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Protection of Access to Common Property Resources Under Traditional Law An Overview of the Code Pastoral in Mauritania

Sept 26, 1999

Summary: The note describes the content and impact of the new herder's code in Mauritania. This legislation forms part of a welcome evolution in the Sahel from transplanting and copying laws to their autonomous development. In the process this incipient movement represents a shift from a legal system stipulating exclusive ownership rights in rural land-tenure to regulations providing for the sharing of user rights (in non-irrigated land).

Mauritania partakes in a growing regional socio-legal mainstream with its draft Code pastoral (before the Parliament in its autumn 1999 session – hereafter referred to as “the Code”). The text recognizes the traditional notion that the interests of nomadic herders are best served by "ownership" in the sense of exclusive property rights, but rather by the confirmation of user-rights, allowing herders access and use of the natural resources essential for the survival of their herds, and therewith themselves: grazing areas, water and salt licks. The Code pastoral recognizes these resources as common property resources, considered public domain and inalienable. Herders in the sense of the Code ("pasteurs" - Art. 5) are nomads tending large flocks of camels, sheep, goats, roaming large areas in search of widely scattered pasture and water in accordance with established traditional patterns. They are not sedentary farmers keeping livestock within fenced-in areas.

The Code recognizes nomadism as a culturally embedded value, adapted to the environment and best suited to exploit the scarce renewable resources of the land for raising livestock. The rationale of the Code reflects these restrictive realities: rarity and widely scattered resources requiring extensive use; reduction of possible range due to extension of agricultural activities, sedentarisation and growing private (exclusive) ownership of land, impeding herders' access. The Code guarantees herders' mobility and free access to the resource as a cultural asset. It provides for fair consideration of their interests in legislation regulating the resource and stipulates realistic conflict resolution procedures. Through the creation of protected areas for herders (espaces pastoraux protégés) and the (re-) definition of protected areas for villages (espaces vitaux des agglomérations rurales) the land resources of the two communities are kept apart, minimizing potential for clashes.

These are also the traditional rules of the Islamic law (Sharia). The Code therefore enjoys the backing of the Islamic jurisconsults (ulema).

The legal framework preceding the Code is relatively hostile to the herders interests: the subsector itself has not been regulated, but adjacent legislation (land tenure, forest Code, water Code) is property-rights oriented and thus detrimental to the herders' interest of free access. Also it is authoritarian oriented, dependant on central government's permission to act. Institutions overseeing the resource are scattered among five Directions in three ministries.

The reason for justified hope that the regulations of the Code will be followed resides in this seemingly obvious, yet de facto revolutionary and new, bold approach: to regulate content that is already known and respected in the culture of the society. As important is the Codes choice of flexible, adapted and already existing institutions to implement its regulations. No law exists just by its word - it has to be endowed with a credible institutional framework to give it force in the case of infraction. By relying on locally resident committees, an equal representation of the parties, and their associations, with only one state authority guarding sovereign interests, the Code has succeeded to combine the base, where the potential conflict resides, with the center, which may not tolerate explicit parallel jurisdictional power. The indigenous community and the modern administration share the power, and the obligation to implement the legislation and preserve civil peace.

The Code represents a "best practice" example of a well drafted legislation reflecting realities on the ground. It embodies concepts of the Convention on Biological Diversity of 1992, of the Kyoto Protocol - the UN Framework Convention on Climate Change of May 1992, and of the Convention to Combat Desertification of June 1994. The principles of its regulations are in the process of being enacted in riparian Sahel countries also (Mali, Burkina-Faso, Niger, Chad.).

Structure:

A.: The economic and administrative context;

B.: Ownership- v. User Rights: the legal principle accommodating herder's requirements, traditional roots;

C.: The Mauritanian Code pastoral

D.: Best practice legislation

E.: "windfall profiteers": indigene crocodiles, migratory birds, the desert's seed bank: environmental regeneration

F.: the Code's compliance with the international convention for biological diversity, the convention on climate change (Kyoto protocol) and the convention to combat desertification;

G.: Comparable legal developments in the Sahelian countries.

H.: Conclusion

A.: THE ECONOMIC AND ADMINISTRATIVE CONTEXT

1. The economic context.

Agriculture represents a considerable economic resource for the Sahelian countries, ranging between 15 and 30 % of GDP. Livestock raising represents approximately 75% of this resource. In Mauritania the figures are And ... respectively. However, whereas sedentary agriculture receives about in foreign and domestic aid, livestock raising receives only a fraction of such assistance.

Also, there is no appropriate legal regulation of the particular needs of nomadic livestock raising. -----
------(explain)

This negligence is surprising, because the nomadic cattle raising (la transhumance) constitutes the economic activity best adapted to arid areas with less than 400 mm rainfall p.a. the nomads are mobile enough to search and use the rare, scattered and shifting resource, the grazing ground and watering places. Such mobility ensures the sustainability of the cattle production, and simultaneously preserves the ecosystem.

The lack of support translates into insufficient treatment of animal health, research into improvement of nurturing – concerning the individual animal, as well as the herd itself, like prediction of good grazing grounds ahead of time – and insufficient marketing assistance, in-country, regional, and international. International exports do occur, notably into Arab countries (El Hadj), but could be substantially increased into the common market in view of growing ecological concerns about cattle raising in the consumer community of the European Community. Naturally, the well-being of the herders and their families themselves is also neglected. This neglect is no accident, but has an explanation in the recent history of the Sahelian countries.

2. The administrative context.

Traditionally, nomads were the ruling elite in the Sahelian countries. Livestock, notably camels, were the source and backbone of their survival. The entire culture evolved around the needs of the herds. Life was organized in relation to rainfall, grazing grounds and watering places, and the respective use of them by the tribes ruling the area.

As in the American West during the period of colonization, "cattle rustling" was a crime punishable by death.

However, the colonial power of the French, as any sedentary government, disliked nomads and their “foreign” lifestyle, their independence. By definition they are difficult to govern, difficult to identify, let alone to tax and rule. They are here one day, and gone the next. They despise authority and do not recognize borders, since they consider themselves the true masters of the space they roam. The legislative and administrative framework of the modern states claiming sovereign authority to the same area therefore most often does not only not accommodate their specific needs, but fights their lifestyle and livelihood in order to force them to become sedentary, and thus easier to control - and to collect taxes from.

This tendency has been encouraged particularly by the legacy of the French colonial administration’s emphasis on the concept of a strong centralized administrative organization, re-enforcing the all-encompassing power of the state, in accordance with the French constitutional model.

In principle this state of affairs would not have really mattered, because the administrative authority of all Sahel countries is exceptionally weak, and administrative power does not reach the country side in such force as to supplant traditional rules. The recurring droughts during the years of independence, which forced the nomads to find refuge in the established villages and towns. The substitution of traditional social assistance systems, through the family and the tribe, by state subsidies, however minimal, accentuated this shift in power.

