

# The Legal Status of Customary Land Tenure Systems and the Protection of Communal Property in Cameroon

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# **The Legal Status of Customary Land Tenure Systems and the Protection of Communal Property in Cameroon**

**Walters Nsoh**

## **Abstract**

The ownership and utilisation of communal property are very much tied to the modern land tenure systems of most sub-Saharan African countries, which nevertheless still rely on the customary land tenure system to operate. But how exactly do the customary land tenure systems which remain operational in many parts of Africa fit into contemporary land ownership and use structures? Drawing on a broad interpretation of (African) customary land tenure and its elements, including its communal interest element, this chapter assesses the extent to which law and practice in Cameroon is developing and protecting communal property. Using developments in the protection of collective forest rights as an example, it demonstrates the continuous difficulty in reconciling western land law principles on the ownership and use of communal property with customary land tenure systems in post-colonial sub-Saharan African societies, and the implications this may have on the wider rule of law in contemporary sub-Saharan Africa.

**Keywords:** Customary law; land tenure; communal property; forest; Cameroon

## INTRODUCTION

Present-day Cameroon, unlike many other States in Africa, has the ‘mixed blessing’ of having been shaped by the experiences of the Germans, French and British colonialists. It includes the British mandated territory of Southern Cameroons which was administered as part of British Nigeria prior to independence in the 1960s. One of the legacies of colonisation is the legal systems that were left behind in the nation-states that were created.<sup>1</sup> As a result of its colonial history, Cameroon is one of the few examples of countries with a dual legal system, the English common law and the French civil law operating in a somewhat feeble coexistence.

However prior to colonisation when there were no nation-states with national boundaries, communities often migrated picking up customary practices along the way. Consequently, many nation-states are artificial creations made up of people of diverse ethnicity, cultures, languages, norms and expectations. For example, the establishment of the German colony of Kamerun in 1884 included all of present-day Cameroon and sections of several of its neighbours. Due to the historical links between Cameroon and Nigeria, and given the dual legal system that still operates in Cameroon, the evolution of the law in Cameroon has therefore been significantly influenced by the development of the law (both imposed western legal systems and the customary law that governed these communities) in Nigeria. This experience is not peculiar to Nigeria and Cameroon and the colonial history of most of Africa is littered with examples of similar such arrangements, demonstrating the relevance of the present discussion for the rest of sub-Saharan Africa.

One area of the legal system where colonisation has had an impact is in the land tenure system. The current land laws of most sub-Saharan African countries such as Cameroon are

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<sup>1</sup> V. J. Ngoh, *History of Cameroon Since 1800* (Limbe, Presbook, 1996), pp. 7-10; M. D. DeLancey and R. N. Mbuh, *Historical Dictionary of the Republic of Cameroon*, 4<sup>th</sup> edn (Lanham, MD, Scarecrow Press, 2010).

based largely on western land law principles imposed by the foreign legal systems, including the German system (which was the system in place prior to the defeat of Germany in World War I). These legal systems have been evolved against a background of the different kinds of customary communal property rights exercised by different ethnic groups, with the primary aim of harmonising/abolishing the customary land tenure systems that existed prior to colonisation. The development of the law in this way has, however, been without a full understanding of the role of custom in the ownership and use of communal property. This lack of understanding has resulted in huge gaps between approaches envisaged in the written law on the protection of communal property and local knowledge and understanding of the ownership and use of communal property. This approach to land reform prevents individuals and communities from making use of lands which they have traditionally occupied and used under custom, if they are not in possession of the required 'legal' documents. Such developments have also failed to recognise the link between customary land tenure, unsustainable resource exploitation and the structural inequality that this generates.

More recently, the role of custom in resource management has received some consideration, notably in relation to matters concerning the governance of commons in England and Wales discussed elsewhere in this volume. Nevertheless, the ownership and use of communal property remains very much tied to the modern land tenure system, which still relies on the customary tenure system to effectively operate. For example, in relation to forestry resources, the law in Cameroon recognises the ownership of, and property rights in, forest, which is strictly governed by the land tenure system, as well as the rules set out in the forestry laws.<sup>2</sup> This means that depending of the categorisation of the forests, 'the State, local authorities, village communities and private individuals may exercise on the forests all the

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<sup>2</sup> Law No. 94-1 of 20 January 1994 to lay down Forestry, Wildlife and Fisheries Regulations (hereinafter, 1994 Forestry Law), s. 6.

rights that result from ownership, subject to restrictions laid down in the regulations governing land tenure and State lands.’<sup>3</sup>

But how exactly does the customary land tenure system which is still operational in many parts of the country fit into this contemporary land ownership and use structure? This chapter assesses the extent to which law and practice in Cameroon are developing and protecting communal property. Using the example of forestry resources, it examines in particular, the meaning of customary land tenure, its elements, including its communal interest element (which is a main feature of the customary system for most of sub-Saharan Africa), and the extent to which successive land law reforms in Cameroon recognise customary notions of communal and/or community property ownership and use rights in forests. Before considering the restrictions on the ownership and communal property by the regulations governing land tenure and State lands in Cameroon, it is important to first look at what is meant by customary land tenure.

### **‘AFRICAN’ CUSTOMARY LAND TENURE AND COMMUNAL PROPERTY**

The term customary law is a very generic one. It is therefore useful to distinguish this type of law from the modern or western law. Elias defines customary law as, ‘the body of rules which are recognised as obligatory by its members.’<sup>4</sup> Gluckman defines it as, ‘A set of rules accepted by all normal members of the society as defining right and reasonable ways in which persons ought to behave in relation to each other and to things, including ways of obtaining protection for one’s rights.’<sup>5</sup> Both definitions highlight the element of consent, a point emphasised by the Privy Council in the *Eshugbayi Eleko v Government of Nigeria* case

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<sup>3</sup> 1994 Forestry Law, s.7

<sup>4</sup> T. O. Elias, *The Nature of African Customary Law* (Manchester, Manchester University Press, 1956) 55.

<sup>5</sup> M. Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia (Zambia)* (Manchester, Manchester University Press, 1955) xv. Gluckman sets himself apart by limiting the consent to ‘normal members,’ which means that consent does not need to be unanimous.

that, 'It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate.'<sup>6</sup> Assante, in his study about customary rules in Ghana, characterises the system as a body of well-established rules of conduct 'usually enforced by the heads of fragmentary segments, and in rare cases, by spontaneous community action.'<sup>7</sup>

Another useful characterisation is contained in section 2 of the Customary Courts Ordinance, cap. 142 of the 1948 Laws of Nigeria, as amended by the Adaptation of Existing Laws Order, 1963 which defines customary law as:

[A] rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question.

This definition complements those proposed by Elias and Gluckman above by including the phrase 'fortified by established usage,' which means that the (usually unwritten) rules of customary law must, in addition to the other factors, be recognised by the community.

Customary law is therefore, made up of customary practices that have been recognised by secondary rules of the legal order and thereby given formal normative effect.<sup>8</sup>

One characteristic that is also common in customary law is the community interest that appears in land tenure systems across Africa. The community interest refers to the customary collective rights of ownership and use that the community holds over the property. In this

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<sup>6</sup> [1931] 42 AC 662.

<sup>7</sup> S.K.B. Assante, *Property Law and Social Goals in Ghana* (Accra, University of Ghana Press, 1975), pp. 2-3. See also, K. Akuffo, 'The Conception of Land Ownership in Africa Customary Law and its Implications for Development', *African Journal of International and Comparative Law*, 17 (2009), 57-78.

