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Land Law in Senegal: The Failure of Commission-Led Reform

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Land Law in Senegal: The Failure of Commission-Led Reform

Joyman Lee*

Unlike in many Commonwealth African nations where the persistence of neo-customary land systems is mediated through a conflict of laws system and the development of a "lawyer's customary law", in Senegal the prevailing picture is one of state withdrawal. Civil law systems rooted in French law follow an "absolutist" notion of private property rights, which made the civil code difficult to apply outside an extremely limited context even during the colonial period. In the post-colonial period, the domaine national *which governs rural land in Senegal remains thinly developed and relies on a formal jurisdictional distinction between "general" law (*droit commun*) and administrative law. It was against this background that the Commission Nationale de Réforme Foncière put in place in 2012 failed to offer substantive solutions partly as a result of customary resistance. This Article argues that the failure of incremental reform proposals highlights a more fundamental problem, where French private law's more rigid character precludes its effective reconciliation with areas in African society where law traditionally played a different kind of role. What is required in such contexts is an alternative*

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conception of the role of law rooted organically in past and existing practices, notwithstanding the challenges this may create in areas such as investment and economic development.

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I. Introduction

Unlike in many Commonwealth African nations, where the persistence of neo-customary land systems is mediated through a conflict of laws system and the development of a "lawyer's customary law",[1] in Francophone West Africa legal pluralism—defined as the coexistence of modern law with other legal orders—is better understood as state *withdrawal*.[2] Civil law systems rooted in French law follow an "absolutist" notion of private property rights, which made the civil code difficult to apply outside an extremely limited context even during the colonial period. This failure to extend Western law to vast swathes of the country explained Senegalese founding president Léopold Sédar Senghor's introduction of a *domaine national*, where neo-customary land tenure was formally introduced as a parallel legal system. Unlike mainstream civil law, or for that matter

[1] See for example ES Nwauche, "The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana" (2010) 25 Tul Eur & Civ LF 37. Constitution of the Republic of Ghana (Amendment) Act 1996, s 11(2) recognizes customary law as a formal source of the country's common law.
[2] See for example Ghislain Otis, Jean Leclair and Sophie Thériault, *Applied Legal Pluralism: Processes, driving forces and effects* (Routledge 2023), particularly with respect to Côte d'Ivoire.

"lawyer's customary law" in Anglophone jurisdictions,[3] the law concerning the *domaine national* remains thinly developed, with the state lacking the means to put in place key mechanisms such as rural councils necessary for its functioning beyond a mere reaffirmation of existing rights. With varying differences in formality, customary land holding is organized similarly across the subregion, and the most effective substantive reforms are found in the economic powerhouse of Côte d'Ivoire, especially concerning urban land.[4]

It was against this background that Senegal's *Commission Nationale de Réforme Foncière* (CNRF) put in place in 2012 failed to offer substantive solutions, particularly with respect to the legal characterization of rights held by rural users of land. The commission was subsequently dissolved by the executive in 2017. Although in the case of the CNRF, its "failure" is best explained as a response to civil society's demand for a more durable solution to the issue of real rights in agrarian land. From a legal perspective, the failure of incremental reform proposals illustrates a more fundamental problem, where French private law's more rigid character precludes its effective reconciliation with areas in African society where law had traditionally played a different role. In line with legal anthropologist Étienne Le Roy's call for a genuine legal pluralism to take into account the possibility of the withdrawal or the significant adaptation of Western conceptions of "law",[5] the challenge of providing a set of durable rights in sub-Saharan Africa reflects the vast gulf which exists between the rigidity of state law and existing practices. What is required in such contexts is an alternative conception of the role of law rooted organically in past and existing

[3] See for example Gordon Woodman, "The Implantation of the Common Law Among African Laws in Ghana" in Michel Doucet and Jacques Vanderlinden (eds), *La réception des systèmes juridiques: implantation et destin : textes présentés au premier colloque international du Centre international de la common law en français (CICLEF)* (Bruylant 1994) 653.
[4] Bréhima Kamena, "Les droits fonciers coutumiers sus le prisme du droit des biens: propriété, possession ou détention précaire?" in Ndiaw Diouf, Mohamed Niang and Abdoul Diouf (eds), *Le droit africain à la quête de son identité* (L'Harmattan 2021) 667.
[5] Etienne Le Roy, *Les africains et l'institution de la justice : entre mimétismes et métissages* (Dalloz 2004) 262.

practices, in light of "modern" challenges in the areas of investment and economic development.[6]

This Article consists of two parts. Part II first concerns the background and current state of the *domaine national* which accounts for the vast majority of rural land. As the context of the Senegalese *domaine national*, or for that matter, customary landholding in sub-Saharan Africa, may be unfamiliar to many readers interested in property law, the first part of the paper aims to situate the system of landholding in the broader legal and historical context of Senegal. Part III focuses on the proposals for reform. Here the author agrees with the view expressed by civil society organizations that, without a greater effort to reconcile property law with the normative foundations of society, in other words to "Africanize" the property order, any attempt at reform is likely to be temporary in its effects.

II. Context of the *Domaine Nationale*

The fact that rural land in much of sub-Saharan Africa is held on a customary or neo-customary basis is well known.[7] To a large extent, this reflects the lack of penetration of colonial and postcolonial states into landholding in rural areas, at the same time that there is also an appreciation that customary or neo-customary systems may conform better to normative intuitions with respect to the use of land. In Senegal, the vast majority of rural land and a significant amount of suburban land are held as a part of the *domaine national* introduced in 1964,[8] which aimed to place customary rights on a new legal basis, at the same time

[6] These proposals stand in contrast to the role of OHADA as a body of uniform commercial law in a number of Francophone African states. While OHADA has been successful as a project, it is based largely on the Washington Consensus and the French civil code rather than indigenous legal principles. Claire Moore Dickerson, "The OHADA Common Court of Justice and Arbitration: Its Authority in the Formal and Informal Economy" in Karen Alter, Laurence Helfer and Mikael Madsen (eds), *International Court Authority* (OUP 2018) 104.

[7] The political scientist Catherine Boone has noted that the situation is similar in many parts of Asia, sub-Saharan Africa and the post-Soviet space, where users of agricultural land tend to enjoy only a limited right of usage, as opposed to the full rights of ownership common in Europe and North America. Boone, *Property and Political Order in Africa: Land Rights and the Structure of Politics* (CUP 2014) 310.

[8] Loi nº 64-46 du 17 juin 1964 relative au domaine national.

that there was little substantive change to landholding patterns on the ground.

a) Land in the Pre-Colonial Sahel Region

Land was historically and remains the most important means of production in African societies.[9] Thanks to the work of pioneering jurists including Togolese jurist Guy Adjété Kouassigan,[10] the Nigerian jurist and later chief justice Taslim Olawale Elias,[11] the Belgian jurist Jacques Vanderlinden[12] and the Italian comparativist Rodolfo Sacco,[13] the basic pattern of precolonial landholding in sub-Saharan Africa is well established. These works paint a highly generalized picture which does not take into account regional specificities or change over time. In the Senegambia region in West Africa, this is particularly problematic given that the influence of Islam, dating from twelfth-century Toucouleur and the development of the Jolof Empire as an offshoot of the Mali Empire between the fourteenth and sixteenth centuries, led to significant changes in broader Senegalese society which are absent from the general picture described for the entire subcontinent in these pioneering works.[14]

Pre-colonial landholding in sub-Saharan Africa is usually described as communitarian. As land was viewed as sacred, transactions of land

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[9] For the situation today, see Charline Rangé and Kenneth Houngbedji, "Partager la terre" (Modernités Africaines, 15 Feb 2023) https://www.podcasts.ens.psl.eu/en/ecole-normale-superieure-modernites-africaines/202302150500-partager-la-terre (accessed March 14, 2023).
[10] Guy Adjété Kouassigan, *L'homme et la terre : droits fonciers coutumiers et droit de propriété en Afrique occidentale* (Orstom 1966) ; Kouassigan (ed), *Encyclopédie juridique de l'Afrique: Droit des biens*, Volume 5 (Nouvelles éditions africaines 1982).
[11] TO Elias, *Nigerian Land Law and Custom* (Routledge & Kegan Paul Ltd 1962).
[12] Jacques Vanderlinden, *Les systèmes juridiques africains* (Presses Universitaires de France 1983).
[13] Rodolfo Sacco, *Il diritto africano* (UTET 1995), translated into French in Sacco, Marco Guadagni, Luca Castellani, *Le droit africain - Anthropologie et droit positif* (Michel Cannarsa tr, Dalloz 2008).
[14] Although the direct effects of Islamic law on land are often viewed as minimal, Islam nonetheless had broad-ranging effects on political and social dynamics in the region. As the US-based Senegalese philosopher Souleymane Bachir Diagne puts it, the gulf between Islamic and African studies has contributed to a gap of knowledge concerning large-scale Muslim state entities in the region. Diagne, "L'Islam et l'ouest africain: une histoire intellectuelle" in François-Xavier Fauvelle and Anne Lafont (eds), *L'Afrique et le monde : histoires renouées De la Préhistoire au XXIe siècle* (La Découverte 2022) 77-78.