This shift has been accentuated also by donor intervention. International donors bring money and development through the investment into the sedentary administration and projects. They are de facto successors to the colonial power, due to their pecuniary strength, and molded in the same pattern as the latter: communicating much more easily with the governments, their contractual partners and likeness, than nomads, people following “alien” lifestyles. Donors require formalized rules and regulations to be in force before intervening. Naturally they tend to privilege sedentary agriculture in the rural context, a situation they know and can control, rather than extensive nomadic cattle raising. This explains the discrepancy between investments in agriculture – defined by planting – and livestock, referred to above. It also explains the continued encroachment of planters into the range land areas, even though unsuitable for rainfed agriculture. A tendency responsible for substantial loss in potential productivity Dregne, H.E. and N.T. Chou, 1992, Global desertification dimension and costs. In H.E. Dregne, ed. Degradation and restoration of arid lands, Texas Tech University, Lubbock, Texas. And the motive for the pastoralist-friendly legislation.

The variance in administrative and cultural affinity also has roots in differences of legal traditions.

B.: PROPERTY v. USER RIGHTS; THE LEGAL PRINCIPLE ACCOMODATING HERDER’S REQUIREMENTS

1. Ownership- v. user rights.

The traditional approach to “rights”, in the western mind, is formed by the Roman Law: “ownership” over a good is defined as the exclusive possession, the right to do with the good whatever the “owner” pleases, to the exclusion of everybody else, including willful destruction. This is considered “normal” to the European legal mind, embodied in the Code Napoleon, the German Buergerliches Gesetzbuch and also the common law.

(Traditionally courts have established constitutional limits to the owner's use of his property, in the interest of ordre public including the protection of similar rights of other citizens. But this is not the point here)

The same notion applies to land. “Ownership” comprises a bundle of user rights and obligations, which can be, and have been identified and separated during twenty centuries of legal tradition. But the essential feature still remains that such separation of rights imbedded in the “ownership” is subject to the will of the owner, as individual holder of all such rights. Such legal system serves agrarian societies with sedentary farmers well. The Roman society thrived on such understanding, depending mostly on wheat imports and agrarian agriculture by large landholdings and slave work. Cattle was raised on fertile grass lands within limited (fenced-in) boundaries – as in the “modern world” of the industrialized countries. The same rights

systems is also appropriate under certain conditions in the developing world. Such is notably the case where the land needs substantial investments to yield a substantial crop, - the oasis' agriculture, or the newly irrigated agriculture of the Senegal River Valley.

Given the influence of the Roman law on the French Code Napoleon of 1801, and the French preferences to centralized administration as a colonial power, it is only natural that they imported their own legal system to Mauritania.

Mauritania's ruling society with a nomadic lifestyle, only to a minor part depending on a subsistence farming, did not know such an exclusive right, because the underlying natural resource, shifting pastures, is not geographically stable and its sustainability depends on a sparing use by the entire community. The property right systems of the black African tribes living in the Senegal river valley shared other characteristics, a religiously embedded system of rights based on use, fructification, group ownership and individual claims and obligations similar to those prevalent in other African peoples. These systems are not subject of this comparison, neither the question, whether these rights of resident farmers might be considered equivalent to western ownership rights or not.

Nomads rely on user rights. Such rights might be defined as : permission to use a common resource intermittently. As the resource stretches over a vast area and is unstable – grazing areas – or, while fixed, substantial requirement for several users – like watering places and salt licks – not one single person or family may be entitled to their exclusive use. Such exclusiveness is also not required – the resource being sparse as well as abundant, because renewable over a certain time horizon – if used “reasonably”, meaning sparingly.

The structure of such user rights is more complex than the one applying to exclusive, single person ownership. The use is regulated (sparingly, in the interest of the subsistence of the resource), the right to use is regulated, by attaching to a group of persons, which might be very far away at a given point in time, and the right may be given to a variety of groups concerning certain uses, who otherwise do not share other rights. Each tribe may have specific grazing grounds, which may be wide apart, and differ during the seasons of the year, and according to actual rainfall; but several tribes may share the same watering station, essential for all their livestock, even though they may graze in different areas.

2. User rights: the legal principle best serving herder's interests: It follows from the above rapid outline, that user rights are better suited to serve the requirements of nomadic cattle raisers than exclusive ownership rights, as far as the common resources of grazing area, water and salt licks are concerned. No single group needs the entire resource of one specific grazing area for its survival. One single grazing area, however, would also not be sufficient for survival, because it does not yield grazing all year, and not every year. Therefore a "fair" sharing of the resource, and its use in such a way as to enable its regeneration, is essential to the survival of all. The rules of such sharing are established by tradition embodied in the Sharia. They correspond to common sense and fair burden sharing. They are followed (against ever lurking egoistic instincts) out of fear to contradict a religious sanction and thereby religious authorities and tribal chiefs in case of transgression.

The Sharia recognizes five principles (preparatory note by the drafters of the Code):

(1) the first principle consists of the collective user rights to pastoral resources (le caractère collectif et l'usage commun des ressources pastorales). PAROLE DU PROPHET.....(p.8) this principle excludes the establishment of any exclusive rights on pastoral resources. Only the state may be entitled to emergency restrictions in the public interest, preservation of the resource in extremis and prevention of civil strife.

(2) the second principle consists in the protection of the vital space of villages (la protection de l'espace vital des agglomerations- Hima). The outer perimeter of this space is defined by the needs of the animals attached to the village, and its needs in firewood procurement.

(3) the third principle consists in the prevention of damages which migrating livestock may cause to planted fields. This principle, which intends to avoid conflicts, may lead to mutually forbidden zones for farmers and herders, respectively, at specific times of the agricultural cycle.

(4) the fourth principle consists in the right of the migrating herder (transhumant) to spent three nights within the vital space of villages. This exception to the protection of the Hima is justified by the herder's need (and his animals need) for water and food provisions from the villagers.

(5) the fifth principle is based on the joint responsibility of the herder and the farmer to exercise vigilance in the protection of livestock and crops, respectively. The herder is responsible for the supervision of his animals at night, whereas the farmer has to protect his fields during the daytime.

