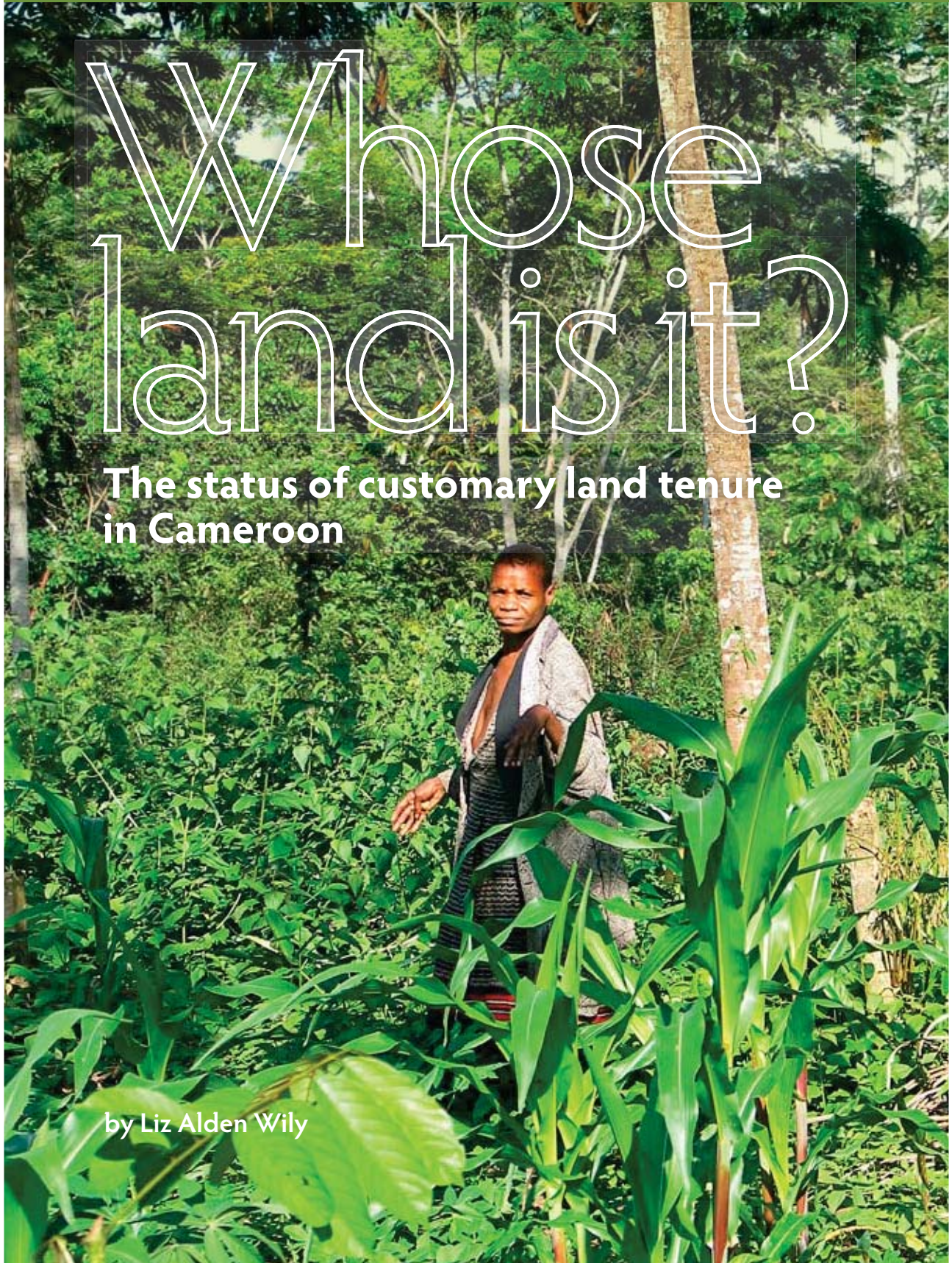


Centre for Environment and Development / FERN / The Rainforest Foundation UK

# Whose land is it?

**The status of customary land tenure  
in Cameroon**

by Liz Alden Wily





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Centre for Environment and Development, Etoa-Meki, BP 3430 Yaoundé, Cameroun  
[www.cedcameroun.org](http://www.cedcameroun.org)



FERN office UK, 1C Fosseyway Business Centre, Stratford Road, Moreton in Marsh,  
GL56 9NQ, UK. FERN office Brussels, Rue d'Edimbourg, 26, 1050 Bruxelles, Belgium  
[www.fern.org](http://www.fern.org)



The Rainforest Foundation UK, Registered Charity No. 801436, Imperial Works,  
Second Floor, Perren Street, London NW5 3ED, United Kingdom  
[www.rainforestfoundationuk.org](http://www.rainforestfoundationuk.org)

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## Introduction

This report sets out to identify the current legal status of customary land interests in Cameroon, and suggests ways for their improved recognition. This arises in the context of an ongoing review of forestry sector legislation. By customary law, forests are a major common property resource of rural communities, both settled and mobile. By statutory law most forests are the property of the government. How this conflicting tenure is resolved impacts upon human rights, how forests are managed, used and conserved, upon how democratic transition is or is not realized, upon the inclusiveness of development transformation, and upon social stability.

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This report analyses what the law says concerning customary land rights, focuses on the forestry legislation in force and compares the situation in Cameroon to that in other African States. The report also suggests ways forward by describing what an optimal legal status of customary land rights would look like and what possible avenues can be found in the existing law. The five chapters, summarized below, are preceded by a summary of the full report.

### **1. What is the problem and what can be done?**

The core issue is the *de jure* reality that most rural Cameroonians are little more than squatters on their own land, with regard to the forests and other land assets which by custom they have logically held in undivided shares (‘common

properties'). The proposed structural framework for remedy is outlined. An important element of this is the need to correctly locate customary or indigenous land tenure as a modern and current community-based system of organizing land relations, and practiced by most rural communities, not only forest-dwellers or hunter-gatherers. A second key element is the need for the issue to be approached holistically, as neither confined to the forest sector, nor approached outside the context of inclusive development change.

## **2. The law and customary land rights**

This chapter is prefaced with an overview of customary land tenure, from a global perspective of its operation in more than 100 agrarian societies today. Cameroon's land legislation is critically reviewed in depth for its treatment of customary tenure. Overall this is found wanting in social and developmental respects, and constitutionally unsound.

## **3. How does Forest Law treat customary land rights?**

6 The provisions of the 1994/95 legislation are closely examined. The main conclusion drawn is that, intentionally or otherwise, the law has added significantly to the wrongful demise of customary land rights, and in unnecessary and patently rent-seeking ways, not least of which is designating the most valuable forest resources of its citizens as its own private property. Sustainable forest conservation and management of use are also being affected.

## **4. Lessons from other African States**

This chapter reviews how other Sub-Saharan countries are dealing with comparable issues arising out of a common colonial history along with capitalist transformation which has been inattentive to majority land rights. Land tenure reform is found to be comprehensive in some cases, but in most cases it is still a work in progress, and vulnerable to hesitant political will. Nonetheless, a clear path has been laid down on the sub-continent, closely linked to progressing democratisation overall. The symbiotic relationship of forest tenure reform and rights-based Community Forestry is remarked.

## **5. The way forward**

What would the legal status of customary land rights ideally look like? And do existing laws – national or, more likely, international – provide for any remedy along these lines? Broad suggestions as to strategy are laid out towards essential reforms, with primary reference first to the forest sector. The importance of

nesting changes in a broadly based approach towards raising rural tenure insecurity is advocated, specifically through adopting a community based domain framework, and which can integrate proactive regulation and management of natural resources and land relations within a devolved, democratic and accountable regime.

### **A final word**

This paper does not derive from first-hand knowledge of local situations in Cameroon and is accordingly limited in this respect. It focuses closely upon the substance of Cameroonian law and builds substantial comparative experience with land and forest developments elsewhere. It is hoped that the many local experts in Cameroon will be able to make use of the more generic tenure and continental perspective offered in constructing local discussion and strategy.

Whose land is it?

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## Summary

# Cameroon





### **Are rural citizens squatters on their own land?**

Rural Cameroonians are deeply insecure in their land tenure. National law provides some security of occupancy for unregistered house plots and farms, but only to the extent that (limited) compensation is payable for loss of permanent crops or infrastructure when the government requires the land for other purposes. These include the right to grant unregistered land (most of Cameroon's land area) in absolute title, lease or exclusive occupancy licences to loggers, miners, ranchers, biofuel or food entrepreneurs, or to itself (in the form of State Forests). The government may do this for two reasons: first, because the legal definition of public purpose is very loose, and second because Cameroonian law fails to acknowledge customary land-holding as amounting to real property interests, and therefore according the protection of private property, including paying customary owners the market value for lands which government appropriates for public purpose.

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Nor does Cameroonian law or practice make it easy for customary land-owners to formally register their holdings to secure their property. Registration in Cameroon is a remote, complex and expensive process. It also converts customary lands into individualized parcels without social conditions, impacting negatively upon family and community interests. In any event, registration is limited to lands which have been cleared or cultivated or physically settled with houses. In light of the fact that most of the customary estate is purposely held for non-permanent cultivation and is owned collectively, the greater part of

the citizenry's land resource is especially vulnerable to allocation to grantees or buyers of government's choice.

Underlying this is the fact that unregistered land is made the *de facto* property of the State in the form of National Lands. In 1984 a Court of Appeal judge, examining a comparable situation in Tanzania, opined that this reduced customary land owners to being 'squatters on their own lands'. Predictably, the poor are most affected as those least well equipped to defend their interests. More than half of Cameroon's most poor live in forested zones in Cameroon. Government appropriation of customary lands in these areas to service protection and commercial and industrial production are common cause of people's land loss.

### Causes

12 The legal and political origins of this egregious situation are found in the persistent retention of colonial norms. Under colonialism, it was convenient for the purposes of mass resource capture to deny that Africans owned the land that they and their ancestors had controlled, lived upon and used. Land was generally declared to be the dominion of the State, and traditional owners held in law to be no more than permissive occupants and users. Virtually all of Sub-Saharan Africa was affected. From the outset, possession of naturally collective properties like forests and rangelands were most at risk, as not visibly cultivated or settled. However even where land was found to be actively occupied and used, the greater interest of the State (in effect, government) prevailed. Over time this dispossessionary paradigm was reinforced by the land-grabbing interests of emerging African economic and political elites.

For similar reasons, most independent governments sustained the colonial norms, in practice cementing the State's role as landlord. At the same time, national law extended opportunities for individuals to convert their customary interest into the private property system originally introduced to serve white settlers. UN and especially World Bank guidance reassured governments in the 1960s and 1970s that they were on the right track; modernization could only be achieved by doing away with what they saw as the unsatisfactory communal foundation of African land-holding. Proprietorship by individuals on the one hand, and the commoditisation of land on the other, were necessary to kick-start commercial agriculture and to provide the landless labour needed for industrial growth.

In Cameroon's case, the new government went a step further. It took the opportunity in its land laws of 1974 to do away with the opportunities which colonial land laws had provided for rural communities to have their domains recorded,

affording some degree of protection. Such provisions had crept into legislation around the continent (often in the form of native reserves) as the purposes of colonialism changed to be more African production focused and as the denial of native land rights became a subject of public scrutiny in home countries. In Cameroon, the opportunity to register community land areas had been taken in colonial laws and not backed up with facilitation. Nonetheless, removal of this legal opportunity in 1974 laid the customary land sector even barer of protection than previously.

Casual retention of the provision that government may declare any part of these lands (under the blanket categorization 'National Lands') to be the *private* property of the State would prove to be an even more serious factor in the abuse of citizen land rights. On such occasions, customary ownership is simply extinguished. The supposedly modern Forest Law of 1994 adopted this mechanism with alacrity, in establishing that any decree or order declaring a State Forest also serves as a Land Certificate. In these lands and other non-forested areas brought under the *private* property of the State, customary land-owners have moved from being permissive occupants and users of national land, a poor enough condition, to being the tenants of government, or of the private owners, leaseholders or licensees to whom government has allocated or sold their lands.

### **Is there anything to learn from other African countries facing similar problems?**

Such circumstances have not been uncommon in Sub-Saharan Africa. What is more unusual is how slow the Cameroonian State has been to tackle these conditions, will to do so only now beginning to be expressed in some quarters. In contrast, by the early 1990s, many other governments on the continent were conscious of the injustices, and aware too that promised equitable development and mass employment opportunities had failed to materialize to justify and compensate the de-securing of rural occupancy in the interests of economic growth. Popular dissent had played a role in heightening awareness in many countries, at times developing into civil war (e.g. Sudan, Liberia, Sierra Leone, Angola and Mozambique). In Sudan for example, government allocation of millions of hectares of customary lands to commercial interests was a prominent cause of the long civil war from 1984-2004. Since the 1990s most African administrations have begun to question the wisdom and justice of presuming their rural populations to be landless in the eyes of the law. There has also been re-examination of whether collective land-holding is so inappropriate; whether indigenous tenure systems are as unsound as western norms imply; and whether the formalization procedures advanced for land ownership in the



1960s have been appropriately structured to be relevant to or usable by the rural majority.

Today three-quarters of Sub-Saharan countries have land reforms in preparation or under way. A common underlying objective is to better enable citizens and communities to be participants in land-based growth, not its casualties. Structuring law and formalization of rights in ways which assure them control over their natural capital – land and resources – now seems a surer way of furthering growth than can occur through stark polarization of land ownership and landlessness. A major result has been the decline in the proportion of rural lands in many of these countries which are designated as public, State or National Lands. Much of this area is now acknowledged instead as community land.

The path of reform has not been easy. The passage of Uganda's new constitution in 1995 was a landmark event. This was because this supreme law turned some 80% of the population whom law held to be permissive tenants at will on government land into land owners in their own right. This was achieved through simply declaring that customary land tenure is a legal means of defining, acquiring, owning and disposing of land. The 1998 law confirmed that this is irrespective of whether the property is registered or not, or whether the holder is an individual, a family or a community. Not all countries have followed Uganda's lead.

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Yet in different ways and to different degrees, these countries have positively altered the status of customary land rights: Angola, South Africa, Namibia, Lesotho, Madagascar, Mozambique, Zambia, Malawi, Tanzania, Kenya, Ethiopia, Rwanda, Benin, Burkina Faso, Mali, Niger, Cote d'Ivoire and South Sudan, and Liberia, Sierra Leone and Nigeria are among those who plan to do so. Botswana and Ghana had made significant improvements to the status of customary land rights before 1990. Local government and natural resource legislation, not just constitutions and land laws, are proving important in engineering positive change.

As a latecomer, Cameroon can learn from the growing experience of land reform around the continent. Among lessons to be learned, it has been shown that there is a need for the following:

- a. to move beyond the focus of the farm in considering land rights, to ensure that important collectively held lands like marshlands, pastures, rangelands, forests and woodlands are integral to new acknowledgement of land rights;
- b. to endow customary land rights with status as legal rights of property, and ensure they are given the same level of protection as lands held under introduced non-indigenous systems;

c. to utilise swift routes to founding legalization, such as through constitutional and land law proclamation, rather than relying entirely upon case by case registration which even with improvements remains expensive and time-consuming;

d. nonetheless to provide for such titling procedures as a route to more precisely and strongly embed rights; of necessity this procedure must enable customary land interests to be registered 'as is' without conversion into introduced forms which restructure customary tenure in unfair ways, allowing for example secondary access and use rights to be considered;

e. to provide for this procedure at the most localized level possible to facilitate mass uptake, at minimal cost and maximum accountability;

f. to enable first-line security of tenure in the form of community land areas agreed by neighbouring communities, and within which members of the community may gradually order and, if they so wish, record their family, or group rights;

g. to provide for the identification and ordering of rights within communities to limit wrongful elite capture, land hoarding, landlordism, and undue loss of communal assets, so critical to the livelihood;

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h. to explicitly address the special needs of women, orphans, newcomers, pastoralists, hunter-gatherers and other disadvantaged groups within such inclusive framework, knowing that without such special attention, their rights can be easily defeated by stronger interests; and

i. using incremental and bottom-up approaches, with pilot schemes to test feasibility. Some early reforms (in South Africa for instance) were enshrined in laws which were then found to be unworkable, forcing legislation back to the drawing board.

With some exceptions (South Africa, Zimbabwe and Namibia), there is normally enough land in the public and government land sectors, and enough wrongs to redress to limit restitution to those areas. In most African States the public land sector (including lands which governments have made their own private property beyond the call of necessary public assets like roads, rivers and buildings) are precisely the lands today which are latently or openly contested. It is within these areas that government and customary tenure most overlap, customary rights persisting despite legal or physical subordination (eviction or curtailment of access).

Reform is part of a wider process of democratization, and usually plays an active role in restructuring governance in general along more devolutionary lines. How natural resources are managed is also directly affected. In practice, in Sub Saharan Africa the forest sector is proving to be a leader, often being the first to see the logic in community-based norms, and opening practical routes for communities to secure ownership, not just access and use of their traditionally owned forests and woodlands.

It is incorrect to presume reform has been and will be a straightforward or short process. Progress has been highly variable around the continent, at times bold and transformational, at other times hesitant and subject to flagging political will. The effect has been to make ordinary communities, along with civil society, more activist in these areas, an experience also seen in the new generation of land reforms globally.

It is helpful for interested policy makers and administrators to become more familiar with the themes and procedures of these reforms. Experience shows this can help overcome long-rooted conceptual impediments, such as difficulty accepting that customary land interests can amount to property, that communities can be legal persons without recourse to incorporation or creation of representative agencies, and that government revenue need not unduly suffer should communities be recognized as the owners of valuable forest and pastureland resources.

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### **Getting to grips with legal reality in Cameroon**

The main purpose of this paper is to examine the legal status of customary land rights in Cameroon. Sooner or later, national legislation must be reformed: and this document suggests how this reform might be approached and undertaken.

However, since legal change will take time and experimentation on the ground, a number of untested provisions in existing land law are identified as routes through which trial remedy could advance. Perhaps the most viable is an existing if awkward mechanism for communities to become grantees of National Lands, in a similar way to that being used already by companies and private individuals. Government might also be challenged for failing to follow the law at several points, such as concerning payment of compensation to evictees, and in particular in failing in its constitutional duties of citizens, weakly provided as this currently is.

Legal advantage may also be taken of the fact that customary rights have never

been specifically annulled in a generic sense, and that injustice arises principally from how customary land interests are interpreted in law and practice. This opens the way for focus upon new *interpretation* of these rights, and in light of rising commitment to democratic principles. The use of international law is not advised except as a last resort; this is based partly on the inauspicious failure of the Bakweri land claim; partly upon the high costs and time involved which rural communities can ill afford; and partly upon the reality that decisions by external bodies are unenforceable in the absence of unaltered (or un-reinterpreted) law (see Box 10, page 153).

In practical terms, it is suggested that advocacy agencies work with enlightened officials to pilot new paradigms, working through a community based approach which operates within a discrete community by community land area framework, rather than with individual households or clusters. This will help selected communities in different parts of the country, including forested lands, to identify and agree the boundaries of their respective domains and to have these formally recorded. Such grounded exercises go a long way in helping clarify community membership in consensual ways, distinct or overlapping rights among different ethnic groups in the same community land area, and helps lay foundations for structured and eventually formalized community based land administration. The last will dovetail well with the expressed commitment of Cameroon to more decentralized government, devolutionary norms generally being essential to support land reforms affecting majority rural populations.

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### **How can the forestry sector advance democratic land reforms?**

As has proven to be the case in a number of Sub Saharan countries thus far, the forestry sector can be an important contributor to reform. The sector in Cameroon has already made important changes over the last decade in attending to the rights of rural populations in forested areas, but retains forest tenure norms which are in urgent need of review. These norms build directly upon unjust legal treatment of customary land rights so changes in these norms in the forestry sector can provide an important start-point.

The well established Community Forestry sector can be an ideal platform for such change. For example, the construct of Community Forests is precisely the route through which communities may most readily be recognized *as legal persons in their own right*. This would obviate the need for communities to create legal entities, which has proven not just expensive and inappropriate to needs, but also encourages elite capture, and can be detrimental to the natural social composition of the community. Enabling Community Forests in area to be larger

than the current limit of 5000 hectares would also be advantageous, since this restriction undermines the important notion of a cohesive community land area, out of which a Community Forest is more sensibly defined and at a size which is relevant to the local situation.

There also seems to be no reason why more successful Community Forests should not be acknowledged and registered *as the private group-owned property of communities*, thereby moving Community Forestry beyond recognition of only management and use rights to their customary forested areas. Legal provision for grants of national land in temporary then absolute title provides an existing vehicle for this to occur.

Using the domain-centred approach mentioned above, the forestry sector could also assist communities to identify *all* forested land within their domains and adopt simple zoning to earmark (and limit) farm expansion zones, forest production zones and protection zones, establishing rules for each category, following guidelines which could easily be drafted in the sector.

18 Under this approach communities could also be given the opportunity to add to the Permanent Forest Estate themselves by creating *Permanent Community Forests* for protection or production. Such developments would dramatically boost the still uncertain focus upon ordinary citizens as the logical front-line conservators and managers of valuable resources.

A major contribution to land reform also implied in the above is that the forestry sector will help do away with the antiquated notion that effective occupation can only be demonstrated through clearing or cultivating land. In fact this is already anachronistic and discriminatory against rural communities, in that large holdings are frequently granted by government or sold without this proof of development. Once a Community Protected Forest or Community Production Forest is recognised as community-owned property, the falsity of such notion can be practically demonstrated. Within or beyond Community Forests set aside indefinitely for forest purposes, hunting and gathering and the retention of substantial areas of land not for cultivation should also become a more obviously acceptable basis for recognizing tenure.

The Ministry of Forestry and Wildlife could also further advance the policy principle of participatory forest governance. With one important exception explored in the text, current law and practice is more aptly described as dissemination and consultation than genuinely shared decision-making. A good start may be made by empowering Village Forest Committees and Rural Councils as decision-makers, not simply advisory bodies.



Finally, progress needs to be made in considering just how necessary or beneficial is the practice of declaring every State forest the private property of the State. This position has already led to no fewer than 2500 rural communities being unnecessarily dispossessed, and which promises to be a growing source of discontent. There is no constitutional requirement for forests to be held to be State property (unlike minerals) and although the 1970s land laws amply provided the opportunity for such dispossession, it was not incumbent upon new forest legislation in 1994 to adopt this tactic. This seems to have been pursued more on the basis of convention, and the presumed needs of the private logging sector than around Cameroon's own citizens. It was also no doubt founded upon the fallacy that rural people lack the capacity to own, manage, regulate or conserve precious forest resources – a position which has proved repeatedly false in Cameroon itself as well as in many other African States. Admittedly, rural communities will fail to see the purpose of doing so for as long as they are deprived of the single most important incentive of sustained conservation and forest use: secure acknowledgement of rightful legal ownership of those resources.

State ownership also sidesteps and delays the right and need for poor rural communities to be directly involved in zoning and leasing lands for industrial and other activity. Ideally it is citizens, not government, who should be in the role of lessor, with government fulfilling its proper role as facilitator and regulator. Until capacity is developed, it will be reasonable for communities to pay government to manage or lease out those lands on their behalf, as now occurs in South Africa in respect of some commercial plantations, wildlife and forest reserves. In such scenarios government rightfully withholds the cost of administration, and taxes community income, at source as necessary.

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If the Cameroonian State were to relinquish forest ownership, it would help to resolve the conflict of interests caused by its current position as both owner and manager, which limits efficiency and integrity. It would allow government to develop and refine its due role as neutral mediator, technical adviser and monitor and rigorous regulator of best practice. Helping actors become familiar with more modern paradigms such as operating not just in countries like Sweden and Mexico (which in different ways operate highly successful locally based forest enterprise) but in the growing numbers of African States which encourage community based conservation and productive enterprise (e.g. Tanzania) will aid understanding among officials and politicians as to what is possible. Donors and international forestry agencies are well-placed to facilitate this.

In the interim, a first step for the Ministry of Forestry and Wildlife would be to halt the declaration of further State Forests, exploring concretely how these desirable areas could be just as efficiently managed and conserved by commu-

nities as Permanent Community Forests (Production or Protection as appropriate), as suggested above.

The way in which the private logging and conservation sector operates also needs to be set on the road to reform towards democratic and more sustainable arrangements. Again, there are continental and global precedents to build upon. While obligatory social contracts are a blunt instrument for this transformation, they do provide a first starting point. However, it is also worth promptly instituting trial cases of minority shareholding by communities in private forest enterprise, with willing businesses which are according afforded tax breaks in return.

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## Chapter 1

# What is the problem and what can be done?

# Cameroon





## **I Overview**

### **The issue**

Rural Cameroonians struggle to have their most basic interests and rights as citizens upheld when it comes to natural forest resources. This is not only unjust: it is an impediment to sustainable resource conservation and management, to good governance and to modern paradigms of economic growth in which rural communities are assisted to become shareholders of resource-based development rather than beneficiaries of uncertain government benevolence. International experience also suggests that unsound paradigms threaten peace, as those who are dependent upon the land become more aware and resentful of the role which resource dispossession plays in keeping them poor.<sup>1</sup> Unless something is done, this may also happen in Cameroon.

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### **The cause**

In modern legal terms, those who live in Cameroon's rural communities are little better than squatters on their own land; that is, permissive occupants and users of communal land co-opted by the State largely as its own private property. These norms impact most upon valuable forest, wetland and rangeland resources. These

<sup>1</sup> Zimbabwe, Angola, Somalia, Ethiopia and Sudan are post-Independence examples of this, with echoes in civil war and conflict globally; Pantuliano (ed), 2009, Commission of Legal Empowerment, 2008. Alden Wily, 2008a.



are resource lands which, by custom and logic, communities own in undivided shares ('common properties').

To embed and rationalize State appropriation, modern Cameroonian land law retains the classic instruments of colonial dispossession.

*First*, only registered holdings are considered to amount to property. The corollary is that unregistered land is unowned, and depending upon the land concerned, falls to the trusteeship or ownership of the State. This renders the overwhelming majority of rural Cameroonians legally landless. Generation after generation they live on their own lands as tenants at will.

*Second*, despite the proclaimed intention and duty of the State to ensure comprehensive registration of land interests, in practice the procedure is available only to elites because it is centrally controlled, paper-bound, expensive, time-consuming, and demands levels of literacy and institutional empowerment which most people do not have.

*Third*, registration is restricted to recording ownership of only those lands which have been cleared and converted to make farms, paddocks, housing or other buildings. This immediately excludes the millions of hectares of common properties which families, groups and villages traditionally maintain as intact rangeland, wetland or forest for sustainable livelihood support. The rights of those with least wealth and socio-institutional strength, including forest-dwelling 'Pygmy' populations, are the most abused in this failure of modern governance procedure. This is not least because the poorer the community the more dependent it is upon natural resource use.

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At the other extreme, the law does provide exceptions for the well-off, on the basis of demonstrated financial and other means to log the forest commercially or to convert land into productive farming or other enterprise. An applicant, even if not from the local area, may acquire substantial acreage under long or short term registrable arrangements on the 'promise' of developing the land.

*Fourth*, registration norms remain inappropriate to customary land-holding. On a number of counts these deny legal support to the deliberately diverse patterns of ownership and right holding which characterize the customary regime, and which despite capitalization of land relations persist due to their practical workability. Since the greatest risk to tenure security is in respect of so-called undeveloped lands (the very lands which groups and communities hold in common), the lack of a registrable construct for collectively-held private property in national law is very serious. European forms of individual and absolute entitlement (and with

the male head of the household as the titleholder) pattern the available registration system.

### **The results**

Therefore legal security of ownership exists only for the rural minority who have secured registration of their houses and farms. Legal security even of *occupancy* is available only to those who build or clear land to farm or create paddocks; this is provided in the form of weakly acknowledged possession. Even legal *access and use* to the remainder of the rural domain including forests is proscribed. The law makes permitted use, such as in respect of sustainable hunting and gathering, a privilege rather than a right.

The result is an embarrassment of outdated and exploitative paradigms, and the impact is not confined to a minority but to the greater proportion of rural Cameroonians. Thankfully, the government of Cameroon is now committed to poverty alleviation and equitable democratic governance and, like many other African countries, will need to reconsider current land ownership to achieve these objectives.

This is to the good. From a modern State-making perspective it may be argued that a government which denies its rural majority the land assets upon which to securely survive and develop their skills and economy is not significantly different from rogue States where by dictatorship or simply sustaining obvious injustices, government operates in competition with the very people it was instituted to serve. Land reform in this regard becomes a crucial tool in the democratic State-making (or rather, State reconstruction) agenda.

25

### **The remedy**

The single most important remedy is legal change. This needs to uphold customary land interests as rights of land ownership, not just as rights of occupation and use on land belonging to another entity or persons. Customarily held rural parcels should accordingly be legally protected as a class of private property. This needs to be irrespective of whether or not the affected land is (i) farmed or unfarmed (i.e. visibly used or not); (ii) held by an individual, family, group, or community; (iii) able by custom to be transferred or sold; (iv) able to be removed even at sale from community-based regulation as to use; or (v) formally recorded in a statutorily entrenched system of registration. Habitation should remain the outstanding criteria: habitation not in the sense of necessarily fixed settlement, but in the sense of being on the land and using it over the year, as 'our land'.

Associated basic remedies include (I) legal provision for locally based verbal testimony as an evidential source of tenure, in the event of challenge to this customary ownership by the State or courts; (II) the establishment of fair, inclusive and accountable legal procedure through which this may be secured; and (III) the creation of legal procedures which enables customary land-holders to voluntarily have their interests and subsequent transactions recorded in ways which must be upheld on challenge, including at acquisition for public purpose. This suggests highly localized procedure, preferably at the community level itself and nested in supportive higher level machinery, such as at Rural Council level.

What is also implied here is that such recording of rights does not mean the conversion of these rights into imported or other tenure constructs which do away with critical attributes of the customary right, but is able to register this 'as is', subject to overriding constitutionally rooted parameters of equity and justice.

26 In short, this means the introduction of a dual regime for private property registration, plural in systems, but singular in its integration under national law, the statutory regime. For the avoidance of doubt, 'private property' needs to be understood as not necessarily individual property but inclusive of registered ownership by families, communities and other groups.

Underlying all the above is a simple founding prerequisite; that the reigning socio-legal notion as to what constitutes a private property right in the modern agrarian world needs updating. In the process, colonially introduced and entrenched norms need unseating. This is, as one of Africa's greatest scholars put it, 'the last colonial question' (Okoth-Ogendo, 2007). Or in the words of another great scholar:

Customary tenure is – and always has been – one of the foundational elements of the land laws of all States of Africa. It is not an add-on to received law; indeed received or imposed law is the add-on. Received law thus needs to be adapted and adjusted to indigenous law, not vice versa, and proponents of received law should be advancing the case for legal pluralism (McAuslan, 2006a).

Both scholars agree that in legal terms customary law must become the basis of African jurisdiction, and specifically in respect of land resources held under common ownership, rationalized customary land law entrenched in national law as the regulatory regime.

### **The impact**

The impact of such legal reform would be enormous. From being permissive occupants/State tenants on their traditional lands, the rural majority would become land-owners in their own right, and constitutionally protected as such. Government would surrender its wrongful landlord status of most of the country and at last be able to develop its more modern and rightful role as ultimate regulator and administrator of rural lands, including those with significant commercial values. As land-owners, communities would find that their role in resource development would change, and legal paradigms would need to be adjusted accordingly, to reflect and nurture a more equitable State – people relationship in matters of land holding, use and governance. With secure rights over their natural capital – land – poor rural communities would have the foundation needed to move out of poverty, a process in which the State is the main facilitator.

Forest tenure and forest governance, the primary context of this study, would in particular alter. As owners, communities would need to be directly involved in decisions about local forest resources and national policies affecting these. Incremental arrangements would have to be made to enable communities to become partnering shareholders in a growing range of conservation and commercial enterprises. Kernels of this already exist in Community Forestry arrangements of the non-Permanent Forest Estate, and this is a basis for further reform. Over time the orthodoxy that a forest reserve or park conservation and commercial logging or other development may only occur by denying citizen rights would give way to a modern, citizen-based regime of resource management, subject to the technical assistance, counsel, and vigilant monitoring of government.

27

### **II Can this be done?**

Is the above vision too utopian? Can such a degree of change be envisaged? In the case of Cameroon, is it conceivable that the State would surrender its ownership of land resources to its people? Would aligned elites from within and beyond Cameroon allow government to do so? And what about the not-so-progressive element of the conservation sector which cannot envisage ordinary citizens as conservators of biodiversity, let alone imagine resource ownership as the foundation for this, preferring to see them dispossessed of these assets and then later invited to contribute a little to protection, in return for re-grant of limited access to these areas? And how far would the advising international financial community, so focused upon seeing treasury coffers filled from natural

resource exploitation that it turns a blind eye to the misconstructions of tenure upon which this is based?

Finally, do rural communities themselves really still exist as sufficiently cohesive entities to enable locally derived tenure and resource governance to flourish? And even if they do, would the taut and inequitable interrelationships among different social groups be reduced or worsened in the process of structural land tenure change?

In answer, no fewer than 30 agrarian economies in Africa, Asia and Latin America now demonstrate that equitable legal change in land relations may safely and productively occur. Chapter 5 is devoted to examining this on the African continent, where governments are battling with a similar historical, legal and political legacy as in Cameroon. More precisely, these countries too have endured:

- a. a base situation of wrongful but 'lawful' historical State capture of communal property, and with much entrenched bad practice to overcome;
- b. resistance to change by officials, power-holders and economic elites who benefit from the status quo;
- c. the continued belief that modernization means doing away with customary land tenure; that *private* property means *individually* owned property; that communal tenure equates with 'no ownership' and therefore the 'tragedy of the commons'; that indigenous (i.e. non-imported) systems of organizing land relations are incompatible with the commoditization of land and commercial utilization of resources; and that citizens do not have the capacity to safely own valuable natural resources making the State the only safe pair of hands for land ownership;
- d. concerns that it is too late and too difficult to identify the overlapping rights and claims among ethnic groups; that 'community' no longer exists in a viable form; and that rural dwellers do not seek security of other than house and farmlands; and that support for entrenchment of customary rights is a foreign invention; and
- e. perhaps most pervasive of all, the suspicion that equitable legal status for customary rights will engender changes in how the State may appropriate these properties for genuine or less genuine and privately driven public purpose; and that the implications for governance change overall could be tiresome.



Implementation in the face of such fundamental constraints has therefore been mixed. This ranges from swift, radical and comprehensive surgery to root out failing and unjust legal paradigms, to country cases where policies are made but not delivered, or are structured in deliberately limiting ways. Nonetheless, as Chapter 5 outlines, while progress is slow and hesitant, it moves tangibly and inexorably toward more just norms, which quickly demonstrate their superiority in terms of putting land- and resource-based economies on a more inclusive and stable footing. Although not covered in this paper, comparable reform in Asia, Central Asia, Latin America and the Pacific shows the same trends.

### **But the challenges are great ...**

It is also true that Cameroon (and the timber-rich Congo Basin States in general) presents especially challenging if not unusual pressures. For this is a country whose customarily owned common properties deliver extraordinarily high value to the landlord State and to aligned industrial and commercial enterprise. Change can be unwelcome. This is also a State which has not been averse to intimidating or even imprisoning those challenging the status quo. Nor is its oppressive handling of common property rights merely a hangover from colonial times; it was reengineered as recently as the 1990s. Chapter 3 explores this in respect of forest legislation.

29

Meanwhile there is no let-up in the pressures from the mining, timber and conservation sectors. This discourages lessening of State proprietorship. More recent pressure comes from the so-called 'global land grab' since the food crisis of 2007. This is seeing wealthy nations which have insufficient arable land of their own seek land on which to grow food and biofuels for their own economies. Africa is the main source of lands for this, with already more than 20 million hectares leased by African governments, and at very cheap prices (GRAIN, 2008, von Braun & Meinzen-Dick, 2009, GTZ, 2010). Few agreements are made public but are understood to lack conditions requiring a proportion bio fuels and foodstuffs to enter the local market, minimal wages for employed labour, or payment of compensation for the many land holders who are being evicted from or losing access to the lands being leased.<sup>2</sup> Nor is it routinely clear that investors must even swiftly or fully develop the lands leased, raising alarm as newer lessees now

<sup>2</sup> A somewhat better than usual arrangement has been arrived at in the recent case of leasing of 200,000 ha lease by the Government of Congo (Brazzaville) to South African farmers, 'with a further 10 million hectares in the balance' as reported by Pambazuka Press on 7 January 2010. At the same time the lease is in the form of tax-free renewable 30 year leaseholds, and with no restrictions placed on export of the products. Sulle and Nelson, 2009, also identify some fairer arrangements in Tanzania. The Tanzanian Government halted leasing in 2009 to consider a detailed strategy to minimise abuse of local rights, but this is the exception thus far in Africa.

include private investors and hedge funds intending to speculate on rising food and land prices as well as produce (GRAIN, 2009). It is estimated that more than 20 million hectares have so far been leased in the post food crisis land acquisition boom (GTZ, 2009).

### **Whose land is it?**

Of concern is the fact that much of the land being leased by governments is only technically their property to lease; most of the leased lands embrace customarily held and occupied domains, classed as public, national or State land, in the absence of statutory recognition norms for customary tenure. Although in comparison to Ethiopia, DRC, Sudan or Mali, Cameroon is not yet a major lessor of land for inter-state food and biofuels production,<sup>3</sup> the strength of its control over unregistered rural lands, and its long history of co-opting then selling or leasing such lands for mining and logging, suggests this could easily become the case.

30 In summary, traditional tenure rights are fragile in Cameroon, from historical, legal and political standpoints, and with as yet, no real sign of reversal. An added concern is that precisely such conditions have been a trigger to civil strife in a number of other countries on the continent and beyond, among which the 24 year-long civil war in Sudan is accessible example. In that instance, wilful allocation of several millions of hectares of customary rangelands and woodlands to officials, businesses and foreign investors for mechanised farming was a main driver to resistance then war between the north and southern regions, and only slightly less influential in triggering the continuing Darfur crisis (Johnson, 2003).

