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State Property vs. Customary Ownership in Francophone West Africa: a Comparative Framework

This article examines relations between state and customary land claims in Francophone West Africa. This region, despite a broadly common legal heritage at the time of independence, experienced a wide variety of changes at the national scale to the point where these countries now form a full spectrum of statutory/customary relations. After a historical review of rural property rights in Francophone West Africa, this article proposes a typology of State vs. Customary ownership in the region with a focus on four exemplary cases: Burkina Faso, Côte d'Ivoire, Senegal, and Mauritania.

Keywords: customary rights; rural land; state property; legal pluralism; French West Africa; land reforms.

INTRODUCTION

In 1999, a foreign corporation, already in the later stages of approving a large investment in the agribusiness sector in the region of Bobo Dioulasso, decided to cancel all plans due to concerns over property rights and land security in Burkina Faso. The corporation was expected to take control of large agricultural areas either via rent or sale contracts. However, due to the situation of legal pluralism that then prevailed, these lands were susceptible to competing claims under customary law. Upon departing, the corporation relayed its concerns to the then Minister of Agriculture, Salif Diallo. This is said to have raised concerns for the international attractivity of the country in the agribusiness sector and inaugurated a business-friendly rural land reform agenda, which ended up taking quite a different direction and, more than a decade later, eventually resulted in the current land reform.

This reform is in line with the broad trend that has been taking place in the developing world in the last three decades: while in the 1990s and early 2000s,

international organizations policy incentives advocated the transcription of customary claims and a transition towards a western-style exclusive individual private property regime (Demsetz 1974; Feder and Feeny 1991), the 2000s saw the emergence of a trend towards the recognition of customary claims (Cotula, Toulmin, and Quan 2006; Borras and Franco 2009). Within this framework opposing private property and customary ownership, the state is merely considered as an intermediary between customary land regime and market/private land regime. It performs what James Scott called 'state simplifications' whose consequences may be broken down into two broad categories: the conversion of customary rights into private property through titling programs; and the transfer of land ownership, here claimed by the state, to local or transnational corporations, in what has been dubbed as land rushes or land grabs (Scott 1995). In either case, the State tends to settle in favor of private property, to the detriment of customary ownership and its claimants.

The coexistence of statutory property and customary property has created situations of legal pluralism. Early on, the concept of 'bifurcated state,' introduced by Mamdani, addressed this divide whereby colonized states are in a situation of legal pluralism, with different legal regimes applying to colonized and colonizers, uncivilized and civilized, rural and urban (Mamdani 1996; Capps 2018). In this framework, sub-Saharan African countries are not only characterized by a bifurcated state, with a regime for the colonizers or the elite (titled private property in association with public property) and a regime for indigenous or now rural dwellers (customary property); but also by overlapping and competing regimes whereby the state claims ownership on most land also claimed under customary law (Alden Wily 2012b). Rural property is then characterized by a situation of legal pluralism with competing claims applying on a large majority of lands.

This article's contributions consist first in proposing a typology for the situation of legal pluralism regarding rural land property. It examines the spectrum of situations regarding the coexistence between state and customary ownership of land through a comparative analysis in francophone West Africa. This typology exposes the wide variations in state/customary land relations both in time and space. It shows that despite a broadly common legal heritage at the time of their independence[1], these countries experienced different trajectories to the point where they now form a full spectrum of statutory/customary relations: from situations of ubiquitous State property to the State's 'full recognition'[2] of customary ownership. This classification will open up new venues for the analysis of legal balance between state property and customary ownership –a key factor in land grabbing dynamics– in West Africa and beyond.

This article will first discuss the colonial aspects of land property, which led to the situation of legal pluralism most sub-Saharan African countries have had to deal with since their independence. It will then provide a typology that presents a spectrum of state/customary relations in Francophone West Africa, focusing on four cases with similar starting points but diverging trajectories: Burkina Faso, Côte d'Ivoire, Senegal and Mauritania. For future analysis, this typology may be replicated or expanded elsewhere on the continent or the global South, in other situations where the overlap between customary and state property claims. Finally, the article will address the

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[1] Different colonies experienced the implementation of identical colonial laws in different way, depending on the colonizer's interest in the land in question. One could for example contrast colonial interests in Côte d'Ivoire with that of Haute Volta. Additionally, as mentioned later on the diagram, Togo is somewhat on the side-lines of this history as it was never part of French West Africa and does not as a consequence have the same legal history.

[2] As argued below, resolving the situation of legal pluralism necessitates to strike a compromise between State claims and customary claims, and even in cases where the State 'fully recognizes' all customary claims, some customary claims are always ignored, specifically those that overlap public lands such as river banks, coasts or land that was improved by the state.

disconnect between *de jure* and *de facto* claims and the problem of state capacity and reform implementation.