<sup>8</sup> See also Rodgers in this volume.

regard, the much referenced principle of customary land tenure<sup>9</sup> by a Nigerian chief, the *Elesi* of Odogbolo, before the West African Lands Committee: ‘I conceive land belongs to a vast family of which many are dead, few are living and countless members are still unborn’<sup>10</sup> is therefore not an empty statement. This suggests that customary communal property rights are exercised over all land under the customary land tenure system. This basic principle was accepted by the Committee in its Report<sup>11</sup> and has received judicial approval in several cases. For example, in the often-cited Nigerian case of *Amodu Tijani v Secretary, Southern Nigeria*,<sup>12</sup> the Judicial Committee of the Privy Council accepted as ‘substantially true’ the following statement of Rayner, C.J. in 1898:

Land belongs to the community, the village or family, never to the individual. All members of the community, village or family have an equal right to the land, but in every case the chief or headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of land to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent

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<sup>9</sup> Although different laws and customs obtain in various communities of Cameroon, the definitions of customary law cited above and other evidence indicate that it is possible to discern some general principles of customary land tenure law. For an authoritative and detailed discussion of customary land tenure systems, see C. K. Meek, *Land Law and Land Administration in Nigeria and the Cameroons* (London, H.M.S.O., 1957); J. W. Bruce, *African Tenure Models at the Turn of the Century: Individual Property Models and Common Property Models*, Vol. 1 (Rome, FAO, 2000); C. Lund, *African Land Tenure: Questioning Basic Assumptions* (London, IIED, 2000); M. Doumbé-Mouloungou, *Les Coutumes et le Droit au Cameroun* (Yaoundé, CLE edn, 1972); F. M. Mifsud, *Customary Land Law in Africa: With Reference to Legislation Aimed at Adjusting Customary Tenures to the Needs of Development* (Vol. 7, Rome, FAO, 1966); ; R. Debusmann and S. Arnold (eds), *Land Law and Land Ownership in Africa: Case Studies from Colonial and Contemporary Cameroon and Tanzania* (Bayreuth, Bayreuth University, 1996);; C. N. Ngwasiri, ‘The Impacts of the Present Land Tenure Reforms in Cameroon’, *Cameroon Law Review*, Editions Clé (1984), 73-85; C. N. Ngwasiri and Y. N. Nje, *Advocacy for Separate Land Legislation for the Rural Areas of Cameroon* (A. Ndeso-Atanga and others (eds), Yaounde, A PVO-NGO/NRM Cameroon, 1995).

<sup>10</sup> C. J. Rayner, *Report of the Land Tenure in West Africa* (1898), Comnd. 1078, p. 183.

<sup>11</sup> Rayner, *Report of the Land Tenure in West Africa*.

<sup>12</sup> [1921] 2 AC 399.

must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this [West African] coast and wherever we find...individual owners, this is again due to the introduction of English [and French] ideas.<sup>13</sup>

In as much as the above statement of principle is true to some extent, it is also not without some dispute. For example, Elias,<sup>14</sup> Coker<sup>15</sup> and Lloyd<sup>16</sup> (all writing about family property rules in the Nigerian context) are all of the view that customary ownership of land is vested in individuals or in joint descendants of an individual owner, the family or extended family, not the community at large, which is made up of other families that are not necessarily part of that lineage. Although the family or extended family could, in itself, be regarded as a 'close knit' community, the above argument appears to suggest that in terms of resource control and use, customary ownership is still vested in individuals. The reason for this may lie in the 'patrilineal kinship systems'<sup>17</sup> which dominate traditional African extended family cultures. Under such systems, ownership remains with the family head of the lineage, although the members may share in the resources.<sup>18</sup> This is the very basis of individual ownership; a view also supported by Utuarna<sup>19</sup> who maintains that Rayner's above statement is incorrect in so far as it denies the existence of individual ownership of land. In another Nigerian case of *Balogun & others v Oshodi*,<sup>20</sup> decided 10 years after the *Amodu Tijani* case, Webber, J., pointed out that the notion that individual ownership is quite foreign to native ideas has disappeared with the process of time, due to the spread of English ideas. This view is also shared by Speed, Ag. C.J. in the case of *Lewis v Bankole*, who had observed that 'the

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<sup>13</sup> Rayner, *Report of the Land Tenure in West Africa*.

<sup>14</sup> T. O. Elias, *Nigerian Land Law*, 4<sup>th</sup> edn (London, Sweet & Maxwell, 1971), p. 74.

<sup>15</sup> G. B. A. Coker, *Family Property Among the Yorubas*, 2<sup>nd</sup> edn (London, Sweet & Maxwell, 1966), p. 29.

<sup>16</sup> P. C. Lloyd, 'Family Property among the Yoruba', *Journal of African Law*, 3 (1959), 105-115 at 105 and 115.

<sup>17</sup> G. Foster, 'The Capacity of the Extended Family Safety Net for Orphans in Africa', *Psychology, Health & Medicine*, 5 (2000), 55-62 at 56.

<sup>18</sup> Foster, 'The Capacity of the Extended Family Safety Net for Orphans in Africa', 56.

<sup>19</sup> A. A. Utuama, *Nigerian Law of Real Property* (Ibadan, Shaneson C.I., 1989), p. 6.

<sup>20</sup> [1931] 10 NLR 35, [50].



institution of communal ownership has been dead for many years and the institution of family ownership is a dying one.<sup>21</sup> However, in *Bujulaiye v Akapo*, Butler Lloyd, J. rightly rejected this observation, stating that ‘the institution of family ownership is still a very live force in native tenure....’<sup>22</sup> This statement suggests that customary land tenure is characterised by customary communal property rights exercised by all members of the family or extended family, living as a community. Irrespective of which side of the argument is correct, it suffices to say that the notion of customary law and ownership is an ever changing one,<sup>23</sup> and there is no dispute that the traditional basis of customary land tenure is private as well as communal ownership, whether it is within a family, extended family or a community.<sup>24</sup> As the search for a distinction between western land law and customary land tenure continues, this qualification remains one of the distinctive features of customary land tenure systems, even up till this day.

Another distinctive feature lies in the role of control and management that is vested in the chief of the community/village or family head (in most cases, usually, a member of the royal family of the community/village or family head as designated by the succession rules) in the administration of the communal land. In addition to the rules known to the entire group, he also allots or allocates portions of the lands to members (or non-members in some cases, as customary tenants), for their individual use (mostly for subsistence farming or building residential houses). In every case however, such land remains community/family land, except where under some custom or agreement, the land has been partitioned. In those cases the

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<sup>21</sup> [1908] 1 NLR 82, [84]

<sup>22</sup> [1938] 14 NLR 10.

<sup>23</sup> On how time has affected the notion of customary law and ownership, see e.g. M. Gluckman, *Ideas and Procedures in African Customary law* (Studies presented and discussed at the Eighth International African Seminar at the Haile Sellassie I University, Addis Ababa, January 1966), pp. 9-15.

<sup>24</sup> H. W. J. Sonius, *Introduction to Aspects of Customary Land Law in Africa as Compared with Some Indonesian Aspects* (Leiden, Universitaire Pers Leiden, 1963), p. 19.

individual members become absolute owners of their allotted portions (i.e. exclusive of the community/family).

It is worth emphasising that these distinctive features also apply to communities in Cameroon. For example, in villages of South Cameroon, plots with houses, farms, and fallows on the one hand, are owned by individuals. Ownership of land is acquired by effective use or occupation, recognised by all Bantu-speaking communities in Cameroon<sup>25</sup> and the 1974 Land Ordinances.<sup>26</sup> On the other hand, land reserves made up of forests that have never been cleared, belong to the customary domain of the village and have the status of communal property. Indeed, they belong to the entire group in a village and each member of the group has the right to take a portion in accordance with rules that are known to the entire group (such as clearing). The group has the authority to exclude non-members of the community from forest land that extend to the borders with neighbouring villages.<sup>27</sup> Thus to them, there is no such thing as vacant or unoccupied land. To some groups such as the indigenous Pygmy<sup>28</sup> communities, with different approaches to land and natural resource usage, land is a zone of influence, where their hunting and gathering activities take place.<sup>29</sup>

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<sup>25</sup> Bantu speaking peoples are the largest group in Cameroon and are spread into other African countries: Ngoh, *History of Cameroon Since 1800*, pp. 31-33.

<sup>26</sup> See below 'Ownership and the Land Ordinances of 1974'.

<sup>27</sup> According to some authors, this system is based on the colonial practice in which 'community was conflated with tribe and "strangers" were seen as having no traditional access to land whereas in most of pre-colonial Africa, strangers were considered as members of the kinship network... thus enhancing the prestige and labour force of a household, kin group or community': N. V. Pemunta, 'The Governance of Nature as Development and the Erasure of the Pygmies of Cameroon', *GeoJournal*, 78 (2013), 353-371, at 363-364. See also, M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, Princeton University Press, 1996), pp. 139-146.

<sup>28</sup> The term 'Pygmy' or 'Pygmies' may have derogatory connotations, but is used here as a term externally imposed but now reclaimed by some indigenous groups and support organisations as a term of identity to encompass different groups of central African hunter-gatherers and former hunter-gatherers, and to distinguish them from other ethnic groups who may also live in the forests, but who are reliant on farming, and who are economically and politically dominant; See e.g., Survival International, 'The Pygmies' (*Survival International*, 2017) <<http://www.survivalinternational.org/tribes/pygmies>>.