6. In Mauritania, as in most other Francophone African countries, the state laws regulating natural resources (land, forest and water) followed the notion of ownership and disregarded these time-honored principles indicated above. The laws de facto and de lege confiscated the previously existing rights to land in favor of the state, in theory in order to redistribute them in accordance with the principles stipulated in the law. It is true that literally this only concerned les terres mortes, (Art. 9, 11 Ordonnance No. 83-127 of June 5, 1983) - which, however, protects only farmed, or recently farmed land, not pastures. Redistribution was intended for the purpose of planting, and might or might not follow some of the traditional rules. The difference was, however, that the state would be seen as the source of the right, and these would be stripped of all cultural, divine or religious content, with the new owner therefore not bound by any restraint emanating from those sources. This authoritarian and sectarian intention of the legislator and regulator transpires also through the stipulations of Décret No. 90-20 of January 31, 1990, implementing the Code rural and providing in its Art. 4 that the espace vital des agglomérations should be defined by ministerial Arrêt. Arrêté R 016 of July 5, 1991 regulates les reserves foncières of villages, and Circulaire 012 of November 22, 1992 defines the conditions of the creation of these spaces. Together, these provisions are intended to (i) regulate the areas suitable for planting only, and (ii) abolish communal property, in whichever way the group entitled to the right(s) might be defined. It left thereby the legal and physical space of interest to herders vulnerable for "trespassing" by farmers through progressive encroachment of planted fields into grazing zones.

Mauritanian Decree 0029-----, recognizes in its paragraph ----- community property existing prior to 1963 - but this also refers to villages only.

Forests are regulated by Mauritanian Law No 97-007 of January 20, 1997 (Code forestier, replacing Ordonnance 82-174 of December 1982). Article 2 defines "forest": "...comme étant les espaces comportant une couverture végétale dans laquelle prédomine les arbres, arbustes ou broussailles, ainsi que d'autres espèces de flore susceptible de fournir des produits ligneux ou non ligneux autres qu'agricoles. Sont également considérés comme forêts, les terrains qui étaient couverts de forêts récemment coupées ou incendiées ou dégradées mais qui seront soumis à la régénération naturelle ou au reboisement." Needless to say, there are not many forests left in Mauritania - even though in the upper Senegal river valley elephants roamed still in the beginning of this century. In order to be recognized as forest, the area needs to be "classified", a procedure regulated by decree (.....), which stipulates the members of the respective commission. The administrative act itself is an Arrêté of the minister in charge of the environment. Article 32 of the code forestier expressly prohibits the entry of livestock into a classified forest. This seems natural, but by providing only for potential uses of the riverain populations (.....), the legislation again indicates its complete disregard for the herders' interests.

Water use is regulated in a more comprehensive and inclusive manner (see below,). Nevertheless, herders' rights are not particularly protected.

The current legislation, concerned only about the value added potential of farming, and thereby fixed on the notion of "property", "forgets" the rights and interests of the herders and thereby renders their

business and survival more and more difficult. The drafting committee of the code pastoral has listed a number of constraints in the area of land tenure, access to water sources, protection of pastures and carrières d'amersal (see Annex/endnote) which the Code intends to remedy.

7. Since some time a new trend reversing the existing legal approach is to be observed in the Sahel, a favorable groundswell for the herder's needs and requirements, re-balancing their interests with those of the sedentary farmers. It is a return to the sources of traditional rules. A continent-wide pastoral movement might be the initial motor for such awakening. Several herder's associations intend to create a representative association (-----), the inaugural meeting is to be held in December 1999 in Nouakchott, Mauritania. The drafting of appropriate legislation is one of the objectives of this associative movement. A seminar on the legal development is scheduled to take place in November 1999, also in Nouakchott among legal scholars, to discuss the herder's laws already passed or prepared in Sahelian countries, together with herder's representatives and project directors. These events might shed light on the sources of this trend. It can be observed in Mali (charte pastorale, in preparation); in Niger (.....), in Mauritania : the Code pastoral, and also in other riparian countries.

8. The Mauritanian initiative has its roots in the GtZ project "Gestion Intégrée des Ressources Naturelles dans l'Est de la Mauritanie (GIRNEM)" (GtZ advisor Dirk Thies) in the far north-east of Mauritania (Assaba, Hodh El Gharbi and Hodh El Chargui). The project is influenced by the Bank's former operation Livestock II (Credit 1508-MAU) and the currently implemented project Natural Resource Management in Rainfed Areas, (Credit 2965-MAU), active in the same geographic area. Climatic and soil conditions in this area with rainfall below 400 mm/a do not sustain traditional agriculture and allow for grazing activities only.

9. The change in the legal framework required to benefit herder's interests, and proposed in Mauritania through the Code Pastoral entails: free access to the natural resource for all nomads; limitation of the expansion of rural planting areas (with due protection to a village's survival requirement); and detailed conflict resolution methods. The content of the rights conferred are based on traditional law and the Sharia.

10. The Mauritanian Code Pastoral is therefore sponsored by the traditional Mauritanian society, including the Ulema. It has been drafted by a team of Mauritanian jurists and jurisconsults, well versed in modern French law and the Shari'a, which governs the Mauritanian legal system (Art..... of the 1992 Constitution).

C. AN OVERVIEW OF THE MAURITANIAN CODE PASTEURAL

11. The Code is a well written piece of legislation. It is short (58 articles), concise, easy to read and clearly understandable to any reader. It is well structured: the first chapter, constituting article 1, states the objective of what the text intends to regulate; the second chapter (5 articles – Art 2 to 6) enounces the principles guiding the regulation; the third chapter (6 articles, -Art. 7 to 12) gives definitions, thereby already re-enforcing the theme of the first chapter; the fourth chapter (20 articles – Art 13 to 32) constitutes the center pieces through express protections of herder's access to the essential natural resources; chapter five (3 articles – Art. 33 to 35) addresses the rights of pastoral organizations; chapter 6 (18 articles – Art. 36 to 53) regulates potential conflicts between herders and peasants; chapter 7 (3 articles – Art. 54 to 56) defines penalties and the final chapter 8 (2 articles – Art. 57 & 58) defines the text as a law and allows for further regulation by decree.

12. The disposition and weight of the number of articles already indicates the drafters priorities: a clear policy outline up front, and the purpose of the regulation in avoiding conflict, or, if conflict cannot be avoided, in giving clear, realistic and practical guidelines how to solve conflicts without reverting to violence. The violent reaction of the nomadic herders to the encroachment of fields into the open grasslands prompted and justified the legislation in the first place. The unfortunate armed conflict between Mauritania

and Senegal in the spring of 1989 was triggered by the outbreak of a violent conflict between nomadic Mauritanian tribesmen and Senegalese peasants. It was a similar incident, the crossing of a river and, by implication, of well tended irrigated fields, which led to the codification of the respective rights of herders and peasants almost two hundred years earlier in the Niger delta: king Amadou Sekou's Dina legislation in 1821, regulating, among other things, the yearly passage south through the river Niger on December 21, which is still respected to this day.

13. The objective of the Code is the definition of a rational administration of the Mauritanian grazing range (espace pastoral) benefiting the strengthening of herder's rights. For this purpose the principal concepts of herding are being defined, and the rules and rights relating to herding established.