Legal Pluralism: a Colonial Legacy

Today, large swaths of land in Africa are *de facto* regulated by customary land regimes (Alden Wily 2011). The idealized view of African customary tenure, largely constructed by colonial authorities, is that of a communal tenure over a sacred resource that cannot be alienated. This picture is not that of real or 'authentic' customary rights. That property regime underwent dramatic changes since the arrival of European colonizers. Customary law is indeed the reinterpretation of existing rights both by land chiefs and colonial administrators: land chiefs often described to their advantage their rights on land to colonial administrators, who in turn, interpreted and transcribed these through the prism of property relations they were familiar with (de Sardan 1995; Bouju 2004). It remains however that this tenure regimes, with local variations, regulate most transactions today, without much involvement by state authorities.

Legal pluralism and the superimposition of ownership claims on land is a widespread phenomenon in sub-Saharan Africa and dates back to the creation of the modern colonial states by European powers (Le Roy 1987; Lund 2001; Chauveau, Le Pape, and de Sardan 2001) and is the result of the construction of modern nations imposing a centralized legal system (Griffiths 1986). Colonial interests required control of the land, and colonial administrators were eager to find ways to lay claim on land that was not theirs. Among the strategies developed, were the doctrine of state succession, or later the theory of vacant or unowned land (Crinot 1990). This legal argument has been used in almost all settlers' colonies in history: the French in Algeria and sub-Saharan Africa, Dutch and British in South Africa, British in Australia, etc. used similar arguments to dispossess natives of their land (Gbaguidi 1997). Colonization by the

French state presents some of the most striking cases of superimposition of claims. At times, the colonizer claimed state ownership on all colonized land, save for a few 'islands' of titled private property, while in parallel, customary authorities laid claims on virtually all land.

One of the main legal consequences of colonization in what became French West Africa was the transfer from the French context to the colonies of the distinction between the State's Private Domain and Public Domain. This distinction, which is implicit in French Law, is made explicit in French colonies, since the Public Domain in the colonies is limited to state property allotted to public use and conservation, such as forests, coasts, riverbeds, roads, etc. The property regime that regulates the public domain is particularly restrictive and it aims to protect the essential character of these properties, i.e. their public utility. As a result, all property that belongs to the public domain is inalienable, imprescriptible and unseizable. That is to say, it cannot be sold, transferred or seized neither by the state nor any other entities unless it has first been declassified from the public domain. The private domain on the other hand includes all other property of the state that is not essentially allotted to public usage, and its regime resembles that of individual private property, since the state can lease, sell or transfer property under the private domain. The private domain includes rural and urban land plots, buildings, etc. The essential difference between these two regimes is the existence of the right of alienation for the private domain, which is absent for the inalienable public domain (Kpenonhoun 2019; Sarr 2019). This double meaning is hence what is to be understood here by 'state property.'

The introduction of land titling and its expansion under colonial rule, despite its proclaimed goal of securitizing landholding, constituted a way for the state to control land management in opposition to customary land rights. Two colonial administration

decrees published in 1904 and 1906, valid in all territories then incorporated into French West Africa, aimed to promote the adoption of an individual titled land regime, in replacement of the customary communal land regime that was in place. The decree of 24 July 1906 in particular, introduces a land registration procedure that is the essential tool of colonial dispossession (Moleur 1986). In what became known as a vast legal colonial means of dispossession, colonial authorities refused to register land that was left 'unused' for several years without a proof of ownership, taking advantage of the customary character of land tenure in colonized countries as well as the long fallow period that characterize agriculture. The decrees also declared the state the owner of all 'unregistered land', except for 'land collectively owned by indigenous groups' or 'held by the chiefs representing them' (Ouédraogo 1993). The procedure of land titling implemented with the 1906 decree was long and costly[3] and was designed mainly for the registration of lands owned by the colonial companies. Peasants on the other hand generally did not estimate it necessary to strengthen the recognition of a claim on land that nobody (but the State administration, potentially) contested or challenged.

Given the limited success of land titling in the first two decades of the 20th Century, the colonial state endeavored to secure land tenure for a larger segment of the population and encouraged individuals to proceed to the registration of their customary land rights on a land register (*livret foncier*), with the 8 October 1925 decree. This attempt however largely failed due to its oversight of the overwhelmingly collective or communal nature of customary land rights, which hence excluded the whole population from the process, save for a small local bourgeoisie that had individual claims on land. In a late recognition of customary land rights by the colonial state, the 20 May 1955

[3] The cost of registration could run from one-third to one-quarter of the value of the land (Crinot 1990)

decree extended registration on the land register to both individual and collective customary land rights. The condition for registration remained that the land must be used in a continuous manner. Following the establishment of independence obtained between 1958 and 1960, the new states, while keeping many aspects inherited from French law unchanged, turned away from this recognition of customary property rights and asserted the ownership of the state on a large portion (if not all) of the national land, with a marked hostility towards customary land rights, which were seen as an obstacle to development.