tended not to be possible; rather, land was viewed as a resource which gave rise to life, but which could not itself be appropriated as a commodity. The distribution of land was handled by a hereditary office known as the Master of the Earth (*maître de la terre*), whose holder traced his origin to the first inhabitants of the land. The apolitical character of the office was underlined by the fact that he retained this role even as his community was subjugated by a different political authority. In such a setting, the temporal nature of secular political power contrasted with the permanent and sacral character of land administration. To Senegalese legal historian Mamodou Badji, these rights were functionally real rights in view of their stability. As the inability to alienate these rights renders them lesser rights than ownership, they were appropriately analogized with a usufruct.[15]

Departures from this generalized pattern were more pronounced in the semi-arid Sahel region in West Africa, which hosted large states and urban centers with strong connections to the Middle East.[16] However, even in this region which includes Senegambia at its periphery, Islamization did not lead to a general imposition of Islamic law on new subjects.[17] In line with the division between temporal political authority and permanent and sacral institutions exercising control over land, a relatively stable local oligarchy with its roots in communitarian structures,[18] and a separate cast of political elites formed around elected kings or conquering groups, existed simultaneously.[19] In these societies, there was a constant tension between local and centralizing forces.[20]

[15] Mamodou Badji, *Introduction historique à l'étude des institutions publiques et privées de l'Afrique au sud du Sahara (VIIIe-XXe siècle)* (Presses Universitaires d'Aix-Marseille 2021) 279-281. A loose analogy can also be made with a life interest in common law.
[16] Particularly well known were Timbuktu and Gao as medieval Islamic centres of learning, which were well connected across the Saharan desert to Cairo. See Ousmane Oumar Kane *Beyond Timbuktu: An Intellectual History of Muslim West Africa* (Harvard UP 2016).
[17] Badji (n 15) 71.
[18] Pathe Diagne, *Pouvoir politique traditionnel en Afrique occidentale : essais sur les institutions politiques précoloniales* (Présence africaine 1967) 21.
[19] Ibid. 28.
[20] Ibid. 12.

Significant social hierarchization in this region contrasted with egalitarian modes of social organization in the forest zone.[21]

In the hierarchical yet pluralistic Serer and Wolof states (which dominated the core northern part of Senegambia), Masters of the Earth (known locally as *lamane*) provided an important counterweight to royal authority, and political authorities controlled access to personnel rather than land.[22] As land was the primary means of wealth-holding, it also underpinned the communitarian and participative character of political structures, as decisions of war and peace would potentially lead to a redistribution of land. In everyday litigation concerning land, the king played a key arbitral role in a largely hierarchical social order which was thought to reflect the structure of the universe, and it was the divine who punished the guilty *through* the medium of the king.[23]

Yet, as the Atlantic slave trade intensified in the late seventeenth century, there was a major realignment of the political order in which the kings through the use of *tiedo* (slave) soldiers were able to reduce the influence of Masters of the Earth. The royal consolidation of authority was made possible by a redistribution of land: while *gormon* lands held by the Crown and *lew* lands held by the Crown's allies were not novel legal institutions, in this period there was a significant redistribution of land in favor of the political authorities.[24] At the same time, popular resistance which included the invocation of *jihad* against slavers undermined the moral authority of traditional political rulers.[25] These

[21] Ibid. 11, 255.
[22] Ibid. 103. For the situation in southern Senegambia, which had a markedly different socio-political composition, see Djibril Tamsir Niane, *Histoire des Mandingues de l'Ouest : Le royaume du Gabou* (Karthala 1989).
[23] Diagne (n 18) 60, 224.
[24] Mouhamadou Ba, "La gestion de la terre au Sénégal depuis le XVème siècle : analyse juridique et historique" (PhD thesis, Université Cheikh Anta Diop de Dakar 2019); Joyman Lee, "Land 'Ownership' and State Authority in Pre-Colonial Senegambia" in Rabiat Akande and Idriss Fofana (eds), *International Legal Histories of Precolonial Africa* (OUP, forthcoming).
[25] Diagne (n 18) 129. For a nuanced discussion of *jihad* in the Sahelian context in this period, see Amir Syed, "Between Jihād and History: Reconceptualizing the Islamic Revolutions of West Africa", in Fallou Ngom, Mustapha Kurfi and Toyin Falola (eds), *The Palgrave Handbook of Islam in Africa* (Palgrave Macmillan 2020).

developments contributed to the rise of a clerical class known as *marabouts*, and among this group the *fakk taal* who focused on religious rather than political questions came to play a pivotal role over land.[26] As they were not viewed as contenders for power, the *fakk taal* was able to amass significant landholdings within the legal framework of *sax*, which was the religious equivalent of *lew*. A key theme which emerges therefore is that control over land formed a core element of political power in pre-colonial Senegal, contrary to traditional European perspectives—influenced by racism and the desire to justify colonization—which had viewed land in Africa to be abundant and that control over labor rather than land was the primary political factor.[27] Furthermore, the increase in religious property had a significant impact on later developments in the twentieth century, when the *marabouts* replaced the monarchy as the primary customary authority and a key intermediary between the colonial and post-colonial states and local populations.[28]

b) Colonial law

When French colonization in Senegambia began with the founding of Saint-Louis in 1659, it was against a backdrop of significant state formation.[29] Initially French control was restricted to the Four Communes, which played a highly exceptional role in French colonial

[26] Cheikh Guèye, *Touba: La capitale des mourides* (Karthala 2002); Abdoulaye Bara Diop, *La société wolof: tradition et changement* (Karthala 2012) 236-237, 243.
[27] See for example Igor Kopytoff, *The African Frontier: The Reproduction of Traditional African Societies* (Indiana UP 1987).
[28] See for example Donal Cruise O'Brien, *The Mourides of Senegal: the Political and Economic Organization of an Islamic Brotherhood* (Clarendon 1971). In many respects, the marabouts of Senegal played an analogous role in Senegal's post-colonial socio-political order to traditional rulers in other West African countries such as Nigeria. However, compared to Nigeria, marabouts in Senegal enjoy a stronger political rapport with the post-colonial state, and the largest brotherhoods wield significant electoral influence in a largely democratic system.
[29] Badji (n 15) Title 2 ch 1.

history in an "assimilationist" phase of the French Empire, when local subjects were granted full rights as French citizens.[30] In contrast, as French rule expanded into the interior, colonial rule became much more aligned with the experience of European colonialism elsewhere. Like its British counterpart, French colonialism was marked by its parsimonious character, and a two-tier system which imposed duties rather than rights on colonial subjects.

Given the universal pretensions of French civil law, formal law in cities followed the French model closely. In 1906 a system of land registration was introduced,[31] which was subsequently modified in 1932.[32] Under French law, although registration is not required for property transfer to take effect,[33] it is nonetheless necessary for effectiveness against third parties in the case of land.[34] In French West Africa, registration was mandatory where real property previously governed by customary rules formed the object of a written contract conforming to French law,[35] in other words when it was brought into the Western property system. However, unlike the situation in metropolitan France, where property rights were understood as a natural right, in colonial Senegal formal property rights emanated from the state.[36] This was similar to other colonial societies including common law societies in North America and Australia; unlike in

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[30] Mamadou Diouf, "The French Colonial Policy of Assimilation and the Civility of the Originaires of the Four Communes (Senegal): A Nineteenth Century Globalization Project" (1998) 29 Dev Change 671. The situation in the *Quatre Communes* differed significantly from the experiences of later colonisation, when French subjects including Léopold Sédar Senghor himself were denied full citizenship, which contrasted with the unitary and centralising characteristics associated with the French state.

[31] Décret du 24 juillet 1906 portant organisation du régime de la propriété foncière dans les colonies et territoires relevant du Gouvernement général de l'Afrique occidentale française.

[32] Décret du 26 juillet 1932 portant réorganisation du régime de la propriété foncière en AOF.

[33] Code civil, art 1583.

[34] Décret n°55-22 du 4 janvier 1955 portant réforme de la publicité foncière, art 30; Code civil, art 1198, concerning priority. Although there is disagreement as to whether registration is required for property transfer to be effective against third parties in general, or whether it affects only the double sale of property, the former is nonetheless understood internationally as the "French" system of property transfer, for example as enacted in Civil Code (Japan), art 177.

[35] Décret du 24 juillet 1906 (n 31), art 5(2).

[36] Monique Caverivière and Marc Debene, *Le droit foncier sénégalais* (Berger-Levrault 1998) 11, 42.