<sup>29</sup> For more on the customary land usage amongst Pygmy populations, see e.g. K. Biesbrouck, 'Agriculture Among Equatorial 'Hunters-Gatherers' and the Process of Sedentarization: The Case of the Bagyeli in Cameroon' in K. Biesbrouck, S. Elders and G. Rossel (eds), *Central African Hunter-Gatherers in a Multidisciplinary Perspective: Challenging Elusiveness* (Leiden, CNWS, 1999); K. Biesbrouck, *Bagyeli Forest*

However as Lewis asserts, there is a ‘long-standing and widespread perception by local, national and international non-hunter-gatherers that hunting and gathering does not confer rights over land.’<sup>30</sup> In line with Pemunta, this is because of the undue importance that colonial and post-colonial land tenure attaches to agriculture when determining rights over land, thereby downplaying other local forms of land and resource use.<sup>31</sup> Such perceptions help explain the ‘casualness with which governments and other outsiders have appropriated Pygmy peoples’ lands.’<sup>32</sup> Notwithstanding, the notion remains amongst the Pygmy groups that land is communal property on which their hunting and gathering activities take place. This difference in perceptions between the Pygmy groups and non-hunter-gatherers, and the implications this has on land and resource use supports the argument that the development of the law has been without a full understanding of the role of custom in the ownership and use of communal property.

The right of control and management vested in the community chief or family head ensures that legally, nobody, not even a member of the community or family, can make use of the community or family land in any way whatsoever, without the consent or concurrence of the community chief or family head. This position, however, has never been respected by everybody, including the government, right from the colonial days, especially in French Cameroon between 1959 and 1963.<sup>33</sup>

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*Management in Context* (Wageningen, Tropenbos-Cameroon Programme, 1999); Valérie Couillard and others, *Land Rights and the Forest Peoples of Africa Historical, Legal and Anthropological Perspectives* (Moreton-in-Marsh, Forest Peoples Programme, 2009), pp. 12-14.

<sup>30</sup> J. Lewis, ‘Technological Leap-Frogging in the Congo Basin, Pygmies and Geographic Positioning Systems in Central Africa: What has Happened and Where is it Going?’ *African Study Monographs Supplementary Issue*, 43 (2012), 15-44 at 18.

<sup>31</sup> Pemunta, ‘The Governance of Nature as Development and the Erasure of the Pygmies of Cameroon’, 364.

<sup>32</sup> Lewis, ‘Technological Leap-Frogging in the Congo Basin, Pygmies and Geographic Positioning Systems in Central Africa’, 18.

<sup>33</sup> C. F. Fisiy, *Power and Privilege in the Administration of Law: Land Law Reforms and Social Differentiation in Cameroon* (Leiden, African Studies Centre, 1992), p. 32.

It has been pointed out that in such a system, any proceeds or money, whether arising from sale, compensation, or rent of the communal or family land, received by the community chief or family head must be shared within the community or family.<sup>34</sup> This is because, in the actual sense, the chief or family head holds the land as a custodian and manages it in consultation with principal elders of the community. In theory, this means that as the custodians of lands, they hold the land in a fiduciary capacity, and are accountable to members of the community to whom the land belongs.<sup>35</sup> From every indication, it seems this is the very idea of communal ownership. According to some sources, it is not an idea peculiar to the people of South Cameroon or the west coast of Africa; it is an African idea.<sup>36</sup> So how does this prevailing model of customary land tenure fit with the statutory ownership of land in Cameroon?

## OWNERSHIP OF COMMUNAL LAND IN CAMEROON

In 1974, the divergent systems of land tenure in Cameroon were brought into parity by the enactment of the 1974 Land Ordinances. These Ordinances, which are considered in detail in the next section, still form the foundation of the present law. They generally nationalise all land and are strikingly similar to the pre-existing Land Tenure Laws of the Francophone

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<sup>34</sup> Per Endeley J. in the case of *L.E. Agbortar J.A. Oben v Chief M.M. Besong* [1968] 43 WCLR 45, [45]. See also C. Anyangwe, 'Land Tenure and Interest in Land in Cameroonian Indigenous Law', *Cameroon Law Review*, 27 (1984), 29-41 at 31-38 and J. G. Frynas, *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities* (London, Transaction Publishers, 2000), p. 73.

<sup>35</sup> See, e.g. D. Fobih, *The Significance of Secure Access to Land for the Livelihoods and Food Security of Africa's Farmers and the Urban Poor* (Proceedings and Summary of Conclusions from the Land in Africa: Market Asset, or Secure Livelihood? Conference, London, 8-9 November 2004) (writing about customary land rules in the Ghanaian context).

<sup>36</sup> L. Hangula, 'People's Rights to Land and Natural Resources' in K Fischer-Buder (ed), *Human Rights and Democracy in Southern Africa* (Windhoek, New Namibia Books, 1999), p. 84; J M Sarbah, *Fanti Customary Laws: A Brief Introduction to the Principles of the Native Laws and Customs of the Fanti and Akan Districts of the Gold coast with a report of some Cases thereon decided in the law courts*, 3<sup>rd</sup> edn (, London, Cass, 1968); N. A. Ollennu, *Principles of Customary Land Law in Ghana*, vol. 2 (London, Sweet & Maxwell, 1962). Interestingly, this is also the system of landholding among the Maori indigenous people of New Zealand. See Frédéric Sautet, *Once Were Iwi? A Brief Institutional Analysis of Maori Tribal Organisations Through Time*, New Zealand Business Roundtable Working Paper, 2008.

regions of Cameroon.<sup>37</sup> In fact, the 1974 Land Ordinances have been aptly described as the successors of the 1963 Decree-law and others laws from the colonial days.<sup>38</sup> So the 1974 land reforms have not brought about any real change either to the western value system aspects of the land tenure system or in the efforts to erode and replace the customary land tenure systems of the country.<sup>39</sup> But who owns what, and to what extent are customary communal property rights over land and resources still recognised, under the 1974 Land Ordinances and customary laws?

### **OWNERSHIP AND THE LAND ORDINANCES OF 1974**

The Land Ordinances were promulgated in 1974 following a successful referendum on a unitary State in 1972. By these Ordinances (the “1974 Ordinances”) the land tenure systems in the French and English speaking parts of Cameroon were brought into parity. Based on what was framed as a public consultation,<sup>40</sup> they are:

- Ordinance No. 74/1 of 6 July 1974 to establish rules governing land tenure;
- Ordinance No. 74/2 of 6 July 1974 to establish rules governing State Lands; and
- Ordinance No. 74/3 of 6 July 1974 concerning the procedure governing expropriation for a public purpose and the terms and conditions of compensation.

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<sup>37</sup> Before the 1974 Land Ordinances, many other laws, decrees, and orders had been enacted after 1963, all aimed at consolidating the State’s grip on land. For example, Law No. 66-3-COR of 7 July 1966 and its Decree of application, Decree No. 66-307 of 25 September 1966 emphasised that there must be what was called “*la mise en valeur des terres*”, requiring every individual, including the customary “holders” to apply for a land title, irrespective of the nature of the tenure.

<sup>38</sup> R. S. Mbatu, ‘Forest Exploitation in Cameroon (1884-1994): an Oxymoron of Top-Down and Bottom-up Forest Management Policy Approaches’, *International Journal of Environmental Studies*, 66 (2009), 747-763 at 754.

<sup>39</sup> A. J. Njoh, ‘The Political Economy of Urban Land Reforms in a Post-Colonial State’, *International Journal of Urban and Regional Research*, 22 (1998), 408-424 at 411-412.

<sup>40</sup> A. D. Tjouen, *Droits domaniaux et techniques foncières en droit camerounais: étude d'une réforme législative* (Paris, Economica, 1982), p. 84. The legitimacy of such public consultation has however been questioned. See for instance, Fisiy, *Power and Privilege in the Administration of Law*, p. 38.

Following their enactment, these ordinances could only be made operational after a decree of application had been enacted. It took another two years for these procedural rules to be elaborated.<sup>41</sup> On 27 April 1976, three decrees of application laying down the conditions for obtaining land certificates, the management of national lands, and the management of the private property of the State, were finally published. Although the 1976 Decrees of Application rendered the 1974 Land Ordinances operational, their application soon revealed gaps in the conception and procedural requirements of the land reforms. The result of this was another round of amendments and facilitating legislation and by the end of 1985 at least 57 normative texts relating to land tenure had been published in the Official Gazette. Since its enactment, the 1974 Land Ordinances have remained the subject of much debate in the country. Their various shortcomings have been highlighted and they can be described as revolutionary, reformative,<sup>42</sup> controversial, and impactful especially on customary land rights.<sup>43</sup> They certainly form a complex piece of legislation, with far-reaching consequences. Apart from the overarching need to harmonise, rationalise and consolidate the various legislations<sup>44</sup> (especially those of land and forestry) it seems difficult to fully explain the real motives of the sweeping measures contained in such rapidly changing body of legislative enactments, especially as the 'land tenure legislation was enacted without the full knowledge of the indigenous land tenure systems in the country.'<sup>45</sup> Significantly, it seems in no area is the complexity of the legislation more pronounced than on the issue of ownership of land. For that, one can only gain a better insight on how the law is structured and operates by focusing

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<sup>41</sup> Tjouen has suggested that this delay was caused by the opposition that followed the enactment of the Ordinances, especially from traditional authorities and landlords in the southern parts of Cameroon who perceived the law as a covert form of expropriation of their land: Tjouen, *Droits domaniaux et techniques foncières en droit camerounais*, pp. 85-87. This argument conflicts with the view that the people were adequately consulted using questionnaires and had given their full support for the reforms.