As illustrated by this summary of colonial land grabbing, until the 1955 decree, land titling was introduced in parallel with the idea that all other (untitled) land belonged to the state. As a consequence, private property came to define and delimit state property, leaving no space for customary ownership in the law. The 1955 decree was motivated by a strategic realignment where the State hoped to gain the support and collaboration of local customary authorities (Moleur 1986). This strategy however was never implemented, as autonomous French colonies actively delayed its implementation so as to keep control over the domain of the State, which is a prelude to rural land policies that were implemented in the earlier post-colonial period, as examined below.

A Comparative Framework in West Africa

After gaining their independence, francophone West African countries inherited the colonizer's legal system, including the Decree of 1955 recognizing customary tenure on land. In the following decades, however, these countries took radically different paths leading them to a variety of situations today. Some countries, such as Senegal, rolled back the late colonial reforms leading to the recognition to customary ownership and opted instead for a generalization of state property on land, while others, such as Togo, implemented reforms seeking to give further legitimacy to customary rights on land.

As colonized countries gained independence, the essential traits of the French colonial legal system remained in place. This includes administrative centralism, the uniformization of the legal system, and ambitious legal codes. But the central concept for the purpose of this article is that of 'domaniality,' (*domanialité*) which sets the criteria for state ownership and contains the theory of vacant and unowned lands as defined in articles 538 and 539 of the *Code Civil*:

> Article 538: Highways, roads and streets at the national charge, rivers and streams which will carry floats, shores, ebb and flow of the sea, ports, harbors, roads for ships, and generally all portions of the national territory, which are not susceptible of private proprietorship, are considered as dependencies on the public domain.
>
> Article 539: All property unclaimed and without owner, and that of persons who die without heirs, or of which the succession is abandoned, belongs to the public domain[4].

In other words, it constitutes an *a priori* principle of state ownership, whereby all land that fits the criteria and is not otherwise owned is assumed to belong to the state. As examined below, this concept deeply influenced conceptions of public land management in newly independent Francophone West African countries.

After gaining their independence, almost all francophone West African countries opted for land reforms that would roll back the recent recognition of customary rights over land (with the 1955 decree) and deepen state control by instituting a national land domain, based on the notion of *domanialité*. The *Domaine Foncier National* (National Land Domain – hitherto *DFN*), as initially designed in 1964 in Senegal under the government of Léopold Sédar Senghor, included all land of the national territory except titled land. The *DFN* were created for three main reasons: first, state control over land for these young republics would facilitate large public development and infrastructural projects, which would be harder to implement with customary rights applying virtually

[4] Translation adapted by the author from a 1827 translation of the original 1804 code (*Code Napoleon: Or the French Civil Code* 1999)

everywhere; second, to set up a way to limit speculation on land, by subjecting every transaction to state supervision (*DFN* land belongs to the state, while titled lands cannot be sold without the approval of state services); and third, to serve the local intellectual and urban elites who feared that maintaining the 1955 decree and its recognition of customary rights could lead to them inheriting a powerless state, unable to impose its policies to the rural world. As such, the creation of the *DFN* constituted a way to limit the influence of customary authorities (Ndiaye 2012).

This reform was then emulated in a number of other francophone African countries and aimed at facilitating state-led agricultural development or limiting the political influence of customary authorities (Tallet 2009). The emergence of other socialist regimes in the 1970s and 1980s marks a rupture with previous land titling policies inherited from colonial rule: Matthieu Kérékou's Benin (from 1975 to 1990) and Thomas Sankara's Burkina Faso (from 1983 to 1987) led the way in elaborating and implementing (with mixed success) revolutionary land reforms aiming to wipe away both the colonial and the customary land regimes that had been regulating land ownership until then. Despite its current legal heritage, the sub-region now offers a complete picture of state/customary property relations, from ubiquitous state property to fully-recognized customary rights.

The different paths followed here between the 1960s and today arguably constitute different strategies to solve (or sweep under the rug) the contradictions wrought by the situation of legal pluralism inherited from colonization. Francophone West African countries today may hence be situated along a continuum of relations between state property and customary property. At one end of this spectrum, Mauritania and Guinea abolished customary tenure and declared the state as sole owner of land. At the other end spectrum, Burkina Faso, Benin, Mali and Niger (following the footsteps of

the landmark Uganda land reform) passed some of the most radical land reforms in Africa and fully recognize customary property, structurally reducing state property to a meagre area. Between these two extremes, Senegal represents cases where the State owns and manages the land in the general interest of the nation but tolerates the implementation of customary rights at the local level. Still in between but much more favorable to customary rights are the cases of Mali and Ivory Coast, in which the state does recognize customary land tenure, but only as transitory rights of inferior value to titled property and that need to be formally registered within a certain time so as to be valid. This present section presents these four categories, from the most favorable to state property (or the public domain) to the most favorable to customary ownership.