Europe, property rights in colonial settings were often conditional upon settlers' ability to "improve" the land (*mise en valeur*).[37] In Senegal, the French colonial state was reluctant to grant this right even to white settlers. If the state were to undertake a compulsory purchase of land, a large compensation had to be paid to property owners, which curtailed the appeal of land registration from the state's vantage point.[38] The post-independence state largely followed the same policy: the end of a simplified procedure for registering land in the name of the state represented a *de facto* abrogation of the 1932 system.[39]

As highlighted above, the most striking feature under French colonization was the colonial state's lack of interest in extending the modern land registration system over rural land. In many respects, the French approach formed a part of a more general pattern of European colonial rule in Africa and elsewhere, where the desire to place colonies on a self-sustaining financial basis severely limited intervention on the part of colonial authorities.[40] In legal terms, the most striking departure from metropolitan law was the use of native courts or customary tribunals, whose work was presided over by a colonial administrator assisted by native assessors familiar with customary practices.[41] In Senegal, there was a tripartite division between civil law (*droit commun*), administrative law, and traditional law, in contrast to the ordinary bipartite division between civil and administrative law in metropolitan France. Procedural law was much simplified compared to the usual

[37] Ibid. 43. Cf the relative ease with which titles were granted in the US under the Homestead Acts.
[38] Caverivière and Debene (n 36) 35-36.
[39] Ibid. 52.
[40] See for example Jane Burbank and Frederick Cooper, "Imperial Repertoires and Myths of Modern Colonialism" in Burbank and Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton UP 2011).
[41] For the practice in British colonies, see Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court* (OUP 2013) and Sally Falk Moore, "Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running Their Own Native Courts" (1992) 26 Law & Soc'y Rev 11. Note that customary courts remain an important tool in the arsenal of contemporary French colonialism, notably in New Caledonia. See, Oona Le Meur, *La fabrique du droit coutumier en Nouvelle-Calédonie: Épreuves coutumières et raisonnement juridique* (Editions de l'Université de Bruxelles 2025). This contrasts with the absence of a distinct customary jurisdiction in post-colonial states such as Senegal.

French practice,[42] with tribunals consisting of single judges sitting as justices of the peace, and appeals were also handled by a single presiding judge and an assessor selected from first-instance magistrates. Oversight was handled by *Chambres d'annulation* attached to the *Cour d'appel*, which enjoyed supervisory control over the customary tribunals.[43]

In rural areas, the French colonial regime barely touched the traditional system of landholding, which remained largely collective in character. Unlike in British colonies, where the courts involved themselves directly in the recognition and development of neo-customary law;[44] in Senegal customary systems were preserved largely as a result of the state's inaction. As Badji highlights, French jurists did not see customary law as a mode of self-regulation, but rather pluralism was only embraced on a pragmatic basis, and it was colonial administrators rather than jurists who pushed for the recognition of custom.[45] Whereas a 1935 decree introduced the presumption that land not occupied after ten years would become a part of the public domain,[46] the proposal was viewed as a violation of traditional rights and did not gain traction. Decrees in 1955 and 1956 immediately before independence effectively restored the pre-1935 system by recognizing only the state's administrative and police powers over such lands.[47]

Thus, despite a shared preference for minimal intervention, French colonial rule differed from British rule in a number of respects.

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[42] This situation has a parallel with the practice in British India, where the colonial government's distrust of courts outside the metropolitan centers led to the wholesale removal of the system of "equitable title" and with it the latitude for equitable discretion enjoyed by courts in the English tradition. See Katy Barnett and CK Nandakumar, "An Extended Comparative Map of the Laws of Constructive and Resulting Trusts and the Associated Remedies in Australia and India" (Obligations Group Workshop, Melbourne Law School, March 11, 2026).

[43] Mamadou Diop, *La gouvernance judiciaire: Promouvoir au Sénégal une justice moderne et efficiente* (L'Harmattan 2017) 23-25.

[44] See Elias (n 11); Nwauche (n 1); Constitution of the Republic of Ghana, s 11(2) (n 1).

[45] Badji (n 15) 289. The situation was very similar to Malawi under British rule. See Mary Jiyani, "Protectors and protected: regulating land and labor in the Nyasaland colonial protectorate" (DPhil thesis, University of Oxford 2024).

[46] Décret du 15 novembre 1935 portant réglementation des terres domaniales en Afriqueoccidentale française.

[47] Caverivière and Debene (n 36) 69.

The common law system in British territories enabled a more fluid approach to customary law, as courts were able to cite previous judgements issued by a formal court system. While French colonial administrators shared with their British counterparts an appreciation for the importance of custom, juristically the civil law system's emphasis on statutory texts meant that customary law existed in a void which was better characterized as the state's "withdrawal".[48] Compared to British colonies, French colonial rule was also highly centralized at least on paper, and it was necessity rather than design which forced the devolution of authority from Dakar.[49] Locally the power of the French colonial state was represented in the form of the *commandant,* which left a deep cultural imprint on African societies.[50] Furthermore, given that a formal and entrenched division between private and public law existed in France, with the latter being judge-made in nature, colonial law in the French context was categorized as a branch of administrative law.[51]

c) Transition to the *Domaine national*

As a result of the country's dependent position in the global economic order, Senegal's accession to independence did not bring about a substantive departure from previous legal or political structures. Ambitious social and economic reforms at the point of independence were quickly abandoned with the political downfall of

[48] Otis, Leclair and Thériault (n 2).
[49] Badji (n 15) 327-329.
[50] See for example the celebrated Malian author Amadou Hampâté Bâ, *Oui mon commandant!* (Actes Sud 1994), published posthumously.
[51] This practice has continued in France's remaining colonies today. See for example Marc Debene and Jean-Paul Pastorel, *La "loi du pays" en Polynésie française* (Harmattan 2011). In many ways, this bears similarity with the situation in settler colonies such as Australia, where indigenous law is also said to have a public law character, given that the Crown is often the defendant in such cases. For example, a key question in *Mabo* (n 46) 52 was a reclassification of the Crown's claim to sovereignty as "a radical title to land and a sovereign political power over land" (Brennan J). In a comparative context, this reflects a prominent feature in nineteenth-century European colonialism when sovereignty (*imperium*) and private property rights (*dominium*) were conflated, and in cases such as Cour d'appel de l'Afrique occidentale française (CA AOF), 1 March 1907 (*Abdou Cogna Diop et Louis Abadie c Alpha Diol, domaine de l'Etat et Ficatier*), (1907) 10(III) Recueil Dareste de législation, de doctrine et de jurisprudence coloniales 97, 101, 111, French courts contended that the colonial state derived both *imperium* and *dominium* on the basis that traditional rule in Kajoor (Cayor) was "despotic" and hence the ruler's sovereignty allegedly included both attributes.

Prime Minister Mamadou Dia in 1962, who had attempted to pursue a more radical reformist agenda. Thereafter President Senghor pursued a politically conservative path which involved working with entrenched interests including French commercial interests in Dakar and Muslim marabout clerics in the countryside. At the same time, the future member of the Académie française devoted much energy to a muscular cultural agenda, which ensured a high regard for Senegal on the international stage.[52] The poet-president was also committed to a multicultural and secular vision of Senegal, which meant that authoritarianism in the country avoided the repressive character of authoritarianism in other parts of the region.

Inspired by Senghor's vision of the African legal order described below, the *domaine national* which replaced customary law in 1964 has the following features:[53]

- Denial of the right of "ownership" to users of rural land, at the same time as granting them a right of "usage"
- The right of usage is granted free of charge, including customary fees and obligations
- Land remains inalienable and cannot be transmitted.

Importantly, the system did not apply to frontier areas such as the Senegal Valley in the country's arid north which required active efforts at settlement. As population density was relatively low across Senegal at the point of independence, the *domaine national* was an effective system which granted immediate protection to cultivators, notwithstanding the limited resources which were available to allow its detailed implementation.

[52] Most notably, in 1966 Senegal hosted the first World Festival of Black Arts under the auspices of UNESCO, which predated similar international events in Algiers in 1969 and Lagos in 1977.

[53] "Premier Rapport d'étape de la Commission Nationale de Réforme Foncière (CNRF)" https://www.afrique-gouvernance.net/bdf_document-1755_fr.html (accessed March 31, 2023) 4.

d) Senghor's View of Land

The direct intellectual contribution of Senegal's founding president to the legal structure of property is highly unusual in modern African history. In his position as the country's independence leader, as well as a key figure in the development of the Francophonie, Senghor's conception of the country's place in the world was a force which shaped the country's development profoundly. In a manner which may resonate with modern environmentalism, Senghor took a harsh view on Western civilization's emphasis on the "possession" of land, which in his view "kills" nature. Rather, Senghor argued that men possessed only a right of "usage", whereas "ownership" belonged to the realm of Mother Nature and spirits.[54] To Senghor, the African chief was not an authoritarian ruler but a community leader in which his powers were balanced by councils of the elderly who looked after the wellbeing of the entire community.[55] An ethnic Serer (although educated almost entirely in French), Senghor described the African political order in a way that reflected the known characteristics of Serer and Wolof political structures which had been dominant in the Senegambian region.[56]

To a historically minded legal scholar, linking post-independence Senegal's success in achieving a strong international reputation in the cultural sphere with legal developments may be challenging, given the widespread sense that the decolonization of the country's political and legal institutions has lagged behind its cultural achievements. Senghor's ideas centered on the tensions between his interest in an authentic pre-colonial culture which can be "owned" by Africans (*Négritude*) while he subscribed strongly to universal ideals. Thus, the retention of a French legal system was not at odds with Senghor's worldview, much like the maintenance of large parts of the French colonial bureaucracy notwithstanding Senegal's greatly reduced size compared to French

[54] Elara Bertho, *Léopold Sédar Senghor* (Presses universitaires de France 2023) 80-81
[55] Ibid.
[56] Badji (n 15) 121-124; Diagne (n 18).

