous national director admitted this serious shortfall in a national workshop in 2005.[15] DINATEF is now paying more attention to the community dimension of the Land Law.

Meanwhile, in a new context of land pressure, rapid economic growth and government fast-tracking of private investment, DUATs acquired by occupation – those of the vast majority of the rural poor – remain invisible on the maps and vulnerable to expropriation and "capture". Moreover, even if they do have their DUATs delimited and a certificate in their possession, local communities and individuals with rights by occupation are not totally secure. They cannot enter into contracts or use their rights to help secure bank credit and other forms of partnership with third parties if they are not in the *Registo Predial*. Yet, if they have difficulty getting cadastral registration, imagine the challenge of securing legal registration in the *Registo,* which only exists in the capital cities of some provinces.

4 FORMALIZING DUATs BY OCCUPATION: PARTICIPATION AND REGISTRATION

The 1997 Land Law created a fundamental and far-reaching process for the formal recognition of customarily acquired rights. Rights that were previously informal, and thus insecure, were formalized by a simple change in perspective regarding their legitimacy and relevance. Even though they may not have the *título* document that awarded-DUAT holders have, local people with customary rights still have title by law and are *titulares* equal to registered title holders.

However, these rights are still vulnerable and exposed because market forces and other provisions of the law for awarded DUATs operate more forcefully. In other words, they need stronger forms of protection, such as surveying and registration, although these are not the only or most practical options. There are other ways to formalize rights in Mozambique, such as the legally mandated role of a local community in administering land and use rights within its own area, and in awarding and allocating new state DUATs. In addition, in the case of customary or informally administered rights that are largely invisible to formal systems of rights registration, there is the challenge of finding ways, *when necessary,* to formally record and register DUATs acquired by occupation.

In the following section we examine the formalization framework for these different perspectives and describe how various strategies have been adopted (or not) to meet the challenges they present.

4.1 Local-level consultations and bargaining power

The Land Law requirement that potential investors engage in consultation with the local community should ensure that local rights are not ignored and "captured" by investors or others. Anyone requesting a new DUAT must present a statement from the local district administrator that the land is unoccupied. This is preceded by a community consultation in which local people

[15] The National Meeting on District Decentralization and Land-use Planning

are told of the intended project and have the opportunity to say if they have any interest over the land. In nearly all cases they do, and the consultation must then establish the terms of a partnership between the community and investor as the basis for the former, in effect, ceding its rights to the latter.

A study commissioned by the FAO Livelihoods Support Programme looked at how this works in practice. The study underlines several points about a correct consultation process:

- Define the occupation – The definition of "occupation" used in the consultation should be based on the legal definition. Local communities need to know they have rights acquired through occupation over very large areas, even if they are not currently being used or physically occupied.
- Develop a partnership – The agreement for a "partnership" should be reached through a true negotiation process to determine how one party can gain access to land that is legally occupied by another. Partnership is not a simple "no objection" hurdle to be jumped by a new land claimant on the way to gaining a new land right.
- Reach a consensus – The "consensus of community opinion" is not legally binding although in a *de facto* sense it is because the community members must base their decisions on a clear understanding of what their real rights are and what their decisions mean for the future (Tanner and Baleira, 2006).

A well carried out consultation ensures that local DUATs are not ignored and can result in local people getting real benefits from the "partnership" if they cede their DUAT. However, most consultations are poorly carried out and often fail to forestall what is essentially unlawful occupation of someone else's land (Norfolk and Soberano, 2000b). On the other hand, they can produce real economic benefits that can maintain livelihoods or alleviate the poverty of beneficiaries (Tanner and Baleira, 2006).

The problem is that neither communities nor cadastral agents understand or apply the *legal* definition of occupation. As a result, the consultation discussion focuses on land actually in use, instead of the far more extensive rights allowed for and recognized by law. The concept of "empty land" still often guides surveying teams, and local people do not know that they can defend their rights to land that is not in use or to common resources such as forests.

Since fast-tracking investment is the key objective for government, most investors and civil servants do not see consultation as a means of protecting local rights. Instead they see it as one of several administrative steps for securing a new DUAT. The fact that a Ministry of Agriculture directive states that all new DUATs should be processed and approved within 90 days has a major influence on how consultations are done (Tanner and Baleira, 2006). Although this 90-day limit is not part of the Land Law, it puts great pressure on cadastral teams to do consultations quickly and secure a community "no objection", without which a new DUAT cannot be awarded.

Even if negotiations take place, agreements are rarely respected. The area agreed is often enlarged when actually laid out on the terrain or registered, and promises of jobs, shops, wells, schools, etc., used by investors to convince locals to sign are not kept. Minutes of meetings are imprecise and therefore useless as documentary evidence if *either side* accuses the other of non-compliance.

Nevertheless, *all* new DUAT requests *are* accompanied by a consultation. Whether the *consulta* is well executed or not, local rights are on the agenda and investors must take note of them. This alone is a huge step forward and is a major part of the formalization process.

4.2 Local community participation in land and natural resource management

Article 24 of the Land Law specifies that local communities must participate in natural resource management and the allocation and titling of new DUATs. They do this through the consultation process, and by using customary norms and practices as an integral part of the formal natural resources management system, including conflict resolution and defining the limits of their own DUATs. In other words, communities are formally recognized actors within the institutional environment.

How this engagement takes place is extremely important. In particular, the ways in which the interests of a local community are defined and represented to the state become critical. Article 30 of the Land Law recognizes that other legislation should clarify who represents the local communities and how they should participate in relation to the DUAT. Recent decrees linked to the decentralization programme are seen by some as responding to this need. Decree 15/2000[16] and its later regulatory diploma[17] recognize community authorities as "people who exercise a specific form of authority over a specific community or social group." It also identifies several "areas of articulation" between these individuals and state entities, such as on the "use and benefit of land." However, there can be incompatibilities and conflicts of interest because these community authorities have other obligations[18] such as:

- disseminating government laws and policies among community members;
- collaborating with the government to keep peace and fight crime, specifically the illegal exploitation of natural resources;
- mobilizing and organizing communities for local development activities such as building and maintaining water supply infrastructure, education and health facilities, cemeteries, roads, latrines, agricultural markets and fairs;
- participating in the civic education of community members about sustainable natural resource management, premature weddings, etc.;
- mobilizing and organizing people for tax payment.

These are public roles in which community authorities act as the public representatives of a particular constituency. Although they may have some role in land use issues, these "authorities" do not necessarily represent the group of private individuals who collectively hold a local-community DUAT.

A DFID report prepared by CTC, a British consulting firm, notes that this confusion leads to incorrect practice, endowing individuals in communities with tasks not given them by the Land Law. "The Land Law is clear [that] the community is a private rights holding entity. … For issues relating to the use and allocation of DUATs, co-title holders, not "local authorities", must represent the "Land Law" local community. … Where Article 4 of Decree 15/2000 refers to the "use and benefit of land" as an "area of articulation" … [this is] the public face of the customary land management system" (CTC, 2003).

The CTC report also points out that Decree 15/2000 does not mention Article 30 of the 1997 Land Law and is not an adequate response. However, the land administration has determined

[16] Decree 15/2000 of 20 June (Local Community – Forms of Participation in Public Administration) [Boletim da República (BR) № 24- Supp., Series I – 20 June 2000]

[17] Ministry of State Administration Diploma 107-A/2000 of 25 August (Regulations of Decree 15/2000 – Local Community-Forms of Participation in Public Administration) [Boletim da República (BR) № 34- Supp., Series I – 25 August 2000]

[18] In turn, they are granted specific privileges as official representatives of their communities including the right to retain a fixed percentage of the taxes they collect, specifically of the National Reconstruction Tax levied on a per capita basis on all adults.

that a meeting with these local authorities can be treated as a community consultation and is sufficient for securing a community "no objection" to a request for a new DUAT (CTC, 2003). The negative impact of these assumptions is well documented (Afonso, *et al*., 2004; Norfolk and Cau, 2001; Tanner and Baleira, 2006).

4.3 Surveying and registering

The search for an efficient and affordable way to formalize local land rights has long been a concern. Before the 1997 Land Law, there were two approaches: i) the state land administration favoured surveying individual family-sector plots (*machambas*) and issuing individual title documents, while ii) NGOs favoured forming farmers into associations with legal status (*personalidade jurídica*) and requesting land use titles in the name of the association, thus giving an umbrella of legal protection to the rights of association members.

The NGO approach was painfully slow and expensive, requiring two time-consuming steps: setting up and legalizing the association followed by surveying and registering all the *machambas* of its members. Field evidence showed that this approach did not work, with only one or two associations a year getting past the first stage (Fourie, 2003).

A Swedish technical assistance programme, implemented by Swedesurvey AB, used aerial photography as part of its effort to strengthen the capacity of the state to map and title customary rights and convert them into individual DUATs.[19] Aerial photographs identified plots that cadastral teams would then measure, register and issue title documents for. A pilot project was launched in two southern districts where land use is particularly intensive. However, a review of the pilot showed that after five years, just 69 titles had been registered out of 800 in process. The process was slow and costly, and constraints and problems had been significantly underestimated. The review also found titling on its own could not deliver the project objectives unless accompanied by an education and communication programme:

- those who acquired titles or participated in the titling programme either were unaware of what it meant to have a title or confused it with cards issued by former state farms that had allocated agricultural inputs;
- those receiving or applying for titles under the project had no information on how to register sales or inheritance transfers or subdivisions, and even having a title did not ensure efficient transactions (Nichols, *et al.*, 1997).