Figure 1. History of land legislation in Francophone West Africa and continuum of state vs. customary rights

The State as sole owner of the land: Mauritania

Mauritania and Guinea, despite their diverging land laws (the former only recognizes the state as owner of the land, while the latter recognizes private property), may be placed under the same category when it comes to the relation between the state and customary rights: these are negated despite the broad implementation of local customary practices. After a long period of monopoly of the state on the property of land, Guinea revised its agrarian law with the Domain and Land Code of 1992, which is still in place today. Similar to many other African countries in the 1980s and 1990s, Guinea turned to liberalization policies so as to boost investment. The main goal of the new Land Code was to proclaim the right to private property on land and facilitate private acquisition of land. However, registration of property rights on land in Guinea is subjected to drastic conditions and impossible in practice. Article 39 of the code defines landowners as:

> Natural or legal persons occupying [the land], and able to provide the proof of an occupation as landowner, in a manner that is peaceful, personal, uninterrupted and in good faith.

It is telling that throughout the whole Domain and Land Code, one is unable to find a single explicit reference to customary land rights (as opposed to the land reforms in Mali, Togo, Niger, etc.). Hence, even if article 39 was intended as a first step towards the recognition of customary rights, its formulation is so detached from the reality of such rights that the law cannot be used for legalization purposes (Le Roy 1987). In practice then, customary right holders in Guinea find themselves in a situation similar to that of Mauritania: they are 'squatters on their own land' (Alden Wily 2012a), occupying land that formally belongs to the state, with no perspective that the situation might change.

Between 1960 and 1983, Mauritania managed land following the 2 August 1960 law that passed only three months before its independence, under a short period of relative autonomy. The law, in line with late French colonial land policies, recognized the existence of customary rights, and allowed the registration of individual customary rights. By the 1970s, customary rights were so prominent that the Mauritanian state was no longer able to perform land management. The elites of other former French colonies had sought to remedy the situation by reforming the 1955 decree recognizing customary rights. The case of the Senegal River valley is a striking one: while the Senegalese bank of the river benefitted from an important state-led agricultural development, the Mauritanian bank remained in the hands of customary landholders who were unwilling or unable to invest and develop the land (Crousse 1986; Ba 1991).

Mauritania then reformed its land law with the Ordonnance No 83.127 of 5 June 1983, which continues to regulate land to this day. The reform was a radical turn away from the 1960 law: Article 3 states that "customary land tenure regime is abolished,"

while Article 1 reads "land belongs to the nation and every Mauritanian, without discrimination of any kind, can, in conformity with the law, own land." This reform greatly expanded the reach of the public domain, which extends to the entire national territory save for the few plots covered by property titles. Many of the property titles that exist today were delivered either during the colonial administration or before 1983, and virtually all of them concern urban land: in 2014, Mauritania counted 27,075 property titles, of which 27,003 were tied to urban land, and 72 to rural land, i.e. 0,27% of all property titles.[5]

Another aspect of the reform introduced the possibility of the individualization of domain land for the case in which an occupant formulates a request and then develops the land in a manner that is evident and permanent, i.e. requiring a significant investment. This is what the law designates as the concession regime: individuals may obtain a concession to develop land from the public domain, but the procedure for obtaining a property title is lengthy and intricate: the request first leads to a temporary concession (or *permis d'occuper* – occupation permit), which may then be transmuted into a permanent use right. Only then the "occupier" of the land can request that the process of registration of private individual property be engaged. In practice, no permanent occupying permits have ever been delivered, which precludes any possibility for land registration, and effectively ensures the monopoly of the state on land property.

The State as Steward of the National Domain: Senegal

The reform trend started with the *domanialization* of the national territory in Senegal as early as 1964, under the government of Léopold Sédar Senghor. As declared in his 1st May 1964 discourse, in line with Senegalese socialism, the purpose of the law was to

[5] Directorate of Land and State Assets

‘achieve a socialization of land property that is more in line with Negro-African tradition, move away from Roman law back to Negro-African law, from the bourgeois conception of land property to its African socialist conception…’ Senegal was the first country to radically reform its land law after the independence. Following studies that showed that many privately or communally possessed lands were not put to productive use, the government decided as soon as 1963 to pass a land reform that would give the state control over land management (Moleur 1978).