### **III How to move forward?**

The question facing communities and reformers in Cameroon is how to move forward. Some principles of strategy – elaborated in later chapters – are outlined below.

#### **1. Tackling a main cause of inequity and underdevelopment: unjust land relations**

It is crucial to get the focus right. This means accepting that a meaningful difference can only be made by tackling the root source of the problem, the

<sup>3</sup> The most commonly referred to lease in Cameroon has been for 10,000 ha to a Chinese company (Grain, 2008).

persisting dispossession of the rural population of their customarily owned lands. Without this, other changes are ultimately slight, diversionary and unlikely to last. In practice, this means moving beyond palliative benefit-sharing models, and ensuring that even lands comprising valuable resources like rangelands and forests are included in reformed land tenure paradigms. Not only justice, but soundly based resource development is at stake. Maintenance of misaligned tenure with regard to naturally collective resources maintains resource sectors on unstable ground.

## **2. Looking beyond forests**

It is more productive to focus on the structural flaws in current arrangements than on the effects in one sector. The key issue is not forest tenure: it's the relationship between what may be termed 'government's and people's law'. All land under customary tenure is affected, inclusive of houses and farms. Where forests do come into close focus is in that most damage from the unjust relationship is wrecked upon forests and like naturally collective rather than individual, and by tradition, community-owned assets. It is the collective aspects of customary rights which are most likely to fall foul of national law tenure norms.

31

In practice, given the controversy which the forestry sector generates, and to emphasize the structural drivers which need to be overcome, it will be strategic to tackle the status of communal rangelands alongside forest tenure issues. This includes trialling reforms on the ground in rangeland areas, if only to pre-empt the charge that what works for forest area populations cannot work for unfor-ested zones and so is not valid.

## **3. Excluding minerals**

Not all naturally collective assets should necessarily be the target for reform, at least in the first instance, or in the same manner. There are justifiable reasons why coastal and inland water resources and subterranean minerals have been made public property. In addition, little mileage can be gained from threatening powerful mining interests at this time. In due course, the impact of tenure change affecting landed collective resources will create the conditions for addressing issues of access and benefit in the mining sector. This will in turn open routes to discussing the potential for citizens to be direct shareholders in commercial exploitation affecting their lands. Even reaching this point depends ultimately upon ensuring that rural communities are acknowledged as the legal owners of the lands below which mining occurs.

#### 4. Ensuring the most marginalized are not overlooked

Confusion between *indigenous land systems* and *indigenous peoples* needs to be avoided. The former refers to all land holding and land use regimes which are indigenous to Cameroon, as compared to those which have their origins in European systems as introduced by colonizers and entrenched in post-colonial law and practice. All relevant Bantu and non-Bantu systems are included. Considering indigenous regimes globally, it is their ‘indigenesness’ or their autochthonous character which allies and distinguishes them, and this in turn is always distinguished by being community-based (as compared to nationally based).

One small sector of this indigenous land-holding community consists of those referred to as *indigenous peoples*. Although awkward terminology when applied to Africa, where all Africans consider themselves to be indigenous, ‘indigenous peoples’ has acquired international recognition as mainly referring to hunter-gatherer and pastoralist groups (see later)<sup>4</sup>. In Sub-Saharan Africa these include around 25 million pastoralists and less than 1.5 million hunter-gatherers (IGWIA, 2009). Together they constitute less than 5% of the total population of the sub-continent. Some groups comprise less than 2,000 persons.

32

As is the case globally, hunter-gatherers in Africa are noticeably disadvantaged in a host of areas, and perhaps most potently, in an institutional sense, their communities often find it difficult to advocate successfully on their own behalf. This is partly because they are usually among the poorest and least literate in society and partly because of their socio-cultural norms. They also pursue collective land tenure procedures which while maintaining acceptance of boundaries among their often vast domains, balance possession with reciprocal land relations among their neighbours in times of need. Stronger agro-pastoral or cultivator societies have found it easy to exploit this flexibility, visiting and encroachment ultimately becoming colonization of hunter-gatherer territories.

Factors which contribute to difficulty in resisting loss of territory and use rights usually include (i) the disregard with which indigenous peoples are held by settled peoples and officialdom, with a tendency for hunter-gatherers to be invisible in procedures of consultation and service provision, and/or directly

<sup>4</sup> Most tangibly in the International Labour Organization’s 1989 Convention No. 169 on Indigenous and Tribal Peoples. The African Commission on Human and Peoples’ Rights has also recognised that the rights of these peoples are protected under the African Charter on Human and Peoples’ Rights and has undertaken significant work to identify who can be considered as indigenous peoples in the African context.

discriminated against; (ii) their consensual decision-making mechanisms which discourage individualized leadership such as chiefs and handicap representation, with a frequent result that they have little access to formal decision-making in the locality; (iii) their tendency to enter into, and rely upon, client relationships with stronger groups, inviting exploitation; (iv) significant mobility within their respective territories, often misunderstood as random nomadism and evidence that they are ownerless; (v) a related common absence of permanent settlements and cultivated lands, the conventional 20th century indicator of possession; and (vi) the fact that their domains are extremely large and lightly populated, precisely in order to sustain viable hunting and gathering. This makes defence of these realms difficult even should these groups feel able to do so. These territories are in fact so large and the focus of hunter-gatherers so strongly upon use of resources within, that perimeter boundaries may be fuzzy – at least until such time as resource shortage begins to bite. By then it is usually too late for these traditional owners to claim exclusive hegemony, even should there exist legal and other instruments to do so.

In Africa, the creation of game reserves, national parks, and in the case of forest-dwellers, logging and mining concessions, have all added to the toll of hunter-gatherer land loss over the last century, also affecting settled farming communities. Meanwhile nomadic pastoralists have also found themselves severely squeezed for land access with each passing decade, their traditional seasonal domains being regularly curtailed and transit routes blocked by settlements and farming, often under the aegis of planned government projects.

33

Indigenous peoples in Cameroon constitute an estimated 20,000 nomadic pastoralists (Mbororo) and around 50,000 hunter-gatherers (Nguiffo et al., 2009). This includes 'Pygmy' population. This term is eschewed as far as possible in this report given that many find this term offensive. The Baka are the largest group (40,000), living within a 75,000 sq km forest zone in the south east of the country. The Bagyeli/Bakola are a small group of around 3700 persons, occupying an area of around 12,000 sq km in the south coastal region. The Bedzang live in the central region and number less than 1000 people.

Land occupation by these groups pre-dates also very old Bantu settlement. Diminishment in their traditional land areas has been steady, due to all the usual forces cited above. Changing conditions, including forest loss and entry into client relationships with settled communities in and around forests, mean that those living entirely by hunting and gathering are a tiny minority (possibly under 5%). Around three quarters now supplement this with some farming, and around one fifth combine hunting with farming (CED, 2008).

There is little doubt that these indigenous peoples of Cameroon are chronically disadvantaged when it comes to land security. FERN, 2006 and CED, 2008 document how six protected areas in forested areas overlapping their traditional territories were created without their consent and participation, and from which they are now variously evicted or endure constrained access. There are others within the 2,638 communities known to have lost land and use rights through issue of current logging and mining leases in the Permanent Forest Estate. There is evidence that hunter-gatherer forest-dwellers continue to be discriminated against, under-represented, and/or simply excluded from development benefits. For example, WRI researchers have recently documented that while no forest communities are in practice receiving the full promised share from forest revenue-sharing, hunter-gatherer forest-dwellers are especially missing out.<sup>5</sup> All this points to the need for their situation to be addressed in a specific manner, within the broader context of land reform.

## 5. Explain and pilot reforms

34 Tenure reform experience suggests that resistance to recognition of customary land ownership has roots in (I) ignorance about the nature of customary land tenure, especially in modern times (see Chapter 2); (II) concerns as to workability of reforms, as relating to powers of government on the one hand, and to the cohesion and capacity of rural communities to organize and sustain rights on the other; and (III) anxiety as to the presumed impact of tenure reform upon the commercial use of forests and current systems of revenue generation, upon which the State is deeply dependent.<sup>6</sup>

Removing misconceptions, explicating process, and allaying unjustified fears accordingly becomes the handmaiden of reform. Informed advocacy is pivotal. Cogent justification of why and how customary land rights should be acknowledged as existing private property interests needs to direct approaches adopted. Apart from clarifying the issue itself, this is useful in order to:

- a. counter common misunderstandings surrounding customary land tenure;
- b. lessen apprehension of reform that arises from misunderstandings of objectives and implications;
- c. illustrate how failure to act can increase civil strife and political turmoil;

5 Oyono et al., 2009, Morrison, 2009.

6 Toulmin & Quan (eds.), 2000, Alden Wily, 2006a, 2008, Cotula (ed.), 2007.



- d. show how proposed change in State-people land relations does not exist in a total vacuum but logically arises out usually founding constitutional commitments;
- e. show how reform is more or less mandatory if poverty alleviation, good governance and sustainable resource conservation are to be genuinely achieved;
- f. engage policy-makers in an iterative learning process which eases policy and legal change;
- g. answer commonly raised concerns, such as: ‘What would happen to a private registered farm in an area where the community claims to be owner?’ ‘Can private individual and family rights exist in a customary system?’ ‘How would the State get revenue if it is no longer owner of the forests?’ ‘What would happen to protected areas if communities became their owners?’ ‘How would concessions be issued to loggers if the community is the land owner?’ ‘How can equity be achieved where one community owns a forest but another has no such resource to build upon?’ and ‘Do communities exist in modern Cameroon in a way which allows for discrete local ownership of different parts of the forest estate?’ and
- h. to help communities clarify their preferences and demands. Many rural Cameroonians have endured such a long experience of contradictory legal and local positioning as to their land and natural resource rights, that they no longer know what is ‘right’; a presumption that the law is always right is a common element in confusion. Added to this they know that leading members of their communities have already or wish to secure entitlements, and in the absence of alternatives to the one conversionary route available, naturally presume securely recorded rights can only be achieved by abolishing customary rights.

35

The following chapters elaborate the above. In general facilitating understanding means demonstrating how legal acknowledgement of customary interests as real property rights and inclusive of resources held collectively will *enhance* rather than threaten conservation; will not interfere with the natural right of the State as ultimate regulator of how land resources are protected, managed and used; need not significantly reduce the revenue the State and its agencies (e.g. Rural Councils) from forests and other resources, but rather put this on a more modern and lasting footing (e.g. through taxation of community benefits); does not prevent the State from setting aside areas for protection or commercial use, but changes the manner in which it does so; and does not interfere with the class of public assets like roads and highways, coastal waters and rivers, national monuments and services, clearly serving the public at large.

What tenure reform in this vein does do is to remove the spurious notion of 'un-owned lands' where customary possession self-evidently exists; reinterprets the meaning of 'effective occupation'; clarifies the natural relationship between possession and real property; and reins in incautious appropriation of affected lands for oftentimes dubious public purpose.

At the crux of reform lies reconfiguration of the grounds upon which, and therefore the manner in which, rural citizens participate in the resource-based economy. As an example, it is quite possible for a protected forest reserve, park or production forest to be *owned* by a community. As owners, they remain subject to resource zoning and related statutory regulation, given the rightful oversight of government. What changes is the faulty elision of ownership with management classes of land (e.g. protection and production reserves). In Ghana, South Africa and Kenya, communities own important reserved areas today, although it is frequently the case that the community leases the estate back to government for management purposes. Or, again, the community becomes the lessor of productive forest to private commercial enterprise, albeit hand in hand with the advising, monitoring and regulating – and taxing – State.

36 As owners, rural citizens also gain a rightful role in the decision-making around zoning and other overriding management tools. This generates democratic changes in institutional governance. The case for devolutionary decentralization in general is strengthened.

Once again, the use of operating examples of reform will be helpful, including hands on exposure to successful country cases as appropriate. This paper starts the process with a short overview of reform around this matter in Africa at this time (Chapter 4).

## **6. Changing the law is key – but not enough on its own**

Legal reform is indispensable in this instance of social relations, given the power and use to which laws have been consistently put. Changes without repeal of unsound or unjust law are fragile.

There are cases where a simple change in law can have a dramatic effect in its own right. Uganda is such a case in Africa; there constitutional change in 1995 saw more than 80% of the population move overnight from being tenants at will on public lands vested in the State to being acknowledged land owners in their own right. This led to new land law (1998), laying out basic new models and procedures. These in turn impacted upon the shape of Forest Law (2003) adjusting to a new generation of governance paradigms.

More commonly, enactment of new land law is more incremental, much debated and time-consuming and increasingly comprehensive in its scope.<sup>7</sup> On average it is taking a full decade for a country to move from proposed new policy into hard legal change.<sup>8</sup>

Nor is legal change ever enough on its own. Carrying provisions through requires considerable commitment and advocacy and embraces a widening range of sectors. Among these, local government reform can prove a factor in success. Primarily this is so in the sense of empowering and helping communities to regulate and administer their land relations and to represent themselves and negotiate with non-local interests. These considerations suggest that tenure change in Cameroon will take time. Change is likely to be dogged with stops and starts, and some backtracking, requiring vigilance by officials and others.

#### **7. Inclusive and participatory approaches need to be taken seriously**

There is also merit in adopting a multi-faceted approach, in order to capture opportunities, tackle the founding inequities from different aspects, and to encourage mutually reinforcing change. Given the right circumstances, this could extend to bringing current failure to honour customary land rights to international notice (Chapter 4). More immediately, a broad-based approach means involving the forestry sector in tenure change. This is because the sector has been most active in beginning to tackle community forest use rights over the last decade, because ownership of the resource is at the centre of contestation (particularly as affecting forest-dwellers), and because there is will to address strategy in the sector at this time. Chapter 6 makes suggestions.

37

This should be complemented by an inclusive and participatory, and yet locally-grounded strategy. Officialdom, conservation, industrial users of customary resources, and civil society actors need to be involved, as well as customary landholders themselves. Participation cannot limit itself to consultation and would advisedly extend into trial learning by doing. Successful tenure reforms in Africa and elsewhere at this point have found this important.<sup>9</sup> Chapter 5 suggests practical ways to achieve this.

7 Alden Wily & Mbaya, 2001, Deininger, 2003.

8 McAuslan, 2006b.

9 See Alden Wily, forthcoming (b) for details of Tanzania and Afghanistan. Land reform in Cote d'Ivoire, Benin, Burkina Faso and Mozambique also demonstrate critical reshaping of law on the basis of practical lesson-learning..

Whose land is it?

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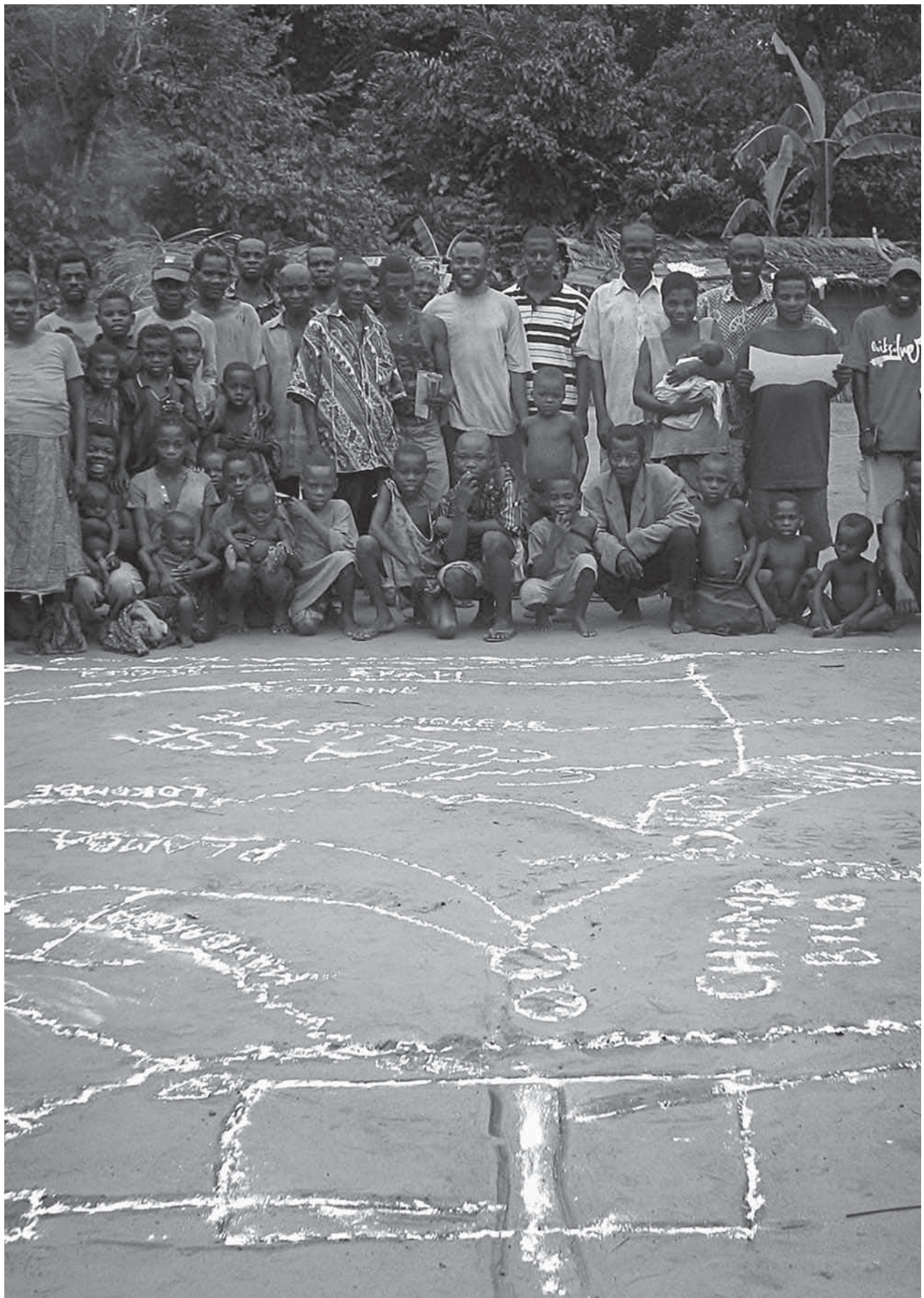
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**Chapter 2**  
**The law and customary land rights**

Cameroon









## I Customary land tenure

Formal law encompasses statutory law; that is, the national laws and ordinances which the national parliament of Cameroon enacts, as well as the decrees, orders, circulars and instructions which government issues on the basis of these founding enactments. Laws relevant to the subject are not only land laws. The constitution, forest, mining, gas and decentralization legislation are also important. Before reviewing the impact of statutory law on land rights, comment on customary land tenure and law must be made.

41

In Cameroon, customary land ‘law’ refers to the (usually unwritten) rules and procedures through which a rural community regulates land relations among its members, and with neighbouring or associated communities. The ways in which communities do so have marked commonality with other customary land tenure systems around the African continent, and beyond.<sup>10</sup> This is not surprising, for *community-developed* systems of land ownership are always rooted in the practicalities of land use; similar use systems logically generate similar rules for land ownership, access, use and transaction.

General characteristics of customary land tenure regimes are outlined below.

<sup>10</sup> See review in Alden Wily, 2007a and Alden Wily, 2010 forthcoming (b) for a thorough review.

1. Customary land tenure regimes are pre-state systems or indigenous systems. This means they exist or have their origins in arrangements existing before the creation of national States (and national laws). In the preceding Chapter the distinction between indigenous systems and indigenous peoples was noted; the latter are one (small) sector of all those who regulate their land relations on the basis of indigenous (or native, autochthonous or customary) norms.

2. Customary land tenure is a *rural* regime. Although rural people who move to cities bring many home customs with them into informal city settlements, this is relatively limited.

3. Customary land tenure is mainly confined to *agrarian economies*, that is, to those societies where farming and other land-based use, rather than employment, is the source of livelihood of most people. However even some of the most advanced industrial economies continue to uphold customary regimes in rural areas, particularly as relating to communally owned forests and pastures. Switzerland, Portugal and Spain are good examples.<sup>11</sup>

42 4. Customary land regimes are most accurately described as *community-based systems*. This is because they derive from and are sustained by the community, not by the national state or national law, although national law determines the legal status of the system.

5. 'Community' in regard to customary land tenure always has a *linked social and spatial basis*. It may mean a whole tribe or ethnic group and its territory, or refer to a single settlement, village or village cluster, or hunter-gatherer band. In most cases the operational unit is the most local level, often the village. Tenure concerns at a tribal level tend to come into play only when member communities collectively find their lands threatened.

6. The territory, community land area, or *domain* is the sphere over which the community exercises jurisdiction, determines rights to the land and resources within the domain, regulates and upholds these. There is always a perimeter boundary to this domain. Depending upon the terrain, this boundary may be precise and visible, such as a river or other such feature, signalled by specific trees, rocks or hilltops. Where land use pressure is low and lands very extensive, the boundary might be defined as a substantial zone in itself.

7. Customary land tenure regimes are *sophisticated systems*, distinctive for

11 See Brouwer, 1995 for Portugal, Merlo, 1995 for Italy, Berg et al., 2002 for Spain.

their ability to cater to a complex menu of rights. These include distinctions between controlling ownership rights, access rights, and other secondary rights. Rights-holders themselves may vary, including individuals, families, clans, groups, village communities or ethnic groups, depending upon the resource and its location. Although not common, in some situations two or more land-use groups may own different rights in the same territory; this has been noted at times in Sahelian States where a fishing group, a pastoral group, and a settled farming group may have distinctive ownership rights in the territory at different times of the year, or in respect of different assets within the territory.<sup>12</sup> Mountain tops and rivers may belong traditionally to the whole tribe. Most resources are owned at more local community level. The more permanently and visibly land is used, the more likely it is to be acknowledged as individual or family property.

8. Accordingly, *not all* customary land interests or rights are necessarily collectively owned. Individual and especially family tenure are common in most customary systems other than hunter-gatherer regimes. However, lands held collectively are those customary properties which are least secure in today's world, and where these areas have such high intrinsic values and frontier land expansion values. This is especially so when these common properties comprise valuable forested, mineral or wildlife-rich areas. Over the 20th century, governments characteristically brought these under their direct control and even ownership.

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9. *Collective ownership* is traditionally an integral facet of customary land tenure. In some cases the entire domain is owned by community members jointly and any use of the domain, even farming, is considered a use right, no matter how fixed or permanent it is. Members in these cases are therefore both *shareholding owners* of the land and *usufructaries*, holding rights to a particular parcel in the domain. They are also *use right holders* to those parts of the territory which all members of the community have the right to use in defined ways. In other situations, while communal *jurisdiction* (and customary rules or law) is retained over the whole area ('our land', 'our territory'), only the non-farmed and non-family held areas are considered to be actually owned by the community (as common estates, common properties, or commonhold). Where a customary domain is entirely subdivided into family plots, communal jurisdiction frequently remains; this can be strikingly vibrant, such as in approval or non-approval for inheritance, sales or land use on these plots.<sup>13</sup>

12 Cotula and Cisse in Cotula (ed.), 2007 provide a good example of this in Niger.

13 Kenya provides a good example; even in areas where all lands are privately titled and therefore in law withdrawn from the customary domain, families continue to pursue customary norms of transfer and inheritance (Hunt, 2005).

10. Another set of rights may overlay founding ownership rights. For example, a group of pastoralists who have traditionally used the area at a certain time of year may hold rights to use parts or all of the land and its resources (e.g. water). Alternatively, neighbouring communities or relatives may hold rights to enter and use resources in the domain on certain conditions. However, these are usually secondary rights only; they are normally *access and use rights* and do not in themselves have the rights accorded ownership.

11. Customary land tenure is *self-administering* in the sense that it depends upon local consensus to be upheld and retained, even where chiefs are endowed with day-to-day administration powers.

12. Customary land tenure regimes are *not always equitable*. Feudal or feudal-like practices can exist in the past and even currently.<sup>14</sup> The rights of women and very poor client families are generally weak and easy to exclude.

13. *Tradition* in the context of customary land tenure is often misunderstood. Rightly, land-owners take support from the fact of the longevity of their possession. However *in its practice* customary land tenure is always 'current', determined by what the current living community dictates as acceptable. Customary land tenure is therefore a flexible regime, respondent to changing conditions.

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The following are common changes seen in African customary regimes today:

- a. Family-based usufruct is often maturing into full private property (e.g. 'customary freeholds', as so referred in Ghana) in line with increasingly permanent housing and farms.
- b. There is declining sanction especially in peri-urban areas against families or individuals selling, leasing or renting out their farms and houses.
- c. Witnessed documentation of transactions is common, especially at sale.
- d. After a century of colonial and often post-colonial support for chiefs as customary land administrators, decision-making is now more broadly based and more obviously dependent upon community consensus. Where elected

<sup>14</sup> The most famously expansive feudal regime in Africa in the 20th century was in Ethiopia, abolished following the fall of Emperor Haile Selassie through equitable distribution of lands to tenants. Mailo tenure in Uganda today represents a residual form of feudal tenure. Laws in the 1950s and again after Independence abolished feudal Nyarubanja practices in Tanzania. Many other cases exist; some would argue that land relations of Ashanti chiefs with their people are feudal-like (for this issue see Ubink & Amanor (eds), 2008).

community governments or committees are in place (e.g. Tanzania, Ethiopia) these generally take over customary jurisdiction and administration.

e. Perimeter boundaries of communal domains are hardening, with pressure from neighbouring communities, urban expansion, and expanding settled farming. Perimeters are increasingly subject to inter-community agreement, often being demarcated for the first time.

f. Communal domain is declining as a proportion of the community land area under population pressure, expanding agriculture, urban encroachment, and State appropriations. Rights to the common properties frequently becomes a contentious issue as poorer members find elites extending farms too deeply into these areas, usually giving rise to reclarification of the area as communally owned and the institution of new rules.

g. Free access by outsiders declines for the same reasons. This can affect relatives, pastoralists, or other groups which have by custom enjoyed access, with the tacit permission of the community. Now formal permission is often required and access may be limited, or made subject to 'gifts'.

h. Institutionally weaker groups within the community, such as women, orphans, and in-laws often now find their rights curtailed. Distinction between indigenes and immigrants has become a major issue in many West African States, even where the latter have lived in the community for three or more generations. Contrarily, demand for equity in the customary land-holding community is rising, usually through pressure by women and poorer families, supported by local NGOs. Both customary and supporting statutory provisions which limit the rights of long-settled 'tenants' and immigrants to own lands they have been allocated, are being actively challenged in West African States, notably Ghana and Côte d'Ivoire.

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i. Under rising pressure this last half-century, customary land-holders everywhere are becoming more vigilant as to their land rights. The proprietary attributes of their tenure is increasingly emphasized. Historical possession is more consciously taking form as demand that this be modernly recognized as private property, group-owned or otherwise.

14. Especially where national law has failed to recognize and protect customary rights, conflicting overlaps in rights may exist today. Common overlaps include:

a. *Overlaps within the customary sector itself*, such as between hunter-gatherers and incoming or expanding farming communities; between settled farmers and

pastoralists, the latter finding their customary access rights curtailed by settled communities; between chiefs and their 'citizens' (as referred to in some West African States); between elites and the poorer households within the community, particularly as the former tend to control allocation and use of the commons; and between members of the community and incomers, including poor immigrant settlers who may begin as workers in the area initially, and wealthier individuals who seek lands for investment opportunities and may have bought their way into the area through mechanisms which members now criticize.

b. *Overlaps between customary land-holders and their domains and expanding peri-urban development*, particularly affecting collectively owned parts of the area, often coopted through mechanisms which do not rest on local permission (or benefit) or arise through misuse of powers by traditional authorities.

c. Overlaps between State and community, where government authority is overlaid on local authority and tenure in the case of public, national and State lands, or by outright appropriation of customary domain into the private domain of the State, the effects of which can be felt to varying degrees, such as resulting in diminished security of occupancy and use, curtailing of access to parts of the land, or in outright eviction and absolute dispossession; and

d. *Overlaps between lessees, managers, grantees of such public or State lands and customary communities*; although the statutory rights of incomers may have the effect of extinguishing customary rights in law, the effect on the ground is erratic, depending upon the activity pursued. In as many cases, customary rights are not so much extinguished as overlaid, both in a legal and physical sense, leaving communities and their customary land rights in uncertain territory. The main difference with the above is that other parties are interposed between the State and communities, adding to vulnerability of traditional owners.

15. Despite the pressures (and despite colonial and post-colonial predictions), customary land regimes are *not* disappearing. In many cases they are getting stronger, for a number of reasons:

a. the system is so tied to land use that so long as rural families and communities use land, it remains relevant and active;

b. the system exists as the *de facto* land administration system in countries where neither conversionary statutory titling nor decentralized land administration have been extensive – the case over much of Africa;

c. as a community-based regime, the customary organization of rights



responds directly to local realities and needs and has a natural affinity with rising demand for more localized and democratic decision-making;

- d. its inherent flexibility means its rules easily mutate to adapt; and
- e. with democratization and popular empowerment, communities are less willing to surrender their interests to officialdom or entrepreneurs.

16. Customary land tenure remains a *major world tenure system*.<sup>15</sup> Around two billion people today are customary land-holders, in Africa, South-East Asia, Central Asia, Latin America, the Caribbean and the Pacific. Their customary properties embrace over two billion hectares of land. A substantial proportion of this is forested or pasturelands.

17. While customary *security* of tenure varies widely, it is globally on the agenda, with a marked rise in legal security in more than 30 countries, from Norway, New Zealand, Canada and a multitude of Latin American States, to expanding reform initiatives in Asia and Africa.<sup>16</sup> The routes of change are threefold; *first*, through indigenous land claims, most active in fifteen Latin American States (and delivering more than 200 million ha of land to legal community ownership); *second*, through restitution of State-captured rights to private property collectives defined by local norms, in former nationalized regimes (particularly in the former Soviet Union States of Georgian, Armenia, Moldavia and Kyrgyzstan), and *third*, through legal change in the status of customary tenure in particularly Africa, trends in which are outlined in Chapter 4.

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In all these cases, the status of land assets which by tradition have been owned and managed collectively – such as forests, rangelands and marshlands – are the focal point of legal alteration.

18. At the same time, threats to security of tenure by customary land-holders continues to rise, both through the usual pressures of population growth, urbanization and class stratification arising from and with the commoditization of land, to newer threats such as illustrated in the current flurry of inter-state land leasing for food and biofuel production for economies in the Middle East and East Asia, which are wealthy but have little arable land of their own.

<sup>15</sup> Commission for the Legal Empowerment of the Poor, 2008.

<sup>16</sup> The literature on this is too great to cite; for examples of partial overviews, see Borrás et al., 2009, Alden Wily et al., 2008. Alden Wily, forthcoming 2010 (b) provides most comprehensive coverage for Sub Saharan Africa.

## II National law

The focus of the following review is to determine whether customary land rights are legally acknowledged as existing in Cameroon, and if so, how they are understood in the law, and what level of protection of tenure is provided. Equitable status in modern-day land relations depends upon recognition of customary interests as *real property* interests, which are accordingly upheld by courts when wrongfully treated.

A number of statutes in Cameroon have implications for customary land rights, including local government and natural resource management law. The most important are listed in Box 1, excluding forest legislation which is addressed in the following chapter. Annex A provides text of main land laws.

Other important land laws which have been reviewed but are not longer in force include: (i) the Order of 15 September 1921 Relating to the Organization of Conservation of Private Property and Land Rights in the Territory of Cameroon; (ii) the Decree of 21 July 1932 Instituting the Land Registration System in Cameroon; and (iii) the Decree of 12 January 1938 and its Order of Application of 31 October 1938 on Land Matters; and Law No.59-47 of 17 June 1959 Concerning the Organization of Private and National Property (key text provided in Annex A).

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### Box 1 – Main land laws in force as affecting rural communal property interests in Cameroon

#### SUPREME LAW

Law No.96-6 of 18 January 1996 To Amend the Constitution of 2 June 1972 (in force as of 2001)

#### LAND TENURE LAW

Ordinance No.74-1 of 6 July 1974 To Establish Rules Governing Land Tenure, including amendment of 1977

Law No.19 of 26 November 1983 to Amend the Provision of Article 5 of Ordinance No.74-1

#### LAND REGISTRATION LAW (private property law)

Law No.76/25 of 14 December 1976 to Establish Regulations Governing Cadastral Surveys and Records

Decree No.76-165 of 27 April 1976 to Establish the Conditions for Obtaining Land Certificates Amended

Decree No.481-2005 of 16 December 2005

Decree No.2005-481 of 16 December 2005 to Amend and Supplement Some Provisions of Decree 76-165

**NATIONAL/STATE LANDS LAW**

Ordinance No.74-2 of 6 July 1974 to Establish Rules Governing State Lands

Decree No.76-166 of 27 April 1976 to Establish the Terms and Conditions of Management of National Lands

**GOVERNMENT LAND**

Decree No.76-167 of 27 April 1976 to Establish the Terms and Conditions of Management of the Private Property of the State,

Decree No.95-146 of 4 August 1995 to Amend and Supplement Certain Provisions of Decree No.76-167

Law No.80-22 of 14 July 1980 to Repress Infringements on Landed Property and State Lands

Decree No.84-311 of 22 May 1984 to Lay Down the Conditions for Implementing Law No.80-22 of 14 July 1980

**LAND ACQUISITION FOR PUBLIC PURPOSE**

Law No.85-09 of 4 July 1985 to Lay Down the Procedure Governing Expropriation for Public Purposes and the Conditions for Compensation  
Decree No.87-1872 of 16 December 1987 to Implement Law No.85-9 of 4 July 1985

Instruction No.005/1/Y.25/MINDAF/D220 of 29 December 2005 to Recall the Basic Rules About the Implementation of the System of Expropriation for a Public Purpose

**NATURAL RESOURCE TENURE**

Law No.94-1 of 20 January 1994 to Lay Down Forestry, Wildlife and Fisheries Regulations and subsequent legislation as listed in Box 3 (Chapter 3)

Framework Law No.96/12 of 5 August 1996 Relating to Environmental Management

Law No.2001-1 of 16 April 2001 to Establish the Mining Code

Law No.2002/003 of 19 April 2002 on the General Tax Code

Law No.2002-13 of 30 December 2002 to Institute the Gas Code

Decree No.97-116 of 1997, The Pipeline Law

**LOCAL GOVERNMENT LAW**

Law No.2004-17 of 22 July 2004 On the Orientation of Decentralization, with Law No.2004-18 of 22 July 2004 To Lay Down Rules Applicable to Councils and with Law No.2004-19 of 22 July 2004 To Lay Down Rules Applicable to Regions

### III Findings

Ten main conclusions concerning the land laws are presented below.

#### 1. Constitutional protection for customary land rights is weak

Worldwide, there have been more than 40 new national constitutions enacted in agrarian States since 1990. Most have found it necessary to be more specific than in the past as to the land rights status of majority rural populations, including as relevant customary land-holders.<sup>17</sup> Mozambique, Namibia, South Africa, Liberia, Malawi, Zambia, Uganda, Rwanda, Burundi, Eritrea, Ghana, Angola and Sudan are among those countries in Africa which have done so. The detailed chapter on land in the draft Kenyan Constitution is the most recent provision, and notable for an entirely reformed vision of customary land rights.

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In contrast Cameroon's 1996 Constitution<sup>18</sup> shied away from laying down clear land rights principles, beyond reiteration of conventional generalities as to 'the freedom of settlement', 'guarantee of the right to use, enjoy and dispose of property' (in accordance with the terms of the law which then restricts this) and 'protection against deprivation of property, save for public purpose and subject to payment of compensation', again under (limiting) conditions to be determined by law (see Box 8 in Chapter 5 for text ).

The constitution does not mention customary land interests. It does pledge to protect the rights of indigenous populations but does so only in the preamble. Moreover, the context is ambiguous, implying narrow responsibility to minorities and 'indigenous peoples', raising questions as to who is included in such protection. Proclaimed attachment to the fundamental freedoms enshrined in international conventions is also unhelpful, as discussed in Chapter 4.

#### 2 The minimal attention given to customary land rights in the land law has the effect of being suppressive

Unlike colonial legislation as later discussed, current land laws fail to address customary land rights directly. This is despite the fact that at least

17 See Alden Wily, 2009a, for a review of land provisions in contemporary constitutional law.

18 Since independence, the country has three Constitutions and a number of amendments. The first Constitution marked the independence of French Cameroun on 1st January 1960. The unification of British and French administered Cameroun provided a Federal Republic with a new Constitution on 2nd June 1972 and which became simply the Republic of Cameroon in 1984. Significant amendment to the 1972 Constitution and 30 new articles marked what is referred to as the third Constitution in 1996, but which came into force only in 2001.

half the population are customary land-holders. No special chapter on the subject is provided. Where the law does consider customary interests, this is in a manner which truncates their scope and substance as shortly to be outlined.

Only four sections in the land laws mention customary interests. Each raises hope of positive treatment but is followed by extreme limitations:

a. Section 17 of Ordinance No.1 of 1974 (the founding land law) refers to ‘customary communities and members thereof’ but guarantees them only *peaceful occupation and use* of lands. Even the guarantee of peaceful occupancy and use is limited to those parts of their lands where ‘human presence and development is evident’.

b. Section 7 of Ordinance No.2 of 1974 declares that ‘bona fide owners and occupants of public property may not be dispossessed thereof unless the public interest so requires, and subject to compensation’. However, this too is heavily proscribed as shown below.

c. Law No.76/25 of 1976 requires ‘landowners, customary land holders, farmers and other holders of property interests’ to be present at adjudication, ‘to declare every property that they hold’ (Section 9). Adjudication turns out to be interested only in farm and house lands and particularly only those which are held to be property due to their registration.

d. Section 15 reiterates the inclusion of customary holders in its requirement that ‘landowners, possessors, usufructaries, farmers and other holders of real property rights’ comply with summonses from survey officials. This does not mean however that other than housing and farming rights will be acknowledged or registered.

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### **3 The heart of Cameroon’s land law is deceptive in its simplicity, endowing the State with extreme dispossessory powers**

The core of land legislation in force is found in two simple provisions: *first*, that ‘the State shall be the guardian of all lands’, and *second*, that only two categories of land tenure exist: private and public land (Ordinance No.74-1 of 1974, Sections 1(b) and 14).