West Africa.[57] Consequently, the poet-president favored a gradualist reform agenda, such as an unsuccessful attempt to replace the specialized French court system with a centralized supreme court, which he saw as more aligned with traditional African juristic thinking.[58] At that time, Senegalese universities also welcomed French jurists with open arms in enlisting their assistance for the drafting of the new *Code des obligations civiles et commerciales* (COCC) promogulated between 1967 and 1985. Although this was largely a modernized version of the *Code civil*,[59] it contrasted with the more purely European civil code in Ethiopia authored by the French comparatist René David which parted completely with customary law.[60]

e) Formal Abolition of Customary Law

With the end of colonization, Francophone states including Senegal were quick to formally abolish customary tribunals to maintain a legal façade of the uniform application of a Western-based state law across its territory.[61] In substantive terms, however, the limited application of state law continued largely as before. While it is possible for formal law to abstain from practical structures of landholding in rural areas, this comes with significant drawbacks, particularly in urban peripheries and from the perspective of economic development. Notably, it increases the difficulty in developing security rights where rights in land can be used as a collateral for borrowing to fund

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[57] Senghor favored the preservation of French West Africa as a unit and warned against what he described as political balkanization, which contrasted with the visions of many contemporary African leaders, notably Ivorian founding president Félix Houphouët-Boigny

[58] Fatou Kiné Camara: "La Cour suprême du Sénégal: leçons d'un faux départ" in Diouf, Niang and Diouf (n 4).

[59] Roger Decottignies, "Réflexions sur le projet de Code sénégalais des obligations" [1962] *Annales africaines* 171.

[60] See for example, Nicholas Vosikis, *Le trust dans le Code civil éthiopien : étude de droit éthiopien avec référence au droit anglais* (Droz 1975).

[61] As observed in fn 41, this contrasts with the situation in New Caledonia today. The Cameroonian jurist Charles Fombad has observed that many African post-colonial legal systems were hastily assembled in the image of the "parent" country, which might not even have reflected legal practice under formal colonisation. Fombad, "Sub-Saharan Africa" in Mathias Siems and Po Jen Yap (eds), *The Cambridge Handbook of Comparative Law* (CUP 2024) 370-371.

investment,[62] which necessitates the development of alternative rights of varying degrees of formality capable of performing a similar role.

Yet, as one of the most stable political entities in Francophone Africa, in Senegal the state's withdrawal from the rural legal order was counterbalanced by its continued presence in the political and social realms. In particular, although they were introduced later than the *domaine national* itself and were often under-resourced, in many instances rural councils as mediative institutions ensured access to a form of justice.[63] Arguably this strategy represents a continuation of the colonial state's preference for an administrative over a judicial pathway to the creation of norms,[64] at the same time that it suggests that an executive rather judiciary-centered approach to rural land regulation is possible. Put differently, it suggests that Western property orders based on formal state law are not necessarily a prerequisite for an effective allocation of land rights, at least at lower intensities of land use as found in the case of rural land. In fact, in the context of low productivity, the lack of formal rights may offer an effective safeguard against the overconcentration of land ownership, with its adverse effects in frustrating the poor's access to land and therefore exacerbating inequality. However, the situation is very different in urban peripheries, where customary rights clash more directly with rights deriving from modern property systems.

f) The Mechanics of the *Domaine national*

How does the *domaine national* work? Strictly speaking, land in Senegal is not held under a customary regime, but rather the creation of a *domaine national* has generated a new set of legal titles.[65] Land that was not registered either as public or private land automatically became a

[62] This point is acknowledged in the CNRF's "Premier rapport" (n 53) 4.
[63] In 1999, Maisons de justice in charge of mediation and conciliation were also introduced. Décret n° 2007-1253 du 23 octobre 2007.
[64] Badji (n 15) 433.
[65] Caverivière and Debene (n 36) 72, 183. After the promulgation of the law, customary rights are no longer relevant, and the ability to stay on the land depends on continued use and occupation rather than claims to ancestral rights.

part of the *domaine national*.[66] In principle the state is the "holder"(*détenteur*) of the land.[67] At the same time, the state can only exercise its rights as an owner in the ordinary sense after having registered the land.[68] Thus the state's rights over the *domaine national* are more akin to the British Crown's nominal ownership of land in England, or perhaps the Crown's "radical title" in Australia,[69] than "ownership" in the civil law sense. Alternatively, one can also conceptualize the state as the modern incarnation of the Master of the Earth. For Monique Caverivière and Marc Debene, the system is best understood in terms of *res nullius*, or a thing outside of law, and *res communis*, a common resource that individuals can access for subsistence purposes.[70] It should be remembered that it is legitimate for a property system to make its own choices with regard to items that it excludes from general circulation. For example, in the same manner that corporeal body parts cannot usually be the subject of property in Western legal orders, it is also normatively permissible for land to be excluded from circulation in sub-Saharan Africa.

In the *domaine national*, users of land only have a personal right of usage.[71] In line with the colonial principle where real rights were granted only to those who could "improve" the land,[72] users are required to farm the land personally and must remain in occupation, and their rights can be terminated in the event of a failure to use the land.[73] These rights cannot be the subject of a commercial transaction,

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[66] Loi n° 64-46 (n 8), art 1.
[67] Ibid., art 2. However, as noted in Caverivière and Debene (n 36) 85-88, the precise juridical nature of the state's role is unclear.
[68] Loi n° 64-46 (n 8), art 3. At which point the land passes into the Domaine de l'État, which is the ordinary legal regime for public lands in civil law systems. Art 13 states that the state may only register land on the grounds of public utility.
[69] *Mabo* (n 46) 52 (Brennan J).
[70] Caverivière and Debene (n 36) 88-89. Cf contemporary discussions on commons property based on the rejection of the idea of the "tragedy of commons" in Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 1990).
[71] Décret n° 72-1288 du 27 octobre 1972, art 3.
[72] In the Anglophone context, this is also known as the homestead principle based in part on John Locke's labor theory of property. Examples of legislation putting in place such a principle include the Homestead Act 1862 in the US, Dominion Lands Act 1872 in Canada and Crown Lands Acts 1861 in New South Wales, Australia.
[73] Loi n° 64-46 (n 8), art 15.

notably a sale or lease.[74] As the usage right terminates upon death,[75] it is not available for succession, although heirs can apply to the rural council for the same right where they are able to farm the land and their usage does not result in an excessive fragmentation of the land.[76] Although there is some protection against illegal encroachment in the criminal code,[77] there is a lack of clarity as to whether the law of the *domaine national* applies to buildings erected on domain land or whether ordinary civil law principles such as accession operate.[78]

Ostensibly, the main role of the *domaine national* is as a placeholder mechanism. Until the Senegalese state, with its aspirations for modern economic development, decides what to do with the land, it refrains from granting real rights to any party. Ownership is held in suspense until a purpose can be identified, at which point the land can be registered and placed under a modern or an alternative set of principles. In other words, the *domaine national* is envisaged as a transitional regime.[79] At the same time as depriving users of a property right, it allows farmers to benefit from the ability to use the land without paying rent, and to retain the fruits of their efforts.[80] In the 1960s, the model was sustainable, partly because there was a considerable amount of surplus land, as Senegal's population was only 2 million. However, today 19 million people live in the country.

g) Lack of a Real Right

From a property law perspective, there are acute limitations to systems that do not confer a real right to users, although even in Europe and North America there are several exceptions to the norm that users of land enjoy a property right. In settler colonies such as Quebec in Canada, Indigenous residents living in reservations "accept" a system

[74] Décret n° 72-1288 (n 71), art 3.
[75] Ibid., art 5.
[76] Ibid., art 6.
[77] Loi de base n° 65-60 du 21 juillet 1965 portant Code pénal, art 423.
[78] Caverivière and Debene (n 36) 2.
[79] Compared to common law jurisdictions, the system is more rigid as it is not open to courts to recognize customary rights as "proprietary" without the direct intervention of the legislator.
[80] Ibid. 219.

where they do not hold property rights in exchange for certain benefits such as the possibility of greater autonomy or the prospect of eventual independence.[81] In the case of Senegal, in the absence of a property right, Senegalese farmers cannot sell the land, nor can they use the land as a collateral to fund investments. In the words of Senegalese judge Keba M'Baye, later vice-president of the International Court of Justice, the user of *domaine national* land only has authorization to exploit the land.[82] In colloquial terms, they are not on the property ladder.