A first draft of the land reform was rejected by the constitutional court for being contrary to the constitution (it did not recognize common property guaranteed by article 12 of the constitution). But in 1963 the constitution was revised, and the stipulation ‘individual and common property is guaranteed by constitution’ was replaced by ‘property rights are guaranteed’. With its Law No 64-46 on the National Domain of 17 June 1964 land reform, which has inspired many West African countries and is valid to this day, Senegal created a National Domain that encompassed all land that is not part of the public domain, as well as all land that is not registered (Article 1). As stated by Article 2, the state legally is only the *détenteur* (holder, i.e. ‘steward’) of the *domaine national*, which means that the state may impose the developmental orientations that occupiers of the land may follow. The 1964 reform introduced a concession system whereby local administration today may deliver occupation or exploitation rights. In practice, these rights are managed following customary rules. As a consequence, the Senegalese national domain is a legal regime within which other regimes can operate, such as traditional customary land holdings (Crousse, Mathieu, and Seck 1991). The national domain was then a way to find a compromise between customary rights and developmental needs, all the while correcting the damage of the recent colonial past.

However, market imperatives introduced by international organizations in the 1990s have changed Senegal's policy orientation.

Framework Act No 15/2004 establishing future policies in matters of agro-sylvo-pastoral development calling for a land reform abolishing the notion of National Domain and the necessity to recognize customary property rights, so as to promote the emergence of a land market, leading to an improvement of land productivity. This framework went unheeded but 2012 saw a new impulse for land reform which led to public hearings and the definition of a road map that indicate a mere decentralization of land management to local authorities (*collectivités territoriales*), with usufruct rights distributed according to needs at the local level (Touré 2018). Despite the Framework act, however, such reform had yet to emerge at the time of writing, and land in Senegal is still managed by the land reform of 1964: a state steward of the national land that tolerates the management of land following customary rules at the local level.

Recognition of Customary Claims as mere Transitory Rights: Côte d'Ivoire

Côte d'Ivoire and Mali recognized the existence of customary land tenure, but only granted it a temporary status until these rights are registered by the state. Similar to the Senegalese landmark case, the goal of the reform was to institute a national land domain, so as to facilitate the implementation of national development and agrarian policies (Togo had a similar regulations since the 1974 land reform but passed a new law in June 2018 that fully recognizes customary rights, hence situating it in the next section). The major difference between the cases of Mali and Côte d'Ivoire with Senegal, however, lies in the fact that the former recognized the existence of customary rights on land and promoted their registration within a certain timeframe. Mali's reform passed in 2014 and the slow pace of its implementation means that it is still early to draw definitive conclusions on its success with regards to its proclaimed objectives.

Côte d'Ivoire's land management is characterized by tensions around property rights, particularly between autochthonous and foreigners, i.e. migrants or their descendants from the north of the country or from Burkina Faso, who went south to participate in the Ivorian economic miracle and work on cocoa plantations. Felix Houphouët-Boigny's famous Lockean aphorism "Land belongs to those who develop it" (*"la terre appartient à ceux qui la mettent en valeur"*) could have been a strong statement in favour of customary rights, but the 1963 land reform, in line with most other reforms of the developmental era, reversed the promises of the 1955 decree and planned to keep land management under the control of the State. The law however was never implemented and opened up a long era of extra-legal management of land ownership (Ley 1972).

The 1998 land reform emerged under the government of Henri Konan Bédié who had introduced the xenophobic notion of "*ivoirité*" and intended to roll back a 40-year-long *de facto* regime that generously protected land ownership of migrants. To do so, it recognizes customary rights but reserves the right to own land to Ivorian citizens only, therefore negating the rights of millions of "migrants". Additionally, local chiefs were the ones to determine who owned what at the initial stage of implementation of the reform. This resulted in a flare of tensions around competing claims and led to the perpetual postponement of the reform (Chauveau 2000).

Recognition of Customary Rights: Burkina Faso

Benin, Burkina Faso, Niger and Togo all adopted somewhat similar land reforms in the last 20 years. In all cases, the main feature of these reforms consisted in ending or significantly altering the concept of domaniality that was central to land management before, and simultaneously enact a full recognition of customary ownership claims. Following the neoliberal turn of the 1990s and the renewed promotion of exclusive

private property, the 2000s saw the re-emergence of a concern with customary land holding regimes.

Togo was the first country in Francophone West Africa to implement a reform in favor of customary rights following the independence in 1974 and gave claimants a five-year period to register their customary ownership[6]. On 14 June 2018 however, a new land code was enacted that fully recognized customary property, with the caveat that the state is still defined as the steward (*détenteur*) of all land.[7] This is the latest reform to date in Francophone West Africa, which is clearly aligned with the current trend towards land reforms that allow customary and statutory rights to coexist.