From these descend significant but ‘lawful’ misuses of power, resulting in diminishment and even *de facto* and *de jure* engineered annullment of existing customary property interests, depending upon the circumstances. This is so even though at

no point in the land law are customary land rights formally extinguished or even denied as existing.

This is not to say that an individual, family or collective land interest cannot become a real property right but this may only occur at registration and through surrendering customary rights to secure the statutory entitlement. This incurs much more than loss of customary rights, removing existing incidents of that tenure such as how the land may be used, transferred, and the identity of co-owners other than the single grantee. The opportunity to register customary holdings is limited to settled and farmed lands.

Nine devices which suppress customary land interests are employed in the law:

**a. No provision is made for Community Land**

The classification of lands is restrictive and deceptive. Formally, the law provides only two classes of land-holding: private and National Lands. Somehow customary properties are to fit into the two categories as either private or National Lands but cannot easily do so. Definitions of these classes prevent customary properties being considered private land yet national land does not make room for these assets. The main message is that customary land ownership simply does not exist in the eyes of the law.

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Private land is defined in ways which deliberately exclude unregistered property (Ordinance No.74-1 of 1974, Section 2). Private land also appears to include the public and private property of the State (Section 14 (1)). This is expressed obliquely, through exclusion of what exists in National Lands:

“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 public or private property of the State and other public bodies”.

“National lands shall not include lands covered by private property rights as defined in Article 2 above” (Section 14 (1 & 2), Ordinance 74-1).

Little customary property has been subject to formal registration and thereby respected as private property. This is because: (i) the procedure for voluntary registration has been remote, expensive and time-consuming. Pursuing it requires knowledge, income and mobility; (ii) the promised process of comprehensive survey and cadastral registration of rights has never taken place (as laid out in Law No.76/25 of 1976); and (iii) only certain parts of customary estate are registrable (houses and farms).



And as noted above, even if communities or customary land-holders seek to register their lands, the procedure automatically converts these into a different, imported and non-customary form of ownership, extinguishing customary attributes. That is, the procedure is not simply a matter of recordation or certification of rights, but transformation. Private property and customary property are made mutually exclusive categories (compared for example to some other States where customary property is acknowledged as a class of private property (see Chapter 5).

National Lands are defined as public land under the guardianship and administration of the State including absolute allocatory powers (Ordinance No.74-2 of 1974, Part III). This makes these lands the *de facto* property of government and confirms that customary land owners are not owners at all, but occupants on government or public land.

This is clearest in the subdivision of National Lands into lands into two classes: occupied with houses, farms and plantations and grazing lands manifesting human presence and development (Category 1); and lands free of any effective occupation (Category 2) (Ordinance No.74-1 of 1974; section 15). As documented below, occupants and users may only apply for certificates out of Category 1. The presumption is that customary interests do not even exist under Category 2 lands, the very lands which represent the major common property assets of rural communities.

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**b. Even the definition of public property manages to capture significant customary estate**

Public property is defined under Ordinance No.74-2 of 1974. This is described as inalienable, imprescriptible (unable to be registered) and unattachable, reserved for public purpose and unable to be subject to private tenure (Section 2(2)). As Ordinance No.74-1 provides for only two classes of land (private and National Lands), public land holds ambiguous status. They are formally excluded from National Lands (Ordinance 74-1, section 14). At the same time, they are not logically part of private land. Frequent reference to public property under ‘the public and private property of the State’ makes this *de facto* government rather than national property. Further it is noticeable (at least in the English versions of the law) that the terminology of ‘public lands’ is avoided in favour of ‘public property’.

The composition of public property is categorized as either natural or artificial assets. These are predictable in content; coastlands, all waterways including lakes and marshlands, and subsoil and air space are designated as natural property.

Roads, railways, ports, etc are designated as artificial property (Sections 3 and 4). Two points are of note: (i) forests and rangelands are not made public property and are therefore potentially alienable. This opens the way for these resources to become the private property of the State, and which it may in turn alienate or allocate; and (ii) *'the concessions of traditional chiefdoms and property relating thereto'* are classified as artificial property (Section 4 (l)). This is stated as *more especially in the provinces where the concession of chiefdoms is considered as the joint property of the community, the chief having only the enjoyment thereof'*.

In this way, these substantial common properties are unable to be registered as the private collective property of those communities. But then, neither may these properties be alienated by the State to others, locked into the class of public property. By sleight of hand, the State retains proprietorship.

**c. Even though the law recognizes that customary interests are often held collectively, it provides no routes for common properties to be registered**

54 The above reflects the absence of provision for registration of collective entitlement on the basis of shared customary interest. This is despite articles which recognize that customary land interests may be held collectively and even at times refers to the clan's 'property' (as in Section 4(l) of Ordinance 74-1 cited above).

Law No.76/25 of 1976 governing cadastral survey and records also refers to the cost of clearing of boundaries being at the charge of the 'owners or of the local *communities* as the case may be' (Section 9). Local communities are among those who may apply for grants of land on a temporary or absolute basis for public interest purposes and in which instance the land would become 'part of the private property of the *community*' (Decree 76-166 of 1976 to establish the terms and conditions of management of National Lands, Sections 19 and 22, author's italics). Under Decree 76-165 of 1976 customary *communities* are listed as among those eligible to apply for a Land Certificate for National Lands.

However, such acknowledgement of communal tenure should not be taken to imply that a community's traditional ownership of a forest, pasture or wetland will be recognized in registrable ways or any collectively held land granted for *other than* development (e.g. farming) purposes. As shown below, most relevant common properties (e.g. forests) are usually not held for conversionary development purposes.

**d. No provision is made for the practice of customary land law**

The land law is silent on the practice of customary land law, the norms and procedures through which African rural communities regulate their land relations among themselves and with outsiders. With no legal position on this, it may be argued that customary law permissively exists, neither halted, regulated, nor made illegal. But neither is it given statutory support to operate. This means that its decisions may – or may not – be upheld, depending upon the will of the State (government and courts).

**e. Communities are afforded token opportunity to determine what happens to their own lands**

Ordinance No.74-1 of 1974 provides for traditional authorities to be members of the consultative boards established in respect of National Lands to ensure their rational use and development (Section 16), or more specifically where and to whom grants of National Lands may be made (Decree No.76-166 of 1976).

However, the chief and two leading members of the village or the community whose land is being discussed account for only three members of the eight member consultative boards. In any event, these boards are only advisory bodies to the prefect.

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**f. Land which is not built on or farmed cannot be registered by customary land-owners**

Only a tiny proportion of customarily owned land is readily registrable as legally owned by current customary holders. The term ‘readily’ is used advisedly, for the laws do not *entirely* prevent lands which do not manifest human presence and development from being registered – a loophole discussed in Chapter 4. In the spirit of the law however, registration of customary rights is dependent upon evidence of development of the land. The definition of ‘development’ is limited to lands found to be ‘occupied with houses, farms and plantations and grazing’ (Ordinance No.74-1 of 1974, Section 17 (2) and Section 15 (1)).

Proportionally little of the overall customary estate in Cameroon (or of other agrarian economies) is so possessed, occupied and used. Most customary land is purposely *not* covered with houses or other buildings, *not* cleared and farmed, *not* put down to permanent paddocks, and not put down to plantations, but retained as far as possible as un-degraded wildlife range, pasturage, forest, woodlands and wetlands, under what may be most accurately described as customary commonhold tenure.

**g. Customary lands are made directly available to non-customary holders**

Yet more damaging, especially since 1977, the land law allows the State not only to declare some of this land to be its own private property, but empowers government to grant, lease or allocate National Lands to whom it chooses including to corporate bodies (Ordinance 74-1 of 1974, Section 18, as provided for by amendment to the law by Ordinance No. 77-1 of 1977, Ordinance 74-2, Section 12).

This places even the *occupancy and use* of customary land-holders at risk. This has materialized frequently, through the allocation of customary estate to non-customary investors, commercial farmers, logging concessionaires and others. Private parties may acquire these customary lands for terms of long duration and even purchase the land outright, on the promise of 'developing' the land.

**h. Public purpose fails to protect customary holders**

56 There is a condition to such allocations, that there must be public purpose to their allocation. Typically, however,<sup>19</sup> public purpose is defined loosely, covering any use which can be justified as having 'public, economic or social utility' (Ordinance 74-1, Section 18 (1)). This includes alienation of customarily owned lands by the State to investors or concessionaires.

**i. Compensation is only payable for title-holders and for farms and houses**

Few communities can even claim compensation when their lands are designated as national property or public property, and/or the former allocated to others in the interest of 'public purpose'.

The extent of lands which may be compensated for due to appropriation for public purpose is limited.<sup>20</sup> Law No. 85/09 of 1985 governs expropriation, with more procedural provisions provided in Decree 87-1972 of 1987 and an Instruction of June 2007. These establish that only private properties (i.e. *registered* parcels) which are taken for public purpose are eligible for compensation. However,

<sup>19</sup> See Alden Wily, 2009a for multiple constitutional examples, and Alden Wily & Mbaya, 2001 for examples in land laws.

<sup>20</sup> Expropriation (the taking of acknowledged private property for public purpose) and appropriation (the taking of land acknowledged as subject to interests, even if less than the law's definition of private property) is a routine right of national governments, but one always proclaimed as to be used judiciously, and always for described public purpose.

compensation is also made obligatory for bona fide owners or occupants on National Lands (State Lands) (Ordinance No.74-2 of 1974, Section 7).<sup>21</sup> This promise is then diminished through the requirement that the land be 'effectively occupied'; that is, with buildings, plantations, farms or animal enclosures physically evident. A cycle of exclusion takes effect. Those who hold lands collectively and not for the purpose of farming cannot obtain compensation.

Compensation for cultivated lands and houses held by registered and titled owners is payable in monetary form or by allocation of land of the same value. If the latter, this must be located as far as possible in the same Council area as the expropriated land (Law No.85/09 Section 8). In principle compensation is to be awarded before eviction, but at the same time the beneficiary of the expropriation may occupy the premises before eviction of the previous owner occurs (Section 4(3)). Only six months' notice to eviction is required (Section 4(4), and this may be reduced to three months (Section 4(5)).

Compensation is payable for these factors: bare land (presumably indicating the intention to farm); the value of standing crops, the value of permanent buildings, and any other development which is duly verified by the verification and valuation commission (Law No.85/09 of 1985, Section 7). This affects both registered owners and lawful occupants on National Lands. The loss of cultural, social or other economies values is not eligible. In the case of lands held by virtue of customary tenure under which a Land Certificate has been issued, the compensation may not exceed the minimum official price of undeveloped lands in the area (Section 9(a)). The extent of such cases is not believed to be great. Meanwhile the vast majority of customary land-owners, those without any such certificate, are not eligible for compensation for loss of their lands.

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Claims against inadequate compensation are proscribed. No claim lodged prior to 1960 is valid (Ordinance 74-1, Section 13(3)). Nor may compensation paid before 1985 be reviewed (Law No.85/09 Section 12). These limitations affected the Bakweri land claims case outlined in Chapter 4. Newer claims are limited by the reality that much of the communal estate and especially forested lands are the private property of the State, as discussed in the next chapter.

<sup>21</sup> The law says that where land is designated public property, bona fide owners and occupants are eligible for compensation as if the land were private property (Ordinance 74-2 of 1974, Section 7 (1) read with Law No.85/09 of 1985, Section 2).

#### **4. In legal effect, customary land-holders are squatters on their own land**

There are only two legal conditions in which customary property is potentially protected; first as above where individual customary land-holders have registered their lands under private Land Certificate title, but who are thereby in fact excluded from the customary sector; and second, in the commitment given to at least peaceful occupancy and use, although this is limited to parcels under housing or farms, and subject to the will of the State. Therefore the only route to security of occupancy is to actively clear and cultivate the land and then to seek formal entitlement for this.

A certain amount of permissive use is allowed on Category 2 National Lands (i.e. lands defined as without 'effective occupation'). In these areas, the law provides that customary land-users may be granted hunting and gathering rights, although only 'until such time as the State has assigned the said lands to a specific purpose' (Ordinance 74-1 of 1974, Section 17 (3)).

58 Today, therefore, customary land-holders live on and use their customary properties only permissively. Many have since found themselves to be the permissive occupants not of government but of lessees or grantees of the State, those with conservation, agricultural, mining, logging or other grants, leases or concessions. They are not often informed of the change in their landlord until eviction or other notices restricting access and use appear.

#### **5. Lands owned collectively are most ill-treated by the law**

All rural dwellers who have long-standing residence and use of lands, and who do not hold registered entitlement, are affected by the above provisions. The minority forest-dweller community is worst affected. First, hunter-gatherers lack the institutional strength and funds to actively defend their interests (and compare for example, the Bakweri Land Claims Committee initiative exemplified in Chapter 4). Second, most and sometimes all of their community lands are held collectively and without the evidential 'effective occupation' by houses and farms needed to be eligible for entitlement, or for compensation, should they be evicted.

Still, indigenous forest-dwellers are not the only rural communities to customarily own communal estates; in different ways and to different extents, pastoralists, agro-pastoralists and settled farming communities all own communal lands by custom.



**6. While the land law severely diminishes customary land rights, it does not go so far as to directly extinguish these interests, preferring to achieve this effect by the back door**

No attempt is made in Cameroon's land legislation to directly extinguish customary landrights. Nonetheless as shown above, there are various routes through which this is practically the effect. First, denial that customary rights are real property rights deserving equivalent protection given to registered entitlements is the most generalised impediment to realization of rights. Second, even those lands which have in the past been formally recorded and possibly surveyed as domains in the name of chiefs are not classed as collectively-owned private properties but artificial public lands which cannot be alienated or registered. Certain types of land are also made inalienable and imprescriptible lands, even though these are generally integral to local communal properties. Third, by denying that 'effective occupation' can exist other than by habitation and cultivation, rangelands and forests which are the customary common property of communities become 'unowned' lands which government is then empowered to reallocate for plantations, ranching or other purposes. The Cameroon law then takes a further step to limit the land rights of its rural population, as described below.

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**7. The ultimate legal abuse of customary land interests rests in the ability of the State to set aside National Lands as its own private property even though customary interests clearly exist**

Guardianship of all lands in the form of administrative and regulatory oversight, including ensuring the rational use of land, is a routine prerogative of the State: but it need not, and should not, extend to wrongful dispossession of its citizens. Nor is it unusual for unregistered lands in an agrarian economy to be classified as national or public lands, *pending* systematic recording of rights to those lands. Nor again is it unusual for a government to set aside some part of these for particular public uses, such as in the interests of conservation.

These paradigms do not mean that affected lands thereby must belong to the State, rather that they are subject to specific statutory regulation to ensure their appropriate, sustainable and fair use.

There are hints that this is not the objective of Cameroonian land law in the opening statements of the primary enactment (Ordinance 74-1). Guardianship for the purpose of just, fair and beneficial use by the population is nowhere mentioned. Instead, guardianship is stated as required 'in the imperative interest of defence or the economic policies of the nation' (Section 1 (2)). This is prefaced

by an equally ominous provision; that (in its effect) only persons and corporations who have *registered* private properties (and this includes the State) are guaranteed the right to freely enjoy and dispose of such lands (Section 1 (1)).

Then the law declares that the State (i.e. government) may declare any part of National Lands as its own private property (Ordinance No.74-1 of 1974, Section 18, read with Ordinance No.74-2 of 1974, Section 10(5)). Once this is made the private property of the State, government may allocate any part of this land by leasehold or freehold to any person or body (Ordinance No.74-2, Section 12).

Data on the private property of the State have not been collected, but they include the Permanent Forest Estate, according to the 1994 legislation discussed below. Most if not all of this land may be presumed to be the customary property of one or other forest dwelling or forest-adjacent community.

As described above, the compensation procedure furthers abuse. The duty of the State to compensate loss of interest is limited in focus and extent. This is quite apart from the difficulties which rural communities or individuals may experience in actually recovering compensation in conditions where it must by law be granted.

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### **8. While the subordination of customary land rights has obvious colonial origins, the worst abuses have arguably occurred through post-Independence law**

Of course none of the above is exceptional when considered in a colonial law context. The primary purpose of colonizing nations was to secure as much land and other natural resources as possible for their home economies and at minimal cost. Denying that 'discovered' natives actually owned the land was the primary legal device to ensure this. At the same time, systems for recognizing real property had to be put in place to cater to settler and colonizing administration demands. Practical realities also dictated that to keep natives 'content and fed', their occupation and use of lands should not be unduly disturbed – until this was necessary.

'Necessary' meant where their lands or labour were needed, generally for expanding State, settler and then investor enterprise, and as the decades passed, putting natives themselves to work in producing the designated crops required by European economies (from rubber, sugar and palm oil to sisal and groundnuts). For this the State needed absolute control lands and found it expedient to achieve this by owning the land itself, as far as it was able. It is this lack of separation

between control and tenure which continues to dog land relations in agrarian economies (and State dictatorships). As Chapter 5 will elaborate, reform in land relations occurring today is as much about (unevenly) devolving power over land as slowly lifting the hand off the shameful suppression of citizen land rights.

Meanwhile the dispossessory model would not remain static although at no point was it thoroughly overturned or reconstructed. The years between the World Wars were a watershed. Colonial enterprise had evolved into de facto autonomous (if still colonial) States, requiring they become more workable enterprises in their own right. At home in Europe, attitudes to colonialism and the colonized were shifting, reflected in the moral constraint placed upon Britain and France as mandated powers ‘to secure the just treatment of the native inhabitants of territories under their control’,<sup>22</sup> and at times harshly criticized when they failed.<sup>23</sup> The end-game began with the end of the Second World War, not least following the massive contribution of Africans to the war effort on their colonizers’ behalf, and alongside the evident inclusion of their elites in the capitalist transformation. On both counts, shifts in the interpretation of native land rights would occur, as outlined below.

Still, the founding legal constructs of dispossession were retained. In brief, the legal schema for this had been refined over several centuries in Asia, the Americas and more latterly Australasia, and was in due course applied to the colonization of Africa in the 19th century. Three elements were involved.

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*First*, any claims of local territorial sovereignty by chiefdoms could be overcome by the impossibility of there being two sovereign polities over the same land, rendering it ‘logical’ that priority be awarded the conquering colonizer (‘the right of discovery’).<sup>24</sup>

*Second*, as native communities on all continents appeared to share rights within their respective domains (and even to regard God as the ultimate owner of the soil), and were unable to alienate or sell their rights in the commoditized manner of land tenure in Europe (‘real property’), it could be presumed that Africans

22 Article 23(b) of the Covenant of the League of Nations, 28 June 1919.

23 For example, the British were firmly rebuked by the Permanent Mandates Commission of the League of Nations in 1920, following the passage of the Tanganyika Order in Council law, for ‘failing to uphold the principle that they had been ceded only trusteeship with possession of powers of management, not possession of the land’, a fact which the British did not formally concede until 1930 (Chidzero, 1961).

24 This was most carefully developed as a thesis in the so-called Marshall Ruling of the US Supreme Court in 1823 in the Johnson and Graham’s Lessee v. William McIntosh case (for details see Alden Wily, 2007; 256 ff), but this too has roots in a Privy Council ruling in 1722, itself building upon much older treatment of customary rights by the English in Ireland, beginning in the 11th and 12th centuries (McAuslan, 2006a, Cahill, 2007).

were mere occupants and users, and the land itself deemed ownerless (*terra nullius*).

*Third*, to salve colonial consciences as to the survival of natives, to sustain their useful production (and to keep the peace), their use of land for farming should be acknowledged to at least a minimal degree, as permissive occupancy. Helpfully, limitations around this could be justified on the grounds that property requires labour to define its limits. With the associated idea that land which is not subject to such useful labour was wasteful,<sup>25</sup> the definition of ‘effective occupation’ and the counterpoint construct of ‘wastelands’ took legal shape.<sup>26</sup> This was delivered in what became the working doctrine of *vacuum domicilium*, ‘according to which undeveloped land occupied by people could be deemed unoccupied, hence rightfully seized.’<sup>27</sup> These residual lands, obviously the greater majority of each colonial territory, would ‘justifiably’ fall to the colonial State.

#### **Limitations resulting in ambivalent treatment of native lands**

62 There were several drawbacks in the above strategy and which would in due course hoist one government after another upon its own flawed petard. For in failing to legally acknowledge that customary property rights exist, these could hardly be annulled. This could occur in practice only through procedures, which indisputably superseded that interest, such as by registration of the land under a freehold or like entitlement. Declaring unregistered lands to be under the jurisdiction or guardianship of the State was not quite enough. Hence over time, in some extreme cases, key unregistered lands were declared to be not just public land, but the private property of the State. Cameroon would adopt this device.

There was also the problem of pre-colonial precedence, in which even royally chartered companies of exploration and trading, and creation of early enclaves of European settlement, had often proceeded on the basis of purchasing suitable lands directly from chiefs. This occurred all along the west and east coast of Africa.<sup>28</sup> Setting aside the ludicrously low prices normally paid, purchase was acknowledgement that these lands were not entirely unowned, as formal colonial policy would have preferred to position the case. Through this and the

25 Even in colonized European States like Ireland, shifting cultivation was held to be wasteful monopolization of huge areas.

26 In due course John Locke would compose a labour-based theory of property in the late 17th century, elaborated by J.S. Mill and others into the 19th century, which explain this aspect, but rooted also in arguably much stronger and older feudal paradigms, in Europe reaching in fact back to Roman Empire times.

27 McAuslan, 2006b.

28 As described in Alden Wily, forthcoming (b).

above, contradictions in especially early colonial land policy across the African continent emerged.

Each colonial State delivered distinctively on all the above, but ultimately in predictably similar ways. Concretely, the land governance norm was dual; a statutorily defined system was put in place to regulate often recalcitrant and land-grabbing missionary and settler expansion and to entrench the State as controller, alongside initiatives to identify, exclude and control in different ways areas of native settlement and production. Out of the latter, the ‘native reserve’ in various forms emerged from the 1930s, especially in Anglophone Africa.

### The case in Cameroon

The foundation for all the above in the Cameroon context is well known as the 1896 German Imperial Decree,<sup>29</sup> which declared:

“All land in Kamerun with the exception of land over which private individuals or corporate bodies, chiefs or indigenous communities may be able to prove ownership rights or other real rights, or land on which third parties have acquired occupancy rights on through previous contracts with the imperial government, is considered vacant and ownerless and becomes Crown domain. Ownership belongs to the Empire” (Article 1).

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The *Grundbuch* registration process was set up to record these ‘provable’ private properties. Land commissions were created to identify and record the non-occupied native lands in the hinterland. It is not known (at least by this author) how far this procedure progressed before German Rule ended (1886–1916).

Following its authorization by the League of Nations as the mandatory power over most of Cameroon (1921), the French administration retained but refined the procedure for recognizing native occupancy. This comprised a system for affirming native rights (*constatation des droits des indigènes*) based upon customary rules (1932). French laws in Cameroon were directly modelled upon those developed in Dakar for the federation of French West Africa. It is of note that initially limited importance appears to have been placed upon whether the land was cultivated or not. Uptake of the voluntary opportunity to have

<sup>29</sup> Unfortunately this author has not directly accessed either this important law or subsequent French legislation of the 1930s in English translation as referred to shortly. She has relied on the literature for this, and particularly Nguiffo et al., 2009, Eckert, 1994, and upon commentary kindly provided by Jeremie Gilbert, associate consultant.

community land areas recorded was slight (Ekert, 1994). It may be speculated that communities did not know of the opportunity, found it too expensive and complex, or presumed their occupancy was secure without such recordation.

A further law in 1938 organized the colonial domain of the State.<sup>30</sup> This retained the 1896 principle of presumption of State ownership over all lands 'belonging to no one' (*terres vacantes et sans maître*). Thereby all lands which did not fall under either the system of '*constatation*' of customary rights or under the formal registration process belonged to the State.

The situation was ultimately similar in British Cameroon. Following World War I, Britain was granted mandatory responsibility for two small sections of modern day Cameroon on the north-west border with Nigeria (20 July 1922). The British protectorates of Southern and Northern Nigeria established in 1900 were combined in 1914 but governed as four provinces (and eventually, federal States). The Cameroon zones were incorporated into Eastern Nigeria, which had its own governor, then governed by the National Council of Nigeria and the Cameroons from 1951. Inter alia, the incorporation of these areas resulted in an influx of people from Nigeria, leading to a conflict of tenure between autochthons and immigrants, which continues until the present.<sup>31</sup>

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The laws of the Nigeria colony were applied to British Cameroon. With regard to native land rights there was a history of benign contradiction, and initially differential treatment of tenure in Southern and Northern Nigeria.<sup>32</sup> The right and title of natives under customary law was recognized from the outset in the South, the Public Lands Ordinance of 1903 allowing the governor of Southern Nigeria to acquire land for public purpose only on payment of compensation. In 1916 native lands were made subject to the ultimate control and disposition of the governor. He could grant statutory rights to both natives and aliens. A main source of dispute at the time was less between the colonial government and local populations than between chiefs and their people as to how lands were alienated. An important case heard by the Privy Council in London in 1921 confirmed that chiefs were only trustees for owners (the communities) and communal ownership deserved respect as such at expropriation for public purpose or at sale.<sup>33</sup> The Council's ruling was also important for clarifying that British sovereignty and

30 Décret du 12 Janvier 1938 et son arrêté d'application du 31 Octobre 1938.

31 Nuesiri (undated). This issue is mirrored in many West Africa coastal countries.

32 Respectively Southern Nigeria, inclusive of Lagos Island, originally purchased by the British separately, and Northern Nigeria.

33 Judgement delivered by Vicount Haldane on the case between Amodu Tijani and the Secretary, Southern Provinces of Nigeria, at His Majesty's Privy Council on 11 July 1921.



securement of radical title of the land was quite distinct from property rights to the land, as held by natives, and who were encouraged to continue allocating and administering rights ‘as is customary’. This confirmed previous court rulings in the colony in 1912 and 1915 that cession of Lagos Island and Southern Nigeria left the ownership rights of families and communities ‘entirely unimpaired’. ‘A mere change in sovereignty is not to be presumed as a means to disturb rights of private owners.’<sup>34</sup>

There was also acknowledgement in that court ruling that community lands extended beyond the farm. However, how far community land was regarded as property was shown in legal limitation as to how compensation was to be paid. The 1921 judgment concurred that under the 1903 Act, ‘There is to be no compensation paid for land unoccupied unless it its proved that, for at least six months during the ten years preceding any notice, certain kinds of beneficial use have been made of it.’<sup>35</sup> This fitted more with the French legislation in neighbouring French Cameroon.

In practice, as creation of forest reserves and demands for federal and State lands rose, along with issuing licences for mining, community lands began to be interfered with, including in those areas which fell within modern-day Cameroon.

By the Second World War the situation in both British and French Cameroon was permissive in law and discriminatory in practice. Customary rights had never been extinguished. Customary norms were acknowledged as existing and necessarily the determinant of local land relations. Voluntary recordation of these was provided for, although expressed in token articles in the law and neither promoted nor facilitated. Nor was this registration designed to enable whole communities to secure their lands but shaped around the presumption that recordation meant an individual African securing title over his acquired private house or farm parcel.

The interests of the urbanizing African elite helped confirm this orientation. By the 1950s they were demanding the same access to registrable entitlement of private property as enjoyed by settlers, as did elites in British Cameroon. Rural and urban relations were also fragmenting, with increasing focus on securing

34 Establishment of political sovereignty should not automatically imply that the British crown also owns the land within her new possession or protectorate.

35 Only much later, and particularly after Independence through especially the Land Use Act of 1978, would customary rights be dramatically curtailed throughout Nigeria by nationalisation of both all lands and authority over land disposition, vested in State military governors. Only now is this law being reassessed under public pressure. See Alden Wily, forthcoming (b) for details.

urban housing plots. Registration law (*immatriculation*) remained focused upon settler requirements and the procedure discriminatory in their favour. Nguiffo et al. (2009) found that the law laid down different requirements for registering farmland for concession holders (Europeans) and communities; the former only had to show development of 30% of the requested area, as per an Order of 7 April 1949. Communities had to show that the majority of the land was developed (cleared).

The law of 1959 'Concerning the Organization of State Land and Tenure' embodied the accumulated contradictions. This law remained in force until replaced by the law of 1974. Key articles of the Law No.59-47 of 17 June 1959 are provided in Annex A. These articles demonstrate that:

- a. there was little intention to release the grip of the State upon landholding in general;
- b. the distinction of natural and artificial public land was drawn before Independence, as was the ability of the State to withdraw public land into its own private domain;
- 66 c. customary rights are admitted as existing, and as owned individually or collectively;
- d. customary rights legally exist even when not registered, in the confirmation that public property does not include customarily held lands unless these have been compulsorily acquired or handed over to the State;
- e. at the same time these rights do not amount to private property, in that private property is (indirectly) defined as an estate which may be sold and which is effectively occupied, limiting this to built upon or farmed land;
- f. should a customary estate have these attributes, then it may be transformed into a real property right under the registration procedure;
- g. to do so land must be shown to be developed, thereby excluding communal lands; and
- h. the law made it illegal to transact customary rights outside customary norms unless the property is registered (Articles 3-6).

In short, the groundwork for the notorious 1974 law was laid. The tragedy for modern rural communities is that the independent State made no moves to

remedy colonial failings and to consolidate dispossession in this enactment. The few important privileges of colonial law were diminished, ignoring the fact that most of the country land estate was held under operating customary tenure.

### Post-Independence

Materialized capitalism and commoditization of land in the African community played a major role; by the end of the 1960s, registration of private holdings in the hands of individuals and in the form of absolute titles had become the main target. There is little doubt that the international community played its part in encouraging Cameroon's government to adopt the kind of land law which the 1974 laws embodied (much in the way it would guide the Cameroonian State in the 1980s to adopt emergency powers in respect of natural resources as part of the structural adjustment programme, greatly affecting how forests would be tenured). In the 1960s and 1970s the UN (mainly UNDP and FAO) and the World Bank were fixated upon the benefits of individualization, titling and registration of rural lands in the hands of advanced farmers and entrepreneurs.<sup>36</sup> Individualized registration of homesteads was the only route for land security provided in the many land titling laws advocated around the agrarian world, and which bore uncommon similarity. Collective entitlement was nowhere provided for and the interests of the majority poor more or less purposively set aside in the assumption that surplus labour would move to towns to support industrialization.

67

The connection between weak respect for customary rights and the way in which the State has been able to maintain itself as the majority landlord in Cameroon needs re-emphasis. The latter is possible only due to the former. Had community entitlement been better promoted and provided for, especially during the 1950s and 1960s, then most of the forest and other traditionally collective assets would be today acknowledged community property.

Cameroonians holding unregistered lands (inclusive of nearly all customary owners) have since been left with only one avenue to secure their rights, and then only where their interests coincide with settled occupation and farming. No purposive legal route to secure their commons has been opened. Nor has the registration process for even 'effectively occupied' (farmed) lands been made easier, more accessible, cheaper or quicker. Not surprisingly, registration continues to be infrequently pursued by the poor. In any case, the only lands they can secure are the house and farm, not community ownership of shared

36 See McAuslan, 2006c.

pasture, rangeland, woodland or forested areas. They continue to routinely lose their common properties, not least through forest sector decisions. Not even the permission of traditional authorities is required before this occurs (such as is the case in Ghana, Liberia and Nigeria). As discussed below, weak local governance further handicaps such protection of existing land rights as may be gleaned from the land law.

### **9. Modern natural resource legislation takes full advantage of unjust land law**

The following chapter shows how forestry law has taken advantage of the weaknesses of the 1974 land laws to maximize State-driven and controlled commercial developments at the expense of people's rights. Brief reference is made here to the mining and gas laws (key text for which are found in Annex A).

68 Specifically, the mining law (Law No.2001-1 of 2001 to Establish the Mining Code) only protects registered private property from mining, using the terms of the land law to define what constitutes private property (see Annex A for text). This makes all customary land inclusive of the forest estate vulnerable to mineral exploration and exploitation. Better protection is given to limit damage to forests (Sections 74 (2), 85 & 63). Ministers in charge of forests and wildlife are empowered to limit mining in forests and reserves; a power which does not appear to be widely applied. The fact that the State is so often both the lawful owner thence lessor and yet regulator of such leases/concessions produces a classic conflict of interest which lends itself to resolution only in the privacy of power politics within the State.

Affected communities have no prerogative to limit mining or establish conditions. The law does ask mining title holders to keep 50 metres away from settlements and sacred places without consent of communities (Section 62). Sections 73 States that the landowner or holder of customary rights or occupancy rights is entitled to compensation for the occupation of his land by the holder of the mining title. 'Community interest' is even mentioned as a factor to be considered, but this is not elaborated upon and is easily sidestepped (Sections 76 & 77). In referring back to land law as to how compensation is to be handled, in practice only those with registered entitlements or evidence of being in effective occupation of the area (i.e. houses and farms) are eligible.

The Pipeline Law (Decree No.97-116 of 1997) and the Gas Code (Law 2002-13 of 2002) are more rigorous in that government first expropriate needed lands if these are private properties or appropriate these if they are unregistered lands, in order to remove any claimants. Easement or occupation rights are then issued to

the enterprise by government. The private land of individuals located outside the easement area is to be the subject of ‘amicable negotiation between the holder and the owners’ (Pipeline law, Section 37) encouraging companies to purchase to those lands. Customary land-holders have no such option; they may be evicted and/or paid minimal compensation for lost houses and crops, but as government owns/holds the land, they cannot sell the land to the company themselves. Should occupation of the land not be met with local agreement, government can issue a temporary occupation order overcoming this. This can also affect the land of a private registered holder. In sum, mining, gas and pipeline legislation afford minimal protection to those whose lands are affected.

#### **10. Weak local government development handicaps delivery on customary land rights**

Finally, a comment must be made on local government arrangements. These directly affect how land governance is exercised. A main concern in Africa at this time is how to democratize government in ways which provide for genuine empowerment of the citizenry, and within this, the appropriation position today of traditional authorities.<sup>37</sup> Broadly, the argument moot at this time is that unless traditional authorities are authorized power holders in voluntary ways by their community members, and unless these powers are rooted in law and indisputably representative of all groups within the community, then they are not in today’s world a satisfactory mechanism for modern devolved governance. That is, tradition on its own, is an insufficient foundation upon which to root workable local level empowerment and governance regimes. Inclusiveness in particular cannot be taken lightly, given quite widely existing feudal-like relations among chiefs and ordinary households, and the inferior role in decision-making and land rights which incoming members to the community, tend to experience. By traditional norms, women and poor households are often similarly discounted. There are also cases, most pertinent to the relationships which hunter-gatherer groups in Cameroon establish with incoming settlers, where inequitable clientage is so deeply established, that these groups find limited routes or conditions through which their own interests can be satisfactorily heard or formally represented.

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Therefore, more and more African countries are finding that village- or community-level authority is best rooted in elected bodies. Often these initially include *ex officio* traditional authorities (e.g. the case in Botswana, Malawi and Lesotho) and in other conditions it has been quite common for communities to

<sup>37</sup> Drawing upon experiences in 30+ States, this is an important discussion in Alden Wily, forthcoming (b).

elect traditional leaders into these governments, over first or second elections (e.g. Tanzania, Ethiopia, Niger, Mali). Rules are also usually instituted to ensure that groups which are normally excluded for social or other reasons have clear representation. A particular advantage of community-level local governments is that they may also serve as a legal entity in which communal entitlement is vested, and/or (preferably) as the legal land administrator of community owned property, and of local inter-family and other land relations.<sup>38</sup>

Such legally instituted, guided and protected community government does not exist in Cameroon (Box 2). Communities are therefore unable to exercise significant authority over their own local resources and social and economic life in ways which courts must uphold.<sup>39</sup> This also means there is no legal entity in which to vest its ownership in the absence of land law which provides directly for formalized communal land entitlement, or in which to institute regulatory powers in legally accountable ways. For this reason the Forest Law 2004 and the subsequent Manual of Procedures was forced to call upon a range of imperfect legal constructs in which to lodge Community Forestry management.

70 Traditional authorities do exist, and many exert considerable influence over internal and social matters (Box 2). This system exists only under the umbrella of superior decision-making by government authorities and which may conflict in important land and resource use matters. Locally elected government also exists but operates at only regional and sub-divisional/arrondissement levels (sub-division). These Local Councils (or Rural Councils) are new, and are handicapped by parallel authority exercised by presidentially appointed prefects and officials from government ministries.

38 Alden Wily, 2003a, discusses land administration and management in Sub-Saharan Africa.

39 Village Development Committees are often instituted in rural communities but are not legal entities endowed with legal decision-making and regulatory powers such as is expected in the institution of village governments.



## Box 2 – The governance regime in rural Cameroon

### Deconcentrated Government

The Cameroon governance system is highly centralized. Under the president and national government, the country comprises 10 semi-autonomous regions. Each is headed by a presidentially appointed governor, with broad powers. The regions are sub-divided into 58 divisions or departments, headed by presidentially appointed divisional officers, known as prefects. These divisions are in turn sub-divided into sub-divisions or arrondissements, headed by assistant divisional officers (Sous-Prefets). There are around 400 sub-divisions. Districts are the smallest sub-division, headed by a Chef de District. They are not established in all divisions.

### Rural Councils

A locally elected government regime is also in place. This comprises ten elected Regional Councils (Communes) and around 355+ Councils, sharing the same boundaries as sub-divisions (arrondissement). The elected Council is headed by a mayor (Marie). In practice, the Presidential representative, the Sous-Prefet, has more authority than the mayor. Mayors also have less authority than the technical offices established at divisional and sub-divisional level and whose staff (e.g. a Forest Officer) report upwards to their respective ministries.

Local government is new in Cameroon, beginning in 1994 in the form of presidentially appointed mayors of municipalities within the 16 cities of Cameroon. Rural Councils were also created headed by an appointee of the State. A more democratic law followed a decade later (Law No.2004-17 of 2004 on the Orientation of Decentralization). This established the ten Regional Councils and 400 Councils at sub-division/arrondissement level. Councillors are elected. They number from 25 to 61, depending upon the number of inhabitants. Small Council areas of less than 50,000 inhabitants do best with a ratio of one councillor electable by 2,000 persons, while Council areas of 300,000 inhabitants may only elect 41 councillors. Documented examples of three Rural Councils in forest areas show these respectively comprise 25, 46 and 11 villages, and with equally dramatic variation in per capita area (0.1 ha per person, 1 ha per person and 50 ha per person (Oyono et al., 2009).