<sup>42</sup> Anyangwe, 'Land Tenure and Interest in Land in Cameroonian Indigenous Law', 29.

<sup>43</sup> Ngwasiri and Nje, *Advocacy for Separate Land Legislation for the Rural Areas of Cameroon*, pp. 3-15; Njoh, 'The Political Economy of Urban Land Reforms in a Post-Colonial State', 411. See also the case of *Amidu Lukong v Razel Road Construction Co. Ltd and MINAT* [2001] 1 CCLR Part 7, 81.

<sup>44</sup> That is the battered remains of English, French and local customary land laws.

<sup>45</sup> Ngwasiri and Nje, *Advocacy for Separate Land Legislation for the Rural Areas of Cameroon*, p. 7. See also Ngwasiri, 'The Impacts of the Present Land Tenure Reforms in Cameroon', 76.

on the three Ordinances and how they are applied. The common feature here is the division of land into three broad categories, private property (Article 2 of Ordinance No.74/1), public property<sup>46</sup> and national lands (Articles 14, 15 and 16). ‘National Lands’ is land that has not been registered as private or public property. This is the area that has generated much controversy and is the focus of the present inquiry.

### **PATTERNS OF ACCESS TO LAND UNDER ORDINANCE NO. 74/1**

Although Ordinance No. 74/1 significantly distinguishes between private and public property rights, it also declares in Article 1 that:

- (1) The State guarantee to all natural persons and corporate bodies having landed property the right to freely enjoy and dispose of such lands.
- (2) The State shall be the guardian of all lands. It may, in this capacity, intervene to ensure the rational use of land or in the imperative interest of defence or the economic policies of the nation.

By this provision, the State recognises the rights of individuals and corporate bodies to privately own land, but also reserves the right to intervene in the public interest to ensure rational use of such lands. Article 1(2) also makes the State guardian of all lands, i.e. public lands and national lands as well, and may dispose of it as it sees fit in accordance with established guidelines.<sup>47</sup>

According to Article 2 of Ordinance No.74/1:

The following categories of lands shall be subject to the right of private property:

- a) registered lands; b) freehold lands; c) lands acquired under the transcription system;
- d) lands covered by a final concession; e) lands entered in the Grundbuch.

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<sup>46</sup> See ‘Public Property Rights’ below.

<sup>47</sup> See further below ‘Implications for (Communal) Land Ownership in Cameroon’.

These were lands already registered under the preceding State land administration systems as privately owned. These included those that were registered under the 1932 Act (for those parts of the country that were under French colonial rule);<sup>48</sup> those for which a Certificate of Occupancy (which was the recognised document of title in parts of the country under British colonial rule) had been issued;<sup>49</sup> lands under the *Grundbuch*;<sup>50</sup> land registered under the transcription system; and those that were covered by final concessions.

There is no doubt that those who held such rights were those who could relate to the colonial and post-colonial legislation. Nevertheless, for those holders of documentary titles in land, a timeframe of ten years, starting from the 5 August 1974, was provided to allow them to convert their previous interests in the land into land certificates under the new law. A land certificate is what confers ownership under the 1974 Land Ordinances. Failure to convert these old interests within the specified timeframe amounted to forfeiture and the land reverted to the common pool of ‘national lands’.<sup>51</sup> Therefore, private property now covers only land for which a land certificate has been issued. In practice and in law, no customary communal property rights are exercisable over these private lands, unless the private property is registered in the name of the community.

To define ‘national lands’, Articles 14 and 15 of Ordinance No. 74/1 state that:

14. (1) National lands shall as of right comprise lands which at the date on which the present Ordinance enters into force, are not classed into the private or public

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<sup>48</sup> This consisted of two decrees enacted on 12 July 1932. The first decree was aimed at the collective recording of land rights by corporate groups for lands which had no document of title. The second introduced the registration of individual interests in land. Holders of interests in land could have them registered and a document of title issued.

<sup>49</sup> Issued under the Land and Native Rights Ordinance of 1927 that was applicable in parts of the country that were under British colonial rule.

<sup>50</sup> The German land register in which a systematic registration of all interests in land was recorded, specifying the location and the dimensions of the interests in land.

<sup>51</sup> Ordinance No. 74/1 of 6 July 1974, arts. 3 and 4.



property of the State and other public bodies. (2) National lands shall not include lands covered by private property right as defined in Article 2 above.

15. National lands shall be divided into two categories:

(1) Lands occupied with houses, farms and plantations and grazing lands, manifesting human presence and development; (2) Lands free of any effective occupation.

This means that occupied and unoccupied lands that are not registered are included in the category of national lands. It is this provision that has raised concerns in local communities that their lands are being nationalised. Instead of being vested in the community chief or family head, the control and management of ‘national lands’ is now by the State.

Specifically, Article 16 of Ordinance No. 74/1 provides that:

(1) National lands shall be administered by the State in such a way as to ensure rational use and development thereof. (2) Consultative boards presided over by the administrative authorities and necessarily comprising representatives of the traditional authorities shall be established for this purpose.

The role of the Consultative Board is to investigate developments on a specific plot of national land, so the involvement of the traditional authorities gives them a real voice in practice over what happens to the customary communal property rights. The one question though, that arises is whether the ‘vesting provisions’ (Articles 1, 14, 15 and 16 of Ordinance No. 74/1) could be effective without first divesting existing customary owners (village chiefs and individuals) of their customary ownership type rights. The effect of this all-embracing notion of ‘national lands’ is that a vast majority of Cameroonians (including individuals and communities), who held land under the customary tenure system and without any State recognised document of title found their lands absorbed into the category of national lands. It has been argued that the effect of this all-embracing notion of ‘national lands’ is to divest all

customary rights holders of their customary ownership type rights<sup>52</sup> but not necessarily other rights (such as the rights to harvest timber products from forest on such lands).

However, it seems clear that this is not actually the case. Everybody still acts as though customary property rights still exist<sup>53</sup> and subsequent legislation such as the 1994 Forestry Law is also drafted on the basis that customary ownership rights still exist.<sup>54</sup> According to Assembe-Mvondo and others<sup>55</sup> this co-existence between written law and customary law is down to what they term the ‘spirit of the Cameroonian legal system’; a system that has variously been described as a ‘dual legal system where customary and informal practices are legalised or accepted by State authorities’<sup>56</sup> and as a “hybrid land tenure regime”, which mixes informal and legal practices.<sup>57</sup> For example, although there is no mention in the land legislation of the land control interests of a community chief and family head, according to Article 17 of Ordinance No. 74/1, a customary community can at any time apply for the registration of land in the name of a community and/or its member as long as the community and/or its member can show proof of effective occupation or exploitation of the land on the

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<sup>52</sup> Ngwasiri and Nje, *Advocacy for Separate Land Legislation for the Rural Areas of Cameroon*, pp. 3-15; Ngwasiri, ‘The Impacts of the Present Land Tenure Reforms in Cameroon’, 75-76; Njoh, ‘The Political Economy of Urban Land Reforms in a Post-Colonial State’, 411.

<sup>53</sup> If there is conflict between the laws, there are certain grounds such the maintenance of ‘public order’ or ‘public policy’ on which written law will prevail over customary law. In other words, the courts are enjoined to apply only the customary law that is not contrary to the law and public policy or public order. This position was affirmed by the Cameroon’s Supreme Court decision in the case of *Bessala Awona v Bidzogo Geneviève* [1962] Cor. A No. 445 of 3 April 1962. For more on the meaning and application of the ‘public policy’ and ‘public order’, see N. Enonchong, ‘Public Policy and Ordre Public: The Exclusion of Customary Law in Cameroon’, *African Journal of International and Comparative Law*, 5 (1993), 503-524.