4.3.1 *The Land Commission solution – the local community*

The Mozambican Commission for the Revision of Land Legislation[20], supported by the FAO Technical Cooperation Programme, had assessed the NGO and public-sector pilot results and was well aware of these weaknesses. Moreover, other empirical work in Mozambique and other African countries showed that the idea of titling individual plots was at odds with prevailing production systems that use many types of resources and are highly dynamic, with shifting agriculture and common access to resources such as forests and pasture (Tanner, 1991; De Wit, *et al.*, 1995, 1996; De Wit, 1996).

The Land Commission, searching for a way around these problems, proposed a collective entity that could include a large number of small, often shifting, customarily acquired DUATs as well as common resources. This collective entity would manage these small local DUATs according

[19] The programme was implemented by Swedesurvey AB, through ASDI finance (US$4 million during five years, 1991 to 1996).

[20] Popularly known as the "Land Commission", which expression is used from now on.

to their own norms and practices (i.e. traditional land management system) and would, itself, be the title holder of a single, collectively managed state DUAT. The result would be a defined "local community" incorporating all of these elements in a wide-ranging although quite clear definition:

> *… a grouping of families and individuals, living in a circumscribed territorial area at the level of a locality or below, which has as its objective the safeguarding of common interests through the protection of areas of habitation, agricultural areas, whether cultivated or in fallow, forests, sites of socio-cultural importance, grazing lands, water sources and areas of expansion.*[21]

The Land Commission also accepted that the country simply did not have the resources to administer all land rights directly (CTC, 2003) and that communities were unaware of their rights and did not have the resources to respond to any legal obligation to register within a set period of time. For these reasons, the new law did not impose an obligation to register rights acquired by occupation.

Nevertheless, while the various provisions of the 1997 law significantly increased the tenure security of the vast majority of the rural population from a legal perspective, rights acquired through occupation remained informal in practice – they were undocumented and their precise extent was unknown. As indicated above, this strategy suited the priorities and realities of the time, but today Mozambique is a very different place. Pressure on land and the simmering debate on privatization underline the need for a more proactive registration of customary and good faith DUATs.

In fact, the 1995 Land Policy highlighted the importance of a Land Law that would, over time, "formalize the informal", principally in respect to land rights and holdings in the family sector.[22] The Land Law makes it clear that when necessary, local communities and individuals with rights acquired through customary and good faith occupation must prove their rights. While rights acquired by occupation enjoy clear legal protection, there is a strong, albeit implicit, legal imperative to formalize them and get them onto the national cadastre alongside the other, mainly private-investor-held DUATs.

4.3.2 *Delimitation - a new approach to formalizing acquired rights*

With a view to formalize the informal and respond to criticism that it was impossible to define a local community, a new participatory rapid rural appraisal approach to capturing these rights was developed through extensive field trials. The result was "delimitation", a flexible and participatory mechanism through which local communities, in effect, define themselves.
This self-definition approach is well suited to a country like Mozambique where numerous cultural and geographical contexts determine land occupation and use. Delimitation can be applied to traditional units based on clans or chieftainships, extended families or simply a group of neighbours (Tanner, 2002). The new methodology was confirmed in national meetings with a wide range of stakeholders and published in the 2000 Technical Annex to the Land Law Regulations.[23]

Delimitation achieves two major legal and practical objectives: i) it proves the *existence* of the DUAT by occupation and ii) it establishes the *spatial characteristics* of the DUAT including its limits and the presence of public and customary rights-of-way or of any other interests over the

[21] Article 1(1) [Land Law]
[22] Article 65 [Land Policy]
[23] This mechanism provides a good example of best practice for the challenging task of formalizing customarily acquired land-use rights, both in Mozambique and elsewhere in Africa.

land in question (Tanner, 2005). A map of the community DUAT with any other information, such as rights-of-way, is then registered in the Cadastral Atlas and a Certificate of Delimitation is issued in the name of the community.[24]

The rules and procedures for this process, essentially a form of participatory rural assessment designed to catalyse and facilitate a local community's self-definition, are the following.[25]

- A series of meetings is held with the community to explain the law and the processes involved, culminating in the election by the community of its representatives for the legal process of delimitation.[26]
- The district administrator is informed by interested parties and given background information on the reasons for the delimitation. An agreement is reached on division of the costs of the process,[27] that is signed off by at least the administrator (or representative) and the community representatives.[28]
- A participatory planning exercise compiles at least two maps of community land use and occupation and identifies limits with neighbouring communities. The community is broken down into subgroups, with men and women in separate groups. The maps they produce are combined into a single *cartograma* of the community land area and produced as official 1:50 000 topographic maps. A report containing the completed work is sent to the SPGC.[29]
- A sketch map and a descriptive memorandum[30] of the community-delimited land are prepared during fieldwork involving the community, neighbouring communities and a team that must contain a technician with basic knowledge of surveying.[31]
- Results of the delimitation process are presented at an obligatory meeting involving the community, district administrator or representative and neighbouring communities. This must include presentation of the sketch map and the descriptive memorandum.[32] A meeting report is prepared and must be signed by representatives of those present.[33]

After the meeting, the SPGC receives the documentation and verifies if the process is complete and within terms of the law.[34] If so, it records the delimited land area in the Atlas and the Register,[35] assigns a parcel number and, within 60 days, issues the certificate.[36]

The delimitation process is also open to individuals, either those from the customary realm who want to separate (*desmembramento*) their individual rights from a community-held DUAT or those who have acquired rights as a result of their good faith occupation of land.

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[24] The methodology within the Technical Annex also accommodates the existence of a diverse range of rights. Based on the flexible definition of the "local community", it provides a guideline and procedures for capturing the formal spatial picture of their acquired rights in any given cultural and geographical context.
[25] Article 7 [Technical Annex]
[26] Form 1 [ibid]
[27] Form 2 [ibid]
[28] Article 8(3) [ibid]
[29] Form 3 [ibid]
[30] Form 4 [ibid]
[31] Article 11(2) [ibid]
[32] Article 12(2) [ibid]
[33] Article 12(3), Form 5 [ibid]
[34] Article 13(1), Form 6 [ibid]
[35] Article 13(2) & (3) [ibid]
[36] Article 13(4) & (5) [ibid]. The Technical Annex and the Norms and Instructions of DINAGECA make no reference to governor authorization that seems to be required by article 35(d) of the land law regulations.

Individuals or business entities that apply to the state for allocation of use rights (awarded DUATs) follow a different process, referred to as "demarcation". Legally, a demarcated land right is equal to a delimited one. The Land Law is clear: there is only one right of use and benefit of land, whether acquired through occupation or through a new request to the state. Thus, whichever process is followed to define the special dimension of the rights and whichever document results, the underlying right is the same.

The Technical Annex specifies three contexts in which delimitation is necessary:

- if there are conflicts regarding land use or natural resources;
- if the state or others intend to establish new economic activities, projects or development plans;
- if the community requests it.

Thus, the legislation allows both the state and a community to invoke the registration mechanism. For the state, there must be a threat to peaceful development due to conflict over user rights, or a need to define and negotiate existing rights because of an intended development. For communities and other individuals, it is a case of perceived need, usually triggered when a cadastral team arrives with an investor looking for land. Recent research shows that this is usually too late (Afonso, *et al.*, 2004).

The Technical Annex also specifies that when registration is undertaken to establish new economic activities, the investor (or the state if it is a public project) should pay for the delimitation. To date, there have been no reports of this clause being invoked. There have been cases in which investors have voluntarily paid for delimitation to establish the boundaries of local rights before negotiating with local leaders over access to those rights. For example, a major forestry investor paid for delimitation in order to establish where local rights existed and then successfully negotiated access to large areas of land in Niassa Province.

Although costs vary according to the size of the community, terrain and weather, the average delimitation exercise costs US$4 000. Doing several delimitations at once in neighbouring communities would dramatically lower the cost.

4.3.3 *Progress on delimitation to date*

The 2003 CTC appraisal of land registration for DFID, (referred to in 4.2) found that 180 delimitations had been carried out but only 74 had received their formal Certificates of Delimitation. The cadastral services offered a range of spurious reasons for the hold up on this final step (CTC, 2003). Recent updates show that the total may have risen to some 185 cases with only 88 receiving their certificates. Table 1 shows the breakdown by province.

Table 1 *Delimitation of community land per province*

Province	Land delimited	Issued certificates	Issued land titles
Niassa	5	3	0
Cabo Delgado	11	0	0
Nampula	56	19	24
Zambézia	48	39	0
Tete	3	0	0
Manica	18	5	0
Sofala	17	5	0
Inhambane	5	0	0
Gaza	13	10	0
Maputo	9	7	0
Total	**185**	**88**	**24**

Source: Research Report 6, Land Registration in Nampula and Zambézia Provinces, Mozambique, IIED, May 2005 (updating of CTC, 2003)

The state has allocated few resources to delimitation and, apart from the Land Commission pilot delimitations and the flagship Community-Based Natural Resources Management Programme (CBNRM) of the previous Forestry Directorate, virtually all delimitations to date have been supported by NGOs funded by concerned donors (CTC, 2003). According to the CTC report, public resource allocations were inadequate from the beginning, with some US$50 000 allocated in 2001 and then the total declining in the period after the Technical Annex came into force (Table 2). To quote the report, "the total spent on community land delimitation over the three years covers the costs of some 20 exercises (using the relatively low average cost of US$4 000). Over the last two years the state made available funds for only four delimitations per year. Some provinces with major land conflicts (Sofala, Gaza, Maputo, Inhambane) have very limited resources available" (CTC, 2003). None of the funds were actually spent on state-subsidized delimitation processes.