Local Councils have limited powers, as these are concurrent with State powers exercised by presidential and government representatives (Section 15 (2)). Their staff derives from central ministries and their budgets are dependent upon State allocation. The most recent 2008 law takes some

steps to limit the power of Prefects to annul, override or interfere with the decisions and orders of the elected Council Mayor.

The law enables the State to transfer property, including national land to a Council (Section 20 and Section 14 of Law 2004-18 of July 2004). This includes Council Forests as provided for under the Forest Law in 1994. Councils are also empowered to prepare 'land tenure plans'.

#### **Traditional authorities**

Chiefdoms also exist in accordance with a 1977 decree. They are integrated into the government system, originally as tax collectors (no longer the case). They continue to wear two hats in the sense of both representing their people and the State to the people. Chiefs are appointed in three levels, the highest being the equivalent of a sub-divisional level Paramount Chief, and the only level to receive a stipend from government. Otherwise chiefs are paid in the form of gifts from villagers for resolved disputes and performing other social services.

As typically the case all over Africa, one of the commonest classes of dispute revolves around land. Chiefs govern in accordance with local customary law, involving elders as advisers. Whose customary law and norms becomes an issue where several ethnicities are involved and where one is subordinate to the other – usually the case in forest-dweller/farmer social relations.

Both government and local government officials depend heavily upon the chief to instruct, inform or organize the people. No project can practically begin with his support. However, chiefs are not formally recognized in all parts of the country and most scarce in forested areas. Local leaders everywhere exist but poor communities do not have the funds to secure official recognition.

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## Chapter 3

# **How does Forest Law treat customary land rights?**

# Cameroon







## I Background

### The Resource

Half or more of Cameroon is forested when all categories are taken into account.<sup>40</sup> Forest law applies to all classes, including dry woodland and forested savanna in the north of the country. The main focus of the law (and associated commentary) is upon forests with commercial logging potential. These forests are mainly confined to the moist forests of the south and south-west. This region comprises between 17.5 and 23.8 million hectares depending upon the criteria used, the extent of forest loss accounted for, and date of information, but may be generally taken as embracing around half the area of the country.<sup>41</sup> The lands correspond administratively to six of the ten regions and 163 of the formally established 355 elected Rural Councils.

75

The economic importance of Cameroon's forest resource shapes forest policy and law. Officially, the sector generates more than 6% of GDP and provides

40 The country may be divided into seven Congo-Guinean forest ecosystems, including shrubbery steppe (4,150,000 ha), wooded savanna (6,000,000 ha), forested savanna (11,500,000 ha), semi-deciduous forest (8,500,000 ha), transitional forest (9,500,000 ha), evergreen forest (7,600,000 ha) and coastal mangroves (250,000 ha) (Foahom, 2001).

41 Compare for example data on forests in Foahom, 2001, The World Bank, 2006, Mbile et al., 2009, Oyono et al., 2009. Estimates on forest area, extent of forest loss, source of forest loss (farming, logging, fuelwood harvesting etc) vary widely.



employment for around 45,000 persons.<sup>42</sup> Industrial logging and wood-processing enterprises grow annually, providing at least one third of non-petroleum exports. Cameroon is one of the world's largest tropical logs producing and exporting nations. The forests are also a source of uncalculated subsistence and smaller income for many millions of others; this includes most of the roughly 56% of all Cameroon's households who are considered poor, the highest levels of poverty being in the forested zones (Center, South and East Provinces).<sup>43</sup>

### The Law

Forest law dates back to 1973.<sup>44</sup> It was revised in 1981, applied in 1983,<sup>45</sup> and focused at that point upon regulating logging activity, although with remarkably little legal requirement for transparency.<sup>46</sup> The law began to be reviewed in 1988, largely at the demand of World Bank-led structural adjustment programming, which concluded that the pivotal forest sector needed reform. Environmental considerations, reaching an apex in the Biological Diversity Convention in Rio (1992), also played a role.<sup>47</sup>

76 Resulting new Forest Policy, 1993 (revised in 1995) laid down new objectives. These were geared around the reduction in forest loss and greater popular participation to help reduce pressure. Law No.94-1 of 20 January 1994, to lay down forestry, wildlife and fisheries regulations, adopted the policy into law. There has been evolutionary development since then, delivered in twenty or more legal decrees, orders and instructing circulars since 1995. Those relevant to the subject of customary interests are listed in Box 3 below.<sup>48</sup> They include instruments (i) directing revenue-sharing with communities; (ii) enabling communities to create community hunting zones; (iii) entrenching the procedures for creating Community Forests; (iv) a decision laying down the procedure for classifying State and Council Forests; and (v) a 'pre-emption' Order, giving communities the right to limit issue of logging permits ('Sale of Standing Volumes') in their locality. Fifteen years have passed since the original

42 The World Bank, 2006. Amariet, 2005 provides different data with up to 70,000 jobs in the sector, and which accounts for 10% of GDP and 12% of exports overall. Morrison, 2009, gives a figure of 45,000 direct and indirect jobs on the basis of 2003, 2006 and 2007 data. Oyono et al. 2009 explain the bureaucratic constraints limiting certain identification of revenue from the sector.

43 Foahom, 2001, Oyono et al., 2009.

44 Forestry Order No.73/18 of 25 May 1973.

45 Forestry Law No.81/13 of 27 December 1981.

46 Oyono, 2005 notes that forest management and revenue collection were taboo subjects during the 1960s to 1980s, likely due to the close connection of political elites with the industry.

47 Foahom, 2001, Mbile et al., 2008, The World Bank, 2006.

48 Other important non-legal documents include the National Zoning Plan, the National Forestry Action Plan, 1995, the National Biodiversity Strategy and Action Plan in cooperation with the World Wide Fund for Nature (WWF) (2002) and the published manual relating to establishment of Community Forests (2002).



enactment and the law is now under official review (inter alia prompting this study).

### **Box 3 – Forest legislation of main concern to customary forest tenure**

- Law No.94-1 of 20 January 1994 to Lay Down Forestry, Wildlife and Fisheries Regulations
- Decree No.95/531/PM of August 23 1995 Decree of Implementation to Lay down the Application Clauses for the Forest Regime
- Decree No.97/283/PM of 30 July 1997 to define the conditions for the implementation of certain provisions of the 1997/1998 Finance Law
- Joint Order No.122/MINEF/MINAT of 29 April 1998 to Lay Down the Utilization Clauses of Forest Exploitation Revenues by Resident Village Communities
- Decision No.253/D/MINEF/DF of April 20 1998 Concerning the Adoption of the Document 'Manual of Procedures for Attribution and the Norms of Managing Community Forests
- Order No.29/CAB/PM of 9 June 1999 to set up a Standing Committee to follow up the implementation of the resolution of the Yaoundé Declaration on the conservation and sustainable management of tropical forests
- Ordinance No.99-1 of 31 August 1999 to Supplement Certain Provisions of Law No.94-1 of 20 January 1994
- Decree No.99/781/PM of 13 October 1999 to fix the modalities of application of Article 71 (1) (new) of Law No.94/01 of 20 January 1994
- Decision No.1354/D/MINEF/CAB of November 26 1999 Laying Down the Procedure for Classification of Forest Permanent Forest Estate of the Republic of Cameroon
- Decree No.2005/5/PM of 6 January 2000 to Set Up the Mbam and Djerem National Park Order No.0518J/MINEF/CAB of 31 December 2001 to Determine the Conditions for Attributing, in Preference, To Surrounding Village Communities, Any Forest Likely To Acquire Community Forest Status
- Decree No.2001/1034/PM of 27 November 2001 to fix the rates and conditions and controlling duties, fees and taxes on forest exploitation activities
- Circular No.677/LC/MINEF of 23 February 2001 to suspend the industrial exploitation of community forests

## Delivery

International agencies regard Cameroon as a leader in the forest sector in the Congo Basin region. Spheres of proclaimed success include: (i) thriving wood-processing developments, and accordingly the reorientation of exports away from complete dependence upon round logs; (ii) the institution of a new forest taxation and revenue-sharing scheme, which includes disbursement of 40% of a new Annual Forestry Fee to local governments (Rural Councils) in forest-logged areas and another 10% directly to affected adjacent villages; (iii) the institution of an internationally backed monitoring regime for commercial use (logging); (iv) strong efforts, largely in the context of WWF and other international project aid, to increase the area of forest under conservation; and (v) in provision of opportunities for communities to secure management and use rights (including commercial use) in non-permanent forest areas through the Community Forest regime.

78 In practice, progress has been uneven, due to a combination of official malaise, lack of reach and persisting corruption. There is also frustration at the weakness of local-level governance and community capacity, and the heavy dependence of the Community Forestry sector upon international and local NGO agencies.<sup>49</sup> Controversy surrounds (i) the continuing lack of transparency in the logging sector, routinely reported upon by FAO and ITTO as well as by Global Witness, which played an official role in monitoring; (ii) the failure of due revenue share to actually reach village communities; (iii) continuing failure to take sufficient account of the rights of forest-dwelling indigenous peoples ('Pygmies') (e.g. see CED & FPP, 2008); and (iv) the Community Forestry sector. This has generated a mass of commentary over the years since its early DFID-supported initiation in the 1990s, and with the gradually increasing awareness that the model adopted may not be the breakthrough it was once held to be.

Through most of the era, serious treatment of forest tenure has been sidestepped by donors and advocates alike.<sup>50</sup> When challenged on this issue in FAO-sponsored continental Community Forestry meetings in Banjul in 1999 and Arusha in 2002, representatives intimated that forest tenure was 'out of bounds' in Cameroon.<sup>51</sup>

49 The World Bank, 2006, Amariei, 2005, Brown, 1999, Brown & Schreckenber, 2001, MINEF, 2004, Mbile et al., 2008, Morrison, 2009.

50 ODI's collation of working papers are a good example; for an overview of these see Brown & Schreckenber, 2001.

51 These continental meetings are reported upon in FAO, 1999 and FAO, 2003. Also see summary overview of the status of Community Forestry in Africa at the time in Alden Wily, 2002a.

As late as December 2008, when guidelines for the community forestry sector were being reviewed, forest tenure was not on the agenda.<sup>52</sup> Only very recently has it come to the fore.<sup>53</sup> The regional conference on forest tenure, governance and enterprise in Yaounde in May 2009 may prove to have been a tipping point. Although organized by international agencies, the meeting was formally hosted by Cameroon's Ministry of Forests and Wildlife (MINFOF).<sup>54</sup> While no declaration was issued, the first recommendation of the conference was that countries in Central and West Africa prioritize forest tenure reform as a national development issue. How far this is carried forward by Cameroon is a focal challenge in years to come.

## II Forest tenure

Forest tenure functions around the founding construct of the 1994 Forest Law which divides Cameroon's forests into a permanent and non-Permanent Forest Estate. This was realised by a zoning exercise (Plan de Zonage). Around half the total area of moist forest falls within each category. The designated Permanent Forest Estate (PFE) covers 8.9 million hectares of production forests and 2.6 million hectares of protected areas. The base of production is around six million hectares in the PFE organized in Forest Management Units (FMU), over which concessions and annual cutting permits are allocated. No single concessionholder is permitted a cumulative area greater than 200,000 hectares. An additional small proportion of the productive estate exists outside the PFE, in the form of Community Forests. As of December 2009, these covered 636,752 hectares, or 3.2% of the total estimated forest area.<sup>55</sup>

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Boxes 4 and 5 provide details of the classification, use and ownership of forests as defined by the 1994 Law to Lay Down Forestry, Wildlife and Fisheries Regulations.

52 MINFOF, 2008a, 2008b.

53 In this regard the signal publication of Mbile et al., 2009 under the aegis of the Rights and Resources Initiative (RRI) must be mentioned.

54 The Rights and Resources Initiative and its partners (CIFOR, IUCN, ICRAF, Intercooperation, GACF, FPP), with assistance from COMIFAC, ITTO and FAO, organized the meeting. See RRI et al., 2009.

55 Mbile et al., 2009, Department of Forestry and Wildlife, <http://minfof-cm.org/art123-fr.php>

#### Box 4 – Classification of forest according to Law No.94-1 of 1974

The Forest Law divides forests into permanent and non-permanent forests (Section 20).

*Permanent forest* (Permanent Forest Estate, or PFE) comprises *State Forests* and *Council Forests* (Section 21). *State Forests* comprise seven categories of areas protected for wildlife (from national parks to zoological gardens) and eight categories of forest reserves (from integral ecological reserves to forest plantations). Forests designated for production and protection are included (Section 24). At least 30% of the national land area is to be designated permanent forest (Section 22).

*Council Forests* have the same objectives as State Forests in being designated either for protection, recreation, scientific research, or other purpose, but in addition are created '*for the exercise of use rights by the local population*' (Section 30). All permanent forests are subject to management plans (Sections 29 & 31).

*Non-permanent forest* is forest on land that may be used for other purposes than forestry (Section 20). Three categories of forest are identified: *Communal Forests*, *Community Forests* and *Private Forests* (Section 34).

*Private Forests* are defined as planted forests on registered land (Section 39) and for which the owner is obliged to prepare a simple management plan.

*Community Forests* refer to forests which are subject to agreement made between the Ministry in charge of forests and village communities, specifying the boundaries and area, beneficiaries, and special instructions on the management of woodlands and/or wildlife (Section 37 & 38).

*Communal Forest* refers to residual non-permanent but natural forest, and from which Community Forests are drawn when created by agreement (Section 35). Former fallow land and other lands which are not subject to private ownership and which have recovered forest cover thereby become communal forest (Section 35 (3)).

**Box 5 – Local forest use and ownership of products according to Law 94-1 of 1994**

Section 7 establishes that *land-owners* have *use rights* to their property. 'The State, local Councils, village communities and private individuals may exercise on their forests and aquacultural establishments all the rights that result from ownership'. These are subject however to 'restrictions laid down in the regulations governing land tenure and State lands and by this law'. Land owners under the land law (No.74-1 of 1974) are defined as those holding registered title. In practice this excludes most communities.

Management plans for permanent forests (State and Council Forests) must include 'the conditions under which the local population may exercise their use rights in accordance with the provisions of the instrument classifying the forest' (Section 29). At the same time, 'public access to State forests may be regulated or forbidden' (Section 26 (2) & (3)). Extraction of certain products may be allowed in State Forests other than those earmarked for production 'if necessary for the improvement of the biotype' (Section 44 (4)).

Forest products are defined as including wood and non wood products, wildlife and fishery resources as found in forests (Section 9 (1)). The ministers in charge of forestry, wildlife and fisheries may limit use rights in the public interest, and as necessary expropriate the land, such as in the case of a Council or private forest (Section 8 (2)).

Use of natural forest products which are scheduled as 'special' (including ivory, animal horns, certain medicinal plants, etc) in all forests, including private land, belong to the State (Sections 39 (4) and 9 (2)). Use may be applied for under special application (Section 9(3)).

*Council Forests* may be designated as for the exercise of use rights by the local population (Section 30 (2)) although 'forest products of all kinds resulting from the exploitation of Council Forests shall be the sole property of the Council concerned' (Section 32 (3)).

*Community Forests* 'shall be exploited on behalf of the community concerned' but 'under State management, by the sale of standing volume, by individual authorisation to cut poles, or by permit, in accordance with the management plan approved by forest services' (Section 54).

The products of *Communal Forests* belong to the State, *except where a management agreement States otherwise (such as in respect of a Community forest)* (Section 35 (5)). Citizens living around communal forests may use

them, in accordance with decreed conditions (Section 36 (1)). The Minister may restrict such rights 'particularly in relation to grazing, pasturing, felling, lopping and mutilating of protected species as well as establishing a list of said species' (Section 36 (2)).

Exploitation of Communal Forest is under the Ministry's authorization but in certain cases, part of the proceeds from the sale of forest products are to be reserved for neighbouring communities (Section 68 (2)).

Traditional hunting is permitted throughout the territory except in State Forests protected for wildlife conservation or in the property of third parties, or in buffer zones round protected areas (Section 86 (1), Section 104). Traditional hunting is not subject to licences (Section 87 (1)). Wildlife allowed to be traditionally hunted exclude species which are fully protected (Class A) and those which are subject to licences (Class B). Communal hunting zones may be created in agreement with the State (Section 96).

Ownership of all forest products belongs to the concerned community in respect of Community Forests (Section 37 (5)). The community also has the right of pre-emption over any products alienated (sold) (Section 37 (7)). 'Village communities and individuals shall be paid the selling price of the products extracted from forest belonging to them' (Section 67 (2)). Order No.0518JMINEF/CAB of December 2001 confirmed this and that these products exclude listed special products like ebony, ivory, trophies of wild animals and special plant species (Article 3 (2)).

Exploitation of a forest is through an *exploitation contract* over a specified area and term (concession), *sale of standing volume*, or through *permits* specifying particular extraction, including individual felling authorisation (Chapter III Part II). Communities are likely applicants only for the last category.

The law reiterates that the holding of any of the above extractive licences does not confer ownership over the corresponding land (Section 62).

### III Findings

The main findings of the impact of the Forest Law on customary/community based land tenure are elaborated below.

#### 1. Forest law compounds the abuse of land law in respect of customary land rights

The Forest Law (Law No.74-1 of 1994, with its implementing decree of 1995) is predictably constrained by the land law in its treatment of community-based land interests (customary land tenure). It takes maximum advantage of these constraints to entrench State control over the resource. In doing so, the law double locks prime forested lands against customary claim. It does this by providing for the best forest in the country to fall under its own private property in the form of a Permanent Forest Estate.

Section 6 of the Forest Law establishes that ownership of forests shall be determined by the regulations governing land tenure and State lands and by the provisions of the law. As we have seen, under tenure and State lands law, this means that any forest which is not under the described parcels subject to formal private tenure or the public and private property of the State, is classifiably national land. This in turn subdivides into occupied and unoccupied categories. Government can formalize private rights out of the former and allocate or alienate land under the latter.

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The Forest Law goes further. It takes the opportunity to declare that all State Forests shall form part of the *private* property of the State (Section 25 (1)). Statutory instruments (Decrees, Orders, Instructions, etc) are not only to classify their boundaries and classification (production forest, multi-purpose forests, etc); these instruments 'will serve for the establishment of a Land Certificate for the State' (Section 25 (2)). By legal definition State Forests are thereby the titled private property of the State (or the de facto private property of government). All existing classified forests automatically became the private property of the State on the commencement of the 1994 law (Section 25 (4)).

#### 2. The creation of State Forest as the private property of the State represents one of the worst abuses of customary land rights in Cameroon

The severity of this measure cannot be overestimated. By this act the Forest Law extinguishes the customary property rights of any individual, family or community in respect of State Forests. The extent of loss also needs to be remembered; State State Forests amount to an astounding 11.5 million hectares, the



greater portion of which (and more likely, all of which) was community owned land.

### 3. The grounds for extinguishing rights and the process are unsound

The manner in which Forest Law brings State Forests into being appears to be on a questionable legal basis and through unsound procedure. Neither the constitution nor land law requires the sector to bring the nation's forests under State private ownership. Nor does this accord well with principles articulated in the constitution as examined below.

The procedure is dubious. It will be recalled that in order for land to become the private property of the State/government, existing rights must be considered, at least to an extent. Bona fide owners and occupants are eligible for compensation (Ordinance 74-2 of 1974, Section 7 (1)) but have to demonstrate *effective occupation* in the form of houses, farms, plantations etc. Owners with registered titles of land which becomes classified as national parks, forest reserves or other classified forests are to be paid compensation under the law for expropriation (Law No.85/09 of 1985). In principle, this includes bare land as well as 'other other type of development, whatever its nature' (Section 7).

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Section 27 of the Forest Law echoes these provisions. Despite being drafted 20 years after the land law, it advances procedure not a jot, in tenure terms. Government is not made legally bound even to respond to community claims against the proposals to create another State Forest. The law only requires that arrangements be made 'to consider and advise on any reservations or claims made by the public or any interested person in connections with processes for the classification or declassification of forests' (Decree 95/531/PM of 23 August 1995, Section 19).

An attempt to improve procedure was made in 1999. Decision No.1354 of 26 November 1999 lays down a proclaimed participatory procedure for the classification of forests in the Permanent Forest Estate of Cameroon. Unfortunately, in content, it is nothing of the sort.

All that the Decision requires is that affected local populations are informed in advance of the proposals and given the opportunity to submit claims regarding it. There is no requirement for government to act on local views or even for the minister to justify his decisions to the affected populations. The instrument itself is devoted to the steps to be taken for this dissemination, collection and collation of views. How these are dealt with are entirely a matter for government, which makes it a nonsense to describe the process as participatory.

A regional commission of four officials is detailed to tour the area, holding meetings (of ‘no more than a half day duration’), informing people of the plans and telling them that they have a specified period to make objections and claims. A more local commission collects the views. It comprises seven ministerial representatives, mayors and ‘traditional authorities’. Infrastructure (fields, buildings, houses) is to be mapped. For those which fall within the proposed boundaries, two options are to be considered; that the boundaries of the proposed State Forest are amended or ‘some infrastructure may be subject to expropriation and compensation’ (Section 2.5). The regional commission is bound to submit ‘a reasoned opinion’ to the Ministry of Forests and Wildlife. It is up to the ministry as to what decisions are made. Even in matters of process, it appears that implementation is flawed; local populations are simply often not informed of developments affecting their land, or final decisions as to the creation of a State Forest out of their land. Pygmies are most affected, often being excluded from opportunities to know about or present their views.<sup>56</sup>

#### **4. Not just tenure but access and use rights are interfered with**

To add insult to injury, in the case of protected areas, hunting (and even gathering) is usually banned.<sup>57</sup> In 2008 protected areas included ten national parks, seven game reserves, two wildlife sanctuaries, and 125 forest reserves covering around four million hectares of the forest estate, so the losses are substantial.<sup>58</sup> Nor is more than the absolute minimum concerning compensation considered. Officials admit they are directed to consider compensation in only three cases: where plantations have been established (coffee, rubber, etc.), where holy sites exist, and where the land is subject to a title deed; ‘No other claims (food crops, hunting campsites, community forests, etc.) warrant changes to the zoning plan proposal’ (Lescuyer, 2007).

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Lescuyer also reports that ‘while villagers claims are never entirely accepted, authorities do not generally dismiss them all out of hand’. The bargaining chip is the useful idea of buffer zones. Their identification secures the reduction of forest area actually gazetted as the State’s property by an average of 15%. These are available for forest use and agro-forestry but not settlement. Mbile and Misouma (2008) compared the creation of the Campo Ma’an National Park favourably in this respect, with the earlier creation of the Korup National Park in 1986. Local forest customary access and use rights may also be lawfully sustained

56 CED & FPP, 2008, Mbile et al., 1998.

57 FERN, 2006.

58 Those which are forested amounted to 4,072,274 ha or 20.74% of the total forest area (Mbile et al., 2009).

through incorporation of these into the Park's Management Plan. Nonetheless, these 'privileges' are a far cry from rightful customary ownership of the land and its resources, and essentiality a deceit. Legally, even petty use and access rights may be withdrawn by a subsequent version of the plan.

**5. Council Forests are the nearest that communities get to in owning forest land, and this is a poor option**

Council Forests, including natural and planted forests, are also established by classification instruments and form part of the PFE. Like gazettelement notices for State Forests, these also served as proof of title entitlement – in this instance, of Council ownership (Section 30 (2)). For the avoidance of doubt the law adds that 'Council Forest shall form part of the private property of the local Council concerned' (Section 30 (3)).

In practice only a handful of Council Forests have been created but given the lack of restriction on their size, these cumulatively amount to 372,669 hectares or 1.9% of the total forest area.<sup>59</sup> Like State Forests, local rights usually overlap these private Council properties. Given the status of Council Forests as owned under private title deeds, customary ownership has also been extinguished by the issue of these gazettelement notices/Land Certificates.

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Nor in practice may communities significantly retain access and use. For as noted in Boxes 3 and 4, while Council Forests are created for the exercise of use rights by the local population (Section 30), this is promptly countered by the following provision that forest products of all kinds belong to the Council (Section 32 (3)).

Nonetheless, there is one redeeming feature. The Council is an elected body mandated to represent the local rural constituency. It could be argued that, if only in a very indirect manner, constituent communities are thereby the owners. The fact that this even has to be contemplated is sorry testimony to the legal treatment of forest tenure in Cameroon. For there is no other avenue through which forest tenure can be secured.

**6. The law fails to provide mechanisms through which ordinary rural communities may identify and secure forested lands as their own property, and develop rational conservation and use regimes on that basis**

59 Mbile et al., 2009.

Instead, the Cameroon Forest Law advances an out-dated model of Community Forestry which awards communities only *management and use rights* in its version of ‘Community Forests’. The land itself remains firmly the property of the State. Box 6 provides an overview.

#### **Box 6 – Community forests in Cameroon**

Provision for *Community Forests* was one of the landmark innovations of the 1994 law. The forests come into being through voluntary contract with the Department of Forests and Wildlife to manage and use a defined area of no more than 5000 ha in sustainable ways, on the basis of an agreed management plan with a maximum 25 year rotation. This must be reviewed every five years. It took several years for an acceptable procedure to be developed, embedded in a Manual of Procedures given the force of a ministerial order in 1998.<sup>60</sup> A revised manual was published in 2001, and revised again in December 2008, but is yet to be formally published.

The first Community Forest was agreed in August 2000. Numbers had increased to 55 by the end 2004, and nearer to 90 were operating in early 2010. The Department of Forestry and Wildlife reports that 404 applications had been received as of December 2009. If all were approved, these would cover over 1.3 million ha of the non-Permanent Forest Estate.

In 1998 the terminology of ‘attribution’ (accreditation) was adopted to express the fact that the Community Forest is acknowledged as ‘belonging to’ the community, but not in a manner which implies or endows ownership of the land. The manual describes the legal status of Community Forests as where a management agreement ‘entrusts a portion of national forest area to the community for its management, conservation, and exploitation for the benefit of the community’. Communities are however guaranteed ownership of forest *products* within these domains as shown in Box 5 above (Section 37). The manual confirms that the Community Forest may not exceed 5,000 ha in area, reiterates that it may be subject to not only forestry use, but used for agroforestry, agriculture or other uses, all of which must be specified in the simple management plan agreed. All revenue is to be used for the development of the entire community (Section 3.2).

The procedure for creating these community-managed forest areas has from the outset been cumbersome, extremely time-consuming for

60 Decision No.253/D/MINEF/DF of April 20, 1998, Concerning the Adoption of the Document ‘Manual of Procedures for Attribution and the Norms of Managing Community Forests.’

communities, facilitating NGOs and department staff, and often technically and financially beyond community means. Because the community is not recognized as a legal person in its own right, it must establish a legal entity to sign the contract and serve as manager of the Community Forest.

No new framework for this was created by the law, which instead relies on entities provided under other laws, specifically in the form of an Association, Cooperative, Common Initiative Group or Economic Interest Group. A simple management plan, a site plan, and if the forest is to be logged, an inventory and coupe/logging plan must be presented, and requiring external expertise. In addition to this the community must prepare an organigram, operational procedures, by-laws and a series of reports on consultation, before it is eligible for agreement. Even in 2001 it was calculated that it was taking an average of 61 days work and around US\$12,000 for the process to be seen through.<sup>61</sup> Despite modifications to reduce beaurocracy, Mbile et al., 2009 report that a recent sample of costs for 20 new Community Forests cost up to \$24,000 to become operational. Not a single Community Forest has been established without NGO financial and technical assistance.

Of equal concern to many observers is the impact the tortuous procedure has upon prompting takeover by elites, often to their own benefit, with poorer households routinely excluded. Communities are often forced to look to external businesses to assist, and this has been known to conflict with local community intentions. Reviews of Community Forestry report how some communities resort to selling wood illegally and/or assisting third parties to obtain annual exploitation certificates for some payment rather than going through the the complex procedure of arriving at a simple management plan.<sup>62</sup>

Moreover, because the area may only extend to 5000 ha, and is not necessarily defined on the basis of a single community's domain, the Community Forest does not cover the entire natural community land area, and/or crosscuts several community domains in an effort to secure more expertise and particular resources. Nor, finally, is the transfer of management authority always complete. Central support is mixed and monitoring erratic, and at times draconian. In 2001, government suspended all Community Forest harvesting operations on the grounds that some were being mismanaged. Ultimately, the model remains fragile from the community perspective in being a temporal construct which government can cancel at any time, and also restricted to the obviously less valuable non-Permanent Forest Estate.

61 FAO, 2003.

62 Oyono, 2005, Lescuyer, 2007, Mbile et al., 2009.

As shown above, even securing management and use rights by communities through Community Forests is achievable only through contractual agreement with Government which is sufficiently complex and expensive, on the one hand, and so geared to commercial utilization, on the other, that a limited area has been so secured after a decade.

More perniciously, the manner in which Community Forests are structured can contradict and undermine the definition of community land domains as well as the natural social composition of the community. It does this by imposing limits upon the size of Community Forests, truncating ideas of the natural community domain, by fixing limits on the period for which a Community Forest will be recognized, and by governance and use requirements. These are structured in such a way that it encourages the emergence of resource-capturing management and/or user elites. Customary rights and claims are accordingly weakened.

It is indisputable that Community Forestry as operating in Cameroon is incrementally enabling rural communities to participate in especially the commercial utilization of forests. While the State keeps a tight hold on forest ownership, communities do receive (in theory) a small portion of forest-related revenue, they do own *the products* within areas agreed as Community Forests, and since 2001 do have a pre-emptive right to establish Community Forests in favour of issuing of these areas for logging to outsiders. Community members are also gradually being permitted to sell more products and (since 2008) utilize non-traditional methods of extraction which helps cut their costs and increase revenue.

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#### **7. Despite shortcomings, Community Forests offer an important route for pursuing customary tenure security.**

The steady rise in applications to create Community Forests suggests some enthusiasm for the programme. This is after all the only route through which rural communities may secure control over at least some part of their local forest resources, and directly control the benefits. A steady stream of incremental improvements is also emanating from government. Recent improvements to the Manual of Procedures focused largely upon reducing the number of steps and time required to reach final agreement and upon increasing inclusive participation by community members.<sup>63</sup>

<sup>63</sup> A National Workshop of Government, development partners, civil society and some community representatives, agreed on around 20 innovations in mainly these areas. Workshop Report, Department of Forestry and Wildlife, 5 December 2008.

Aside from making the procedure a little less demanding and bureaucratic, communities may, for example, now clear tracks in the forest to remove their timber other than by headloads, and may establish hunting zones. New emphasis is being placed upon the development of non-timber forest products alongside logging and wood sales.

Structurally, the most important legal innovation affecting community interests since 1994 was the above-mentioned order of December 2001, giving communities pre-emptive powers over local forest resources.<sup>64</sup> More precisely, this order empowers communities to prevent external logging in their immediate areas by being able to identify from a list of Proposed Zones for Sales of Standing Volume those areas which they would prefer themselves to establish Community Forests. Priority is given to the nearest community (Article 2 (1)). Alternatively, several villages adjacent to the area may join together as a collective partner in the management agreement (Article 2 (2)).

90 The ministry takes responsibility for ensuring villagers see the list of areas proposed for sale of standing volume and gives them three months to submit their intentions in a Letter of Intent (Article 5 (3)). This removes the area from those available for open sale of standing volume. The community then has three years to submit an application to enter a management agreement with government for the area indicated, having completed the necessary (and generally onerous) management planning and institutional development (Article 8 (3)).

Slightly more emphasis is also being placed on the rights of local communities to access resources in or around State Forests – in one or two places.

## **8. The paradigms remain truncated and abusive of customary forestland rights**

Nonetheless, taking both the State Forest sector and the creation of Community Forests on non-permanent forest lands, these measures fall well short of their rightful possession of forest resources and the structuring of forest use, management and governance on this basis.

Despite the declamatory provisions in policy and law towards popular participation, Cameroon persists in the pursuit of a displacement approach towards forest conservation, utilization and management; this is designed to keep

64 Order No.518JMINEF/CAB To Determine the Conditions for Attributing, in Preference, To Surrounding Village Communities, Any Forest Likely To Acquire Community Forestry Status.



community demands for rightful recognition of resource tenure and controlling rights at bay. The instruments being used are the classic ones: exclusionary conservation (keeping people out of protected and commercial zones); buffer zones, designed to deflect and confine utilization to fixed areas (even when this is self-evidently non-degrading); buying community compliance through sharing with them some small amount of revenue (or in practice, promise thereof); and providing just enough opportunity for commercial use by communities through the Community Forest construct to limit demands for structural change.

### **9. Forest governance remains weakly devolved**

Intentions towards devolving forest governance to more local, let alone rural community level is also difficult to find. In theory, by giving elected Rural Councils powers to create Council Forests and for these forestland areas and all products within to be vested in themselves (Section 30 & 32), the 1994 Forest Law embarked upon a devolutionary road. However, approval for the creation of Council Forests remains firmly in the hands of government. This is one probable reason why only 2% of productive forest land is under their aegis. Another reason could be that Rural Councils and their mayors know very well that forest land in their areas is *already* community-owned (by custom): and with communities now able to create their own forest reserves for at least product control (Community Forests), support for the creation of Council Forests may be weak. Furthermore, Rural Councils are remote bodies, embracing large numbers of communities, and hardly equivalent to community-based forests.

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As outlined earlier, the proclaimed policy of local participation remains consultative only with regard to the Permanent Forest Estate, and offers limited participation.

Neither the National Forest Policy of 1995 nor subsequent policy or legal provisions have developed a devolved as compared to deconcentrated strategy to empower local decision-making about the forest in their areas, regionally or nationally. There is no evidence that the Plan de Zonage, upon which the creation of the Permanent Forest Estate was founded, was a locally driven participatory project, or indeed that any policy decisions since have been made through genuinely participatory process. The mechanisms for securing popular participation and support, as through establishing Local Level Forest Councils, has not found a place in the developments since 1994. Except the positive 2001 pre-emption arrangements affecting the non-Permanent Forest Estate, there is no legal requirement for important decisions to take local views

into account, or for there to be mechanisms of accountability to local populations.

Basically, community cooperation rather than participation is sought. They are to help government protect and manage forests, not the other way around.

This is tangible in the way in which local Community Forest Committees are to be instituted, as laid down in Decision No. 1354/D/MINEF/CAB of 26 November, 1999. These should comprise the village chief, a member of the Village Development Committee, a represent of local elites, a represent of relevant outside elites, two women, one young person and a representative of farmers (Section 1.4). Their tasks are to organize discussion sessions with villagers, to help them understand forestry law, to participate in the publication of plans, to listen to villages and relay their suggestions, and to gathers and disseminate information (Appendix: The Community Forest Committee, Section 1.1). They are in turn to serve as the contact point for dissemination of information by the local department representative. With regard to State Forests, the committee may be asked its opinion on the management plan and measures for environmental protection, and it may participate in selecting areas for commercial projects, and in the definition of use rights 'consistent with the management objectives' (Section 1.3). They are also exhorted to play 'an active role in implementation activities, such as in monitoring and evaluations, and patrolling the forest and identifying illegal uses' (Section 1.4). They are reminded however that they have no legal power to apprehend illegal users or seize products and must report illegal exploitation to the Chief Forester Post.

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#### **10. Forest law still has a long way to go towards honouring citizen rights and interests**

In summary, on the face of it, the Forest Law is benign in respect of customary rights. In reality it is full of limitations. Traditional hunting is permitted throughout the territory – *except* in protected areas, buffer zones and areas allocated to other uses. Forest use rights as descending from ownership are guaranteed – *but* as shown above, customary land-holders are not acknowledged as land-owners, only as lawful occupants and users in land law. The opportunity for communities to undertake small-scale logging and other forest uses is provided – *but* limited to small domains (Community Forests, up to 5000 ha) and achievable through burdensome institutional and management planning procedures and which have additionally proven costly. Communities are granted ownership of forest *products* in Community Forests – subject to specific government agreement. Some forest area (in the form of these Community Forests) is set aside for community use *but* not ownership – and the most valuable forest is turned into State Forests.

Management plans for State Forests must identify the conditions under which the local population may exercise their use rights – *but* it turns out this is only if the instrument classifying the forest requires it too. Public access in general may be forbidden.

Abuse of land rights combined with resistance to a modern people-based regime of forest governance underwrite this pale version of Community Forestry. For not only does the law bring six million hectares of largely (if not entirely) customary community land areas under designation as State Forests, and much of which could probably have been as well protected by its customary owners: it wilfully turns this area into the private property of the State.

Rent-seeking landlordism combined with an outdated understanding as to how conservation and management can be best achieved are probably responsible. Use by local people – let alone local ownership – is considered incompatible with commercial or protection designation; local people need to be excluded. Overall, it is difficult to see where communities legally own any forest lands in Cameroon. Foreign loggers, which have obtained secure and renewable leases, have much stronger rights to forests than ordinary rural citizens.

#### **11. The failure to protect customary land rights proscribes sustainable tenure and governance**

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The current Forest and Wildlife Law prevents advantage being taken of the obvious potential of rural communities as front-line conservators and managers of a vast resource. Instead, the State has to rely upon its own officialdom, and in operations which are increasingly difficult to fund and regulate. By depriving communities of recognition that they are the lawful owners of forested and rangeland resources, the law removes their greatest incentive to use these assets in sustainable ways, let alone adopt more active and policed systems and which as the local residential populace they are best positioned to operate and sustain. Indeed, affected communities are alienated. Government finds itself having to 'buy back' cooperation in return for benefits of access which affected communities consider their due right, creating further antagonism. In practice, villagers have become at best, contracted managers, looking after a small portion of the least valuable resource, in return for timber and other use rights in these patches, while millions of hectares of protected and production forest and wildlife rangeland is without popular guardianship.