As Mayatta Ndiaye Mbaye has shown, in practice it is possible to sell not the land itself but the fruits of improvements by the occupant.[83] In particular the procedure of abandonment (*désaffectation*) and reassignment (*réaffectation*) of rights by rural councils can be used to circumvent the ban on transfers, and the transfers are tacitly recognized by both tax authorities and local municipalities, and are coordinated by notaries.[84] However, these practices are legally uncertain, for they rely on their recognition by the relevant authorities who tacitly acknowledge such practices, and it is possible that only certain branches of the local state and not others are familiar with these practices and not others.[85] Furthermore, for each parcel of land it is possible that multiple parties may have documents evidencing rights, and as courts tend to protect formal rights more strongly than informal rural rights, there is ample room for abuse.[86] As the CNRF report points out, such contests often involve competition between different legitimate rights, whether between pastoralists and farmers over rural land, or between different claims to "customary" rights in the urban setting.[87] Sometimes contest

[81] Denys-Claude Lamontagne, *Traité du domaine privé: le droit patrimonial : biens, propriété et modes d'acquisiition* (Yvon Blais 2021) 161.
[82] "Le régime des terres au Sénégal" in International Association of Legal Science (ed), *Le droit de la terre en Afrique* (GP Maisonneuve et Larose 1971) 153.
[83] Mayatta Ndiaye Mbaye, "Le statut juridique des terres immatriculées" in Diouf, Niang and Diouf (n 4) 737.
[84] Ibid.
[85] Ibid. 738.
[86] Ibid. 739.
[87] "Premier rapport" (n 53) 16.

over land leads to violent conflict which has become part of a wider trend across the continent.[88]

h) Urban Developments

In urban settings, the state has also opted for the use of limited property rights, namely the *emphyteusis* (land contract allowing perpetual use on the condition of proper care and rent payments) or the *superficies* (real right in buildings on top of land).[89] While almost all rural land in Senegal forms part of the *domaine national*, urban land is usually held by the state as part of the state domain (*Domaine de l'État*), which contrasts with genuinely private land (*Domaine privé*) which can be held by the state as well as private natural or legal persons. The decree of 1964 accompanying the Act introducing the *domaine national* did not impose the requirement of public utility for the registration of urban land.[90] This means that the Senegalese state had in fact envisaged a two-tier system whereby in urban areas an administrative decree alone would be sufficient to transfer land from the *domaine national* to the state domain.

The goal of the property system in urban Senegal is to incorporate planning powers into the structure of property law, and in doing so to allow the state to retain control over urban development.[91] Unlike rural lands in the *domaine national*, in urban lands real rights can be exchanged for value through a transfer by onerous title and used as a security.[92] Yet, their status as a real right also means that holders are responsible for land and tax charges.[93] Functionally it is possible to analogize the holder of these rights to a tenant, in the sense that, unlike a

[88] Mbaye (n 83) 739; Boone (n 1).
[89] Notably, the notion of *superficies* is also used in a number of civil law countries such as Japan, Taiwan, and the Netherlands. See, Civil Code (Japan), art 265; Civil Code (Taiwan), art 832; Civil Code (Netherlands), art 5:101.
[90] Décret n°64-573 du 30 juillet 1964, arts 36-38.
[91] Caverivière and Debene (n 36) 268.
[92] Ibid. 255, 262.
[93] Ibid. 255.

usufructuary, there is an obligation to pay a fee to the state as the owner of the land.[94]

In other words, in contemporary Senegal, there remains a strong element of public law in the administration of urban land. While it is questionable whether property law is the appropriate vehicle for delivering planning goals, the idea appears to command a certain appeal to states oriented towards economic development. Yet, the efficacy of such a system is highly doubtful in practice owing to the limited capacity of the Senegalese state. As the state has no capacity to ensure that users are able to enhance the economic productivity of land, it is unclear whether the extra layer of administration merely results in the imposition of additional rules that serve no practical purpose.[95] Furthermore, the ambiguity of the content of the state's reserved rights reduces the value of the property right forming the underlying subject of a security interest.

Similarly, like other jurisdictions where the law of *superficies* is widely practiced, such as Japan, the dissociation of buildings from the land on which they stand on may cause confusion.[96] It is probably for that reason that formal laws are often evaded: only 35% of construction projects in Dakar are known to have a construction permit, leading to a level of involuntary laxity on the part of the authorities.[97] Finally, unlike neo-customary law, the COCC and the state's legal innovations concerning urban land do not command the same normative authority among a population who for the most part have recently been rural dwellers.[98]

It seems plausible therefore to conclude that, while existing arrangements offer a certain degree of stability, a system which exists

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[94] Ibid. 259-260.
[95] Ibid. 262.
[96] Ibid. 265. In Taiwan, for example, the completeness of land registration contrasts with the incompleteness of building registration, which means that in practice registration is incomplete, and the transfer of rights in buildings relies on tacitly recognized practices outside the civil code, in a way that is not fundamentally different from urban land in Senegal. Yun-chien Chang, Weitseng Chen and Ying-chieh Wu, *Property and Trust Law in Taiwan* (Wolters Kluwer, 2nd edn 2022) 31, 47.
[97] Caverivière and Debene (n 36) 264.
[98] Ibid. 266.

essentially outside formal property law has significant drawbacks. As the scholar of urban planning Jérôme Chenal has noted, given the overall economic weight of the main city in West African nations, the state is reluctant to relinquish control, which explains the degree of policy intervention in the property architecture. Significantly, the control which the state exercises through the mechanism of urban planning concerns only land deemed to be valuable by the state in the context of its economic objectives, which means that rights in marginal spaces where significant segments of the population reside remain largely informal in nature. [99] As the CNRF report acknowledged,[100] it is often at urban peripheries, rather than in rural areas, where the impact of formal law is most acutely felt and where abuse by the wealthy and the politically connected is the most likely.[101] The stratification of the legal system, which reflects French colonial traditions, is therefore a factor that has contributed to the persistence of compartmentalized and uncertain rules.

i) Conclusion to Part II

Part II has provided a contextualization of the *domaine national* as it currently exists in Senegal, both historically and in relation to developments in urban land. This descriptive presentation is necessary in order to understand the structure of Senegalese property law, which includes at its core a blurry division between rural land and a semi-formal system of limited real rights in unregistered urban land. While acknowledging that the most difficult land-related conflicts in contemporary Senegal concern urban peripheries, at its inception the *domaine national* was envisaged to perform a bridging function between traditional normative values and modern development challenges. As

[99] Jérôme Chenal, *La ville ouest-africaine : Modèles de planification de l'espace urbain* (MétisPresses 2013) 95-96.
[100] "Premier rapport" (n 53) 16.
[101] Philippe Lavigne-Delville, Camille Toulmin and Samba Traoré (eds), *Gérer le foncier rural en Afrique de l'ouest. Dynamiques foncières et interventions publiques* (Karthala 2000) 30.

the next Part further demonstrates, in many ways the core features of customary systems of landholding are retained in the *domaine national*.

III. Proposals for Reform

Given the transitional nature of the *domaine national*, successive governments in Senegal have explored the prospect of reform, especially in light of its perceived incompatibility with development goals that require outside investment as well as the use of land rights as a collateral for security. It was in this context that the CNRF was created in 2012 by the then-president Macky Sall. Although initially the CNRF was a top-down and jurist-led technical process like its predecessors, the successful inclusion of civil society organizations led to a new emphasis on a "participative and inclusive" process of dialogue and reflection.[102] In Senegal, the process of dialogue between the state and civil society organizations is a particularly fruitful site of research owing to the relatively high level of development and the structured and dynamic nature of civil society in the West African nation.[103] While the strong participative character of civil society organizations may reflect an element of Senegalese exceptionalism underpinned by the country's relative homogeneity,[104] it nonetheless offers an important example with respect to the possibility of articulating local norms in a formal and technical manner.

In recent decades, the role of law commissions as a way of softening the rigidity of laws has been pronounced in sub-Saharan Africa.[105]

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[102] Philippe Lavigne Delville, Daouda Diagne and Camille Richebourg, *Influencer collectivement les orientations d'une réforme foncière : enseignements de la mobilisation des organisations de la société civile au Sénégal* (International Institute for Environment and Development 2020) 4.

[103] Ibid. 3.

[104] With only six major language groups and the *de facto* dominance of Wolof culture rooted in the precolonial state of Kajoor, Senegal is an unusually homogenous country compared to other post-colonial African states with boundaries drawn by European colonial powers. With the exception of Casamance, ethnic rivalries are also less intense in Senegal. Mamadou Diouf, *Histoire du Sénégal: le modèle islamo-wolof et ses périphéries* (Maisonneuve & Larose 2001); Diouf, *Le Kajoor au XIXe siècle: pouvoir ceddo et conquête coloniale* (Karthala 1990) 5 ; Maurice Kamto, *Pouvoir et droit en Afrique noire* (LGDJ 1987) 396.