Table 2 *Pubic sector resources to community land delimitation, Mozambique, 2001 – 2003*

	Resources for Community Land Registration (MTS 1000)			Resources for Community consultations (MTS 1000)		
Year	**2001**	**2002**	**2003**	**2001**	**2002**	**2003**
All provinces	1 148 820	449 900	412 669	281 036	513 980	167 020

Source: CTC, 2003, using data from the PROAGRI I agricultural sector programme

This is not a credible commitment to a core area of land law implementation by a government committed to securing land as part of its fight against absolute poverty. PROAGRI II[37] data are not available to the authors, but the current land administration programme does not suggest that much has changed in relation to funding delimitation and other community level work.[38]

4.4 "Opting out" by local individuals

The Land Law Regulations also contain explicit provisions for subdividing land held under community titles which, in effect, means conversion from community control over land to individual titles. This is important, in that it sets the framework for individual members of groups to define where they have individual tenure rights and provides a legal route for their formalization. It is in this realm, according to Article 15, that individual investment and capital accumulation can occur at local level.

Clause 1 of Article 15 further states:

> *The partitioning of community areas for the purpose of issuing individualised titles to individual members of such communities shall not be exempt from the consultation process and shall not affect areas of common use.*

The consultation process here simply requires ensuring that the individual or family requesting an individual title to a plot of land is really the occupier of the land. To that extent, the provision provides a reasonable method for protecting community interests from predatory behaviour by individual members of the community.

4.5 Land rights for women

The equality between men and women established by the Constitution is naturally extended to rights over land. However, the Land Law can be a double-edged sword. Most rural women get their rights through their relationships to male members of their communities, who are the decision makers and "owners" or custodians of lineage and family land. In the customary

[37] PROAGRI is Mozambique's National Programme for Agricultural Development, now in its second phase.
[38] Both authors participated in the recent annual meeting of the newly merged Land and Forest Directorate.

context these rights are always subject to (male managed) customary norms that weaken the control women have over the land they use. They are particularly at risk when discriminatory traditional practices prevail such as in the context of the HIV/AIDS pandemic (Seuane, 2005).

There are various ways in which women can defend these customarily acquired rights. First, the Land Law asserts in Article 12 that a DUAT can be acquired by customary norms and practices, "so long as they do not contradict the fundamental principles of the Constitution." The right acquired by customary occupation is also held by individuals within a local community who get their right through the prevailing customary system. These rights, nested within the overall community DUAT, are also equivalent to state DUATs. Thus if a woman gets a customary use right by, for example, marrying into a family, the right she obtains customarily is equal to a state DUAT and is subject to all the protection offered by law.

Similarly, Article 13 clearly asserts the principle of non-discrimination with regard to formal individual titles:

> *Individuals, men and women, who are members of a local community, can apply for individualised titles, after division of the respective community areas of land …*

The Law further states that proof of the right of use and benefit may be made through either written or oral statements, putting written (titles) and oral (testimonies) by men and women on an equal footing (Article 15).

Moreover, the internal management of a local community (meaning the title holder of the state DUAT for a collective of households linked by kinship, consumption and production) is governed by the rules of co-title as defined in the Mozambican Civil Code. Essentially this says that all co-titleholders (in this case all men and women) in a local community have an equal say over how the assets are used or disposed of.

Together these provisions offer considerable protection for women *viz a viz* the often discriminatory aspects of customary land administration. To date, however, there is no known case of a woman or women using these provisions to defend their rights, in spite of the growing evidence of abuse and injustice as HIV/AIDS impacts ever more deeply on rural social and economic relationships.

5 FORMALIZATION IN PRACTICE – THREE CASE STUDIES

This section presents three case studies that illustrate the practical application of the policies and instruments discussed above. All three depict community groups that have attempted to formalize their tenure. In all three, the formalization has been undertaken in the context of establishing a community-managed investment, either on the basis of their formalized tenure or through establishing partnership arrangements with private sector entities, involving the ceding of formalized resource rights as part of a negotiated agreement.

5.1 Canhane community

The Canhane community in southern Mozambique represents an important new model for community development, with roots in the successful formalization of its land rights title and the subsequent development of a community eco-tourism lodge venture.

Canhane, located on the southern edge of the Massingir Dam Lake, has a population of just more than 1 000 (212 families) living in three villages. On the other side of the lake, the new

Limpopo National Park is currently being integrated with the neighbouring Kruger Park to form the Limpopo Transfrontier Park. Canhane is not within the National Park boundaries[39] but its land is in a prime area for tourism development.

The current story began in the mid-1990s, when the Swiss NGO Helvetas identified the area's great potential for local development. Helvetas recognized that land in this region would be subject to high demand from investors making it essential to give greater practical protection to the community-held DUAT recognized by the Land Law. This process was explicitly linked to a proposal to build a community-owned and community-run eco-tourism lodge.

Funding for the first phase –land delimitation and basic lodge development – was secured from a USAID project supporting new economic initiatives in national park buffer zones. A Land Commission-FAO technical team was asked by the USAID project to train NGO and provincial public-sector staff in delimitation methodology, and supervise the delimitation process which resulted in a certificate being issued in the name of the community for an area of some 7 000 ha.[40]

The delimitation was completed in late 2002, and a certificate in the name of the Canhane Community was duly issued. The map and other details, such as rights-of-way and the presence of existing private investors, were recorded in the provincial cadastral service records. The delimitation process, conducted by Helvetas, also served as the basis for a land use plan that identified the area for the future lodge. During the next two years, the Canhane community was fully involved in the construction of its Covane Community Lodge. It opened for business in May 2004.

The lodge enterprise has required high levels of support from Helvetas, but has had considerable success both in terms of its occupancy rate and impact on the community. Its lodge turnover and gross profits rose from US$4 250 in its first six-month semester of operation to US$14 900 in its third semester (Calane, 2006). A 2006 FAO report to assess its food security impact shows that "the community is gaining a greater capacity to get involved with local institutions, and with the outside world, and to participate in the process of development now underway in the Massingir region." Although the overall performance is not yet commercially viable, the investment is justified by an array of positive impacts, including:

- creation of new employment opportunities;
- diversification of activities in a region very prone to drought and crop failure;
- improvement of social infrastructure thanks to income from the lodge invested by the community;
- establishment of community ownership of the lodge programme, with a community-elected committee running the lodge association;
- improvement of local capacity to assess needs and take planning decisions;
- improvement of market links through community-implemented road improvements;
- renewal of local commitment to education as the secret for its children accessing the new job opportunities opening up locally and in the new national park-driven economy.

The story continues with the community now engaged in selecting a private investor with whom to strike a partnership agreement. The local committee has shown maturity and shrewdness in recent discussions of tender proposals, resulting in an investor being chosen who will build a new 5-star lodge and chalets while using the present lodge as the core of a tented-camp and stopover

[39] This is fortunate because communities inside the park are being subjected to forced resettlement.

[40] The USAID project funded another delimitation process in the neighbouring community of Cubo at the same time. This community is supported by the African Wildlife Foundation (AWF) and the Rural Association for Mutual Support (ORAM), a Mozambican NGO.

facility. The community will receive annual payments and shares of turnover, plus commitments to employ and train local people.[41] Detailed contract negotiations are currently underway.

A key element in this process has been policy and legal support, provided to the working group by one of the authors as part of his work with the Centre for Legal and Judicial Training (CFJJ) of the Ministry of Justice, and a national lawyer specializing in land issues who has provided direct support to the community committee.

When the Covane Committee participated in a tender selection process, members exhibited an increased awareness and capacity as well as a positive attitude about new opportunities being presented. Throughout the selection process, the committee members were very clear about their desire to retain their land right: "that is not negotiable."[42] The formalization of this right was a fundamental step towards giving this sentiment real substance. It also secured their DUAT in a visible and tangible way that has already protected them from other investors seeking a new DUAT by award to build holiday houses by the lake. The delimitation process also created the first representative structure for managing land issues, around which the new community lodge association has been consolidated.

5.2 The Chipanje Chetu project

The Chipanje Chetu project in northern Niassa Province began in 1999. The area is rich in natural forest areas and wildlife but in 1999, there was an almost complete lack of control over timber exploitation and hunting (IUCN and OPORTUN, 2000).

Livelihoods in this sparsely populated area (less than 1 person per km^2) are based mainly on the use of natural resources, including hunting, fishing and collection of honey and other forest products. There is little agricultural potential due to poor soils and erratic rainfall.

In the late 1990s, Provincial Wildlife Services (SPFFB) began to coordinate with several NGOs (IUCN, WWF, OPORTUN and ACORD) that were trying to control the exploitation of wildlife and forest resources. Subsequent activities to make the local population aware of its new rights under the Land Law and forestry legislation led to the formal delimitation of the area in March 2003 and the issuing of a certificate to the community. The delimited area covered 6 000 km^2 with an estimated population of 2 570 or approximately 650 families, spread fairly evenly among the five villages of Nova Madeira, Matchedje, Lilumba, II Congresso and Maumbica.

The delimitation then evolved into the new project. With NGO help, a management structure was established and activities were implemented to increase local control over natural resources. These included disseminating information, establishing and training interest groups, and recruiting game guards from within the local community.