Such a dynamic can hardly be lasting, as well as placing the rural population in a subordinate and conflicted relationship with the State. Instead of being partners or shareholders in protecting and developing forest use on a sustainable basis,

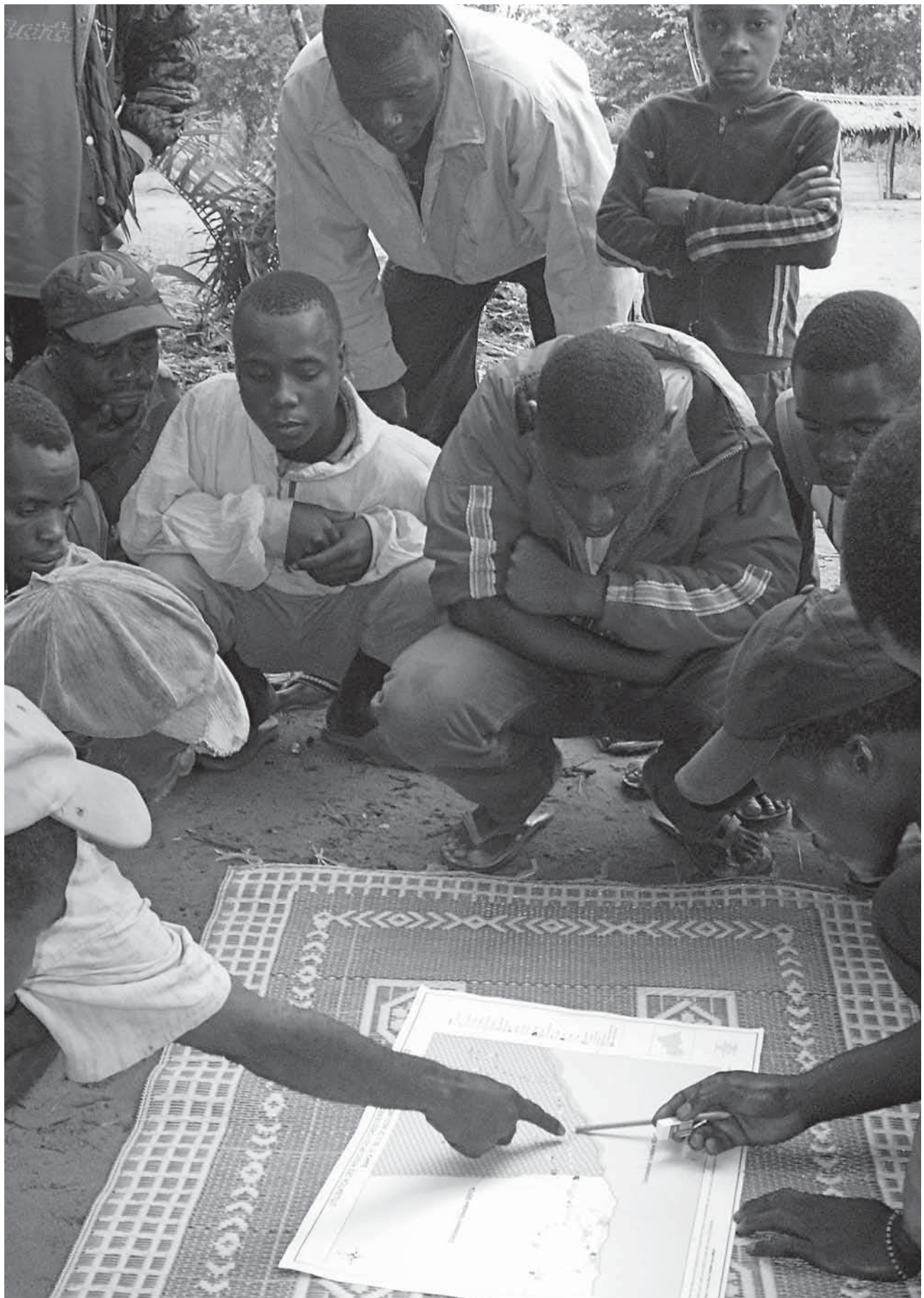
they remain clients of other owners and stronger users (loggers). Meanwhile, land and Forest Law leaves rural citizens with only one practical route to secure ownership of their lands: to clear the forest and range land and put it under farming or other transformatory use, seeking formal entitlement on this basis.

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# Cameroon







## I What needs reforming?

It has been observed that Cameroon is not alone in needing to re-examine the utility and justice of its policies and laws as affecting majority customary land holding. Provided below is a short account of the situation continentally.<sup>65</sup>

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Most Africans are aware that, on the back of slave and other trading, Sub-Saharan Africa endured territorial appropriation en masse by European nations, and that local sovereignty (in the form of chiefdoms, kingdoms and sometimes federations and 'empires') was replaced by European sovereignty in the form of colonial States. Only Ethiopia (largely) managed to avoid this fate.<sup>66</sup>

As colonial administrations were formalized, the holding of land within their new territories was also reconstructed. This was always shaped around the colonizer's intention to control natural resources, and to regulate especially settler land-holding according to domestic norms. By the 19th century those European norms were structured around the demands of urban industriali-

65 A detailed and documented account of land policy and legal changes in Sub Saharan Africa is provided in Alden Wily, forthcoming (b).

66 The relationship of colonies with home nations varied; the French, for example, held these to be appendages of France in the form of foreign departments. The British favoured semi-autonomous administrations along the Indian Empire model, although still drawing upon the British Parliament for legislation.



zation and individualized property rights.<sup>67</sup> Predictably, a main determinant of distinctive details was simply whether the colonizer was Britain, France, Spain, Portugal, Germany, Italy, Holland or Belgium, and the policies and legal norms each pursued.<sup>68</sup> Nonetheless, as outlined in Chapter 2, similar strategies were adopted. In this, the subordination of native land interests was common across colonies.

European misunderstanding of the nature of indigenous land relations played a role. The 'mystery' of communal tenure was central to confusions. At one extreme it could be readily presumed to be no more than a geographical indicator of native occupation. At the other, communal tenure could be interpreted as proving that everyone and no one owned the land. In either case, the indigenous system was seen to represent dangerous open access which had to be curtailed. Moreover, although rights to use the land could hardly be denied, these were evidently not tradable, the death-knell to any presumption of property interest in European norms. As the indigenous system descended from many generations past it was also undoubtedly moribund and inappropriate for modern times; only European tenure was sufficiently sophisticated to work.

98 By the mid-1950s, colonial land policies were everywhere being justified as in the interests of natives themselves. Communal tenure was marked down as an impediment to agricultural growth, the objective being that African farming was transformed into modern (European-like) individually owned farms with title deeds which could be freely traded in the market place. This would allow a commercial large farmer class to emerge, buying out poorer farmers, who would then move to towns to provide labour for industry. Local elites needed no encouragement; more and more Africans with means were entering the land market, taking advantage of the statutory registration system originally set up for settlers, reinforcing the idea that only a registered entitlement amounted to recognised property.

With a few exceptions, newly independent States adopted colonial policies and law into their own canons. The symbolic owners of the soil (once monarchs and presidents of European States, now African presidents) became active landlords, treating unregistered public lands as their own. Settlement schemes were a common vehicle to redistribute land occupancy in accordance with ethnic or other 'policies', with no attention to existing customary control over those lands.

67 They were however still contextualised within residual feudal norms, delivered in persisting separation of ownership of the soil ('radical title') held by monarchs from rights to use the soil, as granted by the monarch, or sub-lord. Root ownership of the land by the monarch was however by then symbolical only.

68 And also America, in respect of Liberia, though Liberia became formally independent in 1857.

Where presidential radical title was not retained at independence (rarely the case), there was still plenty of scope for holding on to millions of hectares of customary property by keeping in law the conditioning of private property on registration, and registrable property conditional upon physical demonstration of occupation (houses and farms). In practice, titling programmes barely advanced. This left the majority of unregistered occupants in uncertain tenure.

## II The situation in 1990

This sorry situation continued till recent years. With exception, from 1960 to 1990, new policies and laws refrained from liberating suppressed 'native rights'. The orthodoxy that communal landholding = open access = bad for development continued to dominate.<sup>69</sup> Evidential use of the land in the form of housing and farming was still prerequisite to lawful occupancy but which also continued to remain largely unprotected. Hunter-gatherers and pastoralists without farms had even less security. The only mechanism which could be pursued towards this was to redefine their territories as 'settlement' schemes, an approach attempted in Botswana in the 1970s.<sup>70</sup> Most of the 450 million smallholders around the continent at the time also continued to occupy and use their lands permissively. Their conditions were not static. Land concentration advanced dramatically along with commoditisation of land and expanding settlement into community-owned commons. In many countries, large and often idle estates owned by politicians, senior officials and businesses lay alongside chronically land-short customary land areas and previously unknown levels of rural landlessness.

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While most governments claimed or thought they had made positive changes in land law during this era, these are difficult to detect. There were exceptions, most notably Senegal and Botswana, followed by Tanzania, but most rural Africans in 1990 were still no more than lawful tenants or occupants on lands variously classified as public, national, State or government property. Constitutions were vague to silent on the nature of customary land rights and national laws continued to empower governments with landlord-like prerogatives and with limited accountability to local populations. Displacement of communities was common, making way for planned settlements, State farms and mechanized farming schemes instituted in many countries between the 1960s and 1980s, often on the advice of international agencies like FAO and IFAD, or in the case of Tanzania and Ethiopia, on the basis of socialist policies. This era also saw a

69 Alden Wily, 1988.

70 Alden Wily, 1979, 1980.

sharp rise in the hectarage placed under oil, mining, gold or timber concession, or brought under wildlife and forest reserves, lands which were in virtually all instances were integral to the customary land domain of one or other community. As unacknowledged owners, compensation was slight to non-existent (usually limited to compensation for loss of crops and huts) and frequently unpaid. Even in the few countries like Ghana where customary ownership had long enjoyed legal status as property, unpaid compensation grew to a mountain of debt which would become a source of dispute in the 1990s, while changes in land administration, forestry and mining law all restructured how benefits from customary lands were secured and distributed in favour of the State and elites.<sup>71</sup>

**The clearer emergence of customary land holding as logically private property, owned by individuals or communities**

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Customary regimes were not unaffected by the consolidation of State tenure and control over African lands during the 1960s to 1980s, nor immune to the surge in capitalization of land relations that occurred. Key points of change, among those listed in Chapter 2, serve to bring customary norms closer to the capitalist construct of private property as a fungible, potentially autonomous commodity on the one hand and able to be discretely parcelled (have clear boundaries) on the other. It would be naïve to not acknowledge that a main source of pressure for the demise of customary land-holding regimes derives from rural elites themselves, keen to capture as much local land as possible to meet their own expanding farming needs. The persisting focus of agricultural and settlement policy upon progressive farmers has aided this, along with declining official vigilance in the 1980s against land hoarding and speculation and historical customary requirement that land be cultivated to be retained as secured family usufruct within the customary domain.

Communal elements of customary land regimes also altered in concert with heightening individualization with the sector. This has often been in heightened clarity as to the distinction of where collective ownership and family ownership apply. In most settings, the former applies only now to un-farmed land within the community area, a domain which is itself ever more discretely defined to limit encroachment by neighbouring communities in land-short times. As also observed in Chapter 2, usufructary rights to farmland are also solidifying into de facto family customary freehold in respect of permanently settled and farmed parcels. Distinction is also more clearly drawn in many African tenure regimes

71 All these matters including case studies on Ghana along with 20 other African States are documented in Alden Wily, forthcoming (b). For Ghana specifically, also refer Ubink and Amanor (eds.), 2009.

between communal jurisdiction (the authority of the community land decision-making, such as over matters of inheritance and sale, and access to common assets where these remain) and collective real estate, as relating to discretely identifiable parcels of forest and pastureland (and which in some countries have obtained the description of commonhold properties). It would take until the 1990s however for policy and law to begin to catch up with such shifts, to deal with the fact that community-based norms were vibrantly alive and working among several hundred million Africans and to remove what had proven to be a century of undue subordination of majority rights.

### **III New reform<sup>72</sup>**

Since 1990 many Sub-Saharan countries have finally begun to challenge the position that customary land-holders are landless in law, and are no more than lawful occupants and users on lands which the State has declared either ownerless or its own property. It is ironic that governments often arrive at this position through initiatives designed to make customarily held lands much more widely available for the market and notably for foreign investors, and which are confronted with the uncertain status of holdings in the customary sector.<sup>73</sup> A full report on the nature of reforms between 1990 and 2010 is under preparation and only 25 general trends are listed below.<sup>74</sup>

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#### **1. Reform is seeing a global shift in notions of property and rights to property**

Reform in Africa has echoes globally. This is evident in the changed legal status of the occupancy and use of land by non-settler populations, or in the case of former Soviet Union countries, in the redistribution of vast State-owned farms to localized individual or collective tenure and management. A similar transition has been seen in China and Vietnam. Resources that have been traditionally held collectively around the world are being affected, as seen for example in the restitution of pastures to community tenure in Armenia, Mongolia and Kyrgyzstan, with a comparable situation beginning to take shape in Afghanistan.

<sup>72</sup> Details and sources are deliberately limited in this chapter. Reference can be made to earlier papers: Alden Wily, 2001a, 2002b, 2003a, 2003b, 2006a, 2006b, 2007, 2008a, and for non-African cases in Chapter 1 of Alden Wily et al., 2008. Alden Wily, forthcoming (b) provides an updated analysis for 40 countries. Other useful literature on African land reform which is not country specific includes: Toulmin & Quan (eds.), 2000, Alden Wily & Mbaya, 2001, FAO, 2002, GRAF, GRET & IIED, 2002, Deininger, 2003, CLEP, 2008, McAuslan, 2006c, Mwangi (ed.), 2006, Lindsay, 2004 and Binswanger-Mkhize et al., 2009.

<sup>73</sup> For an analysis of origins of current reforms see Alden Wily & Mbaya, 2001.

<sup>74</sup> Alden Wily, forthcoming (b).

Box 7 gives a snapshot of examples in other parts of the world. Perhaps the most important feature of note is that indigenous/customary land holding is everywhere beginning to see recognition as a real property interest.

While the extent of this new reform is breathtaking, a note of caution must be sounded. In most continents this development is new and yet to fulfil its full promise. Nor has changed status of customary, indigenous or other community-derived land rights necessarily spilled over into significantly changing the way governments handling rights to minerals, oil, timber or water in these areas – although this too is appearing increasingly on reform agenda.

**Box 7 – A snapshot of global progress towards legal recognition for customary property rights**

**Oceania**

The 1975 Constitution of *Papua New Guinea* recognized collective tenure as legal property, resulting in 97% of the territory now under the ownership of around 8000 distinct collectives. Nonetheless, the owners have limited control over the issue of mining or logging rights in their lands.

In *Australia* in the 1970s the government began buying land for restitution to Aborigines, and in 1976 50% of the Northern Territory was returned to Aborigine ownership. In 1992, the Mabo Declaration recognized native title as unextinguished and in 1993 the Native Titles Act was enacted as a framework for case by case restitution. Given that much of the affected land had been previously issued in leasehold, not freehold, Aboriginal communities are slowly but systematically becoming the new landowners of some millions of hectares of ancestral lands. Communities have leased several important national parks and reserves back to government to manage on their behalf.

The late conquest of *New Zealand* by the British resulted in the Treaty of Waitangi in 1841 which did not take formal possession of Maori property rights. Despite this the government proceeded over the next century to sell off most Maori land to settlers or to co-opt these for public purposes. Reversion to Maori tenure is taking place slowly on a case-by-case basis, since the 1990s, largely affecting Crown Lands (the public and private property of the government). For example a June 2008 ruling restored half a million acres of prime forest to seven tribes. The ownership of foreshore and coastal fish stocks is currently being debated, fishing having been a major tribally based resource use.

### Europe

In *Norway*, much of the Sami territory of the north was settled by non-Sami from the south, producing urban and farm settlements. Reforms began in the 1970s to decipher and order these rights fairly with respect to Sami original tenure, referred to as immemorial rights. This culminated in the 2005 Finnmark Act which transferred State land to an agency which will systematically title Sami groups on this basis. Long existing non-Sami land use rights are sustained through land use planning which provides for community, county and certain national citizenry rights (hunting and fishing) to continue to be exercised under locally agreed conditions, and with implications that revenue reverts at least in part to the land owners.

### Asia

Although still limited, customary land rights have begun to gain more respect in *Indonesia*, beginning with a court ruling in East Kalimantan in 1998 which recognized indigenous peoples and their right to protect their territories, but with clear confirmation in a subsequent national new Basic Agrarian Law 2000. Some local governments have begun to enact laws more strongly recognizing customary rights in forested areas, but generally have their efforts curtailed if these interfere with national forest extraction plans in particular.

The 1987 Constitution of *Philippines* and the 1997 Indigenous Peoples Rights Act strongly provides for ‘ancestral domain’ to be recognized, affecting 5-7 million ha (one fifth of the total land area) through issue of Certificates of Ancestral Domain Titles. These embrace all resources above and below land and inclusive of water. Only 10% of claims have yet been issued (half a million ha).

In *India*, The Forest Rights Act 2006 provides for restitution of deprived forest rights across India, including the right to control, manage and use forests collectively as community property. The law refers exclusively to Scheduled Tribes and forest-dwellers. It could benefit 100 million rural poor. Implementation has been extremely slow and contested, which has been a factor in the resurgence of the Maoist Naxalite movement operating in 11 of India’s 28 States, feeding upon land grievances of the landless and land-poor (up to 50 million people).

In *Nepal*, the status of customary land rights held by indigenous groups (around 44% of the total population) has become a major constitutional issue and integral to commitments under pledged new land reforms. State capture of 22% of the land area in Nepal which is forested is also being contested, largely under the context of the impressive Community



Forestry Movement. A new 'community based land reform', which would restore forests to local community ownership as well as mobilize farm redistribution within the context of around 4000 village areas, is under consideration by the Presidential Land Commission.

#### Latin America

The 1988 Constitution of *Brazil* recognizes ancestral rights over land areas that indigenous groups and former slave communities traditionally occupied. More than one million sq km had been ceded to these communities by 2006 in 580 discrete community land areas, with 167 claims still pending in 2010.

In *Bolivia*, land reform in 1996 recognized indigenous territories and promised lands to poor farmers, and the Government of Eva Morales from 2006 has since speeded up implementation with titling intended to embrace 20 million ha by 2011.

The 1991 constitution of Mexico provided for collective territorial rights for indigenous groups and Afro-Colombian traditional communities. A new law in 1995 enabled their titling in the name of communities, with over 400 titles issued by 2007. The law also allows communities to subdivide and sell these lands, adopted in practice by a minority of communities who have chosen to retain community title intact.

A 2007 Supreme Court ruling in *Belize* made it illegal for government to fail to recognize, protect and respect customary land rights, and it is no longer permitted to issue concessions, leases or other land uses on customary property without the explicit permission of the owners.

Use of the Inter-American Court of Human Rights for land cases received a boost in 2008, when an indigenous community successfully claimed against the *Suriname* government in its issue of logging concessions on their land and ordering prompt demarcation and titling of that community's traditional land area.

## 2. From redistributive reform to tenure reform

Classically, land reform is shorthand for redistributive reform, focused upon rights to farming land. Such land reform was undertaken by more than 55 countries over the 20th century, beginning with Mexico's reform in 1917. The focus was on feudal inequities in which millions of farmers were landless serfs, workers or tenants, even though many of these families had been cultivating the same land for centuries.<sup>75</sup> Current reforms in especially Asia continue to maintain this focus but with extensions.

One of these extensions is particularly relevant to Africa in addressing a previously ignored element of land injustice. This is around the legal landlessness attributed to land held through indigenous tenure systems. Address of this issue tackles inequity from a different standpoint.

While occupancy and use is not always directly altered, and redistribution of lands is slight (with exceptions),<sup>76</sup> more equitable *legal* distribution can be very significant indeed. Majority rural populations can move from vulnerable tenancy status to owners in their own right. One result is that people in such cases rather than their governments become the major group of land-owners, and the role of government shifts from landlord to land regulator, positive towards democratic and transparent land governance. Moreover, legal shift in the status of customary tenure largely affects (positively) the rural poor.

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## 3. The focus is shifting from the farm to all land resources

Such modern reforms also have the effect of shifting attention beyond the farm, onto resources which are naturally local collective assets (both by logic and custom), and are critical to rural livelihood. Especially in Asian cases, equity in distribution of farmlands remains important, but for the most part – especially in African reforms – this objective is limited to policy and constitutional pledge to equitable access to resources.

Although still in its infancy, the broadened focus of land reformism could

<sup>75</sup> For an overview of these reforms see Alden Wily et al., 2008 Chapter One and Appendix. Also see Binswanger-Mkhize et al., 2009, Borras et al., 2005, Ghimire (ed.), Borras, 2007, and Rosset et al., 2006.

<sup>76</sup> The most pronounced farmland redistribution programme advanced in Africa began in Ethiopia from 1975. Equity was the objective, landlordism abolished and farm sizes equalized, taking account however of family size. Periodic redistributions have since occurred to sustain equity but creating a great deal of insecurity in the farming sector. Although constitutionally it is still possible for regional States to order redistribution within a village, this has not occurred for the last decade and is not expected to be re-launched in light of current titling programme to secure current occupancy. For overview of the Ethiopia case see Rahmato, 2009.

impact upon the ownership of 70% of the planet's total land area; that is, the estimated 30% which is known to be forested and the roughly 40% classified as drylands. Most of these areas are customarily owned but designated as state lands or unowned public lands.

#### **4. Reform is sufficiently fundamental to be a constitutional matter**

Reform in land relations rarely occurs in isolation from other reforms, such as reforms relating to democratization, post-conflict conditions, or new forms of government. It is also partly because the inter-linkage of land rights with other aspects of livelihood, rights, economic development, and resource use and management is naturally close, creating a domino effect. Land-related reforms can occur in the form of programmes and new national policies, but ultimately they lead to legal changes. New constitutional law, local government law and natural resource laws (most particularly from the forest sector) all play an active role. Table 1 gives examples of complementary relevant legislation in Africa.<sup>77</sup>

#### **5. Reform is expanding**

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Land reform in Africa is expanding. Over three quarters of Sub Saharan African countries have at least the intention to reform the way lands are held to be owned and how rights in land are recorded and land relations and transactions administered and regulated. This has led virtually all supporting actors to define supporting strategies. This includes most UN agencies and bilateral donors and regional organizations like SADC and ECOWAS. In July 2009 the heads of State of the African Union endorsed the Framework and Principles for African Land Policy drafted by the Economic Commission of Africa in a Declaration which affirms that land reform is prerequisite to poverty eradication and socio-economic growth.<sup>78</sup> They agreed to prioritize land policy development and implementation processes in their countries, including ensuring that new land laws provide for equitable access to land and related resources to landless and other vulnerable groups. Cameroon was party to this Declaration.

<sup>77</sup> Environmental management laws are also very common on the continent but tend towards the declamatory, rarely addressing rights to resources in a concrete or directive manner.

<sup>78</sup> African Union, 2009.

**Table 1 – Complementary recent constitutional, land and forest Laws contributing to improved status of customary land rights in Africa**

Country	New constitutions	New local government laws	New land laws	New Forest Laws
Angola	1992	2007	1992, 2004	In draft (Policy 2007)
Benin	1990	1997, 1999	2009	1993
Burkina Faso	1997	1996	2009	1997
Chad	1996 (2005)	2002	2001	1994
Eritrea	1996	1996	1994, 1997	
Ethiopia	1995	1992	2005	1994
Ghana	1992	1993	(1993) & drafts	1998
Kenya	Draft 2010	Draft 2010	3 laws in draft	2005
Lesotho	1993	1997	Bill 2010	1999
Malawi	1994	1999	In draft	1997
Mali	1992	1993, 1995, 1999	1996, 2002	1995
Madagascar	1992	1994	In draft	1997, 2001
Mozambique	1990	1997	1997	1999
Namibia	1990	No data	2002	2001
Niger	1996	1993	1993, 1997	1999
Rwanda	2003	1999, 2000, 2006	2004	
Senegal	2001	1996	(1964, 1972) 2004	1998
South Africa	1996	1997, 2000, 2002	9 laws 1994–2004	1998
Sudan (national)	2005	1991	Draft	2002
Southern Sudan	2005	Bill 2008	2009	Bill 2010
Tanzania	(1963)	(1992, 1999)	1999, 2002, 2007	2002
The Gambia	1997	2002, 2004	1990, 1991	1998
Uganda	1995	1997	1998	2003
Zambia	1991	(1992)	1995 (& Draft Policy)	1999

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## 6. Land tenure reform is nested within wider land sector reform

Drivers to reform in Africa have proven various ranging from an initial intention to make rural land more freely available to investors (e.g. the case in Tanzania, Zambia, Uganda and Mozambique), concerns about the failures of the systems to deal fairly with expanding urban expansion (e.g. Ghana, Angola), to demand for restitution (e.g. Namibia, South Africa and Zimbabwe). Failures in corrupt,

inefficient and unaccountable land administration have also been triggers for change, normally resulting in more decentralized land administration alongside land ownership and other reforms. Generally, once embarked upon, a widening range of issues are addressed in new land law. These can extend to overhauling systems for land conflict resolution and mortgage law. Although rural tenure is often the main focus, this is increasingly complemented by innovative policy and actions in respect of 'squatter cities' of the urban poor. Interestingly, collective urban titling is emerging as one response, such as provided for in the legislation or policies of Namibia, Angola, Senegal and Kenya.

In the rural sector, demand for change is rarely limited to security of tenure as relating to farmlands. On the contrary, resentment at continuing involuntary loss of communal forests, woodlands, pastures and marshlands is proving an important driver. This has been concretely seen in the shape of reforms emergent in South Sudan, Mali, Mozambique, Malawi and Angola, and latterly in Liberia and Sierra Leone. There are indications that several Congo Basin States, notably the Democratic Republic of Congo, may follow suit.

#### **7. Reforms show maturation in the understanding of customary tenure as community-based tenure**

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The common objective of rural land reform in Africa is tenure security for the rural majority. Within this an important transition is occurring within notions of what customary land tenure means. The shift is broadly towards reinterpretation, or rather acknowledgement, that this is first and foremost a community-based instrument for defining, delivering and sustaining rights to land and resources at the local level. One effect is that hunter-gatherers and other groups defined as indigenous peoples find a more embracing home for their land tenure issues to be addressed. It is rare for new land laws in Africa not to additionally tackle the interests of immigrant groups into the society; West African policies and legislation are most illustrative, unsurprisingly, given the intensity of conflict between autochthons/indigenes and incomer or migrants. Tribalism is everywhere avoided in policies and laws in favour of focus upon the community as a source of tenure. The construct of 'community lands' (or village lands) frequently appears in new legislation, most recently laid out and described in Kenya's approved National Land Policy (2009) and embedded in the draft constitution of 2010. This classification is designed to reframe lands held under customary occupancy and use which the State or State agencies have been holding on behalf of unregistered land owners, and in the case of Kenya, encompasses around 70% of the country area.

## 8. Customary law and community regulation are being merged

A consequence of changing positions as to customary systems and the rights to land they deliver is that customary arrangements are being better understood as the norms of a living community and hastening devolutionary land governance in support of this. There is also a merging of what is customary with what law must and can acknowledge. Excellent examples of this are provided in the legislation of Mozambique, Uganda, Tanzania, Burkina Faso and Ghana. Acknowledged rights cannot be summarily overturned, inclusive of seasonal access, and patterns of inter-community shared tenure where this exists. At the same time, the source of consensus is firmly rooted in the modern living community.

## 9. No one route to rural tenure security is exactly the same

By no means all reforms pursue the same mechanisms towards acknowledgement of customary or community-based rights as *real property* interests. Some countries are adopting a distinct approach to mass rural security by actually extinguishing customary rights in their entirety in order to replace these with legal acknowledgement that *existing community-derived and supported occupancy* is fully recognized, and registrable (e.g. Ethiopia, Eritrea, Senegal and Rwanda). Senegal's model, initiated in 1964, is the most developed, with now half a century of village communities controlling all land and natural resources relations within their respective domains, inclusive of woodlands and pastures.

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The intensely feudal history of settled parts of Ethiopia made abandonment of customary rights logical in the revolution of 1975, in the same way as the intensity of overlapping interests in Rwanda led its new land policy and law to set aside claims on the basis of custom in favour of existing and fairly allocated holdings. In both countries mass titling is now under way to enable allocatees to secure these properties as private property. While communal forested and rangeland properties are few in Rwanda due its high population and fertility of lands, weaknesses in the current titling initiative in Ethiopia which has paid little attention to vast communal lands, are an issue now coming into debate.<sup>79</sup>

<sup>79</sup> Twenty million titles have already been issued to farmers, through a highly devolved system of local adjudication and certification. The process has not covered the millions of hectares of communally owned and used rangeland, traditionally held by one or other of Ethiopia's twelve pastoral communities. These areas, along with more farm proximate pastures of communities are now bearing the brunt of recent leases to a sharp rise in State allocation of unregistered lands to domestic and foreign investors for especially foodstuff production. Refer Alden Wily, forthcoming (b) for details and documentation.

Sahelian States have generally led the way in ensuring that all assets held customarily are considered in the reforms being engineered. This has evolved through integrated local government, tenure and natural resource reforms such as first advanced in Senegal (1964, 1972), and comparable developments in Mali, Chad and Niger, and more latterly in the 1990s Rural Land Plans of Côte d'Ivoire, Burkina Faso, Guinea and Benin. Instructively, especially in the case of the non-coastal Sahelian States such as Mali, achieving a balance between farming and pastoral communities in defining rights is still proving elusive. Nomadic groups in particular feel discriminated against, both in loss of area for grazing and through developments including oil drilling and wildlife reserves. There has also been resistance to norms such as in drafted Pastoral Codes, to ensure seasonal access.<sup>80</sup>

#### **10. Land reform on the continent is a work in progress**

110 Land reform is patently a work in progress.<sup>81</sup> African States are at different points in the process and additionally respond differently to pressures. Several have a more equitable tenure foundation to build upon with which to address unresolved or new tenure concerns affecting majority customary land owning populations (e.g. Ghana, Liberia). Some countries are taking such a long time to formulate policy and action, that there is popular speculation that the State is less uncertain than reluctant to carry out reforms (e.g. Swaziland, Zambia, and until recently Lesotho and Kenya). Liberia, Sierra Leone and Nigeria have most recently established national land commissions and which will take up to five years to deliver their recommendations, based on widespread local level consultation. Although Malawi arrived swiftly at a highly pro-customary land policy in 2001 it has since dragged its feet in putting this into hard law, making it difficult for field projects to entrench the policy changes which they are supporting. This is also the case in Ghana, where an important 1999 policy and which provided for reform to and expansion of Customary Land Secretariats lacks necessary legal backing. To some extent this is also the case in Zambia, still struggling with a nationally acceptable policy.

Others have plunged more fully and directly into the fray with radical transformation in the legal status of customary land rights, and among which South Africa, Mozambique, Tanzania, Uganda and Madagascar are notable cases. Transformation in other countries has been more incremental over the last fifteen years, building upon pilot developments (e.g. Niger, Burkina Faso, Mali and

80 All country cases mentioned are examined in Alden Wily, forthcoming (b).

81 All country cases mentioned are examined in Alden Wily, forthcoming (b)



Benin). Some countries have laws under application but with important lacunae in their paradigms, generating some discontent (e.g. Angola, Côte d'Ivoire and Namibia). It has also been the experience of the last decade that benign intentions may handicap themselves by inappropriate constructs, often caused by failure to develop new paradigms in genuine partnership with those affected and through grounded piloting. In South Africa, for example, the important Communal Land Reform Act, 2004 has been forced back to the drawing board, as was Uganda's Land Act, 1998, in respect of unworkable procedures developed for local land administration and the protection of women's rights.

Too much reliance on legal change without popular empowerment and assisting governance reforms, particularly in the form of community-based governance, is also proving an obstacle. Yet, for all this unevenness, the path has been clearly laid out.

### **11. The main land relationship being reconstructed is that between people and the State**

A key relationship which African reforms end up reconstructing is between people and the State, or more accurately between citizens and their governments. After all, over the last century, the primary beneficiary of the suppression of customary property rights has been the State itself. The trend towards minimising State landlordism in the customary sector and limiting undue powers over customary properties has so far proven strong but uneven. Through alteration in the status of customary rights and thereby the ownership of public lands, the State is quite widely seeing some decline as the majority land owner in the country. The mechanisms for this vary. Generally, the distinction between ownership of the land in the hands of the State and ownership of rights to the land (property interests) is being retained in law, the early landmark case of Uganda (1995, 1998) where this distinction was done away with, remaining an exception. While State trusteeship is more circumscribed than previously (the case in Mozambique, Ethiopia, Rwanda, Madagascar, Senegal, Eritrea, Tanzania, and Burkina Faso), the case can be made that the retention of root title by the State still affords governments added authority to appropriate people's lands at will. Little in fact changes unless unregistered lands are at the same time afforded the same level of protection the law gives registered parcels, to be commented upon shortly. Shifts in the scope of 'public interest' are also required. This is being delivered less in redefinition of this than in the tightening up of procedures for expropriation of unregistered as well as registered lands to an extent that wilful expropriation is definitely now less attractive. Mozambique, South Africa and especially Tanzania, are good examples.

## 12. Restitution of lost customary property is limited

An important decision of modern national governments is how far to provide for restitution of lands which have already been formally alienated into registered private property. Asian and Latin American governments face the same need in their reforms. Examples given in Box 7 suggest active restitution trends in those regions. Even in these cases, it is notable that much of the land being restored to customary ownership is not land now formally privately tenured, but land still held by governments as public, State or National Lands. Most African countries have not felt the need to advance expropriation and restitution of already alienated lands. Broadly, there is sufficient customary land estate left, within the *de facto* or *de jure* land ownership of governments that they do not feel bound to interfere with the registered private land sector. Most countries may in fact meet many demands by simply restoring public lands/National Lands to acknowledged customary ownership.

112 The main exception to the above is in Southern Africa, where intensely racist policies resulted in extraordinary proportions of the national land area ending up as wrongfully allocated or purchased private property. In South Africa, for example, only 13% of commercial farmland was owned by black Africans in 1994 and 87% owned by white owners, whereas around 87% of the population were black farmers and 13% were white or Asian (this excludes the four million hectares of subsistence farming in the former homelands, which account for 13% of the total land area). This resulted in a plan to redistribute 30% of white owned farms or 26 million hectares. Due to the high costs and related problems associated with the adopted willing buyer-willing seller strategy, only three million hectares had been transferred by 2009, but remains on the agenda with new approaches in planning. Namibia has redistributed even less of its commercial farmland, at independence covering 40% of the total land area. Zimbabwe, as well known, lost patience with the willing buyer willing seller approach and in 2001 launched expropriation of white owned farms and often without compensation.<sup>82</sup>

## 13. Intra-communal exploitation is also being addressed

Unjust treatment of customary rights had tremendous bearing upon class, inter-community, and intra-community relations, different rules for customary and non-customary norms being easily manipulated among societies. Combined with capitalist transformation and stratification of society into discernible

classes of wealth and poverty, a great deal of inter-class and often related inter-ethnic inequity in landholding has resulted. Legal but often illegitimate appropriation of customary resources has been a characteristic effect, local lands being acquired by one group or class at the expense of another. Pastoral–non-pastoral tenure conflicts, and cultivator–non cultivator norms are also often in conflict. Hunter-gatherers in general across the continent have lost vast tracts of land, less by conquest than by the failure of colonial and post-colonial governments to protect their differently structured land interests. Examples abound from the San/Khoisan in Southern Africa, the ‘Pygmy’ populations of Central Africa, and the Ogiek, Hadzabe and Sandawe in Eastern Africa.<sup>83</sup> Elites not local to the area often have enjoyed advantages over local communities in ‘public land’ allocation, often associated with or sponsored by the State. Associated ethnicity may play a role. Civil conflict (e.g. Kenya) and even civil war in one or all parts of the country may result (e.g. Rwanda, Burundi, Sudan, Angola and Ethiopia).

Troubling inequities within the local community itself have been commented upon earlier, often relating the indigene–immigrant relationship, chiefs and ‘citizens’ of the community, elders and the young, and men and women. For example, under indirect rule mechanisms, the rights of chiefs were often uplifted at the cost of rights of ordinary community members, residual examples of which are still found in Ghana, Zambia, and Uganda among others.<sup>84</sup>

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Most modern land policy and subsequent legislation necessarily begins to limit such problems. Women’s rights in particular are almost uniformly addressed, extending to providing a presumption of spousal or family co-ownership (e.g. Uganda, Tanzania) or providing for land rights to be held and registrable separately (e.g. Ethiopia). Pastoral and hunter–gatherer land rights as a whole are more weakly addressed in new land policies and laws.<sup>85</sup> Sahelian States as a whole are more vigilant on the latter issue than Sudan, Ethiopia, Kenya, Eritrea, or Uganda. A number of Pastoral Codes in Sahelian countries have been developed, designed to ensure a fairer distribution of resources and access to nomadic pastoral groups.

83 A fairly up-to-date source is the Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, ACHPR, 2003.

84 An extreme example in Uganda, for example, was the development of mailo tenure by the British in the 1900s which rewarded Buganda leadership by allocating vast tracts of land, measured in square miles, to the Buganda King and noble families, turning residents into the tenants. This was incompletely remedied in the Land Act, 1998 and is subject of further amendments at this time. For the relationship of Ghanian chiefs and their citizens, see Ubink & Amanor (eds.), 2008 and Ubink, Hoekema & Assies, 2009.

85 See Alden Wily, 2003a.

#### 14. The nub of reforms: from occupancy and use to property rights

The principle to which more and more countries aspire is that Africans always did and still hold lands in ways which today must finally be respected as *private property*, although not necessarily with the attributes which existing statutes endow private property. Usually a different categorization is being provided for customary holdings, should these be registered. This allows the attributes of customary land-holding to be accurately reflected, not converted into unsuitable forms which contradict the nature of customary property interests.

Such recognition is responsive to changes, which have been outlined earlier:

- a. that 'property' does not necessarily have the attributes narrowly attributed to it by introduced norms of industrialized European society, particular in reference to rural and subsistence-based land-holding;
- b. that as land pressure has increased, boundaries between the lands of one community and the next have necessarily taken firmer shape as defined and *owned* domains;
- 114 c. that land-holding norms within the community/customary society have themselves often altered, including that shifting cultivation has given way to settled permanent farming in many cases;
- d. that transfers now include sales of especially individually held houses or farms; that the demand for formal entitlement is high among better-off customary land-holders; and
- e. that there is now a need to firmly protect the wider domain of rural communities from State and external private encroachment, giving rise to new constructs for collective entitlement, either to the whole area of parts thereof.