<sup>54</sup> E.g. the 1994 Forestry Law, s. 8(1) recognises the ‘customary right’ of the local communities in all the different types of forests. This means ‘the right which is recognised as being that of the local population to harvest all forest, wildlife and fish products freely for their personal use except the protected species.’ Similarly, Law No. 96/12 of 5 August 1996 relating to Environmental Management in Cameroon recognises the exercise of local customary practices as applicable if they offer more efficient environmental management (s. 9(f)). The exercise of customary norms is, however, limited to where there is no written law on environmental protection.

<sup>55</sup> S. Assembe-Mvondo and others, ‘Review of the Legal Ownership Status of National Lands in Cameroon: A More Nuanced View’, *Development Studies Research*, 1 (2014), 148-160 at 153-155.

<sup>56</sup> A. Teyssier, ‘La Régulation Foncière au Cameroun, Entre Régimes Communautaires et Aspirations Citoyennes’, in P. Duguée and Ph. Jouve (eds), *Organisation Spatiale et Gestion des Ressources et des Territoires Ruraux* (Montpellier, CIRAD/CNEARC, 2003), pp.1–10.

<sup>57</sup> E. Le Roy, *La Réforme du Droit de la terre Dans Certains Pays d’Afrique Francophone* (Etude Législative, Rome, FAO, 1987), p. 115.

basis of the traditions and customs of the community.<sup>58</sup> Provided that the land is thus registered, this mechanism should guarantee the continuous exercise of any customary communal property rights over the land. The acceptance that the Cameroonian system is a mixture of informal and formal rules is supported by the decision of Cameroon's Supreme Court in the case of *JIMS André v Madame Effa Faustine*<sup>59</sup>, in which the Judges rejected as unfounded a petition based on a claim to ownership on the basis that the 'customary owner' did not hold a land certificate, thereby explicitly recognising the customary ownership of land based on historical facts.<sup>60</sup> It may well be the case that the acceptance of such a compromise on land tenure is an opportunity for the laws to be updated to reflect the reality of the land claims by local people.<sup>61</sup>

The use of formal and informal rules in the Cameroonian legal system means that it is possible to protect some customary communal property rights, but not others. For example, for some communities such as indigenous Pygmy populations, even if they could afford the cost of applying for the registration of land, proving that they have been in effective occupation or exploitation of the land on the basis of the traditions and customs of the community is very difficult considering their traditional hunter-gatherer lifestyles. This is further worsened by the difficulty in finding out what local community land and forest resource rights are in customary law except by asking people, and the difficulties of verifying what people say in these contexts. Nevertheless, to recommend the grant of a land certificate,

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<sup>58</sup> In principle, land owners who can prove that they were in effective occupation of the land before the 5 August 1974 were given a ten-year period within which they could register the land under the provisions of Article 13 (2) of Decree No. 76/165 of 27 April 1976 (see Fisiy, *Power and Privilege in the Administration of Law*, pp. 42-47). In practice though, communities can still apply for the registration of title even after the ten-year period has passed: Assembe-Mvondo and others, 'Review of the Legal Ownership Status of National Lands in Cameroon', 154.

<sup>59</sup> *JIMS André v Madame Effa Faustine*, [2002] Arrêt No 99/CC (Supreme Court of Cameroon) of 04 April 2002, *Juridis Périodique* No. 52, 29-45.

<sup>60</sup> Assembe-Mvondo and others, 'Review of the Legal Ownership Status of National Lands in Cameroon', 154.

<sup>61</sup> E. Schlager and E. Ostrom. 'Property Rights Regimes and Natural Resources: A Conceptual Analysis', *Land Economics*, 68 (1992), 249-262; Assembe-Mvondo and others, 'Review of the Legal Ownership Status of National Lands in Cameroon', 157.

the Consultative Board<sup>62</sup> concerned has to first satisfy itself that the applicant was either in occupation or exploitation of the land at issue prior to 5 August 1974. It therefore follows that no registration of land can be accepted in respect of land which is in the possession of another without first revoking the right of the original occupier.<sup>63</sup> As argued above, there is a perception amongst non-hunter-gatherers that hunting and gathering does not confer rights over land. This makes it easy for the government and other outside groups to be able to appropriate Pygmy land, because the Pygmies are not perceived as original occupiers with rights that need to be revoked before registration is granted.

For other communities, though, whose land use practices such as agriculture are accepted as effective use and occupation, the occupation or exploitation of such land at a given time must necessarily be derived from customary law. The implication of this argument is that customary owners are still holding land under the customary land tenure system because at the time of the coming into force of the 1974 Land Ordinances, a vast majority of the citizens were without any state recognised document of title. Although the Ordinances do not elaborate on the practicality of a community applying for a land certificate, in principle, any application will be in the name of the community head that is considered to hold the land in the name of his people. Judicial support for this view can be found in the observation of Ekema, C.J. in the case of *Presbyterian Church Moderator v D.C. Johnny*.<sup>64</sup> After rejecting the contention of the Fon (chief) of Mankon that the land in dispute and all land in Mankon

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<sup>62</sup> Each Administrative Division in the country has at least one Consultative Board.

<sup>63</sup> See the case of *Chief Moline & 3 others v Chief Musenja & 8 others* [2000] 2 CCLR 1. See also *Adje Robert Acho v Rev. Ngwane Ediage Thomas* [1998] 4 CCLR 109,

<sup>64</sup> [1974] unreported (Bamenda Court of Appeal).

belonged to him,<sup>65</sup> the learned judge observed that, ‘The chief holds the land of Mankon not in his own name but in the name of the people of Mankon.’<sup>66</sup>

As suggested above, this is a view that runs deep in African customary land tenure and was applied in Cameroon even before the coming into force of the 1974 Land Ordinances; a view that the community chief is a mere trustee holding the land for the common benefit of the members of the community and is accountable to members of the community to whom the land belongs. The chief is in no way the owner of the land which belongs to the community unless a piece of land belongs to him in this capacity.<sup>67</sup> This view contrasts with the present political dispensation in which, according to Pemunta, ‘lineage and family heads own family land, while the chief is the *de facto* owner of all land in the village and the state claims ownership over all parcels of land.’<sup>68</sup> While Pemunta’s view explains why some chiefs may now see themselves as ‘owners’ of land which should belong to members of the community, it has also been argued that the current perception does not depart from the concept of communal ownership. As Mamdani puts it, the reason is that ‘corporate and individual land rights co-exist, explaining why the colonial notion of “private property rights” was only a unilineal reductionism of community rights based on the universal European concept of legal tenure.’<sup>69</sup>

For unoccupied land, no registration could take place under Decree No. 76/165, even if the land was claimed by individuals or customary communities. The only rights available to

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<sup>65</sup> Although not clearly stated, this erroneous claim was certainly based on the fact that in Cameroon, chiefs and other traditional rulers are officially considered as auxiliaries of the administration of the State and they therefore see themselves to some extent as quasi-public authority.

<sup>66</sup> *Presbyterian Church Moderator v D.C. Johnny* [1974] unreported (Bamenda Court of Appeal).

<sup>67</sup> See also the case of *Chief Lobe Njembele v Benedict Nsombai* [1980] unreported (Court of Appeal Buea). This is a case where a chief entered land possessed by another and converted his felled trees. The High Court had ruled in favour of Nsombai but the chief appealed the decision, an appeal that was rejected.

<sup>68</sup> Pemunta, ‘The Governance of Nature as Development and the Erasure of the Pygmies of Cameroon’, 363.

<sup>69</sup> Mamdani, *Citizen and Subject*, pp. 139–146.

individuals and customary communities on unoccupied lands were hunting and fruit picking rights according to Article 17(3) of Ordinance No. 74/1:

Subject to the regulations in force, hunting and fruit picking rights shall further be granted to them on lands in category 2 as defined in Article 15, until such a time as the State has assigned the lands for specific purposes.

According to this provision, contrary to customary rules which recognise communal holding of such lands, a customary community and/or its representative cannot apply for a land certificate for such land either because the law does not recognise the specific form of land and resource use as conferring any land rights, or they cannot claim or prove to have been in use or occupation of the land because the land is truly unoccupied. Such land reverts to the common pool of 'national lands' which the State has a free hand in how they are designated and used as per Article 16 of Ordinance No. 74/1.