The most significant element of the project was an agreement among the project, a professional hunting operation and the provincial government. In the agreement, a portion of hunting fees would be shared with the community, the local government and the project itself. Thus several legitimate public and private local stakeholders would benefit and be able to support a stronger and relatively autonomous local development process.

[41] This process is supported by the African Safari Lodge programme, working with Helvetas, which has helped organize an open tender process, following a model that has been used with success in South Africa.

[42] Chris Tanner: personal observation at key selection process meetings.

The scheme began in 2001. Revenues accrued to the community groups and the project increased (see Table 3 and Table 4). However, in 2005, the provincial government decided to cancel the experimental licence for the hunting firm, effectively paralysing the project.

Table 3 *Allocation of hunting fee revenues in Chipanje Chetu*

Beneficiary	% allocation
Local communities (as represented by the village committees)	57%
Sanga District Administration	20%
Chipanje Chetu Project	23%

Table 4 *Revenues from hunting fees in Chipanje Chetu, 2001 - 2004 – approximate US$ values*

Beneficiary	2001	2002	2003	2004
Local communities	3 000	3 956	6 230	14 800
Sanga District Administration	1 050	1 390	2 185	5 190
Chipanje Chetu Project	1 210	1 600	2 512	5 970
Total	**5 260**	**6 946**	**10 927**	**25 960**

Source: Extrapolated from data in Mubai, *et al.,* 2006

The authorities argued that hunting activities were incompatible with the status of the land and prevented a continuation of the arrangement until the issue was resolved. There are indications, however, that powerful economic and political interests had a hand in the decision to suspend the project. The decision came at the same time as a separate application for rights over the area from another private sector hunting operation. This operation, apparently with close links to high level political figures, is said to have been conducting a local campaign against the existing private sector partners of the community. The result has been conflict between village-level committees and all the other actors, with different groups supporting the opposing interests (Mubai, *et al.,* 2006).

The population in Chipanje Chetu probably feels that its initial caution was justified when the NGOs that were helping had to back away. Financial difficulties forced ACORD and OPORTUN to leave in 2004, and IUCN withdrew amidst political tensions, as plans by elite interests to take over the hunting operations emerged. These withdrawals came at precisely the moment the community needed NGO lobbying and other support, leaving community institutions weakened and vulnerable to manipulation by elite interests (Mubai, *et al.*, 2006).

On September 15, 2006, the province announced a tender process in the *Jornal Noticias*, the national press, for an operator to take over activities in the area.[43] It is notable that the announcement makes specific reference to the land being a "community conservation area", but is obscure in relation to the community DUAT which was proven and registered through a formal delimitation. It also refers to community committees and the local Chipanje Chetu Programme Council as the entities to which the area has been attributed. It calls for the operator to show some "experience in the management of community areas in the region", and ensure some kind of partnership and benefit flow to local people. It is not clear whether the community has its own legal support (as in the Canhane case) or will be free to choose its partner and set its own terms. The fact that the provincial government is running the process would indicate that this is not the case. The latest news regarding the selection process indicates that the process is in fact being deeply manipulated.[44]

[43] *Jornal Noticias* is the main national daily newspaper. It is state owned and presents a mainly pro-government view but also critical reporting. It serves as the main "notice board" for government, NGO, international agency and private sector initiatives, including tender advertisements.

[44] Personal communication from Assane Juanga to Dr A. Kalengo.

Nonetheless, Chipanje Chetu has created the seeds of a stronger community organization and done much to educate people and make them more aware of their rights. Despite the setbacks, these seeds appear to be deeply planted. By their working together with other communities and contexts, hopefully this will one day contribute to a formalization process that is rooted not just in legal provisions and surveying processes, but in acquired experience and lessons learned.

5.3 Coutada 9

This case involves three local communities situated inside Coutada 9, an official hunting reserve. *Coutadas*, created by colonial legislation in the 1930s, are still recognized as official reserves under the jurisdiction of the Ministry of Tourism (MITUR). As areas of public domain, they are subject to restrictions with respect to land rights and activities that can be carried out within them. There is much discussion at the moment as to whether local people have rights within *coutadas*. The Land Law regulations state that DUATs "cannot be acquired in areas of partial protection" However, the question is whether *existing* customarily acquired DUATs are acceptable, or if other rights apart from DUATs must also be considered.

The reality is that long-term resident local populations live inside all conservation areas in Mozambique, and most can prove historical links with these areas.[45] The government and its favoured investors must find a way to deal with them that recognizes their inherent rights (long-term) and the *de facto* rights acquired by good faith occupation over many years.

The Coutada 9 investor is a safari hunting operation with Zimbabwean and Mozambican partners. The operator contracted with MITUR to restore the animal population, introduce good conservation practices and make the *Coutada* a viable economic activity generating revenues for the state. MITUR told them that local people should not be there, implying that they could be removed.

The operator found the area not only populated but also subject to serious, illegal hunting by the local people – illegal in the sense that hunting is against the law but for local people, it is part of their way of life. In this case, however, the Coutada 9 operator (unlike operators in other *coutadas*) did not try to move people out, but assessed the situation, recognized the long-standing rights of the communities (*regulados),* accepted that they had been there a long time and recognized that local people need to get something out of the resource base to support their livelihoods. The operator also realized that forcibly removing local people would result in violence and impasse (as it has elsewhere).

Relatively good relationships were established with local chiefs and a deal proposed. In exchange for giving up illegal hunting, the operator would share trophy fee revenues with the communities. The communities could keep all the meat from animals killed by the sports hunters brought in by the operators. The package also recognized that part of the *coutada* was already so heavily deforested and densely occupied that it should become a multi-use area, usable for agriculture, etc.

The revenue sharing was structured around a *de facto* zoning plan: a core area managed by the operator would be partially fenced and stocked with new animals purchased and brought in from Zimbabwe; a second area between this core and the multi-use area would be managed by

[45] The moral and historical issue of long standing rights in public domain areas or inside older colonial land entities of various kinds goes to the heart of the post-Independence state and its relationship with the people, many of whom supported the armed struggle to get land back from the colonists (*cololono).* When the State now reasserts hegemony over them, arguing that colonial laws and land units cannot be queried, communities feel confused and see this as another example of not being able to trust the state – any state – and its agendas.

the community, also as a hunting reserve. In the core area, the community would get 25 percent of trophy fees (which can be up to US$20 000 or more for an elephant); in the community-managed area, they would get 75 percent. In addition, the community would stop all illegal hunting and use of illegal weapons.

The community agreed and the operator took the proposal to MITUR. At this point, a complex process began to find a legal basis for the arrangement. FAO entered the picture through a food security project[46] that saw access to local resources as central to local livelihoods. This project also brought in the CFJJ-FAO paralegal and judicial training programme in natural resources laws (explained in detail in 7.4) to provide technical support and advocate in favour of this innovative partnership model.

Eventually MITUR agreed to a new contract on an experimental basis. Meanwhile the question of delimiting the communities was raised in community-stakeholder meetings, not to secure their DUAT (which was legally questioned) but to establish the communities as legal entities. The provincial government and MITUR did not accept this, and the legal basis of the contract between the communities and the investor is still unclear. Nevertheless, both sides are going ahead with the agreement, which they see as a legitimate and binding undertaking.

Further discussions have recently resulted in the provincial cadastral service and MITUR stating that the *coutada* borders could not be changed to exclude the multi-use area. However internal zoning could officially record and map the limits between the multi-use 75 percent and the hunting area 25 percent.

In 2005, the first full year of commercial sports hunting was marked in two ceremonies in which the leaders of three communities inside the *coutada* received some US$11 000 to spend as they wish. Each community is supported by FAO-funded NGOs to create local development committees and decide how to use the money. They have opened bank accounts, and one community has built a small health post. Another is developing a community camping-lodge enterprise.

Problems have arisen over continuing illegal hunting. The delicate balance between the needs of the investor and of local people can produce sudden, unrelated conflicts, such as an incident over how elephant meat was distributed to the communities. The operator is taking over a neighbouring *coutada* and more communities are becoming involved. As expectations rise, managing the process becomes taxing to the operator, local leaders, state agencies and the FAO Project Team that moderates the negotiation process.[47]

The widening of the beneficiary circle clearly calls for some sort of delimitation – not of land rights necessarily but of the socio-ecological units that exist inside the *coutadas*. Delimitation would allow all involved to determine exactly which communities have a right to share in the economic returns from the sports hunting, and how the pie is to be divided.

[46] FAO project: Protecting and Improving Household Food Security and Nutrition in HIV/AIDS Affected Areas in Manica and Sofala Province.

[47] Update provided by Catarina Chidiamassamba, FAO Natural Resources Coordinator, Manica Food Security Project, on recent events in Coutadas 9 and 13.

6 IMPLICATIONS FOR FORMALIZING DUATs AND HOW THEY CAN BE USED

This section looks at lessons from the three case studies as to whether local rights should be formalized, if so, how it is done, and what formalization can mean for longer term local development. It also assesses the constraints facing the formalization process and looks for the best way forward in promoting the model of "securing the rights of the people, promoting investment, and sustainable and equitable development" that was set out more than ten years ago in the National Land Policy (in Serra, 2004).