In Burkina Faso (then Upper Volta), the first law departing from the 1932 land decree on titling was that of 24 July 1963, which allowed the government to 'reserve' for the state part of the land developed by the state, and to declare all land that is 'sparsely populated or distant from cities' as state property.[8] In this post-independence period and until 1984, even if customary rights were formally recognized *de jure* (through the 1955 decree), the reach of the state expanded considerably, and in practice customary rights were merely tolerated (Chauveau 2000). As Upper Volta became Burkina Faso under Sankara's brief "peasant parenthesis" (Otayek 1992), the 1984 law

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[6] Until the June 2018 land reform, rural land property was regulated by Edict No 12 on 'land property and domain reform in Togo' from 6 February 1974. (as it has been the case multiple times in Ivory Coast). Edict No 12 states in its articles 2 and 3:

Article 2. – The State guaranties the property rights of individuals or collectives who own a deed delivered according to the law. The State also guarantees the property rights of persons or collectives who can present a claim on exploited land.
Article 3. – Claimants are given a five-year period from the time of publication of the present Edict in order to ascertain their claim on any land that has already been exploited and which bear the marks of permanent individual or collective possession.

[7] Togo - Loi n°2018-005 du 14 juin 2018 portant code foncier et domanial, article 5

[8] Law No 29-63/AN from 24 July 1963 (*Journal Officiel de Haute-Volta* of 17 August 1963, p. 73)

(*Loi de Réorganisation Agraire et Foncière* - Law of Agrarian and Land Reorganization) aimed to radically change the social and productive structure of rural areas, and nationalized all land (Speirs 1991; Kabore 2002).

After decades of hostile state policies towards customary rights on land – from colonial times to the socialist regime of the 1980s – the World Bank imposed the creation of a land market, which rested upon the recognition of actual land possession, regulated by customary property rights. By the mid-2000s, despite the liberal orientation of the latest agrarian reform (1996), it became clear that it had left a number of rural land tenure issues unsolved. Hence, in 2007, the Burkinabè government implemented a National Policy for Tenure Security in Rural Areas (*Politique Nationale de Sécurisation Foncière en Milieu Rural*), which consisted in coordinated action among several ministries, the land offices of communes and departments, the customary authorities, the private sector and civil society, aiming to improve land security in rural areas.

The 2007 text emerged as a policy document that was to determine the reforms to come. In its final section, the document defines a series of general principles that the future reforms should follow. The policy establishes six main objectives:

> - recognize and protect the legitimate rights on land and natural resources for all rural actors;
> - promote and support the development of legitimate local institutions on the ground;
> - clarify the institutional framework for conflict management at the local level and enhance their efficiency;
> - improve the management of the rural space;
> - implement a coherent institutional framework for rural land management;
> - strengthen the state's (both at the national and local levels) as well as civil society's capabilities in land matters.

The law No 34-2009/AN on Rural Land Regime (*Loi No 034-2009/AN portant régime foncier rural*) aims to provide an answer to land disputes between state and customary regimes by recognizing the existence of customary land rights. As such, it complements

the existing legal norms established with the RAF of 1996, while taking into account the results of the 2007 *Plan National de Sécurisation Foncière en Milieu Rural* (PNSFMR). The 2009 law starts off by setting general principles for natural resources conservation and their sustainable exploitation. By stating that 'rural land is part of the national heritage', the law affirms that the state is the steward of that common heritage and sets a number of general principles that will orient all national and local policies on rural land, in order to ensure the rational and sustainable management of rural land, as well as to fight against land speculation and encouraging land development. The second fundamental aspect of the law is the effective legal recognition of 'rural populations' legitimate local land rights' (Art. 4), as well as 'guaranteeing regularly established use and property rights on rural land'.

The Burkinabè national assembly completed the last step of the land reform when it passed the 034-2012/AN bill on Agrarian and Land Reform on 2 July 2012. It became law on 6 September 2012. This new RAF revises the 1996 RAF so as to ensure its coherence with the later developments incurred by the 2007 PNSFMR and the 2009 Law on Rural Land Regime. It reaffirms the existence of a *National Land Domain* but deprives it entirely of the meaning it originally bore in 1984 and later, by dividing it into three domains: State, Territorial and Private domains. Hence, with the new RAF, the central state has effective control only over the state domain, which includes the private domain of the state, and its public domain which is defined in articles 13 and 14:

> Article 13 :
> The natural public domain of the state is comprised of:
> - the public domain of water, as defined by the law on water management;
> - air space as defined by applicable texts and international treaties;
> - mining and quarry deposits as regulated by the Mining Code and other applicable texts;
> - area reserved by the state, in compliance with applicable texts;
> - wildlife and other natural formations reserves designed by the state;
> - mountains and hills.
> Article 14 :

> The artificial domain of the state is comprised of:
> - railroads, roads, herd trails, telecommunications cables and equipment, ways of communications of all sorts;
> - airports, air terminals, aerodromes; […]
> - in general, goods of any nature which Burkinabè laws declare ineligible to constitute private property.