## **PUBLIC PROPERTY RIGHTS**

Under the 1974 Land Ordinances, there are two categories of State lands: the public and the private property of the State, public and parastatal bodies.<sup>70</sup> The public property of the State consists of all personal and real property which, by their very nature (e.g. coastlands; waterways; sub-soil and air space) or intended purpose (e.g. roads), is set aside either for the direct use of the public or for public services.<sup>71</sup> Such lands are inalienable, imprescriptible, and under no circumstances should be subject to any private appropriation.<sup>72</sup> Significantly the public property of the State also includes 'concession of traditional chiefdoms and property relating to it, including where the concession of chiefdoms is considered as the joint property of the community.'<sup>73</sup> In this case, the chief retains a right of enjoyment but not the community while the State is the owner. The nature of this category of property suggests that

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<sup>70</sup> Ordinance No. 74/2 of 6 July 1974 to establish rules governing State Lands, art. 1.

<sup>71</sup> Ordinance No. 74/2 of 6 July 1974, arts. 2, 3 and 4.

<sup>72</sup> Ordinance No. 74/2 of 6 July 1974, art. 2(2).

<sup>73</sup> Ordinance No. 74/2 of 6 July 1974, art. 4(1).

the customary communal property rights have always been exercised over much of what is now the public property of the State, but depending on the purpose for which the land has been set aside, such rights may now be limited if their exercise will be contrary to the purpose for which it is set aside.

The private property of the State is acquired from the category of ‘national lands’ or from private ownership through expropriation on the grounds provided for in Article 18 of Ordinance No. 74/1, as amended by Ordinance No. 77/1 of 10 January 1977:

The State may classify portions of national lands under the public property of the State or incorporate such lands in the private property of the State or in that of other public bodies for purposes of public, economic and social utility.

This provision suggests that the public and private property of the State are both acquired from national lands, and the main difference between these two categories of State lands lies in the purpose for which they have been classified. In practice, though, the distinction between the two is slim. For example, given that the instruments that govern land tenure and determine the status of forest land are the 1974 Land Ordinances, it is possible to establish categories of forest that are equivalent to the legal status of the land on which the forest is found.<sup>74</sup> From this perspective, the land base of State forests should be the public and private lands of the State. However the categorisation of forests makes no reference to State forests being the public property of the State. Instead, all State forests which are made up of the permanent forest estate (forest concessions and protected areas) are classified as part of the private property of the State.<sup>75</sup>

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<sup>74</sup> Assembe-Mvondo and others, ‘Review of the Legal Ownership Status of National Lands in Cameroon, 155.

<sup>75</sup> 1994 Forestry Law, s. 25(1). See also FAO, *State of the World's Forests 2011* (Rome, FAO, 2011), p. 179.

Being included in the category of ‘national lands’, land which belonged to the community can easily be acquired as the public or private property of the State if it is in the public interest to do. However, the rights of bona fide owners and occupants held over State lands prior to the entry into force of the Ordinance were protected except where it was in the public interest to dispossess them and subject to the payment of adequate compensation.<sup>76</sup>

Thus where customary communal property rights are exercised over the public or private property of the State, the customary communities or individuals are legally or in practice assumed to be entitled to the protection given by this provision. For example, within State forests, shifting cultivation is strictly forbidden and local use of forest resources is restricted, with the customary logging rights of the local population preserved but only if they are not contrary to the objectives of such forests.<sup>77</sup> While some activities such as shifting cultivation or public access to State forests may be regulated or forbidden,<sup>78</sup> the local population is entitled to compensation only if the customary logging rights that are contrary to the purpose of the forest, are limited.<sup>79</sup> While this provision is laudable, its application is also likely to leave out a large proportion of lands that are, in the eyes of the law, viewed as ‘unoccupied’ lands and have therefore been sub-summed under the category of national lands. As will be seen in the following section, this provision has been given a very wide interpretation by the State, even where there is clear evidence of use or occupation.

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<sup>76</sup> Ordinance No.74/2 of 4 July 1974, art. 7.

<sup>77</sup> 1994 Forestry Law, s.26(1) and (2).

<sup>78</sup> 1994 Forestry Law, s.26(3). See also, s. 30(2).

<sup>79</sup> 1994 Forestry Law, s.26(2).



## **EXPROPRIATION**

In Cameroon, land expropriation is done under the Land Ordinance No. 74/3.<sup>80</sup> Article 1(1) provides that:

Expropriation for a public purpose shall be pronounced by decree on completion of the procedure defined by the present Ordinance. By the said decree, existing titles over the land in question shall be extinguished and the land thus declared free shall be registered in the name of the State.

Although it is not clear from this provision if by existing titles, the Ordinance intends to include those still holding land under customary law, it nevertheless gives the State the right to revoke any right of occupancy (existing title) for the overriding public interest. Article 2 however, qualifies the meaning of existing titles to affect only private property. It states that ‘Expropriation for a public purpose shall only affect private property as defined in Article 2 [of Ordinance No. 74/1].’ This provision seems to mean that only private rights are extinguished, and not customary rights especially as any land held by virtue of a customary tenure under which a land certificate has not been issued is automatically absorbed into the category of national lands. In broad terms, Ordinance No. 74/3 stipulates that any public body, State Agency, parastatal, or local council can apply to have land expropriated for public use. The implications of this procedure for existing customary communal property rights is that, depending on the purpose for which the land is being expropriated, these rights can be restricted or even extinguished.

## **APPROPRIATION**

In addition to the expropriation procedure explained above, evidence suggests that Article 1(1) of the Ordinance No. 74/3 has been extended to justify the provision of private land

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<sup>80</sup> Ordinance No. 74/3 of 6 July 1974 concerning the procedure governing expropriation for a public purpose and the terms and conditions of compensation.

reserves for the State which could be redistributed if and when the need arise. This is known as appropriation, and by this notion the State could delineate and claim property from ‘unoccupied’ lands. As argued above, ‘unoccupied’ lands include land in respect of which a customary community and/or its representative cannot apply for a land certificate, because the law does not recognise the specific form of land and resource use as conferring any land rights. Such lands were then registered as the private property of the State. This procedure is still widely applied because it does not require the payment of compensation. Once property has been registered as the private property of the State, one of three things can be done to it: (1) the State can sell it or lease it to private individuals or communities in the same manner as if it were National Lands;<sup>81</sup> (2) land can be exchanged between the State and its citizens under the conditions laid down by an empowering decree (no empowering decree has been published and no such situation has yet been recorded under the present law); and (3) the State can give the landed property to a council or public body following the expropriation procedure outlined above.<sup>82</sup> The justification for such appropriation has never been expressly stated in writing, and highlights another dimension of just how State power is used in divesting certain groups of people of their property and reallocating it to others without the ‘public interest’ justification or payment of compensation. For example, under the 1994 Forestry Law the council forests (which along with State forests make up the permanent forest estate), are categorised as the private land of the council, but with no equivalent of Section 26(1) to protect the customary logging rights of the local population.<sup>83</sup> However the development of forestry in Cameroon has also seen some form of re-allocation of appropriated land to communities in the form of community forests.

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<sup>81</sup> Decree No. 76/167 of 27 April 1976 to establish the terms and conditions of management of the private property of the State, arts. 6 and 7.

<sup>82</sup> In Cameroon, the local councils remain very much part of the centralised State even though decentralisation as stipulated by the 1996 amendment of the 1972 Constitution of the Republic of Cameroon is gradually being implemented.

<sup>83</sup> 1994 Forestry Law, ss. 30-33.

Community forests (and some other forests<sup>84</sup>), are unclassified forests which are on non-permanent forest land. The non-permanent forest estate consists of forestland that may be allocated for uses other than forestry.<sup>85</sup> The land base of such forests is national land because they are carved out of the national lands category.<sup>86</sup> Although community forests are re-allocated to communities, the exercise of communal property rights over them must be in accordance with a simple management plans. A simple management plan is part of the agreement for the management of a community forest and determines the activities to be carried out. This agreement is ‘a contract by virtue of which the service in charge of forestry allots to a community, a portion of national forest, which the community manages, preserves and exploits in its own interest.’<sup>87</sup>

Once the agreement has been signed, section 37(5) of the 1994 Forestry Law provides that, ‘Forest products of all kinds resulting from the management of community forests shall belong to the village communities concerned.’ This is significant because it guarantees the rights of communities to own everything from the forests (including timber)<sup>88</sup> and allows them a ‘free hand’ in determining what is contained in an agreement.<sup>89</sup> Crucially, these management agreements must specify the beneficiaries, boundaries of the forest allocated to

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<sup>84</sup> This includes for example communal forests and forests belonging to private individuals; see 1994 Forestry Law, ss. 37-39.

<sup>85</sup> For the account of the concept of community forestry in Cameroon see, E. S. Egbe, ‘The Concept of Community Forestry under Cameroonian Law’, *Journal of African Law*, 45(2001), 25-50.

<sup>86</sup> A. Karsenty, *Large-Scale Acquisition of Rights on Forest Lands in Africa* (Washington, D.C., RRI, 2010).