6.1 Should local rights be formalized?

All three cases illustrate the importance of formalizing local communities and individual land rights acquired by occupation. In Canhane, the formalization process followed the legal process in a straightforward way, pre-empting growing demand for local land in an area about to boom with the creation of the new Limpopo Transfrontier Park. Recent investor interest in the Canhane lakeside areas shows how important it was for their land right to be proven and registered formally before the investors arrived.

Conflicts in neighbouring communities that also border Kruger Park are the result of the delimitation process being carried out too late, at a time when investor interest in land for eco-tourism and game viewing was beginning in earnest. Moreover, subsequent investor-community consultations were rushed through without the community really knowing its rights (Afonso, *et al*., 2005). This put the community in a far more reactive role than it would have been, had it been able to secure its rights through a delimitation programme as in Canhane.

The Chipanje Chetu case also underlines the need to formalize rights. Even though the potentially productive agreement with the first investor has been cancelled, the community has proven and secured its rights, a fact that the provincial government and others are unable to ignore. Nevertheless, the case also shows the vulnerability of any land right in Mozambique to a system that allows state power to intervene and overturn even apparently successful initiatives in favour of other preferred interests.

Coutada 9 illustrates how formalization through other means is also necessary and can be effective if those involved show good will and are willing to experiment. In this case, the formalized agreements were based on implicit recognition by the operator that local people do have historical rights within the *coutada*. There are questions as to whether these rights can be formalized and registered but, in any case, the commercial agreement has gone forwards and has prompted the state agencies involved to rethink their conventional positions and participate in this important experiment in sharing hunting and conservation revenues.

6.2 Does formalizing the DUAT work?

In the Canhane case, the clear, initial focus on the need to formalize rights resulted in a strong legal and protective framework for the local community. This had little to do with public-sector policy in respect of Land Law implementation and everything to do with the perceptions of risk and potential among a key group of non-governmental actors (in this case, a USAID project, Helvetas and the FAO team at the then Land Commission).

Specifically linking the formalization process with a new and innovative economic venture quickly consolidated this right in real terms, giving it visibility as well as economic worth in terms of several buildings, an attractive community camp site and a rising numbers of tourists.

Constant external support from a leading NGO cannot be underestimated. With the added boost from African Safari Lodge and Rural Development Programme (ASL),[48] an NGO that assists rural communities, public institutions and private parties in designing game lodges in support of local economic development, and CFJJ-FAO legal assistance, it seems that the community is set to move ahead into exciting new territory, perhaps the first of its kind in Mozambique.

Nothing is certain however, and much depends upon a good contract being negotiated with the investor. More worrying are indications that the nearby Limpopo Park, with its vested interests, has a less favourable view of Covane Lodge. Its managers even told a group of visiting trainee judges and prosecutors that the lodge was failing and would need to be handed over to a private operator.[49]

The Chipanje Chetu case is similar in several ways but there are also differences. The press announcement of a tender process indicated that the existence of the proven and identified community DUAT, duly certified and recorded in the provincial Cadastral Atlas, had imposed important conditions on the new tender process. In addition, an intervention by a small, independent legal team investigating what had been going on convinced the provincial authorities that it was best to follow a less authoritative and more participatory approach to their new plans for the area.

This case shows that no formalization process is completely safe from measures that come in from unexpected directions, under the umbrella of non-land legislation cloaked in the name of national interest. In this context, the murmurings from beyond Canhane's border, just across the lake, strike some resonance with what has happened in Chipanje Chetu. So does the present high degree of conflict with communities inside the Limpopo Park that are being obliged to resettle in areas quite unlike their traditional eco-systems, leaving behind their burial grounds and other cultural roots.

By comparison, the Coutada 9 case does not involve a DUAT formalization process, but does involve a formalization of mutual interests and objectives between a private operator and the local communities inside the hunting reserve. The relationship between these two groups in contractual terms is almost identical to the cancelled agreement with the first hunting operator in Chipanje Chetu and, to date, is working well. Local people are getting cash income in return for foregoing many of their traditional hunting rights inside the reserve. Those in the core area are, in fact, moving out to make new homes in the main village and the district town. Everyone is gaining – the operator, the local community and the conservationists who argue that people must not live in these areas.

As with the Canhane case, this process has been driven not by the state, but by pragmatic and well intentioned non-governmental actors. In this case, a practical investor came up with the original proposal to zone the area and share hunting revenues with local people. It has been apparent throughout that state agencies have been largely responsible for the delays and complications. They have wrangled over issues such as whether or not it is legal for a community to have a DUAT in a hunting reserve, and have even told investors they have a legal right and almost an obligation to remove local residents from the *coutada*.

External support to the process also has helped. FAO, involved through its food security project in Manica Province, recognized this was a groundbreaking experiment in developing a

[48] The programme is managed by Mafisa Research and Planning in partnership with GTZ Transform and the Ford Foundation.

[49] Dr Carlos Serra, Senior Trainer in Environmental, Forest and Wildlife Law, Centre for Legal and Judicial Training: personal communication after a recent study visit to the Limpopo Park.

constructive community-investor partnership exactly as foreseen in the National Land Policy and in the various Land Law provisions for consultations and making agreements to cede rights to new investors.

Backed by CFJJ legal support, FAO has helped keep the community rights issue alive and advocated in favour of the innovative and practical solution proposed by the operator. Initial resistance from the provincial land, forest and wildlife services and the Ministry of Tourism has been overcome. The new operator contract with MITUR can be seen as recognition and formalization of the rights of local people to profit from *coutada* activities.[50]

Taken together, these three cases show that formalization takes different forms. The issue is much more than registering DUATs and demarcating their limits.

6.3 Awareness of rights, attitudes and citizenship

All three case studies show how an informed population is able to participate both in the formalization of its land rights and in subsequent development activities. The 2006 Calane study further shows how this can result in changed attitudes, increased confidence and, thus, a general ability to engage with the outside world more effectively.

In Canhane, the formalization of land rights in areas of high land value has clearly given the community bargaining power. The local community and its members are the legitimate DUAT holders, which means they already possess a registered right that gives them something to negotiate with.

The cases also illustrate how the formalization process of delimitation helps the community in ways that go beyond the relatively simple act of proving and mapping the local DUAT.

- Civic education – the community needs to understand why it is necessary to delimit and agree to the process, so delimitation activities must be preceded by civic education and awareness raising.
- Community organization – the process of creating a committee of elected representatives who are not necessarily the traditional leaders and community authorities recognized by Decree 15/2000 of the decentralization process builds organizational skills.
- Value awareness – preparation of the basic land use plan, including present and new activities and areas that might be more usefully ceded to investors, gives people an idea of the potential of their land and resources.

The Canhane case in particular shows how formalization, carried out as part of specific development plans or a rural development strategy, can make local people far more aware of their rights. They learn to engage more effectively with state bodies and others in the outside world. The Chipanje Chetu case also shows how the process can lead to more empowered local people and institutions. The community guards who were employed to protect the game from poaching activities soon became confident enough stand up to local administration officials and provincial government personnel who were apprehended while hunting illegally.

This point is made forcefully in research in another part of Mozambique, where Land Law dissemination carried out by local NGOs and subsequent delimitation exercises have for the

[50] More recently, there has been another opening that has resulted in the *de facto* zoning of the *coutada* and recording of three different zones on the Cadastral Atlas rather than in local DUATs. This issue is being hotly debated in the context of major national parks such as Gorongosa and the new Limpopo Park.

first time brought local people into contact with the laws of the state in a real way (Knight, 2002). The Land Law is the first, and so far only, law translated into national languages. There are now six language editions available, translated and published with FAO support.

6.4 Decision-making on land rights – participation, representation and accountability

In general, the implications of new policy and legislation for the interaction among customary, elected local structures and state local administration remain unclear, especially in terms of their source of authority and legitimacy.

6.4.1 *Formalizing institutions that represent group rights*

The Land Law took care to reinforce local practice and institutions by recognizing representative and adjudicatory bodies at community level. The cadastral registration rules for selecting group representatives do not require new institutions but, rather, the recognition of existing ones. The Land Commission Delimitation Training Manual (Land Commission, 2000) underlines the flexibility of the approach, stating:

- the local community is *that which functions in reality* as a community in terms of the use and management of land and natural resources;
- the local community has *its own customary institutions and rules regulating land access*;
- the management institutions and their representatives are *those which the community recognizes as existing and functioning*.

This grounds the evolution of land management institutions in what already exists, rather than something new and unfamiliar.[51] All three case studies show how well this can work in practice. The Chipanje Chetu case further shows that even though the area was a relative vacuum in terms of both administrative and traditional institutions regulating resource control, there still were opportunities to design an appropriate governance structure based on local historical experience rather than on a blueprint drawn from NGO, state or donor ideology or a traditional legacy. The result was a village-level "elected structure for resource governance, representing various strands of authority and interests" (Anstey, 2002).[52] Above these village-level institutions sits a Community Management Council (*Conselho de Gestão Comunitário*).

6.4.2 *New "non-traditional" local leaders*

Although the government recognizes community authorities, some argue that, in fact, it has used this apparent devolution of powers to extend its control over rural communities (Kyed and Buur, 2006). That said, many development projects have had important impact on expanding the capacity of other groups at local level, especially women. "Project leaders" (Tanner, 2007b) are emerging as a challenge to those traditional leaders who exert a negative and conservative hold over moves to democratize local development. Through this challenge, they are indirectly able to maintain some distance and level of locally led discourse when it comes to either resisting top-down policies or influencing the development of new ones (Tanner, *et al*., 2006).