14. In order to achieve this objective, chapter 2 establishes the following principles: the mobility of the herders, and their and their livestock' access to pastoral resources is protected (Art. 4 and 5). Accordingly, pastoralism is defined as livestock raising based on permanent or seasonal mobility (Art 7), and herders are those livestock keepers who depend for their use of pastoral resources on mobility (Art. 8). Pastoral resources, which are defined in Art 9 as water (above and below ground), grass and tree or brush grazing areas, and salt licks, are common property, (Art. 2), are dedicated exclusively for mobile livestock keeping and are forever public domain (Art. 13). The Code re-emphasizes this essential principle by stipulating expressly the negative consequence, namely that any appropriation of pastoral resources by an individual person or entity is illegal (Art. 14: "toute forme d'appropriation exclusive de l'espace pastoral est illégale"). This protection encompasses the necessary access ways to the resource (Art 10 and 15). As the resource may not be properly used without access, this aspect is once more laid out in detail in Art 11, defining access to the resource as guaranty of free access for the herder to the natural resource. The careful precision of access to <the herder and his animals> of Art. 5 is not repeated here in the first sentence, but the stipulation of a public lien (servitude) in the second sentence in favor of the animals, as needed, to reach the resource clarifies the obvious intent: passage in favor of the herder and his animals.

These regulations constitute an elegant solution to an apparent dilemma: establishing an inalienable user right over certain land areas might be assimilated to an expropriation of the former owners/carriers of vested rights, which would automatically trigger the obligation of compensation (constitution of 1992, Art.....). But, the Code rural (Ordonnance.....) by stipulating that all property rights pertaining to land are vested in the state (Art.) did already expropriate all private landowners, with the possibility to regain their rights through registration (Art.....; see above (6)). (Nobody has made use of this possibility in the rural areas of Mauritania, (inspection of the centralized Registre Foncier in the office of the Bureau des Domaines in Nouakchott by the author in March 1999) and since the power of the state to enforce is supposed rights on the land is minimal, these regulations were ignored. They are now subject of heightened attention in the irrigated areas in the Senegal river valley). Technically the state now accords protected user rights to a certain group of citizens out of his ownership - without conferring ownership - and therefore he need not compensate <himself>. The code thus creates a hybrid common property in favor of all herders: it is a common property right granted by the state through a law, distinguished from the recognition of a pre-existing right, and created in favor of a socio-economic cultural group, not a specific clan or tribe. The guarantee of free access therefore is akin to an umbrella regulation, which excludes potentially disturbing groups (farmers), but which does not positively sanction specific user rights to ressources pastorales in favor of specific clans or tribes. Presumably these beneficiaries need to rely, within the framework of the code on their customary rights - to the extent these are respected by their peers.

15. To emphasize the right of the preferential users, the Code specifies, at the address of potential competitors to the herder's interests, that no development may be envisaged which would result in a negative impact on the herder's activities, harm their vital interests, or limit their access to pastoral resources. (Art. 6, 15, 19, 21, 26 et 32).

16. Among the pastoral resources water is clearly the most important. Therefore Art. 22 through 30 regulate the protection of water resources for the benefit of enabling access for herder's livestock. The

principle of free access to the water source is already established in Art. 9, where "les eaux superficielles ou souterraines" are included in the definition of "resources pastorales", free access to which is guaranteed by Art. 5.

17. The Mauritanian Code d'eau (Ordonnance 85-144 of July 4, 1985) protects free access of everybody - not limited to herder's - to surface waters (flowing water, and stagnant waters surpassing 1 million qm, Art. 3) by declaring them public property (domain public). Conversion to private property by Decree is not excluded, however, and it is left to ministerial discretion to define the limits of domain public. The Code, true to its spirit, does not contradict or abrogate such disposition, but guarantees access to a specific group - circumventing the question of ownership or possession. One might conclude, therefore, that in regard to surface waters, everybody has access (because it is public property), but that herder's livestock is privileged in so far as it may not be obstructed. Accordingly the Code pastorale does not use the term "utilité public", but "utilité pastorale" (Art 24) in referring to places where water accumulates, which may not be transferred into private possession (appropriation privative). Such "utilité pastorale" occurs automatically, without further administrative act, whereas water points destined for herders' use (points d'eau à vocaton pastorale) have to be declared as such by Arrêt of the Wali upon proposition of the Hakim (Art. 22). Such watering places may not be changed in any way to impede herder's access by private works (Art. 28). Private water hauling installations on public wells automatically become public goods (revêtent automatiquement un caractère d'utilité publique) so that the herder's animals access (among others) may not be blocked (Art.23).

Such extensive protection of herder's access under conflicting private uses of watering places and wells did not exist under earlier legislation - the Code d'Eau in its Art 43 can be interpreted as limiting access to water holes to those who undertook and invested into its hydraulic structures (if such is the case at specific places).

The priority of uses of water resources under the law (Art. 105 to 107 Ordonnance is quite similar to the traditional order outlined above (.....): first comes household use; second the use for livestock; third agricultural (irrigation) uses, followed by forestry uses and finally industrial purposes (Art. 106).

18. The Code does not intervene in the construction of private or public hydraulic works. But these have to be preceded by an impact study concerning herder's interests (Art. 29), and the act of permitting such works has to have the approval of herder's representatives, among others. As waterworks entail in Mauritania normally irrigated fields around them, Art. 26 stipulates a special lien guaranteeing the animals' passage through them to the water point (servitude). Also the herder's have a say in the management of waterworks situated in their traditional areas (Art. 30).

19. The same policy of unrestricted access of the herder's livestock to its vital resources is also expressly regulated in relation to salt licks: the may not be privately appropriated (Art. 31) and may not be built over or otherwise rendered inaccessible

20. Chapter five, Art 33, 34 and 35 specify that herders may regroup themselves in organizations, and form national associations. This statement is important, because non-governmental organizations are tightly controlled in Mauritania, and not enthusiastically embraced by the government. Art. 34 specifies the right of the pastoral organizations to have a say in the design of development schemes and the formulation of legal texts which affect their interests, and the obligation of the respective administration(s) to facilitate such participation. A protection of the herder's interest which has also been expressly included in Art. 22, which specifies the same principle concerning authorizations to build watering places in pastoral areas, and Art. 18, regulating the authority of the Hakem to limit specific uses of natural resources by farmers or herders by Arrêté (following established administrative procedures).