Today in no fewer than 19 countries on the sub-continent, customary land interests are formally recognized as property interests in their own right.<sup>86</sup> No one constitution, land law or policy achieves this in precisely the same manner. There is most divergence as to whether (i) these rights are upheld as private

86 This includes Angola (2004), Benin (2007), Botswana (1968), Burkina Faso (2009), Cote d'Ivoire (1998), Ghana (1986, 1992), Kenya (1963, with new 2009 Policy), Lesotho (Draft Policy), Liberia (1949, 1956, 2009 Forest Law), Malawi (2001 Policy), Mozambique (1997), Namibia (2002), Niger (1993), South Africa (1996), Swaziland (1998), Tanzania (1999), Uganda (1995, 1998), Zambia (1995), and in less clear ways in Nigeria, Sierra Leone, Rwanda, Eritrea and Madagascar. Details in Alden Wily, forthcoming (b).

property interests without registration, (II) in how far registration involves conversion into another usually existing statutory tenure form, and (III) in how easy it is for groups and communities to secure their customary tenure as a collectively owned private property right, each of which is discussed below.

Such factors are critical for considering if and how natural forest and rangeland commons under customary tenure can be quickly and effectively secured. For it remains the fact that it is *collectively held assets* in the customary domain which continue to be most vulnerable to wrongful (but usually ‘legal’) removal from owners. As long as such lands continue to be held to be un-owned in law and difficult to secure registrable evidence for, they remain vulnerable.

#### **15. Imported and indigenous property systems are coming closer together**

Notions of ‘our land’ and imported notions of property have actually come much closer together over the last century. Many introduced attributes of landed property have been absorbed into what is customary (‘native’ or more correctly, ‘indigenous tenure regimes’). This is partly because the changing nature of many customary estates as listed above. Partly it is due to local buy-in into western ideas of property. Largely it is due to the capitalization of society and acceptance that land can indeed be a commodity, as needed.

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#### **16. In substance reform embodies as much continuity as change**

It must also be remarked that the tenure transition underway in Sub-Saharan Africa is hardly radical in hard legal terms. This is because often what is being entrenched in new land policies and laws is less a radical overturning of existing norms, than *reinterpretation* of what a right in land as deriving from indigenous tenure systems amounts to. Broadly, what may most often be seen is departure from the characterization of a customary land interest as a usufruct interest into due acknowledgement as amounting to ownership, either by communities or community members on a family basis.

This rests largely upon the fact that few colonial and post-colonial governments have formally extinguished customary rights, rather choosing to consider these *as less than* property interests. As the 20th century drew to an end, it has become decreasingly politically or practically tenable to persist in the century-long position wherein most of the rural population is ownerless and landless in law.

#### **17. A better understanding of communal tenure is emerging**

The impacts are nonetheless considerable. A key element of reform is in the legal

attitude to communal tenure, and thence, possession of substantial non-farmed resources. The idea that communal tenure is ‘no tenure’ reflecting open access became the *cri de coeur* of individual titling promoters from the 1950s, gathering ‘scientific’ support from Gareth Hardin’s thesis of the ‘Tragedy of the Commons’ (1968) and fully adopted by international advising agencies. It took until the 1990s for the bounded nature of most rural commons to be better understood as not an area of random open access but a discrete area owned by an identifiable group of persons in undivided shares (common property).<sup>87</sup>

The damage done by denial of collective or communal tenure is also better understood. In short, the process of denial is now somewhat better acknowledged as a process which turned community-held lands into exactly the kind of ‘everyone and no one’s land’ wrongly attributed to communal tenure.<sup>88</sup> This not only dispossessed communities, it withdrew from local populations the vested interest in protecting, conserving or developing these lands, or as pressures increased, developing forceful rules to limit inappropriate encroachment or use. Instead, a prominent attitude of local populations may be paraphrased as ‘if our rights are not acknowledged then we may as well get what we can from the resource before others do’, hardly a basis for sustainable use. Forest tenure is particularly affected.<sup>89</sup> The greater tragedy is not of the commons, but of *public lands* – in the act and impact of dispossessing local communities of their common properties.

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### **18. Making customary rights registrable, including common properties**

Recordation has not been dismissed as irrelevant to land security in modern land reforms. If anything, as pressures rise, the right to secure one’s property in documentation which courts will uphold, has become even more important than conceived in the 20th century. However, new land policies and laws significantly alter the scope and routes for this ‘registration.’<sup>90</sup>

In scope, a major difference is seen in what may be registered and who may be registered as the land-holder. For recognition of customary rights means recognizing that land may be owned not just by individuals, but by families, groups and communities. A growing number of laws provide for collective assets to be

87 The 2009 co-winner of the economics Nobel Prize, Elinor Ostrom, was an important academic player in improved knowledge. Recognition of her work is testimony to just how far notions of property have matured.

88 Refer Alden Wily, 2008b.

89 Alden Wily, 2002a, and Larson, Barry, Dahal & Pierce Colfer (eds.), 2010.

90 Given the long-standing implication of registration as converting customary rights into alien and mainly individualised statutory forms many tenure specialists now avoid this terminology in respect of customary rights where the procedure is more accurately one of certification of what exists, not conversion.

registrable, specifically including family and community ownership. This arises through various routes; such as through ‘the delimitation of useful domain’ in Angola’s Land Law, 2004; in the right of any manner of customary owner to be acknowledged in Benin’s Land Law of 2007; in Burkina Faso’s new acknowledgement that possession may be exercised at individual, family or collective levels under its new 2009 law; and with similar provisions in Côte d’Ivoire (1998); in Amhara Regional State in Ethiopia, in accordance with community will (2000); in Uganda’s recognition of customary rights in all their holding forms (1998); in Tanzania’s new legal requirement that no individual or family titles may be issued within a community land area until the community has agreed, defined and registered its common property in the Village Land Register (1999, 2002); in Kenya’s new Policy provision (2009) for Community Land as a major class of land holding, also entered into the final draft Constitution (2010); in Mozambique’s provisions encouraging group entitlement (1997); and in South Africa’s more awkward provisions for Common Property Associations (1996).

The opportunity to secure community domains inclusive of vast areas of shared resources like forests is not entirely new. In some countries such as Ghana, Nigeria and Liberia, this has been possible for some decades but rarely made use of. Those who failed to take up the opportunities – usually remoter and poorer communities – may now regret not doing so, given endlessly rising insecurity faced by holding unregistered lands, and especially forests and rangelands. In Liberia, for example, it was perfectly feasible from 1949 for a rural community to secure its land as a protected common property entitlement (although unable to be sold). More than two million acres of forested lands were thereby secured under fourteen ‘Aborigines Land Deeds.’<sup>91</sup> Those opportunities dwindled, particularly after the introduction of 1974’s registration law on the recommendation of international agencies whose individualizing titling philosophies dovetailed with the rising commercial interests of government to secure such lands for itself. Communities have since been forced to secure their lands in effect through buying their land back from the State. Despite the heavy survey costs now involved, at least thirty-two better-off communities have done so, adding 4.48 million acres to the registered communal property estate of the country. The need for this route has been in debate since 2006, with indications that provision for community land area registration will be made a priority in the forthcoming National Land Policy being developed by the new National Land Commission.<sup>92</sup>

91 Alden Wily, 2007.

92 As discussed in Alden Wily, forthcoming (b). See Alden Wily, 2007 for a history of collective land registration in Liberia.



### **19. Reconstructing registration process for use at scale and inclusive of the poor is advancing**

Changes in procedure for identifying and recording rights to land are also coming about. These aim to extend the limited reach of existing systems, which is partly consequent upon the inability of the majority of the population to pay the high costs of formal titling. Changes also aim to stem the unjust loss of rights which occurs when customary rights are converted into individual entitlements, diminishing or eliminating the rights of women and other family members.

In addition, elites have regularly benefited unduly from land registration. This has even happened within so-called comprehensive titling programmes, in which all local rights were supposed to be identified and recorded. The titling programme of Kenya, implemented from the 1960s is a case in point. Elites benefited at the expense of poorer families in that commons were often subdivided to the benefit of those who demonstrated the means for sustaining larger farms and paying the fees due in relation to the registration of those lands. Governments have routinely captured residual lands, including forests and rangelands, during the registration processes. They have done so by declaring forest assets in particularly logically the property of the whole district community, held as Council Forests under their trust. Loss of those important assets by sale 'to the benefit of the whole community' has been common.<sup>93</sup>

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Second, the constructs for registration and the loss of land and rights entailed, were simply too narrow to encourage voluntary uptake and use. Even among settled farmers, the idea of a family estate being now held by a single (male) head was often anathema. Nor does security demonstrably derive from a registration procedure which is so remotely controlled as to be unable to be checked or updated at inheritance. Nor has the promised sanctity of title deeds been widely delivered. Remotely managed registers have proven corruptible, for instance with the issue of dual certificates and sales.<sup>94</sup>

Under post-1990 land reforms, new mechanisms are now beginning to be seen, although erratically so. These are characterized by a reduction in mapping requirements and simplification of procedures, additionally made somewhat more accessible to poor community members, in terms of where the procedure

<sup>93</sup> See Alden Wily & Mbaya, 2001 for concrete examples.

<sup>94</sup> A great deal has been written on the failures of land titling in Africa since the 1960s. For an overview see Alden Wily, 2006b.

is located and a cap on costs. Community-based adjudication is increasingly the norm, with procedures in some cases laid out to ensure even the poorest households are included (e.g. Tanzania, Ethiopia and Benin). Local verbal testimony is now routinely made a legal source of evidence. Accountability of decisions is enhanced the closer the systems and procedures are located to landholders themselves, and who because of this, are better able to hold record-makers and holders to account. Although still flawed, the mass titling regime adopted by Ethiopian Regional States suggests it is possible after all for the interests of every rural landholder to be recorded and certificated within ten to fifteen years, never demonstrable in the conventional conversionary and centralized procedures adopted by most countries under land titling laws of the 1960s and 1970s. Much less success in mass titling has been seen in Tanzania, whose new land laws provide for this, but for reasons which include positive measures: that new land law at the same time assures rural families and communities customary tenure security whether their rights are registered or not, and because prerequisites to family or individual titling include formal entrenchment of the perimeter boundary of each community's land area, and definition and recordation of collectively owned areas within this domain. Another important reason for the shortfall in the uptake of opportunities is simply that the community must first establish its land register and registration system, which few have autonomously found easy to achieve.

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## **20. Community-based land administration is a natural corollary of admitting customary land ownership**

One of the most important aspects of emerging land reforms is a steady decentralization of land administration, sometimes to village level. That is, in some countries, it is village communities themselves who are beginning to legally hold and maintain land registers, as guided by regulation. This has two drivers: the shortfalls in over-centralized procedure as observed above, and the fact that customary land rights cannot easily be formalized without customary land administration – the rules, norms, procedures involved. That is, if customary tenure is correctly perceived as no more and no less than a community-based regime, then it follows that land administration has to take this into account and enable communities to formally administer land matters.

In practice this is accomplished in modern land reform in diverse ways. These range from designating community-level elected Councils as the lawful land authority (e.g. Tanzania, Ghana, Malawi, Lesotho), to creating parish or village cluster level institutions (e.g. Uganda, Ethiopia, Benin, Burkina Faso), to county, district or commune commissions or boards (e.g. Botswana, Namibia), and arrondissement, rural municipal, or sometimes district, county and commune

level commissions or boards (e.g. Benin, Mali, Niger). A great deal of experimentation and lesson-learning is under way.<sup>95</sup>

## **21. Mechanisms for registration remain imperfect, particularly as affecting common properties**

There are variations in exactly how certification of rights can be legally put into effect. As suggested above, some new land laws acknowledge customary tenure interests as existing whether or not they are certified or registered and guarantee that they carry equivalent force as already registered private rights (e.g. Uganda, Tanzania, Mozambique, South Africa, Botswana, Ghana, and in policy, Malawi). Registration is voluntary. Others have chosen to set time limits of several years by which time all customary land rights need to be recorded. This has not proved successful, with Côte d'Ivoire, Angola, Namibia and Rwanda among others already having had to extend these deadlines.

There are also important variations in how these rights are registered. Uganda, Tanzania, Mozambique, Southern Sudan, Ghana and Liberia provide for customary rights to be registered as is, without relocation of transformation into a different form of tenure, such as represented by introduced freehold or other forms of private entitlement.

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Others go half way, allowing for customary interests to be fully certified as they exist, including the full array of existing owners (individuals, families, groups, communities, etc.), and also enabling secondary or derivative rights to be certified (access and use rights which do not amount to ownership). Benin, Côte d'Ivoire and Burkina Faso are prime examples. However, their new land codes then require the owners to entrench these in formal entitlements accessible only under existing procedures, which can remain costly and remote. At least in all these cases, the resulting private property is not as narrowly defined as in the past in the sense of not requiring the right to alter its shape to fit conventional forms of entitlement. Others make the process cheap and local but effectively transform the property right into a non-customary right at registration (e.g. Ethiopia, Rwanda).

Some new land laws enable significant natural resources such as forests, woodlands and rangelands to be definitively incorporated in collective entitlement or as part

95 See Alden Wily, 2003a for an overview, and important country-specific reviews by Lavigne-Delville for some Francophone Africa, 2005. See Ubink & Amanor (eds.), 2008 for critical reviews of changing land administration in Ghana.

of the recognized and recordable community land domain (e.g. Ghanaians own the forests and get rent, although Government administers commercial logging and sharing of revenue, including to owners). Tanzania, Uganda, Southern Sudan and Mozambique explicitly acknowledge that, depending upon local decision, all or part of the customarily owned domain may be so included. The most active example is Tanzania, where the construct of ‘village land areas’ provides the working basis of the customary domain overall, defined as Village Land in the new laws of 1999. Today this is represented in the form of nearly 11,000 discrete village land areas, covering over 75% of the mainland land area. Such developments are being more incrementally defined in Uganda and Mozambique.

A crucial issue is the extent to which the entire village or community land area is held in laws and at recordation to be the property of the community, or only under its jurisdiction. One route is for the former to be recorded, thereby making family or other sub-community land holding within the area a lesser rights, such as a ‘customary freehold’ or usufruct. The alternative is for the community to establish only jurisdiction over the village land area, and define only certain parts of it as collectively owned (forests, pastures, wetlands, etc). Uganda, Tanzania, Mozambique, Benin and Burkina Faso are among those who leave this up to the community to decide.

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As already noted, Angola and Liberia provide for village communities to be directly registered as collective land-owners, although use of this facility has barely begun in Angola, while in Liberia it has lapsed into purchasing land back from the State, now subject to formal policy review. Ghana presents an exceptional case in that the chief is often held to be owner of the soil, while his community members are accordingly ‘customary freeholders’ of rights to that land. Although the capacity for community members to secure discrete common properties like a forest or swampland as collective private property exists, uptake appears to be rare.

The situation is different in Botswana where the rural domain is subdivided into some twelve distinct local land board areas, the root ownership of which is vested in these boards on behalf of all communities therein. It is easy for an individual or family to secure a customary title over their village house and farmlands, but not over any part of the vast grazing lands within each of these tribal land areas.

Namibia follows a broadly similar pattern in its new land law affecting communal land areas (2002). This has the effect of leaving the real status of *collective* assets like rangelands within the village or tribal area uncertain, as their laws do not

provide easily for collective entitlement below the level of tribe. They also open up these lands to rampant land grabbing by elite individuals. In both countries this mainly occurs in the form of ranching schemes, which depend upon the ability to sink a deep borehole to anchor the claim, something which is beyond the means of ordinary families. As a consequence, poor majorities are being steadily deprived of rights to these areas in which they previously had communal tenure shares.

Hunter-gatherers in both countries (minorities at 3.4% and under 1% of the total populations, respectively) are also adversely affected, being unable to easily secure traditional land areas as their discrete property within these domains. Efforts in Botswana to help them secure lands, through provision of funds for borehole developments and issuing certificates, appear to have slowed down since their heyday in the 1970s, although an estimated third to a half of Botswana's San do now have some legal land access, and all San have legal occupancy and use rights as residents within their respective land board areas. To some extent provision for wildlife conservancies has also lessened losses, with a number of hunter-gatherer territories now under this aegis in both States, allowing them to become active shareholders. However, the tenure of these is also beginning to be queried by more lucrative commercial interests.<sup>96</sup>

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In such countries, insufficiently clear or robust provision for collective entitlement leaves commons vulnerable to acquisition by individuals from within or outside the community, although subject to permission from the local chiefs, who may concur for financial benefit. Additionally, especially in Angola and Liberia, these lands remain vulnerable to issue of concessions by government. Even in Tanzania, where it was thought that the Village Land Act of 1999 would protect millions of hectares of village community lands sufficiently, loopholes in the law are now being actively exploited by government and foreign investors to capture these lands. As holders of unusually large 'village land areas' and where game abounds, Maasai pastoralists are proving especially vulnerable to the creation of hunting areas in the game-rich north of the country, as the Wildlife Department wilfully leases these to foreign users, on the grounds that the nation – not community land-owners – own the game. They are also being persuaded to release 'unused' areas of their large domains to investors, often coercively. Settled villagers in the far south of the country are suffering equally, largely due to their failure to clearly define and entrench the limits of their respective village lands. Responding positively to the outcry at the growing pressure to release lands for commercial food and biofuel farming, the government of Tanzania has at least responded

96 Discussed in Alden Wily, forthcoming (b).

with a moratorium on more village land acquisitions or leases to foreign governments or companies, pending agreement as to a fair code of conduct.<sup>97</sup>

Some countries add to the difficulties by providing for and sometimes requiring the use of new legal entities in which to vest common property ownership at registration, such as through establishing Common Property Associations in South Africa or Communal Land Associations in Uganda.

Much more development in the constructs and procedures for collective titling is clearly required. Nonetheless, in principle all new land laws and policies explicitly acknowledge that the holding of land informally and entrenchment of this by registration is viable. This represents an improvement on land law as it existed in 1990. It is the mechanisms for realizing this which remain imperfect.

## **22. The meaning of ‘effective occupation’ is changing**

A growing implication of much new land legislation is that evidence of customary/ community-derived land ownership no longer depends upon the land being visibly cultivated, where the parcel is not held for that purpose, such as in the case of pasturelands, woodlands and forests. The case for farming lands is much more rigorous, with the almost uniform requirement that these remain and/or are developed (although inclusive of shifting cultivation and fallow norms). In the event of failure to use or abandonment, new laws generally make these farmlands subject to reversion to communal ownership, and if not tenure, then communal jurisdiction to determine to whom the plot shall be reallocated.

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## **23. Support for equitable legal pluralism is gathering: ‘different but equal’**

When customary rights are recognized, this requires the admission of customary rules or law, more accurately understood as community-based rules or law, much of which is usually based upon traditional practices.

This does not mean that customary law then operates alongside statutory law so much as that national law (statutory law) accepts the operation of customary law as fully lawful. That is, it becomes legal to make decisions about land in defined circumstances (i.e. the customary sector, not the alienated sector) on a customary basis, using customary (community-based) rules.

For this to work, equality in the systems is imperative, and national law (statute) abandons the colonial-originated and sustained hierarchy of laws in the legal system. The place of Islamic law (Sharia) in landholding is more complex, for it is routinely the case that its precepts are integrated already into both national law land regimes and especially customary regimes. In Senegal, for example, where over 90% of the population is Muslim, it is not always easy to distinguish how much of customary practice derives from Sharia and how much from non-religious local norms. In matters of land-holding this does not tend to matter where customary land tenure is correctly located as first and foremost a community-determined regime.

#### **24. Reforms technically constrain unjust traditional practices**

In recognizing customary land tenure, new land laws also explicitly condition this upon principles of equity and justice, as everywhere laid down in constitutional law. Women's rights have historically been among those most commonly undermined. Where hunter-gatherer, pastoral and settled society customs interact, a hierarchy of rights may be practised which is concluded as inequitable.

124 New land legislation has been particularly active in addressing gender inequities but less progressive in handling inter-societal inequities. Nonetheless, in principle, where customary law is given equal force in the statutory law, unjust practices are subject to recourse in law. Customary norms can be forcibly altered through this route if need be. In practice, even where customary land law is given full statutory support, practices on the ground often continue to fall short of constitutional principles. Many reformers believe that a key step towards remedy lies less in the law than in the institutions of inclusive community-level governance which by law and over time can be conduits towards equitable practice. In the interim, advocacy agencies for the rights of women, pastoralists, hunter-gatherers or other institutionally weaker groups are usually essential actors.

#### **25. The natural links of land, natural resource and governance reform are becoming stronger in policy and law**

The main causes are simply that, *first*, much of the communal estate consists of collectively held woodlands, forests, and rangelands; and *second*, delivery of new norms is in practice dependent upon the strength of local level organization.

Specifically, uptake of new legal opportunities by rural individuals and communities is proving most effective where sufficiently empowered community institutions (such as elected village governments) exist or are created, and land administration is legally vested in community hands. Tanzania, Burkina Faso, Ethiopia,



Lesotho and many West African countries provide good examples. Sometimes they begin in an integrated manner, such as in Senegal, Niger and Mali where a primary function of devolving government is to assure security, rational use, and management of local land resources including woodlands, pastures and water. Even without such integration, tenure reform impacts on the way forests and other naturally collective resources are owned, conserved and managed.

Because of the advanced role played by Community Forestry on the continent, the forestry sector is proving the most active in adopting and then influencing the shape of rural tenure reform, and furthering national resource governance in the process. An often cited case is mainland Tanzania. There the Forest Act 2002 was directly shaped by the preceding Land Act and Village Land Act of 1999, and was able to build directly upon already established community governments. Notable effects have been that the Forest Law as a consequence:

- a. places limits on the creation of new national or local government Forest Reserves by requiring the minister in charge of forests to be convinced that the area cannot be better conserved and managed by the customary owners;
- b. provides an active construct for this to be adopted, in the form of Village Land Forest Reserves or Community Reserves; there has been massive uptake of this opportunity with more than 3 million hectares of previously unreserved forest now under this class since the passage of the Forest Act 2002. Although no National Forest Reserve has yet been handed back to communities, several million hectares of National Forests are also now managed by local communities. A number of Local Authority Forest Reserves established by district Councils are earmarked for handover;
- c. changes the meaning of ‘reservation’ itself, as less a tenure classification than a land management classification in recognizing that even a National Forest Reserve could be owned by a community, although subject to the appropriate regulation for that class of forest;
- d. makes a commitment to devolved governance of forests, requiring that management be undertaken at the most local level possible consistent with the purposes of conservation and management of that forest; in policy and practice, the Forest Authority aims to see all 18 million hectares of unreserved forest placed under community forest reserve status and as much as possible of the national forest reserve brought under community management, so that it may refine its role as technical adviser, overall regulator, facilitator and partner to communities in commercial utilization;

- e. takes note of the land law's limitation upon the taking of customary property, other than by paying full compensation for the loss of the value of the land, should the area be definitively required for public purpose;
- f. makes communities and community groups explicitly among those listed in the law as eligible to apply to manage national and other currently government-managed forests; and
- g. where a group or village community forest (two classes) is created out of village land, the owner community is fully empowered to regulate its use, including determining that it cannot be used at all, or in certain ways, and definition of protected areas and species; it may devise rules for the forest which have the full force of law on approval by the local government authority and have to be upheld by the courts as the regulation governing that forest; the community may also issue licences, set fees and collect revenue; patrol the forest, apprehend offenders, and levy fines in accordance with the community's approved rules; lease the forest area for a forest consistent purpose including sustainable timber harvesting; and may hand the forest over to the government for it to manage if so wished, in return for an agreed share of revenue.

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The picture given in the preceding points is that a start has been made, but reforms are still hesitant and incomplete. Nonetheless, these important trends towards this can already be identified:

1. the century-old notion of *terra nullius* (unowned lands) is being eroded;
2. definition of what comprises 'effective occupation' is less fixated upon cultivation;
3. the definition of public land is becoming more limited to land and resources essential for public service and use, rather than encompassing land that simply has not been registered. The proportion of rural areas now under *de jure* or *de facto* government ownership is sharply declining where reforms are undertaken;
4. state landlordism is being curtailed, citizens themselves becoming the majority landholder group;
5. certification/registration is not declining in importance but is being forced to devolve to more local levels to be relevant, and it is helping to promote democratic decentralization overall; the major group of potential beneficiaries is for the first time member shareholders of land assets within families and communities;

6. the meaning of 'private property' is modernizing to reflect the reality that land-holding is more complex in agrarian than in industrial economies and must encompass private estates owned collectively;
7. the 'mystery' of communal land tenure is being unraveled as better understood as a community based regime more than one bound by ancient tradition and perfectly viable as a modern devolved framework through which rights in land may be organized, transferred and regulated;
8. forests/woodlands, rangelands and pasturelands are slowly being brought under more localized tenure, helping to enhance opportunities for lasting and cost-effective management;
9. human (land) rights are slowly being better met, helping to limit civil discontent and historical paradigms by which citizens are denied acknowledged ownership of their most important capital assets;
10. in many cases, useful new legal constructs are emerging, and common-sense procedures are beginning to be laid out, to enhance the attainment of tenure security; and where these are being applied, helpful modifications are emerging;
11. involved African governments may also rightfully claim that they are setting the stage for substantial transformation in the legal landlessness of some 500 million citizens, as existing in 1990. A number of best-practice cases do exist.

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At the same time, land reform has shown that it can be undermined by shifting political will and manipulation of even improved legal terms. The international community is well-meaning but sometimes ill-equipped, at times sponsoring contradictory programmes in the sectors of conservation, resource exploitation and global investment, for instance regarding carbon marketing and globalisation of the land market. Both are still able to exploit the vulnerable status of most customarily owned lands to the jeopardy not only of local majority rights, but also to the essential forward movement towards reconstructed land-based relations in ways which equitably include and de-pauperize the poor, not exclude them.

Practical limitations may be seen in these aspects:

- a. some governments have already found a range of excuses for failing to move fully or swiftly forward on their pronounced commitments, even when these are embedded in fully approved policies or law. This usually stems from reluctance

on the part of leaders, officials and private interests to surrender their powers over unregistered lands, resulting in bureaucratic 'go slow' strategies;

b. common stratagems employed include (i) retention of vaguely stated limitations as to what constitutes public purpose; (ii) excluding certain resources from acknowledgement as inclusive in the customary estate; (iii) withholding powers which are normally integral to powers of ownership, rendering the State still unduly empowered to determine how the land is used; and (iv) drawing a distinction between ownership of the land and the issuing of *commercial* use rights to the land, in the form of retained exclusive State authority to issue concessions for logging, mining, and ranching on owned and occupied lands;

c. complementing the above with weak institutional development, particularly at local levels, such as required for ordinary rural citizens to help realize their rights on the ground; frequent failure to even ensure that ordinary communities are aware of their rights;

d. failure to structure law and especially procedure in such a manner that vulnerable groups must as a matter of law have their special interests represented and heard; and

e. weakness in particular in the provision of collective tenure paradigms; and in their regard, widespread withholding of authority normally associated with resource ownership, resulting in situations where customary tenure is acknowledged but significant rights over naturally collective assets like forests and rangelands are denied.

Overall, therefore, land reform – and its impact upon forest, rangeland and other such sectors – is still in the early stages. Reform itself is acknowledged as a long-term process, in which experience and popular empowerment must play a role. What is now widely accepted across the continent is that legal reform in patterns of land relations is fundamental to securing justice for the rural majorities, and for establishing a workable basis for genuinely inclusive and self-reliant land-based economic development. Moving steadily towards delivery remains the challenge.

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**Chapter 5**  
**The way forward**

Cameroon







## I Introduction

The basic conclusion of the preceding chapters is that Cameroon's land law, looked at closely, is unjust. It has aided and abetted unjust Forest Law. Forest law in turn takes undue advantage of tenure limitations towards government interests. This compounds injustice in respect of forest resources customarily owned by indigenous forest peoples and other local communities and raises query as to the correct positioning of government in land relations.

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A review of the changes which many Sub-Saharan African countries have been advancing over the last 20 years suggests that Cameroon increasingly stands isolated in its unbalanced land relations with its own citizens, and more particularly the majority poor. Although this paper has made no attempt to calculate the social and economic losses, it may be safely assumed that these are substantial and continuing. They are also likely to be sustaining the rural poor in a dependency relationship with the State, which is not good for sound economic growth. Within the forestry sector, it is questionable that incrementally rising 'pay offs' to affected local communities through revenue-sharing from other people's use of their land, or increasing the ration of access of customary owners to conservation areas made out of their lands, will be sustainable as the route forward.

A legal change in the status of customary land rights, and thence the pivotal State–people land relationship, has been highlighted throughout this paper as an indispensable task. This is essential in service of equitable ownership norms, and



to serve more democratic political and resource governance. At the same time, shortfalls in delivery indicated in around half the countries of Africa which have so far advanced down this route, emphasize that legal reform is never enough on its own, and which even within itself must be sufficiently comprehensive and well-structured to have the effects it promises.

This final chapter looks to practical strategy, structured around these questions:

1. What basic conceptual difficulties need to be overcome in Cameroon land politics?
2. In an ideal situation, what should Cameroon's land law say about customary interests?
3. May any remedy be squeezed from the law as it stands?
4. Is there practical value in bringing the force of international law to bear?
5. What key practical steps need to be taken? and
6. How may fair tenure be practically advanced in the forest sector?

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## **II What basic conceptual difficulties need to be overcome?**

There are four main concerns.

1. It is often difficult for non-tenure specialists to envisage how customary land tenure can be given status as *property* and with the implications that this is a *private* right. Despite such explanations as given earlier, the orthodoxy of non-indigenous ideas of property is so deeply rooted and adopted into registration norms, that 'customary' and 'private property' still seem like a contradiction in terms to many.
2. Bureaucrats are also concerned that inclusion of customary rights as a category of private property is not feasible. This arises from fears that it could mean that the entire country area and all its resources will thereby be subject to restitution; interference with established government and private tenure could be excessive. Injustices of a different kind, along with conflicts, could result.
3. There are also usually concerns about the changes in registration practice

that are implied should customary landholders be awarded registrable rights in law.

4. Finally, there are worries as to how a proposed new class of landholder, communities, may be defined. ‘Community’ is after all a fluid social entity; even when its outer social boundaries are easily defined and upheld in the locality, its composition is in flux, altering with every birth, death and marriage or other relationship introducing new members. How can such an entity exist in tangible legal form? Will a distinct legal entity still need to be formed to represent its interests?

### **Customary rights as property interests**

All these concerns may be allayed. To take item (1) first; this does take a mindset change; that ‘private’ does not need to equate to an *individual* person, anymore than it already does in respect of privately formed companies and enterprises, or indeed government itself. It is the *entitlement* that is discretely individual, not necessarily the owner of that entitlement.

### **Feasibility**

In regard to (2) it is reasonable to place limits on the extent of restitution. The primary objective of agrarian reform in African conditions is to enable *existing* customary ownership to be recognized. As noted in Chapter 4, there are instances where the scope of wrongful loss of rights has been so extensive that no land area can be excluded from consideration for potential restitution. South Africa, Zimbabwe and Namibia have been examples. Where new private rights have been fully and legally superimposed over those customary rights, then payment of compensation, or provision of alternative land, are remedies of preference. In the case of Cameroon, there are reasonable grounds for excluding both the urban sector (lands within the boundaries of towns and cities) and properties already under absolute entitlement, in accordance with registered deeds or titles.

This is because, as elsewhere on the continent (outside Southern Africa), such a large area of national territory in Sub-Saharan States is under *de facto* or *de jure* government ownership, that it is within that sphere that practical restitution should be focused. This is especially as it is still within this sector that most customary possession is exercised and/or constrained. Within this sphere, there are certain areas and assets which logically remain national property. These include public buildings, roads and service installations, coastal waters, minerals, and large waterways and dams. Reform recognizing customary land ownership generally focuses upon occupied and used assets beyond these.

In the case of Cameroon, two categories are specifically affected, and these need to be made subject to restitution to customarily defined community tenure:

– The *concessions of chiefdoms*, where the land is the joint property of the community, but currently defined as artificial public property. Arguably, this classification was at least partly due to the absence of a legal class for community lands.

– The *Permanent Forest Estate*, which has consistently seen customary rights extinguished in favour of the State as the private owner. The argument has been made that as well as representing a major abuse of customary rights as existing and exercised at the time, this was an unnecessary action. With hindsight it may be seen that the rightful duty and power to regulate how a forested area is used was confused with *ownership* of the resource. Capture of the latter to serve the former was undertaken; this was likely on the basis of conventional practice and precedence. No doubt thoughtless or out-dated donor endorsement and commercial self-interest added to this.

134 – In principle and practice, there is no reason why a protected area cannot be owned by a community, but subject to conservation regulation. Nor is there any reason why a productive forest area, suitable for lease for commercial logging and management, cannot be owned by a community, or group of communities, which receive a fair share of rental revenue through partnership arrangements, subject to taxation. Alternatively (as is common in South Africa, Ghana and a number of countries outside Africa, including in Europe), the community leases the property back to the government to manage and/or sub-lease.<sup>98</sup>

### **Simplified titling is implied**

With regard to (3), the importance of conceiving land reform as principally a matter of good governance and being nested accordingly has been emphasized throughout this paper. Practical considerations are highlighted later.

<sup>98</sup> For example, restitution of national parks and reserves in South Africa has been slowly progressing, with important cases like the Makuleke, Richtersveld and others, but with a more recent rejection, in respect of the Kruger National Park, for which after a long debate on 3 December, 2008, the South African Government finally determined should not be restored to community tenure, but the equitable redress effected instead, in the form of financial compensation, alternative land, coupled with guaranteed access and a host of other benefits. Negotiations are ongoing.

### How to define ‘community’

Finally, in regard to (4) conceptual change is needed. Early land reforms in Africa followed convention in presuming that although an individual could be held to be a legal person, groups of persons needed to have institutionally based legal personality in the form of a registered company or agency to be recognised as a land owner. Various mechanisms have been used. Nigeria for example chose to vest title in State governors as trustees. Ghana developed another version of trusteeship which vests title in chiefs on behalf of the community owners.<sup>99</sup> In different ways both reflect the difficulties with not vesting title directly in communities, trusteeship all too often becoming virtual landlordism. More recently, companies, cooperatives and other entities with legal status have been called upon to carry collective ownership of real estate.<sup>100</sup>

Group incorporation has also featured, most notably in South Africa’s enactment of the Communal Property Associations Act in 1996, to enable customary groups to incorporate themselves, to legally hold, manage and use property, in accordance with an agreed constitution. The bureaucratic demands and costs have since proved prohibitive, with few bodies created or sustained a decade later. Land governance institutions have also been a means for vesting title, in the form of land boards and land commissions. The earliest use of this on the continent was in Botswana (1968–69) where duties as land administrator, regulator and land-owner (on behalf of tribesmen) were combined in Tribal Land Boards.<sup>101</sup> These powers have not always been compatible. Local government has also been used; Tanzania adopted village governments for this purpose in its earliest attempt to give legal ownership to communities (1984); these bodies at least had the advantage of being community-based, community-elected, and directly accountable to community members.

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However, like so many mechanisms, the real requirement is to be able to vest ownership directly in the community and this is only awkwardly met in the above, as contradictions between governance and tenure interests still arise. Tanzania and Mozambique (among other countries in other parts of the world) eventually disposed of the need to use or create institutions in which to vest

99 In Nigeria, as provided for in the Registered Land Act, 1965 for the Federal Territory of Lagos and strongly oriented to provision of due entitlement of family land to families, not heads of households, an important innovation which was not copied by many subsequent African registration laws in the 1960s and 1970s. Constitutional and land law in Ghana gives clear recognition to chiefs as land-owners on behalf of community members.

100 See Fitzpatrick, 2005 for a useful review of strategies.

101 See Alden Wily, 2003a for an examination of institutions being used for tenure and/or administration in twenty Sub-Saharan States.

communal entitlement, by doing what now seems obvious: accepting that the community can be just as much a legal entity as an individual, and that the centre of legal constraint should be based more productively upon how it operates as owner.

For example, the most obvious requirement is simply that the community – for the purposes of land ownership – is clearly defined in terms of the categories of people it comprises. It usually encompasses all those who are permanently resident in the community land area, inclusive of those who make the community area their primary home. A second logical requirement is that the owner subjects itself to inclusive and accountable decision-making on land issues, with disaffected members having recourse to institutional procedures outside the community. There need be no uniformity in how far these rules or exercise of ownership enter into main or subsidiary law, so long as the decision-making approach is up to the national legal standards needed to ensure justice and accountability.

### **Using community recognition as an instrument towards greater equity in intra-community relations**

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Attention must also be given to the inequitable differentiation of rights and opportunities within a community. This is essential where feudal or client relations are the norm, and where elites hold significant control over social, economic and decision-making powers. It is not just in settled farming societies where this may be seen; pastoralists can be notorious for excluding those without livestock (sometimes the majority) from decision-making.<sup>102</sup>

Where one ethnic group is subordinated to a stronger ethnic group in the community, or where the two groups pursue quite different leadership and decision-making norms, both need to be taken into account in defining the rules of land ownership and land use. Both instances are routinely confronted in respect of Cameroon's hunter-gatherer forest-dweller minorities and other ethnic groups living in the same vicinity. In fact, as experience with hunter-gatherers in Botswana, Namibia, Tanzania has shown, a special effort needs to be made in their regard. This is because both as minorities and as shy cultures, hunter-gatherers have shown a propensity to be drawn into inequitable client

102 In Kenya, for example, one of the causes of failures of the 300+ Group Ranches as a land securing mechanism under the Land (Group Representatives) Act 1969 was the wilful exclusion of their many client families by richer members of the community on the group register. Several major squatter towns arose around Nairobi as a direct result of these families being excluded when it came to subdividing the ranches (Alden Wily & Mbaya, 2001).

relationships in which their interests are quickly subordinated and their voice easily unheard.

### **III What would ideal legal terms concerning customary rights look like?**

How can such models be put into working law? There is sufficient new law on the continent for a rich source of examples to be drawn. In due course, these should be made widely available in Cameroon among interested communities, facilitators and policy-makers. While such examples are unlikely to be precisely applicable to Cameroon, putting them down in writing is a useful and practical way for involved persons to explore what will and will not work.