[51] This contrasts with South Africa's communal property associations that were introduced by new laws as associations to be set up by rural communities for obtaining co-title to land through the land reform programme. The Legal Entity Assessment Project examined the effectiveness of these new institutions and discovered that most communities did not understand the new arrangements. In some cases, they reverted to earlier practise and existing authorities; in others, competition arose between old and the new structures. Hybrid systems of management also developed, leading to uncertainty about rights and processes (LEAP, 2002).

[52] The governance structures also varied from village to village within the project area. For example, while traditional authorities in Nova Madeira actually occupied seats on village management committees, in Maumbica they only had observer status and were seen as advisers rather than decision-makers.

6.4.3 *Individual rights, group rights and accountability*

The delimitation of local community rights vests a single DUAT in the "community". The Land Law then specifies that this DUAT is a co-title, governed by co-property principles specified in the Civil Code (the Civil Code has not been revised since independence). This applies to all community land, including areas of individual cultivation, and is not limited to areas of communal use. Given that in many customary regimes, the most important social unit for land use rights and land allocation is at extended-family or clan level, rather than at the apex of the customary institutions, this calls into question the extent to which this is an appropriate response to the formalization of land rights.

The regulations do recognize that the occupants of holdings under permanent cultivation have a right to an individual title over their land, so long as this does not impinge upon the rights of other community members. The Technical Annex also provides for these rights to be individually registered and removed from the common-hold title of the community. This approach can therefore secure and protect rights within a wide range of real communal tenure situations. It will allow the rights holders to adapt or alter their tenure system to changing circumstances over time.

This issue will be increasingly important in contexts such as rice irrigation schemes that, so far, have been secured *de jure* as group holdings, but which are *de facto* established on the basis of individual tenure. There is also the risk that, as in other land tenure and agricultural systems operating under common property arrangements, the more entrepreneurial and innovative community members may either be forced out or cause internal conflict. This also applies to women who invoke their individual rights. Experience in these situations is extremely limited at the moment, largely because the cadastral services are inaccessible and unable to provide a cost-effective solution to the registration of individually held rights. They are also completely untrained to deal with these complex issues.

The three case studies all illustrate situations in which extensive land areas are being used for low intensity activities such as eco-tourism or hunting that are conducted on land that locals would consider to be communal property. In these contexts, it would be more appropriate to deal with the group and enable the local communities to negotiate land access with private sector users in return for benefits that accrue to the group as an entity.

However, this introduces a level of complexity that is much higher than the simplicity and freedom of choice implied in the formalization of rights at a lower level (Anstey, 2000). Benefits that flow to a group as a result of newly formalized property rights bring with them responsibilities that flow among citizens, members of groups and the institutions that represent them. These require either development of new rules or for existing rules to be maintained by institutions that have local legitimacy and are legally recognized. In some contexts, this might require the forging of new institutions that can guarantee that the benefits do not serve to increase marginalization and internal conflict or create new elites at a local level. This involves risks and costs and can take a long time.

For Cousins and Claasens (2006), vesting land rights in the people who occupy and use land, rather than in groups or institutions, is necessary "to avoid the danger of abuse of power by customary authorities or other structures, and to make administrative structures accountable to rights holders." While the Mozambican legal framework recognizes individual rights, the case studies show the formalization of those rights taking place at a communal level through group membership. They suggest that the legal insistence on community-elected representatives – requiring the creation of numerous committees with new project leaders in rural development

projects that use the Land Law – in practice can counteract the concerns raised by Cousins and Claasens. Note also that the words "traditional leadership" or equivalent do not appear anywhere in the Land Law or its regulations. The accountability of these new institutions is therefore also critical in terms of the outcome.

The Chipanje Chetu case study reveals problems that can be created by the fragility of some of the new institutions. Mubai, *et al.* (2006) report that a village committee was embroiled in conflict when a new hunting safari operator arrived to negotiate access rights to the area and replace the existing operator. The chief and other traditional leaders began to show open support for the newcomers, in opposition to other committee members. In recent interviews, committee members characterized the chief's intervention as sabotage. The chief explained that the committee president was acting unilaterally, without consulting other committee members. The village youth also felt that the committee did not represent their interests adequately and accused them of bad leadership.

The net result of this lack of accountability was internal conflict and polarization, a situation in which strong individual interests prejudiced the community as a whole. Support was needed to ensure strengthening of the management institutions (Mubai, *et al.,* 2006).

6.5 Practical issues

6.5.1 *Costs*

In practical terms, the costs of registration remain the most important factor. All three cases demonstrate the key role of outside agencies not only in facilitating the formalization process but also in paying for it. Neither the government nor the private sector have been willing to support these costs in situations where investment projects have potential to impact upon existing use rights. Community groups must bear the costs themselves if they wish to request a delimitation of their land.

Most delimitation exercises and accompanying civic education on land law and other natural resources rights have been undertaken by NGOs. However, NGO funding has suffered with the advent of budgetary support as the main donor funding mechanism and, in fact, Mozambique is regarded by donors as a model of this new modality. Moreover, as indicated, formalization is not just about land registration. Formalization requires legal support as well as training to improve surveying capacity, learn the methodologies recommended in the Annex for Community Land Delimitation, and improve negotiation skills for reaching agreements with the state and other outside interests. All of these activities cost money.

The Canhane case also shows that a great deal can be achieved in a context with virtually *no state intervention*. With USAID and Helvetas support allowing a more or less autonomous process to take place, a great deal has been achieved. Now, it is vitally important to secure independent as well as public funding to support similar processes elsewhere. This process is a strong element in the overall democratization and rights-enhancing process. With it, communities and others can demand that state services respond when needed – for example to register a community delimitation and issue a certificate – instead of waiting for the state to give its agreement for a process and (as in both the Coutada 9 and Chipanje Chetu cases) potentially wreck it.

6.5.2 *Identification (ID) documents*

Before the 1997 law, an ID document and a police statement of non-criminal status were needed in order to join an association. This was seen as the best way to provide collective protection for local rights. Now, with the Land Law designation of "local community", this is no longer

necessary. However, the widespread lack of official identity documents among rural people remains a major practical difficulty in implementing any kind of conventional formalization of rights. The need for these documents is not specified anywhere in the Land Law, the Regulations or the Annex for Community Land Delimitation. Nevertheless, the entrenched administrative culture often demands documents. For example in Chipanje Chetu, the insistence on ID documents was a continual problem that delayed the issue of its delimitation certificate, the formal recognition of its association, and the opening of its bank accounts for receiving hunting revenues and managing micro-credit operations.

7 NEW CHALLENGES TO IMPLEMENTATION

7.1 Land enclosures and concentration

Increased demand for land is the major challenge to implementing the community and small farmer aspects of the 1997 Land Law, especially in areas that have good soil or are close to markets or roads or to the coast where world-class beachfronts are available at little real cost. In such areas, cadastral service attention to community consultations is driven by the need to secure new DUATs for investors, not to identify where local rights are and promote partnerships in which both sides gain and the poor can use the capital value of their land to break out of poverty. Contrary to the provisions of the Technical Annex, a new project is *not* preceded by delimitation or any other exercise to determine what land is already covered by customarily acquired and good faith DUATs.

Lack of conventional registration is a major problem in this context where real rights recognized in law remain invisible on cadastral maps, and local people are unprepared when investors arrive with an array of state officials to look for land. Few local communities appreciate the extensive nature of their rights acquired by occupation and are easily out manoeuvred when the talk is of "thousands of hectares" with promises of jobs and schools (Tanner and Baleira, 2006).

As a result, local rights are still extremely vulnerable to capture in spite of the protection offered by the Land Law. There are real signs of land concentration in many areas, with most land area allocated to relatively few new DUAT holders. In Zambézia Province, as of March 2000, 11 percent of approved DUATs accounted for 74 percent of the area approved (Tanner, 2007a; Norfolk and Soberano, 2000). In Gaza Province, 42 percent of new land claims account for 95 percent of the area requested (Tanner and Baleira, 2006, using field survey data of João Paulo Azevedo).

Inefficient and incomplete community-rights information that is often unavailable on the public database hinders full analysis of land concentration trends. However, the information that is available indicates that fast-tracking of private sector applications for new land use rights is resulting in a trend towards land concentration. Mozambique could in fact be facing "a European style enclosure movement" in which "many counteracting forces … are taking the Land Law and using its more progressive aspects to justify and give a veneer of credibility to … the occupation and fencing off of local land, and [which] brings very few real benefits to the communities who are ceding their rights over very large areas" (Tanner, 2007a).

The issue is more than whether or not investors can or should get access to local land. Most communities welcome them, knowing they can bring jobs and other benefits. The 1995 National Policy clearly promotes incoming investment that brings sustainable and equitable development. The challenge is to use the 1997 law to modernize the rural economy while gradually formalizing all legally recognized rights and regulating a process of controlled enclosures that can bring real benefits to the poor who are willing to cede or share their legal rights.

7.2 Make consultations work

The Canhane and Coutada 9 cases show what is possible with a well negotiated arrangement between the community and a well intentioned or pragmatic investor. In the Canhane case, the community is now, in effect, carrying out a consultation with the investor to determine the terms of the new partnership agreement. However, this is only possible because they first secured their land right and established Covane Community Lodge, a real asset that gives them a basis for negotiation.

In the Coutada 9 case, a clear agreement has been made with the operator and is functioning well enough. However, once again, the success has depended upon a specific situation – a pragmatic investor who recognizes the importance of making sure local people benefit from their investment and conservation activities. Both cases show that when a consultation is properly carried out, both sides can have positive results.