As for the territorial domain, it is currently inexistent but may be formed by the transfer of national public domain at the local level:

> By decree of the Council of Ministers and for reasons of subsidiarity, the state may transfer the management of a portion of its landed public domain to a territorial collectivity that take in charge its conservation (Art. 112)

The generalized recognition of customary claims on rural land has a direct impact on the area of the public domain, leading it to shrink considerably. Indeed, land that was previously claimed simultaneously by the state and customary authorities (i.e. the vast majority of rural land), now largely falls under customary ownership recognized by the state. The state then, in its recognition of customary claims, simultaneously renounces the claims established either during the colonial or developmental periods. Even if these claims remained purely theoretical, as state authorities often failed to actually make use of these for developmental purposes, this type of reform implies a shrinking of the public domain of the state. It is then restricted to the areas which the state explicitly declares as state property, i.e. a band of one hundred meters along the coasts (behind the line of the highest tides), a band of 25 meters along river banks, protected forests, and land previously improved by the state (irrigated plains, dams, developed grazing areas, etc.).[9]

[9] This reduction of the public domain is equally severe in the case of Niger, with the difference that instead of a hybrid system between communal and state law, customary landholding rights are recognized and enforced as such, without any process of formalization.

De Jure Divergence, *De Facto* Convergence?

De jure landholding and its vast spectrum of situations documented above may not be reflected in actual land dealings and management. First of all, rural land is particularly concerned with discrepancies between de jure and de facto situations. Throughout sub-Saharan Africa, rangeland or forests constitute common examples in which land is possessed by local communities but owned by the state. In most cases, those communities exploit and develop the land and its resources, and perform transactions within customary law without much, if any, involvement of the state.

> Across much of the world, communities and households use land and natural resources to which they have no legal, enforceable title, or no strong political claim. Boundaries between private agricultural lands, communal land, and state lands are often contested or unstable, blurring distinctions between private and public resources and making use contingent on the forbearance of political authorities. (Boone 2014)

In addition to this blurring, state capacities in West African countries, as in most countries of the Global South, have been largely destroyed under structural adjustment programs in the 1990s and 2000s, which curtailed rapid and efficient implementation of laws and regulations. The reach of the State administration over its territory is therefore all relative, especially in rural areas. This adds another layer of blurriness to a situation in which legal pluralism already blurs stuff. Indeed, even if the State passed a land reform acknowledging new rights on land (whether in favor of State or customary ownership), the new *de jure* situation may take years before being translated into de facto rights. This is what Burkinabe lawyer Ouattara calls in the francophone context "judicial and institutional incompleteness" (*inachèvement juridique et institutional)* (Ouattara 2010). The main consequence of this situation lies in the general

inapplicability of land reforms and the consequent impossibility of closing the gap between de jure and de facto rights.

Conclusion

This article has examined how two competing property regimes, state property and customary ownership, have interacted in Francophone West African countries. My analysis shows that despite a broadly common legal heritage, these countries have taken vastly different paths for the management of the situation of legal pluralism derived from the coexistence of the Western-imported property regime and customary rights on land. I considered a state/commons property regime's relations as a continuum from a situation of ubiquitous state property and complete negation of customary rights, to one of full customary rights recognition and revocation of state property. On such continuum, former *AOF* countries may be arranged into four clusters, spanning from Mauritania and Guinea, to Burkina Faso and Niger.

One avenue of research this framework opens up is that of the causal relations between the variegated political and economic history of these countries and their current land rights setting, in line with direction of analysis as delineated by Akram-Lodhi and Kay (Akram-Lodhi and Kay 2010a; 2010b).

This study examined how, despite a broadly common legal heritage from French colonization, francophone West African countries developed divergent legal frameworks for the management of rural land and the ownership of natural resources. The concept of national land domain was first coined by the independent Senegalese government for developmental purpose and state-led agricultural investments. However, it was derived from colonial land law and the doctrine of vacant and unused land,

This study's main theoretical contribution lies in developing an innovative framework that focuses on the source of the situation of legal pluralism in sub-Saharan

Africa, namely the contradictions between state property and customary ownership. In doing so, it uncovered the wide range of situations that may be observed throughout Francophone West Africa today, despite their common legal ground inherited from the colonization.

References

Akram-Lodhi, Haroon, and Cristóbal Kay. 2010a. "Surveying the Agrarian Question (Part 1): Unearthing Foundations, Exploring Diversity." *The Journal of Peasant Studies* 37 (1): 177–202. https://doi.org/10.1080/03066150903498838.

———. 2010b. "Surveying the Agrarian Question (Part 2): Current Debates and Beyond." *The Journal of Peasant Studies* 37 (2): 255–84. https://doi.org/10.1080/03066151003594906.

Alden Wily, Liz. 2011. "Customary Land Tenure in the Modern World." *Rights to Resources in Crisis*.

———. 2012a. "The Global Land Grab: The New Enclosures." In *The Wealth of the Commons: A World Beyond Market and State*, edited by David Bollier and Silke Helfrich. Amherst, Mass: Levellers Press.