[105] See, for example, Mbage Njuguna Ng'ang'a and Virginia Nelder, "Law Reform: Law in Progress, Not in Retreat: The Kenyan Perspective" <https://www.commonwealthlawyers.com/wp-content/uploads/2019/09/D3-Mbage-

Compared to Commonwealth countries, the lacuna with respect to formal law in the absence of lawyers' customary law is more acute in Francophone legal systems. In New Caledonia, for example, the contemporary French colonial state facing existential pressures from the Kanak independence movement has had to actively create a new legal framework including a separate system of courts to accommodate local customary law.[106] In Senegal, at one level the work of the CNRF was a failure in that the cacophony of voices and the great differences in interests persisted, and the CNRF did not succeed in offering a definitive set of propositions prior to its dissolution in 2017 by the presidency. Nonetheless, it is argued that the successful participation of civil society organisations in the CNRF as a consultative process has laid the foundations for a new approach to ostensibly legal and technical issues, which nonetheless have a strong impact on the lives of rural users of land.

a) 1980s-2000s: The Diouf and Wade Administrations

The Senegalese state's interest in land reform began in the 1980s, when economic downturn and the need for bailouts from the Bretton Woods institutions led to a series of involuntary liberalizing reforms in many sub-Saharan African countries.[107] Under this climate of deregulation and liberalization, the legal framework of the *domaine national* was deemed unsatisfactory. As Claire Moore Dickerson explained in relation to OHADA, a strong presumption existed in this period that "foreign private entities would be more willing to invest in African countries that had laws with which these entities were familiar",[108] which meant that law reform was largely influenced both by the Washington Consensus and by the formalism of the French civil code. In rural Senegal, the creation of the *domaine national* was never accompanied by the development of the set of tools necessary for its

Nganga.pdf> (accessed March 14, 2026), and CE Okeke, "Law Reform Process and Practice in Nigeria: Issues and Challenges" (2020) 2 Int Rev Law Jurisprud 57.

[106] Loi n° 99-209 organique du 19 mars 1999 relative à la Nouvelle-Calédonie; Le Meur (n 41).

[107] See for example Adeoye Akinola, "The Bretton Woods Institutions and Economic Reform in Africa", *Oxford Research Encyclopedia of African History* (2021) <https://doi.org/10.1093/acrefore/9780190277734.013.754> (accessed March 14, 2026).

[108] Dickerson (n 6) 105.

delivery. The rural communities charged with the assignment of rights were only created in 1972, whereas the notion of "improvement" to land was never adequately defined. In practice, rural communities merely assigned land among its members, which meant that the substantive utility of the *domaine national* as a tool of economic development was limited.[109]

In 1984, a new agricultural program entitled the *Nouvelle politique agricole* was launched under Senegal's second president Abdou Diouf, with the goal of reducing the state's involvement in rural areas.[110] The reform aimed at creating village-level structures including cooperative organizations and the provision of resources including financing and technical training to these new organizations.[111] It also strongly limited the private appropriation of land.[112] A decade later in 1995, a new *Plan d'action sur le foncier* was introduced by the Diouf administration to explore the means of increasing investment in a rural setting, and the plan proposed three alternative solutions: namely the maintenance of the status quo, the full liberalization of land ownership, or a mixed regime. Fearing political instability if a radical proposal were adopted, the socialist president did not act on the proposals.[113]

By the time the CNRF was created, further attempts by the state to seize control over land and to prioritize the interests of investors, such as the *Loi d'Orientation Agro-Sylvo-Pastorale* 2004[114] and the *Commission nationale de réforme du droit sur la terre* in 2005, were effectively blocked by peasant organizations.[115] One of the signs and consequences of Senegal's remarkable political stability is the strength of civil society organizations, including those representing the interests of rural peasants. In 1993, the *Conseil national de concertation et de coordination des*

[109] Deville, Diagne and Richebourg (n 102) 9.
[110] For an overview of Senegal under the second president, see Momar Coumba Diop and Mamadou Diouf, *Le Sénégal sous Abdou Diouf: État et société* (Kathala 1990).
[111] Ministère du Développement Rural, "Nouvelle politique agricole" (1984) https://www.bameinfopol.info/IMG/pdf/NPA.pdf (accessed April 2, 2023).
[112] Deville, Diagne and Richebourg (n 102) 9.
[113] Ibid. 10.
[114] Loi nº 2004-16 du 25 mai 2004 portant loi d'orientation agro-sylvo-pastorale.
[115] Deville, Diagne and Richebourg (n 102) 4.

ruraux (CNCR) was founded and in 1996 it was recognized by the state as an organization representing rural producers. In 2004, the CNCR published a proposal for a limited reform of the *domaine national*, which advocated a reinforcement of rural land rights including the possibility of a limited ability to assign usage rights within rural communities.[116] This line of working within the confines of the *domaine national* has remained the preferred pathway for peasant organizations, which testifies in part to the resilience of Senghor's vision of putting neo-customary arrangements on a formal footing as a way of constructing a pluralistic legal system. It also highlights the widespread skepticism in rural Senegalese society towards law reform in the direction of strengthening individual property rights.

The *Loi d'Orientation Agro-Sylvo-Pastorale* passed in 2004 under Senegal's third president Abdoulaye Wade was preceded by a previous project aimed at creating a state agency in charge of assigning land to investors, which was in effect an attempt to establish direct state control over rural land. Owing to opposition from peasant organizations, the project was partially abandoned, notwithstanding a later 2017 law to create special economic zones which put in place some of the project's original goals.[117] The revised 2004 law introduced special provisions for the protection of rural land users and rural communities, including a limited ability to assign rights in land to allow the creation of more viable farms, which were to be transmissible in the context of succession and could be used for obtaining credit.[118]

Yet, in the twelve years under the Wade presidency (2000-2012), there was a strong turn towards larger-scale agribusiness, partly because of an increase in international market prices for agricultural goods in the years preceding the 2008 global financial crisis. Locally this played out in the form of land grabs on the part of international investors and local elites.[119] The response to these initiatives led to a crystallization of mobilisation efforts by civil society. Beginning in 2010,

[116] Ibid. 10.
[117] Loi n° 2017-06 du 06 janvier 2017 portant sur les zones économiques spéciales.
[118] Loi no 2004-16 (n 114), art 22.
[119] Deville, Diagne and Richebourg (n 102) 12.

the *Cadre de réflexion et d'action sur le foncier au Sénégal* (CRAFS) came to replace the CNCR and provided a platform for bringing together peasant and consumer organizations, think-tanks, and non-government organizations. CRAFS was particularly active ahead of the 2012 presidential elections, initiating a number of studies on the land question and posing questions to candidates.[120]

b) Changes under Macky Sall

The arrival to power of Macky Sall in 2012 renewed the state's focus on agriculture as a key sector for achieving Senegal's economic potential.[121] In line with liberalizing reforms, the Sall administration sought to increase access to land on the part of investors without compromising the rights of existing users.[122] The creation of CNRF in 2012 was a core part of this effort, and the commission was charged with the tasks of analyzing existing rules, identifying institutional constraints to the optimal use of land, and proposing means of adaptation to contemporary economic challenges. Article 2 in the legislation creating the CNRF highlights the goal of identifying an "attractive legal and institutional framework" that offers guarantees to investors at the same time as assuring social security and peace.[123] In line with the emphasis on the technical character of law reform,[124] a lawyer was initially chosen to head up CNRF, and the views of sociologists and agronomists close to rural movements were marginalized.[125] However, the arrangement was strongly opposed by civil society and international organizations, which led to the resignation of the first chair of CNRF in favor of a more open structure that permitted civil society participation. Thematic commissions were

120 Ibid. 14.
121 For an overview see Ward Anseeuw, "Agricultural policy in Africa: renewal or status quo?: a spotlight on Kenya and Senegal" in Vishnu Padayachee (ed), *The Political Economy of Africa* (Routledge 2010).
122 Deville, Diagne and Richebourg (n 102) 15.
123 Loi n° 2012-1419 du 6 décembre 2012 relatif à la création de la commission nationale de réforme foncière, art 2.
124 See fn 108 above.
125 Deville, Diagne and Richebourg (n 102) 16.

replaced by a committee of technical experts which included a jurist, a geographer, and a sociologist.[126] Collectively the change reflected the will of the CNRF to broaden its definition of technical expertise beyond the narrow confines of French-style legal thinking and to incorporate experts who identified with civil society organizations and rural movements. Arguably, it also revealed a degree of sensitivity on the part of government-affiliated institutions to the views of civil society, owing to the relative proximity between the state and civil society in Senegal.