21. The centerpiece of the law in view of its practical importance - one the policy decisions have been established and clarified - is its chapter six, conflict prevention and regulation. With 17 articles (Art 36 through 53) this is also the longest chapter. The principle upheld by the Code is to avoid potential conflicts by seperating the farmer's and the herder's where, and when possible. This is being done through the authorisation of the Hakim to regulate specific

uses in specific areas - in favor of herders in Art 36: no planting in certain pastoral zones, and in favor of farmers in Art 37: no camps in the proximity of planted fields. The Code favors flexibility in specifying that the regulation emanates from the lowest administrative level (following ordinary administrative procedures - thus assuring that specific local conditions are being taken into account.

22. Such authority to regulate the use of space in the interest to separate the two parties, and avoid conflict, had already been addressed in Art 18 (planting of fields and establishment of camps), 19 (areas of permanent installation), 20 (areas of establishment of villages), 28 (activities in the proximity of watering points), and 32, (protection of salt licks). A very important exception to this rule of separation constitutes Art. 21, stipulating that the protection of an area as <vital> for a certain village (espaces vitaux des agglomérations rurales, pursuant to the land tenure legislation of Ordonnance 83-127 dated June 5, 1983 (art. 23) does not preclude the free access of herders and their livestock. Obviously such regulation harbors potential for conflict, which will be only be avoided through good-will on both sides and reasonable reactions of the administrators.

Chapter six encourages such reasonableness:

23. Art. 38 establishes who sits on the commission intended to solve a conflict through arbitration: representatives of farmers and herders, of the parties, a member of the conseil municipal as representative of the state authority, and, most importantly, two persons known for their moral authority and integrity. This local commission thereby fuses elegantly traditional and modern elements in its constitution, which should give it authority to resolve conflicts in such manner as will be respected by the litigants. With together nine persons the committee might seem to be relatively "heavy" and bureaucratic - a factor mitigated by the implied understanding that the decision is to be rendered immediately, and the damages (either by sale of the animal(s) in favor of the farmer, or payment in favor of the herder) are to be regulated on the spot. An appeal of the arbitration commission's verdict to the local tribunal has to be lodged within three days of said decision (Art. 41). For more serious conflicts, Art. 38 offers the composition of an arbitration commission on county level, which follows the same principles as indicated for the local commission (l'inspecteur du Développement Rural et de l'Environnement; le commandant de brigade de la Gendarmerie Nationale; le chef de brigade de la Garde Nationale; deux personnalités désignées par arrêté du Hakem et répondant aux critères d'autorité et d'intégrité morale; un représentant des organisations des cultivateurs;. By establishing these commissions on the lowermost administrative level, the Code adheres to Mauritania's decentralisation policy. More important, it will, in all probability, have inserted a major impediment against transgression: the mere knowledge that conflicts will be judged and adjudicated by their peers - and not an anonymous judge in the distant chef lieu d'arrondissement - should make any potential violator think twice. The fear of shame, more than the actual reconstitution of damage, should in all probability prevent the majority of infringements

24. The rules governing the regulation of the damage are the same irrespective whether the decision is taken by the respective commissions or the local tribunal. It might be expected that the rules governing the assessment of the damage and the responsibility for it, should also be identical, for Art. 40 provides that the commissions should hold the party civilement responsable liable to repay the prejudice. This appears surprising, at first view, particularly since Art. 16 clearly defines that the duration of the stay of animals in the protected areas of the villages (espaces vitaux des agglomérations rurales) is subject to the rules of the Sharia. In practice, however, this may not be a contradiction, since the Mauritanian Constitution (Art.-----) stipulates that the Sharia supercedes all legislation in case of conflict, and the civil Code (Codes des obligations.... Art. -----) also refers to the Sharia in case of doubt or conflicting written regulations (see also Code de procédure civile:). the bulk of the remaining articles stipulate how the animals should be cared for, and the charges for their shelter be accounted for, during the sale of the animals or in case the respective owner cannot be found.

25. Conflicts among herders themselves, because of inappropriate installations of campsites resulting in the mingling of livestock, are to be solved by a different commission pursuant to Art. 53: a commission to be presided by l'inspecteur du Développement Rural et de l'Environnement and comprising two herders, selected by the Hakim (of the area where the conflict occurred) and representatives of the unités nomades en conflit - that is to say the families, clans or tribes - as may be the case. Again, the regulation remains

flexible and provides the right mix of authority and directly involved parties in order to be able to resolve the conflict in terms the litigants will understand and adhere to. It is symptomatic that for these cases the Code provides a mix of the idea for the commissions of Art 38, and yet restricts it to the necessary elements only. The l'inspecteur du Développement Rural et de l'Environnement chairs Art 38' second, more important commission, on te county level replacing the conseiller municipa as government authority. The representatives of farmers do not take part, because not involved, and the herder's associations are replaced by members of the unités nomades en conflit more directly involved, more knowledgeable of the rules the litigants should have adhered to.

These rules are precisely established by tradition in Mauritania (Isselmou abdel Kader, one of the authors of the Code, to the author in March 1999) :

Lemrah designs the zone of the livestock herd during the night next to the tent of the herder/owner; Metlag specifies the most direct access path for the livestock from the camp to the grazing ground in the morning, and its return in the evening. This corridor has to remain open.

Elmessyah specifies the nocturnal grazing area of the animals.

Elmirad indicates the space between the camp and the water source. Nobody establishes camp in this space.

Tradition requires mutual respect from the herders, hospitality and active intervention in the prevention of conflicts. For instance is every herder required to install his camp in such a way that his animals, on their march to pastures and water resources, will not cross or otherwise interfere with the animals of another camp. Mutual respect

Is also required at the water hole: the priority of use is regulated by tradition in detail: first served are the human needs (Rwaya or Kharza); followed by the needs of herds in emergency situations; next come cattle, then sheep and goats, followed by camels at the end. In the case of watering holes installed by villagers, their needs are satisfied first, in the same order (village human needs / nomads human needs, and so forth). In the case of arrival of two or more nomadic herds, the rang is respected in the same manner (human needs first arrived / human needs second arrived / cattle first arrived and so forth. This may result that between the goats and the camels of the first arrived the human needs of a second arrival have to be satisfied).

26. The seemingly justified confidence in the success of the Code, that its addressees will respect its regulations may be found in its following particularities:

Primo: this openness and flexibility, reliance on the lowest, most directly involved level, and the presence of a representative of state authority, who is deemed to have the respect of the parties, and the knowledge to understand and judge the subject matter. Although a law, by definition, cannot enact rules case by case, but has to state general principles governing the indefinite variances of specific situations and conflicts of interests, this flexibility and openness avoids the pitfall of legislating off target.

Secundo: the provision for the institutions to implement, oversee and execute its regulations. No law exists without institutions, or, rather, a law which cannot rely on the appropriate institutions for its implementation may express sublime thought or realistic advise, but will remain ineffective for all practical purposes. The fact that in most countries of the Sahel the written laws rely on imported legal institutions, the classic European court system, is directly responsible for their inefficiency. It is true that the French colonial power imported both the laws and the institutions, therefore they match in theory, but the institutions at least are badly inappropriate for the local culture, tradition, learning experience and budgetary resources. Once independent, the sovereign nations continued on the same, unreflected path.