The CFJJ study found that in areas of high land demand where many deals have already been struck, local people are learning how to negotiate. In Inhambane for example, communities are beginning to hold out for higher prices for their fixed assets. Although the prices paid still do not reflect the real value of the tourist resource being secured by the investor, things are moving in the right direction (Tanner and Baleira, 2006).

Local people must be made more aware of their rights in this process beyond simply saying "yes this is our land." This means understanding they have a right to accept or reject a proposal, to negotiate and to make demands of those who want their land.

When this level is reached, there will be the possibility of significant benefits for all, as foreseen in the interactive model of the National Land Policy. However, it requires a significant process of civic education and capacity building on all sides. It also requires relatively simple things, such as ensuring that detailed minutes of all consultation processes are recorded clearly and agreed to by all parties. In fact, going even one more step back, this first requires that local people know what minutes are and what should go into them (with legal support if necessary), and the cadastral staff members need retraining in this new area of their work.

It is also important to end behind-the-scenes dealing that, in the long run, does no one any good. In cases where the resource in question is clearly controlled by specific families or individuals who understand their rights, consultations can take place on a more individualized basis. This is most likely where individual occupancy rights exist in areas that are attractive to private sector interests and appropriate for private sector development.

However, this often results in a lack of transparency and forging deals with no legal basis for either side to fall back on if things go wrong. In coastal areas, for example, there is high demand for beachfront land. Interested parties will often conduct informal negotiations and reach agreements with the individual occupiers of land parcels while the formal community consultation process is conducted in parallel with a larger and more disinterested group of local stakeholders.

Transactions with the direct occupiers are invisible. They occur within the informal realm, which means they are usually unrecorded in official records of the consultation, unregistered, unvalued in monetary terms and have no fiscal obligations. This invisibility means that information on these transactions is extremely limited and, thus, less bargaining power for the rights holder. This divide-and-rule tactic of investors allows them to bypass very real problems of institutional inefficiency such as the endless paperwork and time needed for following "correct" procedures.

Formalization involves attention to all these details making it an essential complement to the wider issue of rights registration. It is also an essential condition for the effective channelling of benefits to local people, through the practical, commercial use of their natural resource rights.

7.3 The need to educate

Even with a good law in place, if people do not know what their rights are, there is little they can do to exercise or defend them. Access to information is critical for ensuring that services from a state to its citizens are delivered and that standards are met.

When it comes to rights, entitlements and tenure security for the poor, information is essential. Conversely, restriction of information is one of the most effective mechanisms for ensuring that citizens do not claim and exercise their rights. It is not surprising that it was not the state but the NGO Land Campaign, organized and led by the late Dr José Negrão in the late 1990s, that spearheaded the spreading of information about rights and entitlements in the new 1997 Land Law. The coverage of the campaign was impressive:

> *At the end of two years of operations, 114 of the 128 districts and 280 of the 385 administrative posts existing in the country had already been covered. Around 15 000 volunteers had been trained as activists in the Land Campaign – these included young people, priests, pastors, evangelists, teachers, extension [workers] and NGO workers, in an authentic movement of national unity (Negrão, 1999).*

The campaign concentrated on the Land Law's main messages. In addition to community meetings across the country, there were comic book presentations and audio-cassettes with recordings of dramatized texts of the scripts. Material was in Portuguese and 20 national languages (Negrão, 1999).

Several NGOs secured additional donor funds to continue disseminating the new law when the initial campaign ended. For example, this was a major component of DFID funding to ORAM in Zambézia, which between 1999 and 2002 conducted literally hundreds of information and discussion sessions for community groups, community leadership, local and provincial administrative structures and district- and provincial-level stakeholders.

Administrative structures and service deliverers are often the primary institutions through which entitlements are delivered or withheld. Interaction among citizens and street-level actors, such as local bureaucrats and police, is central to the conversion of abstract rights into concrete reality. Making information available regarding the Land Law has made people much more aware of this process – as a key first step towards improving their capacity to challenge local actors who distort messages or withhold entitlements.

The 2004 CFJJ conflict study revealed that, although there is a basic awareness of the rights attributed by the land laws and other natural resources laws, local people still lack a real understanding of what these mean in terms of their relationship to the state and other powerful groups who want their land. How to use and defend these rights is yet another aspect of formalization that merits stronger civic education. A first attempt to address this question, implemented by the CFJJ-FAO paralegal training programme, gives guidance to local people on how to use rights in consultations and negotiations with outsiders, and how to use legal support and the courts to defend their rights against both investors and public agencies.

7.4 Conflicts and access to justice

CFJJ research into the role of the judiciary in the complex conflicts between communities and outside interests showed a *de facto* judicial vacuum in the middle and a range of hybrid and *ad hoc* solutions pieced together by administrators and politicians (Negrão, *et al*., 2003). Later case study research (Baleira and Tanner, 2005) found that although most rural people have a vague notion of their rights, they still think of land as belonging to the state, and that they are therefore relatively powerless when their rights are threatened.

They have very little idea of what they can do with their rights in practice, why they should bother with a formalization process, and what they can do if their rights are threatened or ignored. When faced with public agents intervening or apparently acting on behalf of investors, they are easily manipulated.

An effective judiciary is essential in this context but is still out of reach for the rural poor. Few rural districts have judges and public prosecutors and, even if they were accessible, communities have little idea of how to use judicial or other arbitration options.

The Public Ministry is a kind of judicial watchdog in the Public Prosecution Service (*Procuradoria Geral da República*) to which citizens can appeal for help. However, even in long and unresolved disputes between local people and outsiders, the Public Ministry rarely intervenes to enforce civil rights defined in laws such as the 1997 Land Law (Afonso, *et al*., 2004; Baleira and Tanner, 2004).

The CFJJ study also supports the Chipanje Chetu view that the state and its agents are not to be trusted. Communities never think of going to the Public Prosecution Service or taking their case to court. In most cases, they think of judges and prosecutors as part of the state apparatus and on the side of those wanting their land (Baleira and Tanner, 2004). Grievances are first raised with local administrators and cadastral officers who are often part of the problem, and therefore unable or unwilling to intervene objectively. Cases then pass up administrative steps, ending with the provincial governor – political power is still seen to be the real basis of decision making, not some vague notion of the rule of law enforced by the local judge.

There are other ways to access justice. Mozambique has laws guaranteeing the right to petition and protest. NGOs and other groups provide considerable support to communities whose rights are over-ridden or threatened. In some provinces, such as Nampula where they are particularly active, NGOs such as ORAM are even called in by the public land authorities to help mediate and manage land and resource conflicts. CFJJ also found that community leaders are learning how to use the media to publicize their causes. Once local people understand their options and how to exercise them, their potential for justice is greatly increased.

Meanwhile the CFJJ course for judges and prosecutors now includes a land and natural resources component, and with support from a Netherlands-funded FAO project, by the end of 2004 nearly 200 district and provincial judges and prosecutors already in post had been trained in land, environment, forest and wildlife laws.[53] A second FAO-Netherlands project is training paralegals who work at community level so they can, in turn, educate local leaders in basic principles of the Land Law, how to use their rights in practice and, if necessary, how to defend them by recourse to the formal state judicial system. According to the CFJJ Paralegal Training Manual, "the law can give the citizen a right, but if this citizen does not use and defend this

[53] In the late 1990s, FAO saw that ensuring effective judicial oversight of the Land Law was an essential part of a broader national land programme concept that never received adequate government support. This project was secured outside the Land Commission context towards the end of the Commission mandate.

right, the right does not exist!" (CFJJ, 2006). Justice is gradually becoming more accessible, and judges and prosecutors are more aware of civil law issues.

Yet, even when a judge finds in favour of local people, decisions can be ignored (Afonso, *et al.*, 2004). Similarly, even successful NGO interventions can be in vain. For example, in Namaacha District of Maputo Province, in spite of an NGO helping people resist local administration pressures to "share" land with newly arrived South Africans and Koreans, buildings were constructed and land fenced off by the investors (IIED, 2005). This adds another level to the issue of "access to justice", in a society in which real power still seems to reside in the political structure and not in the judicial system itself.

7.5 Serious institutional reform and re-training

Despite the innovative instruments of the Land Law, conservative public land services are still geared to the needs of a small, basically urban elite seeking awards of new DUATs. Thus, a major reform effort is needed to implement the formalization options.

This requires a change in technical approach – ensuring that public-sector training institutions for land administration cover issues of customary land management. This also requires institutional decentralization to make services accessible to ordinary people. Fortunately, creating new district-level offices is a key item in the present land administration programme within PROAGRI II. Other proposals being made to the government aim at better public access to land and other cadastral information through such innovations as providing public access to Web-based portals in NGO internet cafés and other sites (LAIN, 2006). Yet, basic constraints remain. Lack of vehicles and fuel to run them means that cadastral teams are dependent upon the "client" to provide the wherewithal to go into the field and carry out their public duties. In this case, the client is usually a private sector entity who wants a new DUAT. Communities that cannot assume these costs are disadvantaged.