The CRAFS framework was thus an important milestone in the evolution of the CNRF, as civil society organizations were directly integrated in the commission's plenary assembly and technical experts representing the interests of civil society participated in the drafting of technical solutions. In the opinion of Philippe Delville, Daouda Diagne and Camille Richebourg, the CNRF's abandonment of a short-term project of technical law reform in favor of longer-term goals signalled the victory of a global and more inclusive vision of change,[127] which was particularly important given the gap between the values of the transplanted French legal system framing the post-colonial state's instinctive impulse, and the local normative order.

c) Legal Changes Proposed by the CNRF

The inclusion of a wider range of experts gave the reformed CNRF the means to explore new angles to important legal questions concerning land ownership and usage. In particular, the need to grant land users a stronger right than a right of usage was a prominent objective, with the commission proposing the *emphyteusis* already used in urban areas as a single solution for rural users as well as investors.[128] Two options in particular were floated as a means of reconciling possible differences in interest between the three principal groups: family farms, agro-industrial investors, and the state. The first option involved the registration of land directly in the name of local

[126] Ibid. 17-18.
[127] Ibid. 4.
[128] Ibid. 20. This proposal is significant, as a single set of rules that is well aligned with the local normative order offer clearer guidance to users.

collectivities. The proposal was later openly resisted by the Sall administration, as it would lead to the state's loss of legal control over the land,[129] and there was also fear that an uncontrolled sale of land by local collectivities would result.[130] The second option involved the registration of land in the name of the state. The state could then either transfer full ownership to local collectivities, which in turn would offer a lease to individual end users. Alternatively, the state could lease the land to local collectivities in the form of an *emphyteusis*, and the collectivities would extend a sub-lease to end users.[131] The last option, which hereto did not exist in the Senegalese legal order, was viewed as an attractive means of balancing a liberal global economic environment and the highly politicized character of local land use.[132] However, the CRAFS viewed the presentation of an essentially binary technical solution as excessively narrow.[133]

In response to the perceived deficiencies of CNRF proposals, the CRAFS created its own committee of "technicians", who approached questions from an angle distinct from the "leaders" of civil society organisations. This creation of the committee could be understood as an attempt to bridge the gap between the needs of land users and the logic of private law. However, the committee was unable to dissuade CNRF from its focus on the two legal options put on the table.[134] The narrowness of the CNRF's proposals contributed to the lack of enthusiasm for the proposals in the 108 local meetings attended by some 38,000 individuals. There was a widespread sense that conferring public

[129] "Premier rapport" (n 53) 13. It is worth recalling, that control over land had been a prominent factor in state formation in Senegambia since the intensification of the Atlantic slave trade. In the post-colonial period, African presidents rarely favor political decentralization, which includes the transfer of land ownership to local collectivities. In a context where African heads of state rely on the sacralization of their authority in a manner akin to a traditional chief, genuine delegation of authority to other governmental institutions remains extremely rare. Kamto (n 104) Titre 3, ch 1.
[130] Deville, Diagne and Richebourg (n 102) 35.
[131] Premier rapport" (n 53) 13-14. The report also discusses certain doctrinal difficulties in granting a sub-lease to end users in an emphyteusis. Deville, Diagne and Richebourg (n 102) 20-21.
[132] Deville, Diagne and Richebourg (n 102) 21.
[133] Ibid. 21.
[134] Ibid. 23.

bodies with the ownership of the land would accentuate the precarity of rural dwellers.[135] It is worth noting that opinions varied enormously even within individual communities. Many were as concerned by the politicization of land management as they were by potential abuses of power by agents of the state.[136]

The CNRF's success in achieving a greater degree of inclusivity did not lead to a solution to the question regarding the legal nature of rights in rural land. Technically, the CNRF's focus shifted from a preference for characterizing rural users' right from a right of usage in 2004 to "real rights" similar to those found in urban peripheries in 2011.[137] This echoed peasant organizations' desire for a secure set of rights over land that would allow their participation in the market, in line with earlier CNCR proposals in the 2000s. In particular, they favored rights that were transmissible and assignable within the community, the latter feature being an important safeguard against the prospect of land falling into the hands of speculators.[138] In this respect, the CNRF's support for "real rights" was attractive as they conferred a stronger interest than a simple land title or lease from the state. The views of these peasant organizations, however, contrasted with groups concerned with local governance, who opposed the very idea of a market in land rights.[139]

d) CRAFS Proposals

As the CRAFS assumed the mantle of the primary organization advocating peasants' interests, its views came to crystallize around the maintenance of a reformed version of the *domaine national*, which it saw as an adequate means of preserving a pluralistic structure that balanced the needs of rural users with the latent role of the state in pursuing

[135] Ibid. 23.
[136] Ibid. 23.
[137] Ibid. 27-28.
[138] Conseil national de concertation et de coordination des ruraux, "Séminaire national des ruraux sur la réforme foncière. Rapport introductif. Réflexions des ruraux sur la réforme foncièr" (2004) 13.
[139] Deville, Diagne and Richebourg (n 102) 27.

development goals in the general interest.[140] CRAFS rejected definitively the idea of an open market in land, and argued instead that users should enjoy a right of occupation which would have legal value for the purpose of financing. Upon the death of a user, heirs ought to have priority in succeeding to the rights of the previous titleholder, provided that the new user also had the ability to put the land to use. Where a local collectivity was willing to assign its rights to an investor, this should be allowed and done in a formal manner. Villagers should be involved in a deliberative process and the agreement between the collectivity and the investor should take the form of a legal contract.[141]

To consolidate its position, the CRAFS moved to convene a national forum in 2016 attended by over 500 members of peasant organizations and other partners from government, financial institutions and academia. It recommended strongly that CNRF should take its time to arrive at a land policy that was acceptable to all parties and to disconnect the land question from the political agenda.[142] The organization reiterated its position that land rights should be transferable up to a limited extent, and that users should be required to "improve" the land, with the exact requirements to be determined by the local collectivity or villagers' organizations.[143] What we see here is a preference for a half-way solution between modern law and the binary legal order rooted in French colonization. Under the CRAFS proposal, registration would remain the exception rather than rule, and after consulting impacted populations, the state would transfer the land concerned to the local collectivity which in turn would lease the land to

[140] It is worth recalling that the pre-colonial political order in Senegambia was highly participatory in character.
[141] Deville, Diagne and Richebourg (n 102) 29. This can be seen as a move away from the colonial rule in Décret du 24 juillet 1906 (n 31), art 5(2), which required the registration of land governed by a formal contract, and in doing so created a binary division between registered land subject to formal rights and customary land.
[142] Cadre de Réflexion et d'Action sur le Foncier sur la réforme foncière au Sénégal, "Document de position du Cadre de Réflexion et d'Action sur le Foncier sur la réforme foncière au Sénégal" (2016) https://www.hubrural.org/IMG/pdf/crafs_doc_de_position_reforme_fonciere_v.finale.pdf (accessed April 2, 2023).
[143] Ibid. 5.

investors. The lease should be renewable but could not be transformed into a land title. Furthermore, such land should not exceed one-tenth of the land available in a particular local collectivity and should not contain land held in common for the community, such as pastoral or fishing areas or certain types of forests. The land should continue to be subjected to interventions on the basis of public utility.[144] Furthermore, the CRAFS noted that whereas a modern system of land registration favored individualism, Senegalese society historically expressed a clear preference for communitarianism. Therefore, specific instances of registration as an exceptional strategy was better adapted to Senegalese conditions than a general policy of land registration.[145]

e) Evaluation of the Work of the CNRF

The transformation of the CNRF from a top-down institution into an inclusive and deliberative forum testifies to the strength and resilience of civil society in Senegal. What is also noteworthy is that Senghor's framework for the *domaine national*, even if it remains problematic at many levels owing to the underdevelopment of institutions necessary to put in place a reformist regime, remains an attractive framework over half a century after the country's independence.[146] Clearly, the communitarianism which motivated the introduction of the *domaine national* continues to express normative values prevalent in rural Senegalese society, where modern land registration remains extremely limited.[147] In such a context, the economic goal of improving the investment environment ought to be accommodated at the margins of the land system and not be placed at its center in a way that may threaten the livelihoods of the majority.

[144] Ibid. 6.
[145] Ibid. 6.
[146] Following the observations of Fombad (n 61), it can be said that Senghor's reflections on land are better aligned *both* with "traditional" normative values in Africa *and* colonial practice compared with hastily-introduced Western legal orders after independence.
[147] "Premier rapport" (n 53) 15, states that less than 10% of land in the country are contained in the cadastre.

It is in this context that we can understand how the ambiguous character of land rights is able to persist in a system where the state retains reserve rights but not full ownership. The hybrid solution favored by peasant organizations such as the CRAFS resists not only private ownership but also attempts by the state to register the *domaine national* in its own name. Clearly, the CRAFS's anxiety with respect to the latter is related to the greater vulnerability of a unified system of land ownership—notwithstanding the advantages of consistency and legal certainty—to predation either by local elected bodies or the agents of the state. The limited penetration of the "modern" economy in the rural space is a further factor which underlines the persistence of the "dual" system of law rooted in French colonialism.

f) The Changing Character of the CNRF

Changes to the CNRF after the replacement of its first leadership appear to affirm the commission's character as a consultative process rather than a forum of negotiation.[148] It involves the recognition of the prominent role of the CRAFS in the work of the CNRF: the CRAFS remained the most active and influential element in the work of the commission.[149] The achievement of the CNRF lay in its ability to produce a document that was relatively consensual in nature, leading to a rejection of proposals to register rural land in the name of the state, which would have been preferred by the post-colonial state with its market-oriented logic and tendencies towards formal law.[150] Instead, its proposals—notwithstanding its temporary character—preserved the

[148] Deville, Diagne and Richebourg (n 102) 31.
[149] Ibid. 33.
[150] From the perspective of legal syncretism, the post-colonial African state derives its legitimacy in part from the external authority of international law, which makes it inherently a creature of the Western legal order. Like pre-colonial Kajoor analyzed in Part II, the state's pre-eminence in the domestic context depends at least in part on its ability to profit from the relationship between the international order and the country's interior. Berihun Gebeye, *A Theory of African Constitutionalism* (OUP 2021). See also Jean-Francois Bayart, *The State in Africa: The Politics of the Belly* (Longman 1993).

pluralistic structure of the *domaine national*, which in the view of the CRAFS offered stronger protection for the rights of existing users.[151]

It is worth noting that macro-level political factors were also at play, at least from the perspective of the state. Widespread land sales to outside purchasers in Zimbabwe at the time caused alarm to the Sall administration and informed their position against proposals to register land in the name of local collectivities.[152] The introduction of special economic zones in 2017 also demonstrated the executive's will to pursue its own development priorities where conditions permitted.[153] At the same time, the creation of limited zones where full ownership was granted did not inherently contradict the spirit of the CRAFS proposals, where investor control of land was permitted as an exception rather than as a rule.