"Institutions" are meant in this context in the original sense, that is to say administrative bodies called upon to oversee, regulate and implement specific rules and/or laws. The term does not encompass those rules and laws themselves. Such seems to be, however, a modern tendency of using the term - as promoted by the so-called "new institutional economics in which institutions are viewed as rules" (Box 6, page 23 of the World Development Report 1999/2000 Entering the 21st Century). This extended use of the term may be useful in certain contexts, but for legal analysis it seems to me too fuzzy to be useful. A study underway (originating at the Max-Planck Institut fuer Internationale Privatrechtsvergleichung in Hamburg, Germany) has keyed

the expression "cognitive institutions" to analyze law in action, the effectiveness of the law, and, to some extent, also combines the positive legal rule with the court system applying it under this notion.

The Code avoids the traditional dilemma of either whole sale non-adapted transplant or unreflective copying.. It does not create institutions which would need incremental funding, buildings, and notably, training for its members (the people called upon to run them and make them work). The Code relies and uses what already exists: the Sharia with all its traditional rules, including procedures and formalities (Art. 1 (1); 16); arbitration commissions composed of the people on site, most directly concerned and also most directly interested in getting a conflict solved, and the civil law rules for determining fault (Art. 40). As indicated supra, these rules already encompass traditional notions of "right" behavior, embodied in the Sharia. Thus no conflict or dualism of legal ground on which to stand on exists for the decision in any given specific case. The reliance on "laymen" - not legally trained parties in all three commissions called upon to solve conflicts (Art. 38, both options, and Art 53) shows the drafter's confidence in this harmonious marriage of substance regulation and institutional set up for their enforcement. The established state court (trail court) may be called upon - but only by an initiative of the parties themselves (Art 41: " la partie qui s'estime lée par la décision de la commision d'arbitrage, peut saisir le trbunal de la Moughathaa, qui devra statuer dans le trois jours qui suivent celui de sa saisine ").

Tertio: the institutional framework corresponds to the substance of the regulation of the Code: to empower the herders themselves, whose rights are protected within the limits of pre-existing tradition, to administer the regulations which are of direct concern to them - within the framework governing the society they live in, naturally. But it is a "bottom-up" approach, an initiative to foster the self regulating powers of society by giving them the space, the flexibility, the rules and the institutions tailored to their needs to live by their principles themselves, and to solve their problems first among themselves. A liberal approach. The state authority is only there to watch over the functioning of this idea, to assure the respect of the form and the rules of the game the parties have agreed to themselves. The state authority imposes nothing - no outside imported ideas or behavior patterns, no incomprehensibly worded new obligations, and, most importantly, no unfamiliar institutions the victim needs to turn to in order to right its perceived wrong.

This may be the core for success or failure of the Code: the perfect fine tuning of content legislation and institutional support. As with cars, this is the most difficult part. A most powerful motor - .e. perfect law - is quite useless if the engineers have failed to provide smooth transfer of that power to gearbox and axles - i.e. the courts, in the ordinary process of dispensing legal services, are non-existent or ill equipped, mentally and materially, to apply the law. Legislation ought to be written with the consideration of pre-existing cultural and traditional notions and behavioral patterns among its addressees which influence the reception and application of the rule. Only intimate knowledge of which type of institution in the sense described above will be able to administer the law so that its content and intent is preserved will render legislation truly useful. This is why the Hamburg study referred to above (.....) speaks of cognitive institutions: the entirety of law and application body. This is also the reason why the World Bank asked for "client commitment" and "government by-in" before initiating legal reform projects - under the assumption that the Minister of Justice would know best how to apply this combination of text and practice. It is the most decisive part and criteria for the "appropriate" application - and unfortunately not all justice ministry personnel take it seriously enough.

Thus it is the conviction of the drafters that the regulations set forth in the Code will be adhered to by conviction, not out of fear for punishment or mere obedience to state power. The Code regulates behavior already prevalent in the society. It "merely" captures this tradition in words and gives it structure.

The Code embodies a further revolutionary notion: that different regulatory principles may be applicable to the same sector on the national territory. The colonial and imported doctrine holds that a sector has to be regulated in exactly the same way across the entire national territory: all land and water rights and obligations are the same for everyone in the nation. This idea of enforcing centralized regulations prevails throughout francophone Africa. It is a truly <virtual> concept, because inapplicable, and not applied, due to the large variety of local traditions and usages, the variety of soil and climate conditions

prompting variations in usage, and, finally, the non-existent, or, in any case weak state authority required to enforce adverse regulations. Traditionally coherence of rules was established according to personal relations - within tribal boundaries, not abstract frontiers. Different rules would overlap where tribes were conquered and subdued and their regulations would not interfere with the interests of the power in place. In medieval Europe various regulations might also overlap concerning land use, until the formation of the abstract nation-state forced unity of law within its borders. This unity, however, is ill adapted to the regulatory needs of different situations, as in Mauritania the use of highly valuable Oasis- and irrigated lands and the areas of shifting pastures. By applying different rules to these different circumstances, the Code, or rather the Mauritanian legislator does the sensible thing. (Exclusive property rights remain in force in areas not qualified as espace pastoral, Code, Art. 10).

D.: Why this text is best practice

- 1) Clear language, using legal terms, but overall comprehensible, readable sentences (and not legalese);
- 2) precise and short;
- 3) clearly structured, from the policy choices to the implementation arrangements;
- 4) content culturally anchored and well rooted in society's tradition;
- 5) fair balance of interests between potentially competing parties - the herders and the sedentary farmers
- 6) provision of light, context adapted institutions - using existing facilities at ground level - avoiding need of additional equipment, works or training;

The pastoral zones in Mauritania are not natural parks, neither protected environmentally endangered zones. Yet, the same principles which experience has taught developers of such protected areas to abide by, namely respect of the needs, beliefs and practices of the local people living there, also apply to legislation regulating usage of natural resources in general - or to any law, for that matter - to be successful. Unless the legal dictum satisfies the fundamental needs of the population meant to be governed and guided by said legal text or rule, it will not be adhered to. By the same token, a park established against the understanding and survival instincts of the local population will not succeed to protect either fauna nor flora.

Examples of failed parks abound, like the sad poaching safaris of the Congolese army into the park of....., a Global Environmental fund protected area housing the shy and rare jungle elephants, among others, or the history of the Tsavo National Park in Kenya, where local people were totally denied access, only to return as poachers and harassers of tourists and administrators alike.