An earlier version of this paper laid out just such a sample schema, just as an example (and which is available to interested readers). This covered the kind of basic principles of tenure which a desirable new land code would adopt to enable majority customary rights to be secured instead of suppressed; provision for an appropriate land class to encompass community-based land interests; and procedures through which community land areas, under the root tenure and jurisdiction of individual communities, could proceed. These paid particular attention to the realities that for many disadvantaged communities, and especially forest-dweller hunter-gatherer societies, some or all of their traditional territories have been overlaid with other rights, and that their own identity as discrete communities is often also uncertain. They set out to ensure that their collective tenure as well as resource use interests would not be jeopardized, and laid down sample legal options for this to materialise. In addition, suggestions for precise entitlements which could be adopted into law to enable these and other non-communal interests to be formally recorded following locally based and supervised adjudication procedure were also offered. Finally, a cornerstone principle laid down was for a community based regime of rural land administration to be developed, as the logical handmaiden of recognising customary rights.

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It was decided, however, that even giving such examples of what could work at this stage was premature, and should await community-based field exploration of the subject on the one hand, and expression of willingness by the administration to consider legal change in the status and administration of customary land interests on the other.

Meanwhile, ten broad intended impacts of essential legal change may be listed:

1. to resolve in a practical manner the inequitable status of unregistered property rights descending from community-based regimes with registered rights;
2. to institute a more democratic, just, accessible, and relevant system of land registration than currently exists, and without loss of the natural attributes of customary ownership and land relations at registration;
3. to deliver tenure security to minority hunter-gatherer and pastoral groups within the least contestable context, by directly integrating their rightful claims with those of other members of rural population in stable legal constructs, but with instituted legal instruments of vigilance of procedure to ensure their voices are heard and their interests carefully explored with them and taken into account;
4. to assist such groups move beyond minimal ambitions to secure access to resources, helping them to grasp hold of opportunities being afforded under more equitable customary tenure and protection norms to secure recognized ownership of at least significant parts of their ancestral lands;
- 138 5. to give legal support and force to much-needed procedure to fairly unpack and order all customary land rights *in practical and sustainable ways*, and thereby limit the potential for conflict among ethnic groups and groups pursuing different systems of land use;
6. to establish a tenure based foundation for development of sustainable rural livelihood through restituting natural capital to rural communities, upon which they can build, with guidance from the State;
7. to curtail excessive State landlordism in the rural sector, specifically by removing State ownership interests in forested land, to enable the ministry in charge of forests and wildlife to focus directly and without conflicting interest, upon performing its rightful role as neutral and efficient regulator of ownership, management and use of land and natural resources;
8. to dramatically increase the area of Cameroon which is under formally acknowledged and increasingly recorded ownership, by citizens, as individuals, families, and groups or communities, as appropriate;
9. to increase sustainable natural resource conservation through citizen-based resource ownership, providing rural communities with this incentive and opportunity to participate in conservation, management, commercial



and other use as lawful partners to government and private enterprise;  
and

10. to provide the basis for a fairer and therefore more lasting system for leasing forest and rangeland resources for commercial use.

#### **IV How far may change be drawn from existing laws?**

The position taken by this critique of the situation in Cameroon rural land relations is that legal land reform is required for justice and sustainability. In the meantime, it is urgent to consider how far at least some remedy may be squeezed out of existing legal norms.

In Chapter 2 it was mentioned that one or two loopholes exist in the land law through which customary owners might be able to pursue their ownership rights. Each is examined closely below.

##### **1. Communities are eligible applicants for private property registration**

The law does not actually prevent a community from being a registered landowner. In fact communities are specifically mentioned as eligible applicants under Section 9 of Decree 76-165. The limitations have been indicated earlier. There are three in particular:

a. The onerous demands of formal survey and registration; this is time-consuming and requires literacy, persistence, and finance. Still, donor/NGO assistance could help overcome these impediments.

b. Registration (and issue of Land Certificate) as currently provided in the law, has the effect of extinguishing customary rights and replacing these with an entitlement which has different incidents. This contradicts even the most modern of customary norms, such as by reducing tenure to a single individual, dispossessing other family members; removing the need to follow customary norms at inheritance and transaction; removing the parcel from community jurisdiction; and enabling the property to be sold to anyone on the open market. However, with active support and advocacy, a few trial cases could be pursued in which at least secondary access and use rights *are written into the entitlement as encumbrances*. An attempt could also be made to attach a prohibition against absolute alienation in the registration file, and also be noted on the Land Certificate as a limitation. Retaining the customary norm as to owners will be less easy, given that the laws for registration are so strongly attuned to individual ownership.

The authorities are likely to demand that the community first forms itself into a legal entity in order to be registered as a private property owner. The experiences of Community Forestry suggest as much.

c. Most difficult to overcome is the fact Land Certificate can only be given for 'developed' land. Registration of unoccupied or unexploited lands is inadmissible (Decree No.76-165, Section 11 (3)). However, for some communities the pattern of their occupation and cultivation might be argued as evidential of occupation or exploitation of the land. This might be achieved by clearing and farming small patches of land in strategically placed areas around the boundary of the communal estate.

## **2. Communities may apply for grants of national land**

This provides a much stronger route through which a community could secure a substantial communal area.

140 By definition all customary landowners live on unoccupied and unexploited national land or government land (i.e. the private property of the State). All natural persons and corporate bodies may apply for a grant from these lands (Decree No.76-166). The law provides directly for 'public services, local communities and autonomous public bodies' to apply for National Lands 'for projects in the public interest' (Section 19). Once the minister agrees to the grant, the land becomes part of the private property of the local community (Section 22). Any grant made is temporary in the first instance (five years) but may proceed to a lease or to an absolute grant.

Although a community is loosely considered a 'natural person' in Cameroon law, there are already some eighty or so communities which have formed associations or interest groups for the purpose of Community Forests; these could stand as the corporate bodies/legal persons acting on behalf of the communities as landowners. Some cases of collective ownership of land through this route may be found to exist already.

The grounds on which a temporary grant can be made are for 'development projects in line with the economic, social and cultural policies of the Nation' (Section 2) or for 'projects in the public interest' (Section 19). Proactive conservation, or securing cultural rights, could be tested as meeting social and cultural interest. Securing livelihood on a stable basis could be argued as a sound economic justification for application.

The limitations of this opportunity are obvious; the community must devise a

project which can be justified as in the public interest, must prepare a plan, and show evidence of the funds needed to fulfil the project. These projects may not compete successfully with other development plans which see lucrative opportunities in turning these areas in to plantations or other commercial enterprise.

### **How viable are these routes?**

While the first of the routes reviewed above delivers an unsatisfactorily constrained result, the second places undue onus upon a community simply seeking to secure its rightful land.

As with Community Forestry, both routes leave rural communities directly dependent upon the advocacy and support of the donor community or NGOs to help them squeeze what they can from the law. It also depends upon the benevolence of land officials to find merit in the applications. The very existence of weak provisions for land security affecting community rights helps relieve government of the need to amend policy, law and practice, at the same time as discouraging their use. In addition, although government may alienate or grant parts of its private property (thereby including the Permanent Forest Estate), such efforts would realistically be restricted to the non-Permanent Forest Estate and other areas outside the private and forest realm.

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Nonetheless, in the absence of reforms, *these routes should be pursued*. They could result in a few working precedents. Of necessity, at least some officials would need to be involved to reach this far. This in turn could open space for more significant will towards a more thorough overhaul of policy and law.

### **3. The State may be challenged for failing to follow the law**

There is also scope for challenging government where its actions interfere with customary rights in disobedience to existing law. How far this is feasible would need to be explored on a case-by-case basis. Potential points of challenge include:

- occasions where the State has failed *to pay compensation* to lawful occupants of National Land when making the land its own private property (the private property of the State) or when granting or leasing lands those lands to other non-customary parties;
- occasions where the State has failed to follow the legal requirement to at least *inform and consult* with local populations in this procedure of creating State and Council Forests.

A number of instances allegedly exist, as in the above-mentioned failure to consult hunter-gatherers in the creation of National Parks. There are also intimations that the State has failed to equitably compensate local households where pipelines are installed and interfere with local farming and livelihood. Mining activity also results in abuse of rights, as does the creation of Forest Management Units (logging concessions).

Establishing sufficient evidence that the law has been broken is needed before guiding communities down this route. Government may avoid responsibility by claiming, for example, that if 'Pygmies' failed to present claims, this is their own fault as everyone in the area was duly informed, or that in the case of settled communities, the law only requires to pay compensation for limited loss of developed lands (housing, plantations, etc.) Nor, under the current terms of the law, is the amount of compensation payable likely to be worth the effort. Where claims are laid, it can be very time-consuming and take many years. An indicative case concerns the Sagba Mbororo community, which has unsuccessfully been claiming compensation for the loss of its grazing lands for twenty-five years, caused by the establishment of the 100,000 hectare Elba cattle ranch, and despite the creation of an active NGO (MBOSCUDA) to pursue their cause.

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#### **4. The State may be challenged as failing in its constitutional duties to its citizens**

Challenge may also be laid at the door of the State on the grounds that it is failing in its constitutional duty to protect rural land rights. The generality of the constitution is unhelpful in this regard. Nonetheless, Box 8 reiterates relevant text and which could be a basis of claim. Most of this is immediately weakened by being found only within the preamble of the constitution, not in its directive text.

Still, it may be argued that the obligation to recognize and legally support hunter-gatherer land rights is indisputable in the Preamble. The same duty in respect of all customary land holders is implicit in Article 1.2.

For an agrarian population, security of tenure and acknowledgement of property interests is a necessary platform for social and economic development. To deprive rural populations of this, and to appropriate their land without payment of full compensation for the economic value of the land, may be held to be an abuse of human rights. This is particularly so as the State often then proceeds to sell or lease those same appropriated lands to other non-customary holders, for their personal or the State's benefit.

### Box 8 – Constitutional provisions relevant to customary rights

The Preamble to the Constitution affirms Cameroon's:

– 'attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations, The African Charter on Human and People's Rights and all duly ratified International Conventions relating thereto...'

It also specifies its attachment in particular to these principles:

- all persons shall have equal rights and obligations. The State shall provide – all its citizens with the conditions necessary for their development;
- the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law;
- ownership shall mean the right guaranteed every person by law to use, enjoy and dispose of property. No person shall be deprived thereof, save for public purposes and subject to the payment of compensation under conditions determined by law;
- the right of ownership may not be exercised in violation of the public interest or in such a way as to be prejudicial to the security, freedom, existence or property of other persons.

The Constitution declares that the State shall:

– 'recognize and protect traditional values that conform to democratic principles, human rights and the law' (Article 1.2).

And provides that the State shall:

– 'transfer to Regions, under conditions laid down by law, jurisdiction in areas necessary for their economic, social, health, education and cultural and sports development' (Article 56).

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It could therefore be argued that by denying customary landholders recognition and protection of their land rights as real property interests, the State is:

- a. not honouring the provisions of international declarations and charters
- b. not providing its citizens with the conditions necessary for their development
- c. not preserving the rights of minorities and 'indigenous peoples'

- d. not honouring the right of every person to use, enjoy and dispose of property
- e. violating public interest in defeating customary land rights
- f. failing to recognize and protect traditional values that conform to democratic principles and human rights and the law, and
- g. failing to transfer sufficient jurisdiction to regions to enable them to support the economic and social development of their populations.

#### How viable is such a challenge?

The constraints against a successful challenge even on legal grounds are many. They include:

1. *Protecting property.* As shown in Chapter 2 it is national law itself which defeats the interests of customary land owners by not recognizing their land interests as constituting property. Therefore these are not legally due the protection due property-owners.

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Even minorities and indigenous peoples (however defined) are not well served. For the protection and preservation of their rights must be undertaken 'in accordance with the law'.

So too, State defence would argue that government is recognizing 'traditional values' – within the boundaries of the law, as affecting land interests.

2. *Preserving the rights of minorities and indigenous peoples.* Lawyers acting for the State could argue that under these terms the constitution is only bound to protect and preserve the rights of hunter-gatherer forest societies and perhaps the Mbororo. While these groups have real interests in need of defence, such an approach could prove unrewarding if the rights of these peoples are set above a more widely presumed duty to protect and preserve the comparable interests of all citizens (see later).

3. *Protecting the rights of occupants.* As unrecognized non-owners, the State is bound to protect the interests of occupants on the public property of the State and may not dispossess persons of these interests of occupancy and use without compensation.<sup>103</sup> However as we have seen, such compensation is restricted to

103 Section 7 (1) of Ordinance No.74-2.

cleared land ('bare land'), crops, buildings and removal of enclosures or plantations, and any other type of land duly verified as developed.<sup>104</sup> It does not impact upon the loss of rights to customarily defined communal property.

4. *Honouring public interest.* As is normally the case, public interest is defined in the loosest of terms. This is not least in order to be able to incorporate private interests of indirect public benefit, as through taxable revenue, employment, or services resulting from private investment and development.

Public interest is most closely defined in Ordinance No.74-1 as the reason for which the State may expropriate private property. This includes for the purposes of 'public, economic or social utility, or indirectly at the request of local Councils, public establishments, and public service concessionaires, when no joint settlement between the bodies in question and the owners has been achieved' (Section 12 (2)).

The law also notes that as guardian of all lands, the State has the 'power to ensure rational use of land or in the imperative interest of defence of the economic policies of the nation' (Section 1(2)). Both reasons result in expropriation of private lands or appropriation of unregistered lands with at most payment of compensation for fixed infrastructure of developments – all in the public interest.

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#### **5. A more direct challenge to the law on the basis of interpretation could be attempted**

The logic of such a challenge would proceed on these lines, using arguments already well rehearsed in preceding chapters; that, in short:

- **Customary land rights survive**
  - That at no time in the history of Cameroon or in present law have customary land interests been legally denied as existing.
  - That no all-encompassing legislation has been enacted to extinguish customary land rights.
  - That outside the private registered land sector, customary ownership abundantly survives.

104 Section 7 (1) Law No.85/09.



– That past (albeit colonial) precedent exists in Cameroon for the formal acknowledgement of customarily held properties as a class of property, protected to an extent against appropriation (the failure of most communities to take up this opportunity is another matter).

- **Interpretation is at fault**

It could be argued that a major impediment is one of legal interpretation as to the composition of customary land interests, and that this may be remedied by a thoughtful modern government, not by changing the law but the way it is interpreted. Wrongful interpretation, undermining the proprietary underpinning of customary land interests may be explained as having arisen through the fact that:

– Customary land rights descend from the community, not the State; and

– Customary land rights are not held in ways familiar to introduced notions of property and upon which colonial land law was based; in terms of (a) patterns of acquisition and transaction; (b) fungibility; (c) patterns of owners provided for (less individuals than whole communities); (d) the sophisticated manner in which rights can be layered to distinguish between controlling and using rights; and (e) in the scope of land uses which the customary property right can encompass, including uses which purposely do not transform the land owned.

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- **Unsound modernization strategy**

‘It is not entirely the government’s fault’: in that the limitations thus placed upon customary land rights and the sustained existence of their properties is also due to international pressure to focus land-based development on individual ownership of resources, and for the purposes of farming. This stems especially from the rural modernization strategies advocated by the World Bank in the 1960s and which wrongly regarded communal land-holding as inimical to development.

The substance of international declaration and law can be used to illustrate the flawed understanding of customary land rights. The fact that other countries have seen fit to amend their national laws accordingly may be used to illustrate the outdated nature of interpretation.

- **The result has proven to be unfair loss of property (and thus natural capital) by the country's own citizens**

The core legal instruments which have been put to use are:

- That property only exists as and when it is so registered, including where the State declares its setting aside of lands to amount to registered entitlement.
- Registration proceeds only on the basis of effective occupation.
- Effective occupation is defined in ways which exclude important and sustainable land uses.

The result is that residual unregistered lands (most of the country land area) may be occupied and used but not protected as private property and is classified as national land, out of which the State may define (I) unalienable public properties (II) private property of the State and (III) grant these lands in absolute title to private persons or agencies.

Accordingly, the State has laid claim to over 11 million hectares of forest land, and a great deal of other land which is not forested, and most if not all of which is customarily owned. Particularly where the State establishes itself as private owner, dispossession formally occurs.

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- **The effects are injurious to human rights, good governance, and environmental sustainability**

The absence of legal respect for existing if unregistered customary property rights makes most rural citizens permissive squatters on their own land. This provides a disincentive for economic development of those resources and for protection of valuable biodiversity. Land and its resources in effect become public resources which may be removed from the customary owner's jurisdiction at any time.

Moreover, by making it incumbent upon an unregistered owner to develop his land in visible ways to secure a Land Certificate, the State places rational use as well as environmental protection at risk. In denying hunting, gathering and other purposively non-destructive use of forests, woodlands, rangelands and wetlands, as evidential occupation and use of land, this breaches the legal commitment to sound environment protection by encouraging forest and rangeland clearance, settlement and cultivation as the only basis upon which to secure tenure.

- **A more complex element of the above could be pursued concerning the survivability of customary property interests**

This rests upon the failure of the law to properly account for customary land interests as property interests, which means that it does not have the grounds to formally extinguish these.

The result is that legal query may be raised as to how far the issue of a Land Certificate extinguishes *customary* property interests. For example, at expropriation of an acknowledged existing private property, the law provides that this will result in the transfer of ownership as well as the existing land titles to the State or to any other public body that benefits from such a measure (Law No.85/09 of 1985, Section 4 (1)). This presumes that when the property was originally registered that customary interests were voluntarily extinguished or compensated and which may not have been the case.

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When private property is established out of public or national land and made the private property of the State, no Land Certificate is issued, nor presumably, registration undertaken. Instead, as in the case of creating a State Forest or Local Council Forest, the statutory instrument determining the boundaries and function of the forest shall also 'serve for the establishment of a Land Certificate for the State' (Law No.94-1, Section 25 (2)). Research is needed to determine how far the relevant statutory instruments which determine the boundaries and functions of the forest have in fact unambiguously extinguished customary property rights – or just customary land *uses*?

Additionally, given that the State is the people and any act it takes must be in the interests of the people, it may be argued that the nature of State private property is different from property held by citizens, and circumscribed by the necessity to serve the people and not damage their interests.

In two circumstances, therefore, a case may be made that customary property interests actively survive through failure to sufficiently formally extinguish these: first, in public and National Lands, and secondly, and less certainly, in respect of the private property of the State. In these circumstances it may be presumed that customary property interests have not been extinguished as such but are rather *suppressed*, subordinated through being overlaid with stronger ownership systems.

- **The economic arguments can be pursued**

Discussion above has focused upon the primary need to legally acknowledge

customary land rights as property interests. A fallback position is less ambitious. This looks to socio-economic security in not putting even occupancy and land use of rural citizens on a stable footing. This handicaps members of the rural community in that it renders their livelihood vulnerable and exploitable; the social, economic and cultural rights are always at risk. *This is so even if customary land rights are understood as no more than occupancy and use rights.*

On these grounds alone the law is unjust and needs reform. That is, for the purposes of social justice and sound development, respect for the primacy of tenure security is required.

## **v Is there practical remedy through using international law?<sup>105</sup>**

Historically, international law has been a predominantly negative force regarding customary land rights in Africa. During colonization, international law was used as tool to justify the dispossession of communities by the colonial States.<sup>106</sup> However, with the more recent development of international human rights, this has changed. By focusing on the rights of individuals and also communities, international law has become more supportive of the promotion and protection of communities rights, including to land. More practically, with the elaboration of several international and regional treaties promoting non-discrimination and property rights, international law may now be interpreted as supporting the rights of communities to have their customary land rights recognized by their governments. This is happening along three avenues: first under the universal human rights framework protecting all individuals, secondly under the more specialized field of protection for minorities and indigenous peoples, and thirdly under international environmental law.

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### **Universal Human Rights Law and Customary Land Rights**

Under the general universal framework, land rights are usually protected under the heading of property rights, such as routinely entered in National Constitutions; first in that property including land may be held individually or in

<sup>105</sup> My thanks to Jeremie Gilbert, lecturer in international law, who has substantially contributed to this section.

<sup>106</sup> This prominently occurred under The General Act of the Berlin Conference on West Africa, signed by representatives of 14 colonising powers on 26 February 1885. Although the subject of ownership was much debated, abuse was by omission in the law failing to acknowledge that African natives owned their land (Articles 34 & 35).

common, and second, that such rights may be encroached upon only in public interest and on payment of compensation. However, as often explored, and noted earlier in reference to Cameroon, land occupation and use has to be acknowledged as property in the first instance, and public interest has to be sufficiently circumscribed to not allow wilful expropriation for private rather than genuinely public cause.<sup>107</sup>

The human rights approach to the right to property may be interpreted to mean that people have a right to possess legal title to lands which they have traditionally occupied.<sup>108</sup> Arguably, the important focus on non-discrimination also supports the fact that governments should support customary land rights of both individuals and communities, since it would be discriminatory to recognize only 'formal' land rights. The rights to equality and non-discrimination are probably the most important rights under the whole international human rights edifice. As such the non-recognition of customary land rights could be seen as violating some of the most fundamental principles of human rights law.

150 Another important and internationally recognized right is the right to development. The UN Declaration on the Right to Development (1986) affirms the rights of people to participate in the development decisions that affect their lives. This means that when developments are taking place on their lands, the communities concerned should be consulted. More importantly, it also means that these communities should participate in land use zoning, property rights reforms, and other decisions regarding the management of the natural resources contained in these lands. Likewise, the rights of peoples not to be deprived of its own means of subsistence contain in Article 1 of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) is relevant since it implies that in no situation could a community be deprived of their means of subsistence. In the case of customary land rights this could be interpreted as meaning that the rural community cannot be denied access to their traditional sources of food, medicine or fuelwood.<sup>109</sup>

Cameroon has ratified no fewer than sixteen international treaties. Regarding customary land rights, the most pertinent are the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights and the International Convention on the Elimination of Racial Discrimination, which all

107 See Alden Wily & Mbaya, 2001 for coverage of this issue in twenty Sub-Saharan States and Alden Wily, 2009a for examples of legal text in new constitutions globally.

108 As noted for example by Lawlor & Huberman, D. 2009.

109 Brown et al., 2008.

deal with property rights and non-discrimination. Box 9 lists the most relevant norms.

**Box 9 – Relevant articles in key declarations, charters & conventions ratified by Cameroon**

*The Universal Declaration of Human Rights* (1948) declares that ‘Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property’ (Article 17).

*The African Charter on Human and Peoples’ Rights* (1981) states that ‘The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws’ (Article 14), and:

‘All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.’ (Article 21).

*The Convention on the Elimination of Racial Discrimination* (1965) defines racial discrimination as including discrimination based on ethnicity (Article 1) and confirms the right to own property alone as well as in association with others (Article 5).

*The International Covenant on Civil and Political Rights* (1966): ‘In no case may a people be deprived of its own means of subsistence.’ (Article 1.2)

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**Minority and Indigenous Peoples’ Rights**

Another aspect of international human rights law comes from the development of specific norms to protect minorities and indigenous peoples. While this part of international law is not relevant to all forest and rural communities, given the definition of minorities and indigenous peoples, these marginalized groups are able to call upon protection of their rights. International law has established a clear connection between the cultural rights of minorities and customary land rights. The Human Rights Committee has stated that ‘with regard to the exercise of the cultural rights protected under Article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated

with the use of land resources, especially in the case of indigenous peoples.<sup>110</sup> The law in this area deals more specifically with customary land rights since it has been recognized as an important factor for indigenous peoples. For example, the Committee on the Elimination of Racial Discrimination which is in charge of monitoring the implementation of the Convention on the Elimination of Racial Discrimination highlighted in its General Recommendation XXIII that States should 'recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources', and additionally urged restitution and/or compensation. The view of the Committee is that the non-recognition of customary land rights would equate to a discriminatory practice on the part of the government.

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The International Labour Organization's Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) outlines the special rights of such peoples regarding activity on their customary lands. More precisely, Article 14 states that 'the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. ... Governments shall take steps as necessary to identify the lands, which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.' While Cameroon has not yet ratified this convention, the recently adopted Declaration on the Rights of Indigenous Peoples (2007) adopts a similar or even stronger language. Cameroon voted in favour of the adoption of the declaration, which is by far the most explicit as to collective property rights.<sup>111</sup> The Declaration notably states: 'Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned' (Article 26).

At the regional level, the African Commission on Human and Peoples' Rights is increasingly calling upon States to pay specific attention to the customary land rights of their indigenous populations. This is notably visible through the establishment of a specific working group on indigenous peoples/communities, which has highlighted the importance of recognizing and also promoting customary

110 Human Rights Committee (1994), General Comment No.23: The Rights of Minorities (Art. 27), UN Doc. CCPR/C/21/Rev.1/Add.5.

111 Articles 8, 26, 27, 28, 29 and 32. Cameroon voted positively in both the Human Rights Council and at the General Assembly. Few countries did not.



interests. Importantly, in a recent decision against Kenya, the Commission has clearly stated that government should respect the customary land rights of indigenous communities, and that non-recognition of such customary land rights would be a violation of Article 14 protecting property rights.<sup>112</sup> As this is the first explicit legal decision on customary land rights for indigenous peoples, this could have important consequences for the region, and for Cameroon. Another precedent case from the Commission directly concerned Cameroon. This followed a complaint lodged by the Bakweri people in respect of customary land which Cameroon's government has alienated. As outlined in Box 10, the commission finally recommended that the Bakweri and the government enjoin mediation to help them come to amicable agreement.<sup>113</sup>

#### **Box 10 – The Bakweri land case**

In September 2002 the Bakweri Land Claims Committee (BLCC) filed a complaint with the African Human and Peoples' Rights Commission under the terms of the African Charter to which Cameroon is signatory. Specifically, they recalled Articles 55, 56 and 58 on property. The case concerns 104,000 ha of traditional Bakweri tribal land in the Fako Division, turned partly into plantations. Originally this was alienated by the German colony. In the 1940s the British bought the land back, declaring it to be Native Lands held in trust by the governor of the mandated territory. The British Administration then leased the land to the Cameroon Development Corporation (CDC) until such time as the Bakweri would be competent to manage the plantations themselves. Notably, CDC was supposed to pay rent to the local Councils of the Fako Division, an important point for the Bakweri, confirming them as the owners.

At independence, the Cameroonian government took over the CDC and thereby the trusteeship. In the early 1990s the government decided to privatize the estate and enacted a law to do so (Decree 94/125) but without commitment to pay compensation. Although not dependent directly on the plantations other than through employment, the principle of concern to Bakweri is wrongful disposal of their land and without compensation. They formed a Bakweri Claims Committee and submitted complaints and court cases, which always failed. Finally in 2002 the committee submitted their claim to the African Commission. The defence of the government was that

112 See: Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Communication 276/2003 (2010).

113 The Bakweri Land Claims Committee (BLCC) vs the Republic of Cameroon (Case No.260/2002), African Commission on Human and Peoples' Rights.

(i) the BLCC did not represent the Bakweri, (ii) the case was unclear; (iii) the case was insulting to Cameroon's judiciary; (iv) the case had already been addressed by a sub-commission of the UN; (v) the BLCC had not exhausted all local remedies; and (vi) the Charter Articles 55, 56 and 58 gave no grounds for Bakweri to be considered owners of the land.

In 2006 the commission found against Cameroon's government on almost all counts but fell short of demanding remedy. Instead, it referred the matter to mediation as the next phase and recommended that the government and the BLCC settle the matter amicably. At the same time its findings observed that the BLCC had presented a strong historical claim and had also presented compelling evidence with respect to the lack of independence of the judiciary. The commission's findings were only published in 2009, following endorsement by the African Union.

*Sources: Tande, 2006, Ndienla, 2009, Nuesiri (undated)*

### **International Environmental Law**

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While international environmental law does not deal per se with land rights, the Convention on Biological Diversity (CBD) is nonetheless relevant since it formally provides binding provisions to protecting the customary use of resources in accordance with traditional cultural practices (Article 10 (c)). The CBD was ratified by Cameroon in 2004. Since Cameroon ratified the convention, there have been nine meetings of the signatory nations (Conferences of the Parties, or COP). Each has delivered multiple decisions. COP7 and COP9 have in particular provided useful decisions.

At a more regional level, the African Convention on the Conservation of Nature and Natural Resources is relevant, whose major objective is 'to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour' (preamble) and which is intended 'to preserve the traditional rights and property of local communities and request the prior consent of the communities concerned in respect of all that concerns their access to and use of traditional knowledge'.

### **The main impact of international law: a benchmark for minimum standards**

A major constraint in using international law is its enforceability. Although some new national constitutions provide for international texts to be adopted directly

into national law upon ratification, in most cases this requires specific legislation to make their terms binding. Although referred to as international law, protocols, covenants, charters and declarations are in themselves advisory. Accordingly, countries are ‘encouraged’, ‘invited’, and ‘urged’ to adopt their terms.

This is also the case with the decisions of the African Human and Peoples’ Rights Commission. It is up to national governments to act or not act upon its recommendations. As the Bakweri found, Cameroon chose not to, and as we have seen early, does not have sufficiently robust land law on such matters to be forced to do so in the local courts. The response in Kenya should be different, but largely on the basis of reformed policy and (currently draft) constitutional law, which provides directly for not only indigenous peoples like the Enderois, the subject of the case, but for all customary landholders to be directly acknowledged as community land owners where their rights are not converted into statutory tenure.<sup>114</sup> In general, there is little chance of a successful ruling in favour of communities unless clear supporting provisions are identified in the national law. Several famous cases of restitution in South Africa, for example, have enjoyed success simply because of the clear constitutional and land law commitment to restitution.<sup>115</sup>

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Theoretically more enforceable would be decisions of the African Human Rights Court in Tanzania. In practice, its performance has been weak, with not a single decision issued since its establishment in 1998, and only two or three cases on its books at this time. There is some indication that a longstanding case relating to the failure to pay compensation to evictees in Lagos, in accordance with Nigerian land law, may make its way to the Court, should inaction continue.<sup>116</sup> Cameroon is not however party to the Court’s jurisdiction.

There are other limitations which rural communities seeking redress through international law would need to consider. In practice complainants need strong backing in a technical and material sense. It is difficult for a poor community to make a claim on its own behalf and follow it through. This is well illustrated in the small number of claims lodged with national courts, such as in Botswana and South Africa, both in respect of San hunter-gatherer claims, and where

114 Refer Alden Wily, 2009b.

115 Most notably the Judgement of 14 October 2003 deciding on the ownership of a vast land area known as the Richtersveld (Case CCT19/03 in the Constitutional Court of South Africa, Alexkor Limited vs The Richtersveld Community and Others.

116 Peel and Burgis, reporting in the Financial Times, 17 September 2009.

dependence upon well-heeled INGOs was key.<sup>117</sup> Cases also take a great deal of time to pursue. In the interim, the Cameroonian government, for example, carried through the sale of the subject plantations claimed by the Bakweri, finally extinguishing their land rights. It has taken the Enderois forty years to secure more than local support for their cause. Even should a ruling be favourable to communities in Cameroon, legal upkeep of customary interests in the land law is such that no single article can be used to force change, or even to force the State to acknowledge that a fair grievance exists.

Cameroonian communities also do not have an advantage in that national courts may be forced to take account of precedents established by decisions on the same subject in other countries, a tactic used by those members of the Commonwealth, which share common law as a source of decisions. If this were so, then claimants could draw substantively on important historical rulings as to the nature of customary land interests in Nigeria (1921) and a critical ruling of the High Court in Tanzania in 1994, on the same subject,<sup>118</sup> quite aside from rulings on the subject which have emanated on almost precisely the same issues with regard to indigenous peoples/customary land rights of Canada, Australia, New Zealand and Belize. Cameroon has no such inter-state relationship to draw support from, or to be rebuked and challenged by.

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Finally, there are limitations in the focus of international law to date. As will be clear from the preceding account, the clearest and most useful text relating to customary land rights has been developed in respect of minorities and indigenous peoples. As long as Africans as a whole are not deemed to fall into this category, or to self-declare themselves as such, there remains a certain awkwardness in bringing customary interests in general to the attention of courts and commissions through this route.

Despite these drawbacks, international law is of increasing public note and relevance to customary land rights concerns and can be expected to evolve substantially on these matters in the coming years. In the meantime its content on a range of fronts serves as an important indicator of the minimum legal standards, which Cameroon should be adopting in its national legislation.

117 Such as the several important cases concerning San land rights in both Botswana and South Africa, the former addressing the right of Gwikwe San to return to their homeland, the Central Kalahari Game Reserve after being forced to leave following termination of water and other services, the latter addressing restitution, and both rising through national courts.

118 Reference is made here to the 1921 Privy Council Ruling *Amodu Tijani v The Secretary, Southern Provinces, Nigeria*, and Court of Appeal of Tanzania at Dar es Salaam, reported in 1995 2 LRC 399, re *Lohay Akonaay and Another vs The Hon. Attorney General, High Court of Tanzania at Arusha Misc. Civil Case No.1 of 1993* (details in Alden Wily, forthcoming (a)).

From this perspective, international law acts as a benchmark to what Cameroon should be aiming at in reforming its land law norms. Going below the threshold established by international treaties (which Cameroon has voluntarily ratified) would be a violation of the standards recognized by all the other States. For those Cameroonian officials who claim that customary land interests cannot possibly amount to property rights, international law may be used to show how this is an outdated and illegal position.

## **VI What practical steps are needed?**

### **1 Anchor concept and practice in a domain-centred approach**

This follows logically from the above. To recap, these basic positions have run through this paper, namely:

1. Customary rights not only continue to be exercised but are much more than rights of access and use to resources; especially at community level, they represent significant proprietary and controlling rights, due respect as a form of private property.
2. Achievement of development soundness, sustainable resource management, and justice require that citizens and their advocates cease restricting their demands to acknowledgement of customary use rights to lands which the State has chosen to declare as its own; to do so reinforces an untenable situation in which the majority of citizens lack tenure security, and despite the longevity of their possession, occupation and use. This is contraindicated for sustainable agrarian society and its development.
3. As community-derived and sustained rights, customary tenure in Cameroon operates within bounded socio-spatial spheres, or what has been referred to as domains or community land areas. Building upon this foundation is logical.

Implicit in the above is that communities are self-identifying and that each has a notion of 'our land' or 'our area,' around which boundaries may be defined. This does not exclude the fact that some of these boundaries are contested. (Boundaries by their nature endure periodic challenge, even at the best of times.) Nor does it preclude the reality that some boundaries are so remote from settlements and current main areas of usage that they are vaguely defined, particularly in forested areas: and that overlaps regarding domains exist in places.

Nor does the notion of *territorial boundedness of a community land area* neces-

sarily say a great deal about the pattern or particular property (let alone use rights) within the domain. In the typical modern village of today, there are almost always parcels within which are recognized as effectively the private property of one family or another.

Nor, finally, does the idea of community land area prescribe the composition of the community, ethnically or in terms of land uses pursued. Depending on how it wishes to define itself, it may exist as a single village or a cluster of villages, and these in turn may operate different systems of land use and be ethnically homogenous or mixed. Access rights to the domains of other communities may also apply, ranging from seasonal access rights enjoyed by nomadic pastoralists in certain defined and annually used areas, to reciprocal rights of neighbouring communities to their respective land areas for specific purposes.

This paper has also outlined how rights fall into different bundles, broadly divisible by rights of possession and controlling authority (in effect, ownership) to secondary access and use rights. These distinctions are advisedly retained as distinct in process of rights identification, and rights management.

158 These presumptions are not casually made. For experience globally shows us that not only do such local socio-spatial formations fairly uniformly exist in agrarian situations, they are the necessary foundation for bringing customary land rights into statutory recognition. That is, it is nearly impossible to recognize customary rights without defining the community aegis from which they stem, and the territorial limits of that jurisdiction. It is not for nothing that customary rights are described as community based interests.

A distinct matter to be tackled is whether decision-making as to tenure matters is usefully vested in traditional authorities or in other more democratic institutions at the local level. In theory chiefs only maintain position and authority today for as long as the community complies with that convenience, upholding their position. In practice, those upholding the chief can even be a small but powerful minority which uses the institution to support their own interests. Alternatively, where several ethnicities or sectors are involved (such as between immigrants and indigenes, or Bantu and non-Bantu in the case of Cameroon), the chief may be speaking and acting for only one sector. In practice, community-based land reformism takes these issues into account in the process of restructuring the rules and procedures around land rights identification and securitisation.<sup>119</sup>

119 Malawi, South Africa, Benin and Tanzania reforms are good examples; Alden Wily forthcoming (b).

A domain-centred approach is therefore desirably at the centre of any legal and implementation process affecting customary land rights. Becoming knowledgeable about the typical and exceptional arrangements of the domain is necessary to appropriate structuring of constructions and procedures.

**2. The certification of community land domains represents the obvious first-line action to secure customary rights**

This means conceiving of rural Cameroon as principally a mosaic of discrete community land areas, and which need systematic identification over time. How many of these areas contain parcels of registered land which may be seen as thereby *alienated* from the community domain, is not yet known.

Practically speaking, a normal first task at implementation following legal support for customary rights as real property is to systematically guide communities to determine the outer limits of their respective domains (boundaries). The larger the area, the more organization this takes. The process itself needs internal consultation and agreement, as well as negotiated agreement with neighbouring communities. The result is demarcation of the boundary if necessary, and simple mapping and description. Many practical guidelines have been developed for comparable processes, which are available for Liberia, Mozambique, Tanzania and Sudan, and are under development in Uganda. Broadly these share these common stages:

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1. establishing a lead land committee to be responsible for the process which may or may not evolve into a more permanent community land administration authority);
2. defining the outer boundary of the domain with neighbours;
3. subsequent registration of this at local government levels;
4. simple zoning within the domain, principally to identify areas agreed will not be subject to individual or family tenure; forests and pastures are usually so included;
5. formalization of rules and systems for the occupation, use and development of the domain or its sub-parts; including creation of a more permanent and accountable land committee, adequately reflecting decision-making processes within a given community, and taking account marginalized groups into account;



6. establishment of a simple Community Land Register, in which to record decisions, allocations, transfers etc., and
7. generally at a later date, issue of entitlements in accordance with whatever legal constructs have been entrenched in law.