<sup>87</sup> Decree No. 95-531-PM of 23 August 1995 to determine the conditions of implementation of the forestry regulations (hereinafter, 1995 Decree of Implementation), art. 3(16).

<sup>88</sup> This right is further strengthened by the provision of s. 37(7) of the 1994 Forestry Law which provides that, ‘Village communities shall have the right to preemption in the event of the alienation of products found in their [community] forests.’ Despite the apparent guarantee of the right to everything from the forests, including timber, based on the current zoning system approved in 1995 (Decree No. 95-678-PM of 18 December 1995 to Institute an Indicative Land Use Framework for the Southern Forested Area of Cameroon), it is highly unlikely that the exploitation for commercial purpose of a valuable resource such as timber would ever be permitted in community forests under the terms of a management agreement or that such high value forests would ever fall under the community forestry category.

<sup>89</sup> 1995 Decree of Implementation, art. 95(2) provides that, ‘Each community shall determine the conditions under which forest exploitation acts shall be granted.’

the communities, and the special instructions on the management of areas of woodland and/or wildlife, formulated at the behest of the communities.<sup>90</sup> This suggests that the communities can specify and exercise their customary communal property rights within such forests. However the process of determining the land use practices that confer land rights, which leaves out hunter-gatherer type rights, means that some groups such as the Pygmy populations, who also inhabit these forests, are likely to be discriminated against in its management and in the share of benefits.<sup>91</sup>

Furthermore, although section 37(1) of the 1994 Forestry Law requires the services in charge of forests to provide free technical assistance to the local communities, the technicalities involved and the process and cost of setting up a corporate body means that simple management plans are cumbersome, expensive to put together and difficult to follow for local village communities. This may in turn limit the manner in which the community is able to exercise their customary communal property rights as the State may still allocate the forests for large-scale industrial logging.<sup>92</sup> While the community forestry option has been seen as a positive in terms of encouraging community participation, it is worth noting that the decentralisation of forest management was a “supply” put forward by the central State, rather than a “demand” from below.<sup>93</sup> In doing so, State authority over natural resources such as forests was validated while at the same time weakening any customary communal property rights the local communities might have had in the past, with the main political argument being that the State wants to regulate forest exploitation in order to ensure rational

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<sup>90</sup> 1994 Forestry Law, s. 38(1).

<sup>91</sup> See, Pemunta, ‘The Governance of Nature as Development and the Erasure of the Pygmies of Cameroon’, 359-362.

<sup>92</sup> A. Pénelon, *Community Forestry: It May Indeed be a New Management Tool, But is it Accessible? Two Case Studies in Eastern Cameroon* (Forestry Participation Series, London, IIED, 1997), pp. 10-11.

<sup>93</sup> P. R. Oyono, J. C. Ribot and A. M. Larson, *Green and Black Gold in Rural Cameroon: Natural Resources for Local Governance, Justice and Sustainability* (Environmental Governance in Africa Working Paper Series, Washington, D.C., WRI, 2006), p. 9.

allocation.<sup>94</sup> The effect is an even weaker or no protection for the customary communal property rights of the some communities such as the Pygmy populations. The failure to recognise the full range of customary communal property rights for the different categories for forest and especially for community forests is one of the main weaknesses of the Forestry Law.<sup>95</sup>

## **IMPLICATIONS FOR CUSTOMARY COMMUNAL PROPERTY RIGHTS IN CAMEROON**

With regard to the pre-existing customary land tenure regime, the important question arising from the above discussion is this: who now owns land (including land that belongs to the community under customary law) in Cameroon? The 1974 Land Ordinances have divested individuals and communities of their customary property rights over land and any natural resources such as forests that it holds, without transferring it to anyone, save that the State is made trustee of it.<sup>96</sup> For land which was customarily owned and for which no land certificate has been issued, it is difficult to know where ownership now lies or whether there is now any kind of ownership of land still existing, especially as there is no mention in the land legislation of the land control interests of chiefs and lineage heads. Nevertheless, there seems to be a consensus that customary landowners have lost their pre-existing rights by the enactment of the Land Ordinances and that the State is now the sole proprietor of these lands

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<sup>94</sup> This was the same argument advanced to justify State claim over ownership of land under the 1974 Land Ordinances. For more on the gap created by the law between the State and local communities, see further, A. Labrousse and F-X. Verschave, *Les Pillards de la Forêt: Exploitations Criminelles en Afrique*, vol. 17 (Marseille, Editions Agone, 2002), pp. 4-7; M. Zoa, 'Community Forests: Reconciling Customary and Legal Concepts' in M. C. Diaw, T. Aseh and R. Prabhu (eds), *In Search of a Common Ground: Adaptive Collaborative Management in Cameroon* (Bogor, CIFOR, 2009), pp. 116-138; and P. R. Oyono, 'The Social and Organisational Roots of Ecological Uncertainties in Cameroon's Forest Management Decentralisation Model', *Eur J Dev Res*, 16 (2004), 174-191 at 174.

<sup>95</sup> See e.g., E. Beauchamp and V. Ingram, 'Impacts of Community Forests on Livelihoods in Cameroon: Lessons from Two Case Studies', *International Forestry Review*, 13 (2011), 389-403 at 399.

<sup>96</sup> Ngwasiri and Nje, *Advocacy for Separate Land Legislation for the Rural Areas of Cameroon*, pp. 3-15; Ngwasiri, 'The Impacts of the Present Land Tenure Reforms in Cameroon', 75-76; and Njoh, 'The Political Economy of Urban Land Reforms in a Post-Colonial State', 411.

and the State alone could allocate the lands in question or deal with them in any other manner.<sup>97</sup> In other words, the guardianship that the State claims over land (Article 1(2) of Ordinance No.74/1) is not just benign protection as it seems; it is ownership with the power to alienate as demonstrated by the far-reaching powers not only to expropriate land from people, but also to control properties through considerable executive and administrative powers.<sup>98</sup> This view is not only shared by several authors;<sup>99</sup> it is also common for government officials in Cameroon's Ministry in charge of forestry, for example, to declare that forest land belongs to the State.<sup>100</sup>

Despite the overwhelming arguments in favour of this view it has, nevertheless, been suggested that the land and resources that the State holds belong to the Cameroonian nation, and so the guardianship that the State claims over un-allocated lands is only legal custodianship with supervisory powers.<sup>101</sup> In spite of this lack of full recognition of customary property rights (except in cases in which a land certificate has been issued) customary communities and individuals have continued to occupy and exploit land (including land that has been re-allocated) as though customary rights still exist. In relation to forestry for example, the lack of security in tenure puts communities in a precarious situation where they

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<sup>97</sup> Ngwasiri has argued that, 'The present land legislation in the country... appears to have reduced all customary land rights to mere greatly limited rights of user with only as much security of tenure as the state is willing to allow.': Ngwasiri, 'The Impacts of the Present Land Tenure Reforms in Cameroon', 75-76. This view is supported by Fisiy who has also observed that, 'the corporate nature of customary land rights cannot be legally enforced under the 1974 land law reforms': Fisiy, *Power and Privilege in the Administration of Law*, p. 52.

<sup>98</sup> Njoh, 'The Political Economy of Urban Land Reforms in a Post-Colonial State', 411.

<sup>99</sup> See e.g., W. D. Sunderlin, J. Hatcher and M. Liddle, *From Exclusion to Ownership? Challenges and Opportunities in Advancing Forest Tenure Reform* (Washington, D.C., RRI, 2008), p. 64; L. Cotula and J. Mayers, *Tenure in REDD – Start-Point or Afterthought?* (Natural Resource Issues No. 15, London, IIED, 2009), p. 67; J. Hatcher and L. Bailey, *Tropical Forest Tenure Assessment: Trends, Challenges and Opportunities* (Technical Series No. 37, Yokohama, ITTO, 2011), p. 48; L. Alden Wily, *Whose Land is It? The Status of Customary Land Tenure in Cameroon* (Yaoundé, CED/FERN/Rainforest Foundation, 2011), p. 189; L. Alden Wily, 'The Law is to Blame: The vulnerable Status of Common Property Rights in Sub-Saharan Africa', *Development and Change*, (42) 2011, 733–757; FAO, *Reforming Forest Tenure: Issues, Principles and Process* (FAO Forestry Paper No. 165, Rome, FAO, 2011), p. 116.

<sup>100</sup> Assembe-Mvondo and others, 'Review of the Legal Ownership Status of National Lands in Cameroon, 155; S. Ongolo and A. Karsenty, 'The Politics of Forestland Use in a Cunning Government: Lessons for Contemporary Forest Governance Reforms', *International Forestry Review*, 17(2015), 195-209.