In the St. Katherine Natural Protectorate, established in 1996, however, flora and fauna and the Bedouins living there are meant to coexist from the beginning. The Bedouins are integrated into the protection scheme through their own "community guard" (haris al biyah), paid employees of the Park, selected because of the respect the tribe shows towards them, their knowledge of places and wildlife, and their attachment to preserve and restore it. The concept is adapted from the traditional tribal law : 'urf - a rule indicating that the protection of a certain area or species is the tasks of one person, and the infringement is an attack at his personal honor, making the violator liable to pay the person damages.

(Joseph J. Hobbs, Sinai's watchmen in the wilderness, *Aramco World* May/June 1999, pp. 12 sequitur)

The respect of the traditional system had come to suffer because people relied less and less on herding and gardening, and more on outside activities for survival, thereby losing their attachment to nature and tradition. The same is true for pastoralism in Mauritania. Nomads relying exclusively on their herds for survival are becoming rare, for a number of reasons, the recurring draughts just being one of them. Employed guards taking care of livestock for master's living in Nouakchott obviously are not as respectful to traditional rules as the nomad would be. Donor sustained farmers also have become more audacious in

encroaching on pastoral lands. The loss of attachment to tribal and traditional law has to be compensated by an additional authority - reinforcing the traditional rule, not superseding or supplementing it. In the case of the Park it is the park regulation established with the voice and consent of the Bedouins. This confers additional authority on the guards, as the perpetrators not only realize and know that they are wrong according to tradition, but also pursuant to the law in force in the area covered by the Park.

In the case of the pastoral Code, the writing of the text of the law was also preceded by wide consultations and discussions among the parties affected, just as in the case of the Park. Albeit less studies needed to be undertaken, because the drafters were "locals" themselves, understanding and knowing the subject because belonging to the same cultural background. As the rules are codified into a law, its authority is supported by the state itself. As has been described, the state is represented by his local administrators, the Hakims, to supervise the respect of the Code's rules. But since any violation will by definition occur in rather remote areas, the Code pastoral would not have a chance of respect, where it not for the fact that it embodies rules the people already know, and are aware of, and understand that they should really respect them. They still carry some of the moral and ethical value all traditional law carries. This crucial element is reinforced by the Islamic Shari'a, which, as has been indicated, is embodied in the Code, and lends it further force and authority.

The expectation that the Code should be respected and applied seems therefore justified. Respected and applied not because of a powerful central state enforcement machinery behind it, but because it is considered <just> and <right> by the majority of the people who are its addressee. As a law, it certainly still needs publication and distribution. Here also, however, it will be more likely that the population actually takes notice, because the text affects them, they already know the gist of the rules by tradition, and they have no trouble understanding the regulations in view of the clear, straight language.

All of the above being advantages "normal" laws in Mauritania do not share: the publication is quasi secret, because of the small number of Legal Gazette copies printed; the texts generally embody more foreign legal thought than local knowledge, and the language is such that no ordinary citizen will easily understand what is regulated, in either Arabic or French, whether they read the text themselves, or someone would read it to them.

E. "WINDFALL PROFITS": ENDOGENE CROCODILES, MIGRATORY BIRDS, DESERT'S SEED BANK.

F. THE CODE'S COMPLIANCE WITH THE INTERNATIONAL CONVENTION ON BIOLOGICAL DIVERSITY, THE CONVENTION ON CLIMATE CHANGE AND THE CONVENTION TO COMBAT DERTIFICATION.

All three conventions have the same purpose: to protect and preserve the environment while, at the same time, enhancing the conditions of the people living there - what is now called sustainable environmental protection. They are also similar structured: a preamble setting the context; definitions; establishment of principles (exhorting conservation, cooperation and enhanced welfare); provisos for the member's legislation; and establishment of implementing/supervising institutions ("conference of the Parties, Secretariat). The desertification convention carries a specific "regional Implementation Annex for Africa", the climate change convention distinguishes between two categories of member parties in its annex I and Annex II. All three conventions provide for data gathering and their coordinated dissemination.

The objectives of the Convention on Biological Diversity (signed in Rio de Janeiro June 5, 1992; [HYPERLINK "http://www.biodiv.org/chm/conv/cbd_text_e.htm"](http://www.biodiv.org/chm/conv/cbd_text_e.htm) [_http://www.biodiv.org/chm/conv/cbd_text_e.htm_](http://www.biodiv.org/chm/conv/cbd_text_e.htm) visited 6/1/99; Mauritania signed on June 12, 1992 and ratified Aug. 16, 1996) are set forth in Article 1: "...are the conservation of biological diversity, the

sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of generic resources, including appropriate access to genetic resources and by appropriate technologies, taking into account all rights over those resources" .

The "ultimate objective" of the United Nations Framework Convention on Climate Change (signed in New York May 9, 1992; [_ HYPERLINK "http://www.unfccc.de/fccc/conv/conv.htm"](http://www.unfccc.de/fccc/conv/conv.htm) [__http://www.unfccc.de/fccc/conv/conv.htm](http://www.unfccc.de/fccc/conv/conv.htm)_ visited 4/20/1998; apparently not signed by Mauritania) as set forth in its Article 2 is: "...to achieve ... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure food production is not threatened and to enable economic development to proceed in a sustainable manner".

The United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (signed in Paris June 17, 1994, [_ HYPERLINK "http://www.unccd.ch/ccdeng.htm"](http://www.unccd.ch/ccdeng.htm) [__http://www.unccd.ch/ccdeng.htm](http://www.unccd.ch/ccdeng.htm)_ visited 6/1/1999; Mauritania signed December 26, 1996) stipulates in its Article 2 as objective: "... to combat desertification and mitigate the effects of drought ... through effective action at all levels, supported by international cooperation and partnership arrangements, in the framework of an integrated approach which is consistent with Agenda 21, with a view to contributing to the achievement of sustainable development in affected areas", and the second paragraph of said Article 2 provides that: " achieving this objective will involve long-term integrated strategies that focus simultaneously, in affected areas, on improved productivity of land, and the rehabilitation, conservation and sustainable management of land and water resources, leading to improved living conditions, in particular at the community level."

With its sporadic rainfall and desert conditions Mauritania obviously is prime beneficiary and addressee of all three conventions. The Code qualifies as legislation intended and apt to achieve their objectives. By establishing the framework for vegetation adapted use of the resources, and thereby implicitly protection natural habitats against destruction through farming.