What is equally significant is that participation in the CNRF increased the experience and ability of the CRAFS to take part in policy making. While the participation of civil society in policy deliberation is not unique to Senegal, the broad societal foundations of the CRAFS's participation were nonetheless significantly different from other recent examples in the Sahelian region.[154] The ability to insert itself meaningfully into a debate over technical questions such as "real rights" is important in view of the technicalization of debates and the inherent potential for such processes to marginalize end users of land. In spite of the CNRF's eventual dissolution by the state, the CRAFS's involvement demonstrates the ability of those in support of a more open vision of law to propose legally meaningful solutions that preserve pluralistic choices at the doctrinal as well as policy level.[155] Furthermore, in spite of the necessity to present legal options using the formal language of law, the CRAFS shrewdly adhered to the political and legal framework

[151] Ibid. 34.
[152] Ibid. 35.
[153] Loi n° 2017-06 (n 117).
[154] Cf the role of more elite groups including the women's jurists association in reform proposals for a new *Code de famille* in Niger in Leonardo Villalón, "The Moral and the Political in African Democratization: The *Code de la famille* in Niger's Troubled Transition" (1996) 3:2 Democratization 41.
[155] Deville, Diagne and Richebourg (n 102) 38.

created by Senghor with its intellectual emphasis on the cultural compatibility between African normative values and the Western legal system as well as the wellbeing of land users, rather than the blind pursuit of "legal rigor" preferred by jurists. In the absence of flexibility on the part of the transplanted system of private law,[156] it was preferable to build on macro-level frameworks that stood outside the Western legal system.

g) Subsidiarity of Law

This Article has argued that legal pluralism presents an attractive option in situations where existing rules are rigid, and limited state withdrawal may in fact be advantageous. What the work of the CNRF and the CRAFS has highlighted is that, at the same time that there is profound distrust of modern property structures owing to the fear that outside investors may weaken the economic position of local users, as economic activity intensifies there is also increased consciousness among rural land users of the importance of formal legal rights as a means of protecting their interests.[157] If the most important rationale for formal land rights is to channel investment into local communities, then one should in no way presume that rural users would not support the development of more formal and secure rights that can support security interests and facilitate the assignment of rights within communities. It should be noted, however, that the focus of Part III has been on rural areas rather than urban peripheries. In the case of the latter, the greater penetration of modern economic forces is likely to exacerbate the

[156] A contrasting development can be found in the area of indigenous law in Anglophone settler colonies, notably Canada, where case law such as *Guerin v The Queen* [1984] 2 SCR 335 has been capable of generating new doctrines that have at least partially reduced the gap between different legal orders. In the French legal system, the relative rigidity of private law rooted in Roman law means that even commercial disputes in metropolitan France are often handled by *Tribunaux de commerce* staffed by elected lay judges from the merchant community, and arbitration commands a more prominent position in commercial dispute resolution compared to England. As discussed above in relation to New Caledonia, it is almost impossible for the unitary French legal system to accommodate other legal orders except in unusual political circumstances, which it does so by creating new and specialized jurisdictions.

[157] Deville, Diagne and Richebourg (n 102) 44.

challenges of competing rights, as the boundaries between different legal orders in a pluralistic legal system are always zones of tension.

In a society such as Senegal where civil society is relatively robust, resistance against top-down efforts at reform is also found less in terms of a generalized opposition to the state than in the desire for greater inclusivity and participation. Here the participatory character of institutions in pre-colonial Senegal might have played an important role, alongside broader political and societal dynamics that underpin the Senegalese state's greater responsiveness to citizens. While there is a justified fear of the politicization of land management and the abuse of power by agents of the state, there is also little evidence of a desire on the part of the CRAFS to categorically exclude the state from its reserve powers over the land. In other words, in a context where the broad need to pursue development goals is widely accepted, trust in elected local representatives is not necessarily greater than overall confidence in the central state. Rather, it is the aim of balance between Dakar and local communities, rather than an unqualified desire for the atomization of society, which appears to stand at the top of the socio-political agenda with respect to land.

h) Special Position of Frontier Regions

Finally, it is worth noting that the situation in frontier regions such as the arid Senegal Valley to the north of the country is greatly different. Given the *a priori* need for significant state investment to develop the land in the region bordering Mauritania and the Sahara Desert, it is rational to adopt a different landholding structure in these regions, notwithstanding the *de jure* inclusion of such areas as "pioneer zones" in the *domaine national*. Here the building of dams required significant inputs from the state, which justified the direct control of land by state organizations such as the *Société d'Aménagement et d'Exploitation des Terres du Delta du Fleuve Sénégal* (SAED).[158] However, as noted in the CNRF report, these amenities tend to be underexploited,

[158] "Premier rapport" (n 53) 4-5.

which contributes to their rapid degradation and high costs of repair. These challenges call for new approaches to the management of resources in frontier regions, requiring potentially a separate set of rights over irrigated land and as well as improved methods for protecting and attracting investments.[159] Potential solutions include clearer contracts between users and the providers of infrastructure. Given the limited ability of the state to effectively manage these resources, the CNRF is in favor of developing new public-private partnerships for their financing.[160] Similarly, this Article has not considered the significance of mining regions, notably of gold in the Kedougou region in eastern Senegal, which features both joint ventures between the state and foreign investors as well as artisanal miners. Given the prevalence of mining concessions across sub-Saharan Africa, the legal implications of mining in eastern Senegal are likely to reveal a different set of issues from those found in the country's semi-arid agricultural core, with a resonance beyond the country's borders.

i) Conclusion to the Second Part

This Part has charted some of the major proposals of reform, focusing in particular on the interactions between the CNRF and the CRAFS. Notwithstanding the final "failure" of the CNRF in the form of its dissolution by the state in 2017, engagement in the work of the commission as a forum of consultation nonetheless provided a focus for the work of peasant organizations represented by the CRAFS in legal and technical debates concerning land rights. In this respect, engagement with the commission's work led to a strong support for the "real rights" option proposed by the CNRF, which gave rural users stronger legal protection at the same time as offering them the possibility of participating in a limited market of land rights and accessing credit using their rights as a collateral. These processes of consultation and deliberation revealed the lack of a need to outrightly

[159] Historically the Senegal river delta has been a zone of diverse systems of customary land rights. JL Boutillier, *La moyenne vallée du Sénégal: étude socio-économique* (Ministère de la coopération 1962).
[160] Ibid. 5.

replace the framework of the *domaine national*. Despite its significant difference from the "modern" law which supposedly prevails in Senegal's national space, the *domaine national* also represents a high-level political and social commitment to the idea of legal pluralism in the country, even if the border between the *domaine national* and Western law remains blurred. In this respect, the work of the CRAFS ultimately confirms rather than challenges Senghor's vision for the balance between universal aspirations and the particularistic needs that arise from the challenges of economic and social development in a poor Sahelian nation such as Senegal.

IV. Conclusion

This Article has attempted to place recent deliberations on land reform in Senegal in a longer historical trajectory and in the context of parallel developments of landholding structures in both urban and rural areas. Despite the colonial interlude which introduced a "modern" property law applied in an extremely limited fashion in cities, for the most part, customary or neo-customary land use has been preserved in rural areas. In this respect, Senghor's idea of a *domaine national*, even if it might have been poorly developed from the lawyer's perspective given the dearth of detail concerning the interpretation of the law's provisions, continues to command normative support amidst legitimate fears of land speculation which may threaten rural land users' livelihoods and exacerbate poverty and inequality. This Article has also argued that the necessity for a separate legal order is partly a reflection of the rigidity of the French legal system with its narrow focus and tendency towards multiple jurisdictions, which results in a larger gap between transplanted law and local normative orders than in common law systems.

Senegal is fortunate in that a relatively high level of political stability, and the development of civil society has allowed the unfolding of an organic process of consultation and deliberation to improve the effectiveness of intervention by peasant organizations. While the substantive character of rural landholding in Senegal may not be so

different from other Francophone sub-Saharan African countries, the existence of the basic legislative text of the *domaine national* as a high-level commitment to legal pluralism is nonetheless unique. It highlights that, despite the nominal supremacy of modern property law in the form of colonial land registration or the COCC, in reality the legal basis of landholding in rural Senegal has remained profoundly neo-customary or "African". It is the preservation of the basic premise of pluralism which allows the values of "communitarianism" highlighted in Senghorian socialism to be given meaning in the socio-economic lives of ordinary Senegalese users of land.