Each of the above needs to be guided, and step-by-step procedures laid out, the most important of which may be established as legally required.

A founding decision is whether the registration of the domain carries with it entrenchment of communal ownership of the area, or is restricted to mean only the area over which that community has land jurisdiction; that is, whether the community is being registered as the legal land authority of that described domain, or the owner of the property, or both. Logic suggests that it should carry both.<sup>120</sup>

### **3. Developing the institutional basis for customary land administration**

The corollary to recognizing customary land interests as property rights has been noted several times in the need to legally recognize and support development of locally based land administration.

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How formal this should be, and how far customary procedures need reform, will vary. Generally, new land laws take the opportunity to lay down parameters to ensure inclusion in decision-making and equity in rights between men and women and other sub-sets of society. Empowerment of the right to govern local land relations is imperative. As shown in Chapter 4, legal reform risks being hollow without governance changes at local level such as in the form of village or village cluster governments, under which to nest, organize, and manage altered rural land ownership paradigms.

### **4. Furtherance of local government development is central to rural land reform**

Sooner or later, modern rural land reform requires supporting institutional

<sup>120</sup> It might be observed here that this represents a development upon an opportunity which was provided under colonial law if in a weak manner; the 1930s and 1950s laws (and even early German intentions) afforded communities the right to define their respective domains, with the implicit assumption that customary law (community based rules and systems for ensuring adherence) would operate. What is being suggested here takes this to a new level in respects of resulting tenure, equivalency with property rights and protection and formalization of community-based land administration.

development at the sub-district, district or commune level, to support, promote and invigilate community-level governance of land, resources (and usually other matters, as community entities are steadily empowered). In the case of Cameroon, a foundation for this already exists in the formation of local Rural Councils and their empowerment as elected bodies. Given the inherent marginalization of indigenous peoples in this context, care needs to be taken to ensure a much more inclusive approach. Women also constitute a group whose representation needs to be positively engineered.

### **5. An iterative learning by doing approach is invaluable**

This means more than information-gathering or consultation. It means involving at least a sample range of communities in the formulation of workable constructs and procedures. This is essential, as imposition of procedures that are alien to communities' internal decision-making structures may cause conflict. Experience with land reform shows this greatly enriches the formulation of law and application norms. Community forestry in Cameroon proves the case in point; as progress gets under way, new needs must be met. Testing new land paradigms, before they are entrenched in law, optimizes the chances of success.

Local involvement in developing paradigms also has the advantage of assisting those communities to concretely conceptualize, articulate and work through viable changes. Although lacking in legal force, it is helpful if reformers and advocates help pilot communities to test and develop the process of defining and agreeing the perimeter boundaries of domains they share with other groups, and unpacking the complexities of rights affecting the domain. Ideally, this becomes an early working project.

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Such exercises should from the outset work in non-forested as well as forest areas where pastoral and cultivator interests conflict. Examination is also due in respect of already granted or upcoming leases of customarily owned areas to foreign governments and/or their associated companies for the purposes of food or biofuel production. This represents a potential new cause of loss of customary estate outside the Permanent Forest Estate. Exactly whose lands are affected needs identification and the building-up of cases studies; in due course it may even prove possible for wrongful leases to be revoked.

Working with officials and politicians remains an equally important part of advocacy work, in this matter as in any other. Partly this can be obtained through involving such persons in local exercises as above. Partly it requires exposure to information and real cases where community tenure has not resulted in the demise of governments, their powers to regulate, or conservation failure, are

worth investing in. This can take the form of study tours, particularly to Franco-phone States, supplemented by bringing information to Cameroon in palatable form (briefs).

## **VII How may the forest sector contribute to tenure reform?**

The forest sector is in the process of reviewing its policy and procedures, providing an environment in which new ideas of forest tenure may get a better hearing than in the past.

There remains a tendency in the sector to declare its hands tied in respect of forest tenure, land law taking precedence. While technically this is correct, there have been occasions where shifts in forest policy and law have directly helped to shape and democratize rural land policy and law. Within Africa, this has been seen in Benin and Cote d'Ivoire, Ethiopia, Tanzania, Madagascar, Malawi and Mozambique, and in process in Liberia, given the new Community Forest Land Rights Law of 2009.<sup>121</sup> As shown earlier, Cameroonian Forest Law has made too much use of unsound land law norms, and this should be remedied.

162 To recap, land law did *not* require Forest Law to declare the Permanent Forest Estate its own private property, irrespective of precedent. On the contrary, the mid-1990s were a period when this kind of norm was coming under scrutiny elsewhere. Nor has Forest Law been *required* by land law to deny rural communities recognition of their ownership of forestlands outside the Permanent Forest Estate. The non-tenure based paradigm of Community Forestry adopted by Cameroon in the late 1990s by-passed development of tenure-based models emerging elsewhere on the continent, most notably at the time in the Gambia, Tanzania and Mozambique. This was despite much discussion on this subject at FAO-hosted Community Forestry conferences in 1999 and 2002. With hindsight, it is apparent that Cameroon representatives did not enjoy the encouragement and exposure to new paradigms, which perhaps better-informed international programme advisers should have been able to provide.

With the passing of time, however, the Community Forestry sector is well entrenched: and despite periodic setbacks, government is able to see positive results. Still, even up until the end of 2008, there was little sign of openness to reconsideration of tenure paradigms, if the useful but limited scope of modifications made to the Community Forestry guidelines are an indicator. Shifts have begun to be detected in informally noted meetings among interested agencies

121 Larson, Barry, Dahal & Pierce Colfer, 2010 give examples from other continents.

and officialdom. How far this transpires to be openness to structural changes affecting forest tenure remains to be seen. Nonetheless, 2010 is the time to lay down the possibilities in the form of concrete ways forward.

To this end, outlined below are some desirable primary objectives and the paths through which they could begin to be explored.

### **Targets for forest tenure advocacy and practical action**

#### **1. Recognizing communities as legal entities in their own right**

The forestry sector is the front-line sector, which can practically address this through its Community Forestry provisions. While revisions to requirements in the Community Forests Manual have been made, these stop well short of simply saying that a community can be directly recognized for the purposes of creating a Community Forest as a legal person.

Simple procedural requirements towards this, along with accountability measures, can be easily developed and adopted. The agreement signed between the Forestry Ministry and the community is a contract: and in contract law, properly constructed agreements are binding.

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#### **2. Providing for communities to be owners of best practice Community Forests**

An obvious first route is to encourage the Ministry of Forestry and Wildlife to give to communities which are successfully managing Community Forests the opportunity to apply for these areas to be granted to them. The route for this is the capacity of the State to grant land to communities among others for social or development purposes, as earlier described. It will be recalled that grants are for initially a trial five-year period, followed by potential grant in absolute possession and registration accordingly. Conditions relating to sustainable conservation and productive use may be attached to the entitlement, also subject to periodic review. In light of the fact that the community will have already demonstrated useful purpose for five or more years, this temporary allocation could even be waived.

Disadvantages in using this route were commented upon earlier, but it remains the best option until the law is changed. Two other disadvantages are that (I) tenure is secured over a likely minor part of the community land area, and (II) the legal owner will be an existing legal entity such as an Association, Cooperative, Common Initiative Group, or Economic Initiative Group; this may not fit

accurately with the composition of the community itself. Where this is shown to be so, then adjustments in the constitutions of those bodies as to accountability to the full community body would be required as part of the preparation procedure.

First tests cases would logically be those Community Forests where the entire community is significantly involved in the initiative. It may also be useful to begin with Community Forests which have been created for forest conservation rather than commercial extractive production, as such cases are likely to involve a greater proportion of the community and with less tension between commercial and other users.

### **3. Providing directly for community-based resource management in the non-Permanent Forest Estate**

The objective here is to directly enable rural communities to identify all forested land within their 'community land areas' and to advance simply zoning and regulation over all its parts. This may be accomplished through simple zoning, such as by dividing the forested land into 'Farm Expansion Zones' (where logging may take place as a preliminary measure to cultivation); Forest Production Zones (where sustainable logging is to be practiced) and Forest Protection Zones (where no timber extraction is to be permitted). Rules for each can be prepared.

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The spatial framework for such simple land use planning and management is definition of the outer boundary of the 'community land area'. This work would logically build upon procedures which have been recommended earlier as tested and developed in a range of rural lands, irrespective of whether these are forested or not. Key to this would be the recognition of all communities as communities in their own right. This may appear simple, but in fact, where, for example, 'Pygmy' communities are subsumed within a relationship of subordination within other communities, it becomes essential to ensure they are not subsumed within a broader reform that may marginalize them further.

Key requirements in this approach are:

1. for the community as a social entity to be self-defined by fully inclusive procedures, and to be inscribed as existing by participant witnessed confirmation (Document of Community Identity);
2. for the limitations of the 'community land area' to be similarly inscribed (Document of Community Land Area, a preliminary to registration, not immediately pursued at this point (see below));

3. that the community establishes a Forest Management Committee which is structured rigorously for inclusive representation, and favours representation by groups which have a major livelihood interest in forest use (e.g. ‘Pygmies’);
4. ensuring that any structures established for decision making follow existing community norms so they are more likely to function and not to cause conflict;
5. ensuring that Community Forestry Rules are developed on the basis of laid down procedures, and, pending approval by the Ministry of Forests and Wildlife, to be accepted as the governing Regulations for the named Community Forests area.

The echoes with existing procedure towards creating Community Forests will be immediately noted. The same skills will come into play. The approach differs in four main ways:

- it embraces the *entire* community land area and community in its sights, providing a more stable framework for sustainable forest planning;
- it creates a *community-wide management regime from the outset*, not restricted to an interest group;
- it helps bring *all forest resources in the locality* under conscious forward planning and regulation, not just the 5000 hectares which are earmarked because of their commercial potential; and
- it provides a logical foundation for testing, and in due course entrenching, the durability of the community and the definition of the ‘community land area’ as the registrable domain of the community. Moreover, this testing is being accomplished by the community being required to exercise resource governance. This in itself will do much to define and entrench community identity and workability as a governance unit; or, as the case may be, reveal such faults in its construction as should then be adjusted.

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There are no losers in this approach. Government gains a low-cost mechanism for bringing more forest under active, citizen-based management. Citizens gain through enhanced tenure security.

#### **4. Doing away with the outdated idea that hunting and gathering is not a land use**

As outlined in Chapter 2, the Forest and Wildlife Law gives with one hand

and takes with the other in the matter of subsistence hunting and gathering. Its practice is guaranteed in principle, and is subject to potentially draconian limitation. Some progress has reportedly been made in recent years to lift some of the pressure upon hunter-gatherer communities in this regard, at least in respect of one or two reserved areas. This should continue to be pursued.

However, this is not the main focus of the proposed intervention. The objective is rather to endow hunting and gathering with equivalent status as *mise en valeur*, or effective occupation and use of land. Failure to do so has roots in the inability of colonial masters to comprehend that just because a land use does not destroy or transform the land into a visible alternative use, it does not mean that the land and its resources are not being used; in fact they are, and in fully sustainable ways. There are therefore no environmental grounds for continuing to deny secure rights to these lands. Moreover, it is blatantly discriminatory in favour of cultivator communities, by allowing only those groups the opportunity to secure (at least primary) areas of land use as owned estate.

166 If State lawyers need a precedent for acknowledging hunting and gathering as a lawful land use, then they may see it in the fact that several hunter-gatherer groups in Tanzania have secured their own (substantial) 'village land areas' on this basis, or that many tens of millions of hectares have been awarded to hunter-gathering communities in the Amazon Basin, by no fewer than four governments. Nor do Mozambican communities claim land areas on the basis of farmland only. Mozambican law accepts that cultivation is just one form of land use.

Nor can the modern Cameroonian State continue to claim that those who hunt and gather are also homeless. True, their homes are often poor shacks, and given their mobility within territorial bounds, often impermanent. Intelligent officials do not need international law to point out the discrimination against the poor implied.

The forest and wildlife sector has a direct role in making change real on the ground. In doing so it will open the door to amendment in the offending provisions of the 1974 land law, as defining 'effective occupation' upon which basis entitlements may be issued.

a. *First*, the sector can pursue much more actively an opportunity which already exists in enabling a Community Forest to be set aside for conservation rather than commercially extractive purposes. Several such cases exist but it is unknown here whether these are Community Forests created on the basis of hunting and gathering or by hunter-gather groups. Such Community Forests would fall under interventions suggested under points 2 and 3 above,



and in the latter case, able to be much larger than the currently restrictive 5000 hectares.

b. *Second*, there is equally no reason why the State cannot create a Protected State Forest precisely for the purpose of achieving conservation through limiting access and use to traditional hunting and gathering (but see later).

c. *Third*, the Ministry for Forestry and Wildlife needs to take much more seriously its constitutional obligation to protect and honour the rights of minorities and indigenous peoples, by systematically reconsidering on a case by case basis, limitations which have been placed upon traditional hunting and gathering in any of the existing State Forests.

## 5. Democratize forest governance

Cameroon's forestry law does not come out well in a comparison of its provisions for popular participation in national and local decision making with other modern Forest Laws on the continent.<sup>122</sup> As described earlier, participation is promised, but delivered as consultation. An important exception now exists in the right given to communities to know about proposed issue of sales of standing volume in their localities and the opportunity to pre-empt such sales by creating their own enterprises under the aegis of Community Forests. This represents a good start to build on.

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While all decisions which have direct bearing upon citizen forest tenure and use rights *should* be subject to free, prior and informed consent, a start may be made by adopting more genuinely participatory processes in policy-making and implementation actions of consequence to communities.

First-line targets must be zoning associated with the Permanent Forest Estate, and creating new State Forests. At the minimum, communities need to be afforded a right of appeal, and to hear directly from the minister the grounds upon which their appeal has been rejected. Participation in decisions around how concessionaires (those holding a Forest Management Unit) operate also needs significantly upgrading, ranging from full and prior disclosure of draft contracts, and introduction of legal requirement that affected communities have the oppor-

122 See Table 1.5 in Alden Wily & Mbaya, 2001, Alden Wily, 2002b in FAO, 2003, Kohler & Schmithusen, 2004, Textier et al., 2000. As a whole, Southern and Eastern African Forest Laws make public and community participation in major policy changes legally obligatory and in making Ministers in charge of forests much more directly accountable to communities, including having to go to the area himself to inform them of developments which affect their interests. See Alden Wily, 2000 and 2001b for details.

tunity to present benefit-sharing and development assistance proposals with a view to these being made part of the contract agreements.

These are modest beginnings to an eventual scenario in which communities are able to be equitable shareholders in any commercial activities on their land, or empowered to lease the lands in the first instance.

## **6. Reassessing the need for the State to own the Permanent Forest Estate**

This and the following related recommended early point of action present the greatest challenge to the status quo in the forestry sector, and progress towards them cannot be expected to be swift.

This concerns the need for government to restore the Permanent Forest Estate (i.e. State Forests and Local Forests) to national public land status, and then to register community ownership, the latter evolving in an incremental, case-by-case basis. Legal, developmental and environmental protection arguments why the status quo has little merit need to be formulated. Examples are given below.

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a. A first line of remedy can be to show how even within the terms of constitutional and land law, government has been over-hasty in defining the area as wholesale the private property of the State. Customary rights are acknowledged as existing. There is clearly great doubt as to how these were properly accounted for at extinction in the case of State Forests. Simply proclaiming customary rights to be cancelled is a weak defence in modern times.

b. On the basis of constitutional declamation of support for indigenous peoples the Forest Law has failed to protect these interests as is its constitutional duty. Failure to understand the composition of indigenous/customary land rights lies with the State, not land-holders, and is in any event erratically demonstrated; as shown in Chapters 2 and 4, there are inconsistencies in how far customary rights are considered to be no more than occupation and use rights, or property rights, eligible as registrable real property.

The position must be taken here that 'indigenous peoples' is meant to include all Africans in Cameroon who are indigenous to the area. Although this may not have been the intention of the drafters of the Preamble, such interpretation is due. The alternative is that the land rights of only minorities are protected, a blatant abuse of human rights.

c. The case may also be made that in declaring Permanent Forest Estate as

private State property, the administration has abused public purpose as laid out in the land law.

d. Meanwhile the lawfulness and therefore effect of its declaration are in question from a compensatory standpoint. Has every household which has lost fixed assets in the appropriation of their resources been compensated?

e. The methodology of defining the Permanent Forest Estate may also be challenged on grounds of defeating the constitutional commitment to *democratic* governance (procedure).

f. Finally, elision of zoning for protection and dispossession is unnecessary and must be challenged. Forests do not have to become state property in order to be kept intact. Taking forests away from citizens and yet asking them to protect the forest is an invitation to degradation. Denying and failing to support local guardianship, let alone failing to provide for explicit legal recognition of ownership may also be demonstrated as time and time again the perfect route to open access tragedies. There is simply no incentive for communities to watch out for the sustenance of resources which have been taken out of their hands. It also takes away from the State the opportunity to use and develop ordinary citizens to become front-line conservators and managers, and at minimal cost to the State.

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A range of concrete provisions for amendment could be disseminated and pursued, with both ideal and compromise clauses.

It should also be recalled that repeal of the classification of the Permanent Forest Estate as the private property of the State, returning it to national land status, does not require a change in the land law. Forest law itself can do this.

A compromise provision could provide for removal of State ownership of the Permanent Forest Estate through incremental registration of community land areas as the collective domains of communities.

As shown earlier, the State does have in its power the right to grant lands from the national estate and from its current own private property, 'for purposes of public, economic and social utility'. The main legal requirement for this is for the applicant to produce a development plan. It is not specified how the applicant must develop the land beyond contributing to public purpose. Conservation and sustainable use towards conserving a highly valuable resource is a valuable public purpose quite aside from its social and economic utility for purposes of poverty alleviation. It will also be recalled that the law is explicit that a community may

be among those applying for land for a public purpose and notably even 'be incorporated in the private property .... of the community'.

## **7. Improving the procedure for industrial concessions**

Significant change depends upon achieving the above, in altering the tenure status of State Forests.

There is plenty of improved practice upon which to build; as observed earlier the most valuable forest resources in both Ghana and Liberia are owned by communities and the State has been forced to devise mechanisms through which this is respected, while enabling it to direct industrial and commercial utilization. In Liberia in particular, movement towards this is still on trial, under the aegis of the new Community Forest Land Rights Law, 2009. It will take a year or so for all parties to remain comfortable with and properly adherent to the terms of the new law. In the case of Ghana, the Forestry Authority tends to avoid the issue by making itself sole controller of exploitation, albeit in consultation with owner communities, and with precise legal requirement as to how revenue is shared with the customary owners. Rental payment to community owners is in both cases obligatory.

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The outstanding procedural question is whether a community owner is legally enabled to rent or lease out its forest area autonomously and/or issue significant commercial extraction permits (e.g. as in Tanzania and South Africa) or whether these functions are specifically reserved to the Forest Authority, acting on its behalf. A third possibility is that a tripartite model is formulated, involving the community as lessor, the State as manager of the contract, and the logger as lessee. Worldwide, Mexico is most advanced in developing workable paradigms between commercial and local owner interests. More widely, such as in Europe, the State is content for almost all forest assets to be locally owned, to regulate utilization, and to secure its own revenue through due taxation on profits.

Set in this context diversion of a share of revenue to local Rural Councils and especially to affected local communities, as provided for in Cameroonian law, is an improvement on the past, but still a pale version of what should be expected of a modern democratic State.

Social contracts between communities and logging enterprise are an even paler version of benefit-sharing, as the blunt end of buying local acquiescence. This is not to say that social contracts do not have a role, especially when benefits do reach the community and are equitably distributed (evidently not yet signifi-

cantly the case in Cameroon). However, without being built upon or built into sound rental agreements for the land which is being logged, will never be really more than a way to limit pressure for change.

Nonetheless, promoting social contracts as a way of contributing to change in the status for forest ownership has value in the immediate future in Cameroon. Marked improvement can be achieved where a legally binding contract is drawn up between community and the enterprise. These matters should be bound to be covered, to be negotiated and agreed by the two parties with the Ministry of Forestry and Wildlife as mediating counsel: employment, safety protection, contribution to infrastructure and social services in the area, access rights to fallen or abandoned timber, poles and other wood products, non-timber products in the forest area, hunting rights, protection of sacred areas and reservation against felling traditionally sacred tree species; along with arrangements for how disputes will be addressed, cash donations expended and accounted for, and compensation for accidents, and interference in defined areas of habitation and local land use, paid.

There is no reason why concerned agencies could not begin advocacy for such changes by providing the Ministry of Forests and Wildlife with sample draft regulation and agreements to ponder.

Whose land is it?

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## Annex A – Relevant text of selected land legislation

### The Constitution (1996, in force from 2001)<sup>123</sup>

In the Preamble, the Constitution recognises that ‘The human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights’ and affirms Cameroon’s ‘attachment to –

- the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations, The African Charter on Human and People’s Rights and all duly ratified International Conventions relating thereto...

The Constitution (Preamble) in particular expresses its attachment to these principles of relevance –

- All persons shall have equal rights and obligations. The State shall provide all its citizens with the conditions necessary for their development;
- The State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law; ...
- Every person shall have the right to settle in any place and to move about freely, subject of the statutory provisions concerning public law and order, security and tranquillity; ...
- Ownership shall mean the right guaranteed every person by law to use, enjoy and dispose of property. No person shall be deprived thereof, save for public purposes and subject to the payment of compensation under conditions determined by law;
- The right of ownership may not be exercised in violation of the public interest or in such a way as to be prejudicial to the security, freedom, existence or property of other persons...? (Preamble).

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The Constitution declares that the State shall –

- ‘... recognize and protect traditional values that conform to democratic principles, human rights and the law’ (Article 1.2).

And while the Constitution vests power over ‘land tenure, State lands and mining and natural resources’ in Parliament (Article 26 (d)).

Article 56 provides that ‘The State shall transfer to Regions, under conditions laid down by law, jurisdiction in areas necessary for their economic, social, health, educational, and cultural and sports development.

123 Since independence, the country has had in effect three Constitutions and a number of amendments. The first Constitution marked the independence of French Cameroun on 1st January 1960. The unification of British and French administered Cameroun provided a Federal Republic with a new Constitution on 2nd June 1972 and which became simply the Republic of Cameroon in 1984. Significant amendment to the 1972 Constitution and 30 new articles marked what is referred to as the third Constitution in 1996, but which came into force only in 2001.

(1) The law shall define:

- The sharing of powers between the State and the Regions in the areas of competence so transferred
- The resources of Regions;
- The land and property of each Region.

**Ordinance No.74-1 of 6th July 1974 to establish rules governing land tenure  
(as amended by Ordinance 77-1 of 10th January 1977)**

Relevant provisions include:-

1. Recognition of a natural person which should include a community, as a land holder (Section 1).
2. Guarantee of the free enjoyment and use and disposal of lands held by those having landed property (Section 1).
3. Makes the State the guardian of all lands (Section 1 (b)). Implicit in guardianship is both authority and duty to govern justly and fairly.
4. Defines private property in such a way as to exclude customarily held lands without certificates (Section 2).
5. Converts certificates of occupancy granted or acquire before the law into Land Certificates (Section 6 (2)).
6. Denies the right of customary land holders to legally lease or assign their land or part thereof (Section 8).
7. Establishes expropriation as 'for purposes of public, economic or social utility, or indirectly at the request of local Councils, public establishments and public service concessionnaires...' (Section 11 (2)).
8. Extinguishes any outstanding cases as of the date of the law (July 1974) involving communities or individuals in respect of land (Section 13 (3)). Any claims for compensation for expropriation or eviction granted prior to that date were thereafter not able to be considered (Section 13 (4)).
9. Categorised the entire land area of Cameroon in two classes: private property and National Lands (Section 14).
10. The law then subdivides National Lands into two categories (Section 15) –
  - Lands occupied with houses, farms and plantations and grazing lands manifesting human presence and development;
  - Lands free from any effective occupation.
11. Reiterates that the State shall administer National Lands (Section 16). It shall do so however in boards inclusive of local representatives, specifically 'traditional authorities'.
12. In administering land including customary lands which it does not recognise as owned, the State may allocate, grant, lease or assign any part of those lands (Section 17). However, if the land is class 1 land as above ('occupied with houses etc') and the occupants are Cameroonians, then they cannot be evicted. They



may also apply for certificates to secure that occupancy (Section 17).

13. Persons living or using class 2 lands – lands without houses, farms, plantations and paddocks – may continue to hunt and gather on those lands – at least until the State assigns those lands for other purposes (Section 17).
14. Finally the law makes it legal for the State (in this case, Government) to classify parts of the national land estate as its own private property or give it to other agencies for public purposes (Section 18).

#### Section 16

- (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.

#### Section 17

- (1) National lands shall be allocated by grant, lease, or assignment on conditions to be prescribed by decree.
- (2) Provided that customary communities members thereof and any other person of Cameroonian nationality peacefully occupying or using lands in category 1 on the date of entry into force of this law, 5 August 1974, shall continue to occupy or use the said lands. They may apply for Land Certificates in accordance with the terms of the decree provided for in Article 7.
- (3) Subject to the regulations in force, hunting and gathering rights shall further be granted to them on lands in category 2 as defined in Article 15 until such time as the State has assigned the said lands to a specific purpose.

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#### Section 18

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.

#### **Law No.19 of 26 November 1983 to amend the provision of Article 5 of Ordinance No.74-1 of 6th July 1974 to establish rules governing land tenure**

This provides that any claim or dispute of a right to property on unregistered lands filed by communities or individuals before the courts as well as cases relating to inter-communal boundaries shall fall within the jurisdiction of the consultative boards (Section 5 (iii) and Section 5 (b)).

#### **Ordinance No.74-2 of 6th July 1974 to establish ruling governing State lands**

This law provides for real or personal property set aside for the direct use of the public or for public services. It makes this inalienable, imprescriptible (unable to be acquired) and unattachable. It is divided into natural and artificial public property.

Natural public property is notable in that it comprises coastlands, waterways, sub-soil and air space (i.e. subterranean resources) but NOT forests and grazing lands (Section 3).

Artificial public property comprises motorways, highways, roads, tracks, railways, ports, telegraph and telephone lines and installations, public monuments and buildings, markets, museums, cemeteries (Section 4).

Most notably artificial public property also includes –

Section 4 (I): The concession of traditional chiefdoms and property relating thereto and more especially in the provinces where the concession or chiefdoms is considered as the joint property of the community, the chief having only the enjoyment thereof.

Section 5 provides that a decree is needed to make real property public property.

Section 7: Bond fide owners and occupants who hold rights previous to the entry into force of the present Ordinance over public property of the State as defined in Articles 3 and 4 above may not be dispossessed thereof unless the public interest so requires and subject to compensation calculated as in the case of expropriation.

Chapter II provides for the State to take public property as its private property and then lease it out or sell it as freehold (Section 12)

#### **Law No.76/25 of 14 December 1976 to establish regulations governing Cadastral Surveys and Records**

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The objective is to provide a complete cadastral survey of every public and private property in the country by a Boundary Commission, which is to give two months advance notice of its activity.

Section 9 declares that –

Landowners, customary land holders, farmers and other holders of property interests or their duly authorized representatives must be present on their land when on the spot checks or investigations are carried out so that they may formulate any remarks they have to make. They shall be bound:

- (a) to declare every property that they hold;
- (b) to allow the officials ... access to their properties including gardens, yards, and enclosures adjacent to dwellings;
- (c) to comply with any summons to be present on their lands or at the surveys office...
- (d) to mark out the boundaries of their properties with permanent boundary marks.

Section 10: The supply and placing of beacons and where applicable, the cost of clearing the boundaries shall be at the charge of the owners or of the local communities as the case may be.

Section 15: Landowners, possessors, usufructaries, farmers and other holders of real property rights shall be bound to comply with summonses from the Surveys official responsible for the maintenance of cadastral records and to provide him with all the informal needed to keep his records up to date.

**Decree No.76-165 of 27 April 1976 to establish the conditions for obtaining Land Certificates amended and supplemented by Decree No.2005/481 of 16 December 2005**

Land certificates and documents certifying other real property rights are made unassailable, inviolable and final (Section 1). Amendment in 2005 improved the opportunities through which action may be taken to challenge the entitlement when fraud is alleged, although only through personal court action, which does not favour the poor owner who finds his land wrongfully registered as belonging to another (Section 2).

The law also shows the variety of entitlements that were available prior to 1977 (Section 3):

- deeds of acquisition entered in the Grundbuch,
- deeds of lands acquired through the transcription system;
- final allocation of orders for a grant out of State Land
- registered entitlements including certificates of occupancy
- final judgements establishing an owner or transfer of rights
- agreements made between Africans which were notarised in accordance with the 29 September 1920 Decree
- deeds of acquisition of freehold lands.

Section 9: The following persons are eligible to apply for a Land Certificate for National Lands which they occupy or develop:

- (a) Customary communities, members thereof, or any other person on Cameroonian nationality, on condition that the occupancy or exploitation predates 5 August 1974.

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Section 11 (3) Applications concerning lands which are entirely unoccupied or unexploited shall be inadmissible under the procedure. Such applications shall be made in accordance with the procedure for grants.

This is provided for under Decree 76-166 of 27 April 1976. A temporary grant for five years is followed by a lease or absolute grant. The outstanding requirement is that the recipient develops the land (Section 2 and 4 of Decree 76-166).

'Temporary rights shall be granted for development projects in line with the economic, social or cultural policies of the Nation' (Section 2).

The process of application is simple but laborious and time consuming, and expensive (see Section 11).

**Law No.80-22 of 14 July 1980 to repress infringements on landed property and State lands**

The law aims to prevent land held in joint property to be sold or granted free of charge (Section 1). The main target is unauthorized occupation, development or sale of the private property of the State or public property or national land (Section 4). (All forest land under the Permanent Forest Estate falls in this category). A fine is levied on the unauthorized occupant and on State employees guilty of complicity in land transitions likely to facilitate the unlawful occupation of another person's property (Section 2).

**Decree No.84-311 of 22 May 1984 to lay down the conditions for implementing No.80-22 of 14 July 1980**

A main objective of this law is to require the Lands Department to in future record on existing and future Land Certificates held in joint ownership, a clause stipulating inalienability of the said land in their present State (Section 2). It may be speculated that this applies to lands registered out of customary lands by chiefdoms.

**Law No.85/09 of 4th July 1985 to lay down the procedure governing expropriation for public purposes and the conditions for compensation**

Section 2: Expropriation for public purposes shall exclusively affect private property as recognized by the laws and regulations.

Those who have title deeds for customary property are included –

Section 9: Compensation for bare and undeveloped land shall be made under the following conditions:-

- (a) In the case of lands held by virtue of customary tenure under which a Land Certificate has been issued, the compensation may not exceed the minimum official price of undeveloped lands in the area where the Land Certificate was issued

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Therefore only those whose lands are held in law to be private property shall be eligible for compensation. It does however cover not just crops, buildings and developments but 'bare land' (Section 7 (2)).

**Decree No.87-1872 of 16 December 1987 to implement law No.85-9 of 4 July 1985 To lay down procedure governing expropriation for public purposes and conditions for compensation**

This establishes a Verification and Valuation Commission.

**Decree No.76-166 of 27 April 1976 to establish the terms and conditions of management of National Lands**

This law describes how the private property of the State may be allocated, assigned, or allotted even in freehold – for public purpose. The land may be sold by auction (Section 6) or by private treaty (Section 8). The land may be assigned to public bodies (Section 11) or allotted as a contribution to the capital of a company (Section 12). The land may be exchanged (Section 13) or leased to a private person or corporate body (Section 16). Freehold entitlements may be given to international bodies and diplomatic or consular missions (Section 27).

This allows a community to apply for National Lands for projects in the public interest (Section 19) and there is a chance the land can be incorporated into the private property of the local community by decree (Section 21).

Grants of rights, at first on a temporary basis (5 years) may be made out of National Lands (Section 1). These are mainly for development projects, but also available in line with 'the economic, social or cultural policies of the Nation' (Section 2).

Grants of less than 50 ha require order of the Minister and grants of more than 50 ha requires Presidential Decree (Section 7).

An absolute grant cannot be considered unless the land has been developed in conformity with the conditions imposed by the deed of grant (Section 10).

This law also provides for the consultative board (Chapter IV). This comprises eight persons, only three of whom are the chief and two leading members of the village or the community where the land is situated (Section 12).

The board's role is to recommend, but also includes 'select the lands which are indispensable for village communities' (Section 15).

***Chapter VI: Incorporation of National Lands in the Private Property of the State and Other Public Bodies***

Section 19: Public services, local communities and autonomous public bodies applying for National Lands for projects in the public interest must address their applications to the Minister in charge of Lands.

These applications should contain details of –

- The project to be implemented
- The location of the project
- The area of land required and its location
- The approximate date of starting the work
- Evidence of availability of funds for any compensation for earlier improvement to the land.

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20. The Minister in charge of Lands shall, by order, declare the proposed work to be a public purpose, and shall notify the prefect for the area where the property is situated in order that an investigation is held.

22. The land shall be incorporated in the private property of the State, the local community, or the public body, by decree...

**Decree No.95/146 of 4 August 1995 to amend and supplement certain provisions of Decree No.76/167 of 27 April 1976 to establish the terms and conditions of management of the private property of the State**

This amendment relates mainly to urban allotments.

**Law No.59-47 of June 1959 Law Concerning Private and National Property (No longer in force)**

Article 1:

The present law about the organization of land and property in Cameroon concerns –

- All the land coming under customary land rights, recognized or not, held
- Individually or collectively by Cameroonians
- Public land which is divided into natural and artificial public land
- The private land of the State of Cameroon, and public bodies
- Private lands acquired through prior registration procedures.

Article 2:

All subsoil resources belong to the State. However, depending on the laws and regulations regarding urban areas, hygiene and police, owners of land granted under the civil code or the registration system, and also recognized owners of customary rights may exploit surface products on their land like sand and stones without formal authorization. In all cases mineral exploitation remains subject to government authorization.

*Chapter II: Lands under customary rights of Cameroon*

Article 3:

All customary rights exercised individually or collectively on all lands with exception of lands which are part of the public and private land of the Government, and those lands which have been established as private property under the laws of registration, and with reservation in that Forest Law provisions need to be respected, are confirmed. No collective group or individual can be forced to cede their rights unless for a State-approved purpose and for which they receive compensation.

Article 4:

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Individuals and collectives who exercise customary rights have the right to confirm their existence, nature and extent through application of a procedure to be laid down by law.

Titles arising out of this process have to be respected.

Where rights include the right to dispose of land, and show evidence of effective occupation of the land, they may be transformed into a real property right under the registration procedure.

Article 5:

All native born Cameroonians effectively occupying land in their area of origin a concession, plantation, a parcel of land may apply for a free title if they have owned that land for a minimum of five consecutive years and if this is in accordance with family norms, and the customary owner may become a registered owner in accordance with Article 4.

Article 6:

Holders of customary rights may cede only those rights which are registered.

Any transaction which took place before registration is not a legal transaction.

Such transactions will be subject to penalty.

**Law 2001-1 of 2001 to Establish the Mining Code**

Mining may be undertaken on all but private property. This includes all national land, the private property of the State, and which in turn contain customary property. Although the constitution does not state that the State owns minerals as is normally provided in

constitutional law, the Mining Law 2001 provides for mines to remain State property and that private mine ownership shall be distinct from land ownership ('ownership of the soil') (Section 6).

The State is to make an agreement with the holder of an exploration permit and which will include specification of the 'relationships with the communities affected by the mining development' and 'obligations relating to employment, vocational training and social activities' (Section 16 (1)). Prospecting 'cannot take place within 50 metres of built on property, villages, clusters of houses, national parks, wells, religious burial grounds and places considered sacred, without the consent of the owner' (Section 62).

Mining occupation entails the right to fell the trees necessary for operations and to use water available on the property (Section 74). At the same time the holder of the mining title must comply with the forestry regulations as concerning felling of trees and the use of water (Section 74 (2)). He is also to 'comply with laws and regulations relating to environmental protection and management'. He is to 'protect flora and fauna, ensure the safety of works and promote or maintain the general health of the population' (Section 85). Mining may also be restricted with wildlife reserves and classified forests and 'all points deemed necessary for the preservation of the environment and the general interest' (Section 63). The holder of the mining title may even claim compensation due to damage caused through the establishment of protective zones (Section 63 (2)).

Mining operators may obtain exclusive occupancy of land (Section 65). In order to acquire this, the State may expropriate land needed from private owners (Section 66). This should yield compensation but it is notable that the Ministry of Lands is only provided six months within which to see the process through, including drafting and seeing enacted decrees to pay compensation, expropriate and reclassify the land as State Land.

Section 76 lays out the compensation due to the landowner specifically in a Section referring to those recognized as private land owners. Their compensation may include –

- Being deprived of the use or ownership of the natural surface of the land;
- Damage caused to the natural surface of the land;
- Severance of the land or any part thereof, from other lands held by the landowner;
- Loss of restriction of right of use, easement or any other right;
- Loss or damaged caused to improvements;
- Interruption of farming activities on the land.

The amount of damages is to be determined by written agreement between the holder of the mining title and the land owner (Section 77). If they fail to agree, they can go to arbitration and if they still can't agree, the land ministry will decide.

Section 73 provides that the landowner or holder of customary rights or occupancy rights is entitled to compensation for the occupation of his land by the holder of the mining title. Under a heading 'Compensation for the local population' it is also provided that 'People affected by mining operations shall be entitled to compensation, the amount of which shall be deducted from the ad valorem tax and from tax on the extraction of quarry products' (Section 89).



Whose land is it?

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**Law No.2002-13 of 2002 to Establish the Gas Code**

Gas transportation and distribution activities (pipelines) affecting local landholders may take place through either incorporating the land in the private property of the State, classifying the lands as public lands or, if registered as private estates, expropriate these in the interests of public purpose (Section 37 (2)). The same conditions of compensation are to apply. Given that community land holders are not considered in the law to own property as such, compensation is likely to be limited.

This report sets out to identify the current legal status of customary land interests in Cameroon and suggests ways for their improved recognition. By customary law most forests are a common property resource of communities; by statutory law most forests are the property of the state. How this conflicting tenure is resolved is key to the future of Cameroon, its people and its forests.

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