The Code also conforms to Art 8 of the biodiversity convention, which exhorts in-situ conservation, and notably : (d) "promot(ion of) the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings"; and in (f): "rehabilitat(ion) and restorat(ion of) degraded ecosystems...". It fulfills the obligation in Article 4 (e) of the climate change convention ("... develop and elaborate appropriate and integrated plans for...water resources and agriculture, and for the protection and rehabilitation of areas...affected by draught and desertification...) inasmuch as the Code constitutes a perfect vehicle to achieve these goals, and represents qualitatively more than a mere "plan". (Mauritania is about four years late in establishing a Natural Environmental Action Plan (NEAP) proper - insofar it is not in compliance with Article 10 of the desertification convention). Simultaneously, the Code complies with the principle (c) of article 3 of the desertification convention to "...develop...a better understanding of the nature and value of land and scarce water resources in affected areas and to work towards their sustainable use" among interested parties. The Code constitutes the "enabling environment by...enacting new laws and establishing long-term policies ..." stipulated as an obligation in Article 5 (e).

The process adopted in formulating the Code, the local consultations with the affected population and the beneficiaries of its regulations, comply exactly with the provisions of Article 10 (f) of the desertification convention, which exhorts signatories to "provide for effective participation at the local, national and regional levels of non-governmental organizations and local populations, both women and men, particularly resource users, including farmers and pastoralists and their representative organizations, in policy planning, decision-making and implementation and review national action programmes". Article 34 of the Code, and its Articles 18, 20, 29 expressly provide for local consultations in all areas pertaining to resource regulation, and chapter IV, Gestion des conflits pastoraux embodies the spirit of these provisions in its entirety. The climate change convention addresses more international cooperation, data gathering and exchange on multi-national level than local level communication and coordination. Nevertheless, the idea is expressed in one of the Recitals, the principles of paragraphs 4 and 5 of its Article 3 and its insistence on promotion of

education, training, and public awareness (Article 4. 1. (i) and Article 6). The biodiversity convention may be situated somewhere between the two foregoing conventions as far as express implication of local populations in the protection of the environment is concerned. Its Article 8 paragraph (j) stresses the obligation to respect and preserve practices of local communities, and to promote wider application of indigenous knowledge and preservation methods "with the approval and involvement of the holders of such knowledge"; Article 10 paragraph (c) protects customary use of biological resources, and the following paragraph (d) stipulates "support to local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced". This is directly applicable to the "over-farmed" grazing areas in the north of Mauritania, to which the Code applies, and which are threatened by inappropriate planting, as the average rainfall does not suffice for regular crop growing. The training provisions of Articles 12 and 13 of the biodiversity convention seem to aim more at scientific research and curricula formation than involvement of indigenous people (see also Article 18).

Upon consideration it is surprising that the climate and biodiversity conventions stress national and international cooperation and exchange to such a degree, and favor it so almost exclusively over attention for the local communities and indigenous people. Whereas those are the ultimate beneficiaries of all promoted actions - everybody is a <local> in his own place - only the desert convention, established two years after the other two, considers local participation somewhat more seriously. Such drafting reflects the paternalistic attitudes of both developed and developing country' governments alike - an attitude which the code has left far behind both in the process of its preparation and in the essence of its regulations. It seems obvious that the objectives of the conventions, (see quotations above), cannot be attained without the support and active participation of the local population, and that, conversely, it is the locals who have the most destructive potential. In this respect, therefore, the Code again appears to be avant-garde. A summary paper by Sara J. Scherr of the University of Maryland, delivered at the World Bank's "High Level Round Table on Drylands, Poverty and Development, Towards a Strategy for the World Bank" June 15-17, 1999 insists rightly on the importance of "community-level changes" which "induce responses in agriculture and natural resource management strategies at both household and collective levels, such as changes in land use, land investment, use intensity, input mix, conservation practices and investments, and collective action" (page 3/4). The Fourth Regional Workshop on Natural Resource Management in West Africa in Niamey, October 12-17, 1998 recommended in its conclusions, inter alia, to "strengthen the capacities of communities to play their role in the planning and implementation of natural resource management actions as well as to enhance their responsibilities" (number 4). The Code heeds these recommendations and findings.

G. COMPARABLE LEGAL DEVELOPMENTS IN SAHELIAN COUNTRIES

The idea being that sovereign rights, in their rigid structure, are loosened up through similar legislation region-wide – thus making the aspect of individual national legislation less relevant. Much the same, in the result, as the difference between ownership rights and user rights
Insofar all these legal texts comply with the exhortation of the conventions to cooperate and exchange - in a way.

Result: de facto harmonization - demand driven (as opposed to OHADA) and bypassing sovereign issues by parallel legislation. Results in mitigation of the separating effect of arbitrary borders through uniform ecological, economic and tribal areas. Ground based networks undermine the nation-state ?

H. CONCLUSION

1. Growing trend of legislation setting rules for herders grounded in traditional law.
2. recognition of common property resources management concept in the use of renewable, yet scarce, natural resources.

3. Recognition of user rights granting access to the resource - as opposed to exclusive ownership rights.
4. Exemplary clarity in language - an abandon of the traditional French drafting style.
5. adapted, workable light institutional framework, designed to build on existing authorities.
6. Adjusted and realistic protection of the environment.

Footnotes:

For a table setting forth the most recent figures for some Sahelian countries see table 1.

Concerning the member countries of the Organization pour la Mise en Valeur du Fleuve Sénégal (OMVS), of which Mauritania is a member, this percentages is heavily influenced whether the investment cost in the dams of Manantali and Diama are taken into account, as they should, or considered as “sunk cost”.

Reference to nomadic rules and traditional systems

reference to American and traditional / Shari’a precedents

Nomadic and settled families do tend to, nowadays, have both, herds and planting areas. Also the recession cropping is an activity overlapping both subsectors. This overview does not intend to be true to the details of economic activities of the Sahelian peoples – though decisively important when understanding their lifestyle and issues is intended.

Qouto Roman source for ownership

The concept of ordre public and the resulting inherent limitation of misuse of ownership in view of the common good (see.....)

.) is disregarded for the sake of clarity in this note. It might be an interesting idea to pursue the thought whether the ordre public of Sahelian countries should not be defined as to require the protection of the essentials required to the nomadic life form, in view of the economic necessities and the traditional values.

The time of the American West and the raise of large cattle herds being the notable exception.

The situation of traditional flood recession agriculture in the Senegal river valley, or the Niger delta, is not reflected here. In view of the traditionally uncertain area where such agriculture would be possible, the overlapping use of the same land by planters, fishers and herders, however, the legal system seems to be closer to the “traditional” notion of user rights, than that of “ownership”. The case merits a specific analysis and is not taken into consideration here

See for the traditional preservation of fixed common resources (like woods and coastlines, coral reefs):.....

The question of rights to the livestock itself is a separate issue, not discussed in this context. Community rights might als – and do – attach to herds in various traditional societies.

Examples of surats in the Koran relating to herders:.....

..

See text of the Code, approved on

.by the Mauritanian Parliament, in the Annex (in French).

See below,

HWW/09/20/99

Return to the sources -5-
Code Pastoral - RIM

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