<sup>101</sup> Assembe-Mvondo and others, 'Review of the Legal Ownership Status of National Lands in Cameroon, 155.

are faced with two options: refusing to allow logging companies access to their forests and negotiating a high price for allowing the companies access to the site.<sup>102</sup> However the overriding State power in the management and control of forests means that in the end, the choice is limited and communities are left with trying to secure as much as possible from the forests even if it is contrary to the law.

There are judicial decisions which go contrary to Ekema C.J.'s observation in the case of *Presbyterian Church Moderator v D.C. Johnny*,<sup>103</sup> that the community chief is a mere trustee holding the land for the common benefit of members of the community, and instead emphasise the view that the State (through its various arms) is now the new 'owner' of land. For example, in *Chief Moline & 3 others v Chief Musenja & 8 others*<sup>104</sup>, the Court in allowing an appeal, made the following observation on the effect of Part III of the Ordinance on customary land tenure in relation to land traditionally occupied by two communities but formally held by the Cameroon Development Corporation (CDC):

A tenant cannot give what he does not have "*nemo dat quod non habet*". The law is that, if a tenant like CDC<sup>105</sup> no longer needs the land for purpose for which it was initially assigned, the said land reverts to the state. In particular, Article 13(2) of Ordinance 74/2 of 6 July 1974 in relation to private property of the state renders void any attempt to alienate property of the state without prior approval of the Minister in charge of Lands.<sup>106</sup>

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<sup>102</sup> Pénelon, *Community Forestry: It May Indeed be a New Management Tool, But is it Accessible?*, pp. 10-11; Beauchamp and Ingram, 'Impacts of Community Forests on Livelihoods in Cameroon: Lessons from Two Case Studies', 397-399.

*Presbyterian Church Moderator v D.C. Johnny* [1974] unreported (Bamenda Court of Appeal).

*Chief Moline & 3 others v Chief Musenja & 8 others* [2000] 2 CCLR 1.

<sup>105</sup> A state corporation.

<sup>106</sup> *Chief Moline & 3 others v Chief Musenja & 8 others*, [5], p. 7 and [5] p. 8.

The Court found that since the issue was ‘title to land, disputed by two communities, and . . . an inter-communal boundary dispute or . . . a claim over unregistered land’ the lower court had no jurisdiction on the matter.<sup>107</sup>

In reaching its decision the court went further to observe that:

[A]ccording to Article 17 of Ordinance 74/2 to establish rules governing land tenure, national lands are allocated by grant, lease or assignment. In the event of such land no longer serving the purpose for which it was initially allocated, it becomes automatically incorporated *as of right* in the national lands.<sup>108</sup>

Accordingly, the question was not which of these two communities ‘owned’ the land. The land in question was formally CDC land and if CDC no longer used it, the land reverted to the common pool of national land. The interests of the communities were irrelevant.

The position of the court in this case and the other cases mentioned above has something rather curious in it. In addition to emphasising the notion of national lands, the above statement by the court reflects generally the trends the courts have mainly followed since the enactment of the 1974 Land Ordinances, i.e. attempting to read the law as it is without attempting to consider the legality of the customary land tenure rules which are nevertheless still applicable. This is perhaps due to the ambiguity in the jurisdictions of the courts of law and the Consultative Board over unregistered land,<sup>109</sup> but this apparent lack of jurisdiction by

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<sup>107</sup> *Chief Molinge & 3 others v Chief Musenja & 8 others*, [5], p. 7 and [5] p. 8.

<sup>108</sup> *Chief Molinge & 3 others v Chief Musenja & 8 others*, [35], p. 7. Italics mine.

<sup>109</sup> Ordinance No. 74/1, art. 5(3). See also, Ngwasiri, ‘The Impacts of the Present Land Tenure Reforms in Cameroon’, 84 and N. Enonchong, ‘Jurisdiction Over Disputes Relating to “National Lands” in Cameroon’, *African Journal of International and Comparative Law*, 11 (1999), 100-127.



the courts over land matters concerning customary law is one of the fundamental weaknesses of the land law.<sup>110</sup>

Notwithstanding, it appears from the current law that the rules of tenure, so far as unregistered land is concerned, are necessarily the rules of customary land tenure even if all land has been 'nationalised'.

The provisions of the Land Ordinances and procedures have made no secret of the intention and purpose of the law. It declared land (occupied and unoccupied, held by individuals and communities under customary law) as national land, except where a land certificate has been issued. There is a bias in favour of private property and communal property is encouraged only when it is administered by the State as 'national lands'. This has made it difficult to enforce collective customary communal property rights, thereby rendering illegal, for instance, any sale or alienation of unregistered land by a community or individual holding customary rights. At the same time, the State is also unable to completely alienate all land in practice because it is just not possible for communities and individuals to register all lands over which they have traditionally exercise customary communal property rights. In the end, because customary practices remain the *de facto* dominant tenure type especially, in rural areas,<sup>111</sup> the Cameroonian authorities are forced to tolerate certain practices. For example, in practice a seller (private individual) of a parcel of 'national land' has to sign a document known as 'Certificate of Abandonment of Customary Rights' which is certified by the authorities and accepted by the Consultative Board (responsible investigating developments

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<sup>110</sup> This view is shared by Ngwasiri, 'The Impacts of the Present Land Tenure Reforms in Cameroon', 73-85 and Enonchong, 'Jurisdiction Over Disputes Relating to "National Lands" in Cameroon', 100-127.

<sup>111</sup> J. W. Bruce (ed), *Country Profiles of Land Tenure: Africa, 1996* (Land Tenure Center Research Paper No. 130, Madison, WI, Land Tenure Center, 1998).

on a specific plot of national land before a land certificate is issued). So, here the authorities can be seen as impliedly recognising customary ownership of the land.<sup>112</sup>

Nevertheless it now seems obvious that the 1974 Land Ordinances have created a situation where the law cannot be effectively applied without reverting to action for which there is no legal basis. That is, it relies on the very features of the customary tenure systems that it refuses to acknowledge to determine who could be granted title in communally held lands that had been incorporated into national lands.<sup>113</sup> These features include the absolute ownership of land by the community and the community chief or family head's right of management and control, which are the hallmarks of customary land tenure systems. As one scholar has argued:

By refusing to acknowledge the existence of local landlords (at least not as owners of land) [but as holders in possession or occupation], *the 1974 Land Ordinances have elevated the State to the status of the paramount landlord, claiming, expropriating, and selling land as it deems appropriate. Nobody, not even the [customary] holder of a land certificate can claim to be free from State encroachment* (Emphasis added).<sup>114</sup>

## CONCLUSION

It could be said that customary landowners have lost their title to land by nationalisation, except where they have applied and obtained a land certificate under the conditions laid down by the 1974 Land Ordinances. Land reform is skewed in favour of private property at the

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<sup>112</sup> N. A. Tientcheu, *Droits Réels et Domaine National au Cameroun* (Yaoundé, Presse Universitaires d'Afrique, 2005), p. 486; Assembe-Mvondo and others, 'Review of the Legal Ownership Status of National Lands in Cameroon, 154.

<sup>113</sup> Ordinance No. 74/1 of 6 July 1974, art 17.

<sup>114</sup> Fisiy, *Power and Privilege in the Administration of Law*, p. 52.

expense of communal property which is encouraged only when it is administered by the State as 'national lands'. Where there is some recognition of the role of the community to administer communal property such as in the case of community forests, the exercise of communal property rights is often limited to the extent that the different range of customary communal property rights that have traditionally been exercised on them is not recognised.

While the 1974 Land Ordinances have 'elevated the State to the status of the paramount landlord, claiming, expropriating, and selling land as it deems appropriate', the State is also unable to completely alienate all land, with certain customary practices legalised and tolerated by the Cameroonian authorities. As a consequence, a majority of citizens have continued to live and use land and resources such as forests on an individual and communal customary law basis as if the written laws do not exist. This situation raises questions not just about the legality of such use and occupation, but also about the legitimacy of State power to dispossess communities of their customary property rights, especially in relation to communal property interests. This is compounded by the fact that the effective application of the provisions of the Land Ordinances relies on the very features of the customary tenure systems that it refuses to acknowledge, and the situation is made worse by the fact some community land use practices are not recognised as conferring land rights of any kind. In the end, the law appears to be recognise and protect communal property in Cameroon either as private or state property, but reconciling the law with customarily ideas on communal property, remains a problem. This situation has serious implications for the wider rule of law in society, raising fundamental questions about the sources of legality, illegalities and legitimacy in land ownership.