Mozambique is establishing a new system for training land administrators, but it still does not have a higher education or research institution in this area except for a small Land Studies Nucleus at the University of Eduardo Mondlane. At this point, it is important that the TPSGC actually implement the recommendations made more ten years ago by incorporating non-Western, Mozambican land management systems into its curriculum, so that its graduates can handle the progressive elements of the Land Law that deal with customary land use rights.[54]

7.6 The Real Property Registry

In 1996, the FAO project supporting the Land Commission proposed to the government that the *Registo Predial* be included in a National Land Programme to implement the Land Law.[55] An FAO consultant proposed institutional harmonization of the cadastre and an investment programme.[56]

The proposals were not taken up and the *Registo Predial* remains seriously under-funded and out of step with the rest of the land administration. A decade later, a new African Development Bank-funded initiative addressed the *Registo Predial* issue, driven by private sector imperatives and the need for an efficient real property register to underpin financial transactions in land and property and for registering mortgages.

[54] Mid-term evaluation of Swedish support to DINAGECA, FAO project files.
[55] Chris Tanner, personal files. Relevant reports also in FAO project files.
[56] João Bosco Monnerat, project files, TCP/MOZ/6612

This initiative will be implemented through the Ministry of Finance as part of a financial sector reform project. Thus far, the project has paid little attention to building bridges with the cadastral system, and none at all to the challenge of community real property rights registration. Moreover, there has been no apparent attempt to involve the broad range of stakeholders who took part in the Land Law process and gave it its high level of legitimacy.

7.7 The Land Fund

Funding of delimitation and local development initiatives needs to remain independent of state actors and official programmes. This is particularly important when the government fails to provide public resources and seems opposed to extending the legal recognition of local rights into the practical sphere of mapping and recording these rights.

In the current context of economic growth and demand for land, providing independent funding is a crucial part of formalization activities. The 2003 CTC study recommended a free-standing fund that communities and others could use independently of both NGO- and state-provided resources (CTC, 2003). Access to funds enables them to exercise their rights by undertaking their own delimitation activities and requiring the public sector to register their rights. DFID recently joined five other donors to launch the new Community Land Initiative that will enable communities to access technical support for delimitation, develop land use plans and new economic initiatives, and contract legal support to defend their rights and help in consultations with outside interests.

Relying on government funding, especially where land grabbing and elite capture are threatening land rights, is a high risk strategy. This kind of fund is essential for providing communities a flexible set of options adapted to specific circumstances. These options may not always include delimitation or other formal forms of rights registration and could include other activities. For example, when communities develop a new lodge project, make their own land use plan, hire a lawyer to sit with them at a consultation, send their members to see groundbreaking projects elsewhere – these are all aspects of formalization.

8 CONCLUSIONS

Mozambique made a huge leap forward in formalizing land rights with the 1997 Land Law and its legal recognition of all rights acquired through customary and good-faith occupation. This point alone demonstrates how formalization can be accomplished with a simple shift in perspective, accepting something today as formal or legitimate that yesterday was informal and therefore not legitimate.

In a context of land grabbing and an increasingly aggressive land market – be it legal or not – the discussion has shown that legal formalization is not always enough. There is a need for a stronger way to protect land rights.

This is particularly difficult in a country with a colonial and authoritarian post-independence past that still influences both government administrators and rural people. In Mozambique, state authorities are still largely managed and staffed by conservative administrators and technicians accustomed to top-down management and more comfortable with the old rules. Citizens generally do not trust the authorities and may not be willing to risk the costs of improving their tenure security through conventional forms of registration.

The state position on community delimitation illustrates this point well as do the three case studies. Taken together, they serve to illustrate the state position and underline the importance of non-state actors, such as NGOs and even private investors, and of new approaches, such the Community Land Initiative, for providing alternative avenues to formalization. The innovative consultation and delimitation processes allow local people to register rights using approaches that are not found in the classical toolkit of Western surveying and registration methods.

Yet, given the underlying historical and political context, even this kind of formalization involves much more than just mapping and registering land rights. For example, because of the social history of Chipanje Chetu, there are certain local beliefs and institutions that must be addressed, such as:

- reluctance to engage with authority or with rules of either a traditional or an administrative nature;
- acceptance that the legitimacy of a traditional/customary role in conflict resolution and social institutions at village level depends mainly on the personality of the chief;
- belief that government and its agents are extractive rather than supportive and that outside agents provide, at best, a source of patronage and short-term benefits but offer little in the way of longer-term commitment;
- belief that personalized relationships and informal rules matter more than institutions codified in law and that legislation is not the "rules of the game" but only part of the game.

One of the major obstacles to formalization in Chipanje Chetu was the fact that many local people were wary of the real intentions of the project. Anstey (2002) notes that:

> *… even after 8 months of discussion locally and the implementation of a number of activities such as the PRA process, discussion of objectives and controls over outsider use there was still a general belief that the programme was for the benefit of the Government or individuals in the NGOs and the talk of devolution to local institutions was merely a variation on a historical theme of local disempowerment.*

Formalization in this context requires careful civic education and community capacity building. Most importantly, it must show real practical results and benefits accruing to local people. The three case studies show that exercising rights by using them in practice is an important way to formalize them. Not only do they lead to the necessary documentation, local people gain confidence and begin to realize the power that their rights give them. By exercising these rights, they also gain a place at the development table that is most often dominated by other, more powerful interests.

In Chipanje Chetu, it was not until the community groups received their first payments from the hunting concession that they began to feel and exercise any real sense of ownership over the project (Mubai, *et al.*, 2006). It is equally interesting that in Coutada 9, payments to the community were based on agreements that grew out of a careful process of negotiation and trust-building and actually preceded formalization in the conventional sense.

Issues of trust and practical consequences are critical if administrative discretion remains a key element in land law implementation and if government sector agencies and actors are the main methods of delivery. Citizens largely view the administrative structure that operates and oversees the processes that regulate land access and use as trustworthy. Because of lack of trust, the rural poor hesitate to occupy the spaces opened up for them at local level by the new laws because they expect it to be a waste of time and effort. As a result, they become more exposed to administrative actions that increasingly favour the politically or economically powerful.

It is sad to see how administrative intervention is undermining the hard work and achievements of the Chipanje Chetu initiative. Although institutional resistance and entrenched attitudes as well as centralized and doctrinaire decision-making also threatened to derail the Coutada 9 case, it did not happen. The operator and community simply got on with their agreement, supported by a range of other actors advocating in favour of this new and important initiative.

The Canhane Community seems to have moved more easily towards a change in attitude and awareness of new opportunities. This may be due to the constant support from Helvetas that has encouraged and built trust among the community. In its most recent phase, the community also has benefited from legal support that reinforced its awareness of rights. The community can use these rights to negotiate with a new investor from a position of relative strength.

Conversely, the population in Chipanje Chetu probably feel that its initial caution was justified when the NGOs that were helping had to back away. Financial difficulties forced ACORD and OPORTUN to leave in 2004, and IUCN withdrew amidst political tensions and when plans emerged for elite interests to take over the hunting operation. These withdrawals came at precisely the moment the community needed NGO lobbying and other support, leaving community institutions weakened and vulnerable to manipulation by elite interests (Mubai, *et al.*, 2006).

This illustrates how important elements of formalization can develop through creation of "appropriate space[s] where legitimate claims [can] be acknowledged" (Sally Falk Moore, quoted in Cousins and Claassens, 2006). However, the Mozambican case also shows the fundamental importance of having the right policy and legal framework in place, especially if it has been produced with the involvement of all significant stakeholders. Stakeholder involvement provides a high level of social legitimacy that, in turn, sets up an even stronger appropriate space for acknowledging and pursuing claims. These appropriate spaces are used to test Land Law implementation and new ideas in practice and can eventually lead to conventional formalization or even legal redefinition of rights and status through modifications to the policy and legislative framework.

The process begins with an open and participatory policy and legislative process that results in an imaginative law with a high level of legitimacy, allowing many flexible routes to formalization. This philosophical and legal space can be used by NGOs, communities, local people and their private sector partners to pursue new economic initiatives that, in themselves, bring about formalization and create the space for the more conventional rights registration. It is important to note that this happens as a result of the other activities, not as a condition for them to happen.

Mozambique today is characterized by experiments and initiatives in the countryside more than by serious, systematic moves to implement more conventional formalization of legally recognized rights. Deals and frameworks for resource use are negotiated and benefits flow to the rural poor. The Land Law and the process leading to its adoption have opened up an important space for these alternative forms of formalization, within which the informal rights of the poor are recognized and given a new legitimacy without needing to be strictly defined or forced into a rigid formal context. These rights are beginning to be taken more seriously and are becoming less susceptible to challenge because the law has broadened the definition of "formal" and has automatically brought legitimacy to the "informal rights". This is also broadening the understanding of the process of formalization, which is usually understood as transforming informal rights to rights in the statutory system.

Mozambique offers two lessons for enhancing the rights of the poor: i) frameworks for new rights should be established through national processes that are broadly legitimate and create space for new forms of negotiations to take place, and ii) it is important to promote new policies that are innovative and flexible enough to be applied within the wide range of tenure situations that exist on the ground. This includes innovative ideas that can accommodate adaptations or alterations over time in response to changing circumstances such as: acquired rights, community participation in dispute resolution and land allocation, oral evidence being sufficient for establishing title, and a flexible definition of a local community.

This process is taking place in the context of rising demand for land, enclosures and land concentration. In many places, local rights are not being used imaginatively in the ways described above. Far more effort and resources are needed to get invisible, legal land rights onto official maps and records. However, registration is just part of a broader package of measures that can secure tenure for the poor and promote the equitable process of land occupation and use foreseen in the original 1995 Land Policy.

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