———. 2012b. "Looking Back to See Forward: The Legal Niceties of Land Theft in Land Rushes." *The Journal of Peasant Studies* 39 (3–4): 751–75. https://doi.org/10.1080/03066150.2012.674033.

Ba, Boubakar M. 1991. "La Question Foncière Dans Le Bassin Du Fleuve Sénégal: L'exemple de La Mauritanie." In *La Vallée Du Fleuve Sénégal: Évaluations et Perspectives d'une Décennie d'aménagements, 1980-1990*, edited by Bernard Crousse, Paul Mathieu, and Sidy M. Seck, 255–76. Paris: Karthala.

Boone, Catherine. 2014. *Property and Political Order in Africa: Land Rights and the Structure of Politics*. Cambridge University Press.

Borras, Saturnino M., and Jennifer C. Franco. 2009. "Transnational Agrarian Movements Struggling for Land and Citizenship Rights." *IDS Working Papers* 2009 (323): 01–44. https://doi.org/10.1111/j.2040-0209.2009.00323_2.x.

Bouju, Jacky. 2004. "Le Coutumier Juridique Africain: Approche Anthropologique d'une Invention Coloniale." *Dejan DIMITRIJEVIC (Éd.), Fabrication de Traditions, Invention de Modernités, Paris, Editions de La Maison Des Sciences de l'Homme*, 125–52.

Capps, Gavin. 2018. "Custom and Exploitation: Rethinking the Origins of the Modern African Chieftaincy in the Political Economy of Colonialism." *The Journal of Peasant Studies* 45 (5–6): 969–93. https://doi.org/10.1080/03066150.2018.1488128.

Chauveau, Jean-Pierre. 2000. "Question foncière et construction nationale en Côte d'Ivoire." *Politique africaine* N° 78 (2): 94–125.

Chauveau, Jean-Pierre, Marc Le Pape, and Jean-Pierre Olivier de Sardan. 2001. "La Pluralité Des Normes et Leurs Dynamiques En Afrique. Implications Pour Les Politiques Publiques." In *Inégalités et Politiques Publiques En Afrique: Pluralité Des Normes et Jeux d'acteurs*, 145–62. Paris: Karthala/IRD.

Code Napoleon: Or the French Civil Code. 1999. Washington, D.C.: Beard Books.

Cotula, Lorenzo, Camilla Toulmin, and Julian Quan. 2006. *Better Land Access for the Rural Poor: Lessons from Experience and Challenges Ahead*. IIED.
Crinot, L. 1990. "L'accès à La Terre et à l'eau En Milieu Rural: Le Contexte Juridique En Vigeur Au Bénin." *Revue Béninoise Des Sciences Juridiques et Administratives*.
Crousse, Bernard. 1986. "Etatisation Ou Individualisation: La Réforme Foncière Mauritanienne de 1983." *Politique Africaine*, no. 21 (March): 63–76.
Crousse, Bernard, Paul Mathieu, and Sidy M. Seck, eds. 1991. *La Vallée du fleuve Sénégal: évaluations et perspectives d'une décennie d'aménagements, 1980-1990*. Karthala.
Demsetz, Harold. 1974. "Toward a Theory of Property Rights." In *Classic Papers in Natural Resource Economics*, 163–77. Springer.
Feder, Gershon, and David Feeny. 1991. "Land Tenure and Property Rights: Theory and Implications for Development Policy." *World Bank Economic Review* 5 (1): 135–53.
Gbaguidi, Ahonagnon Noël. 1997. "La Revendication Du Monopole Foncier De L'état, L'intangibilité Du Titre Foncier Et L'accès à La Terre Au Bénin." *Journal of Legal Pluralism and Unofficial Law* 29 (39): 43–68. https://doi.org/10.1080/07329113.1997.10756491.
Griffiths, John. 1986. "What Is Legal Pluralism?" *The Journal of Legal Pluralism and Unofficial Law* 18 (24): 1–55. https://doi.org/10.1080/07329113.1986.10756387.
Kabore, Roger Bila. 2002. *Histoire Politique Du Burkina Faso: 1919-2000*. Paris: L'Harmattan. http://www.editions-harmattan.fr/index.asp?navig=catalogue&obj=livre&no=2018.
Kpenonhoun, Césaire. 2019. "Réflexion Sur Les Tendances Actuelles de Domaine Public Fluvial et Maritime Au Bénin, Au Sénégal et Au Togo." *Revue Africaine et Malgache de Recherche Scientifique - Sciences Juridiques et Politiques*, no. No spécial Avril 2019.
Le Roy, Etienne. 1987. "Réforme Du Droit de La Terre Dans Certains Pays d'Afrique Francophone." 44. Etude Législative. FAO.
Ley, Albert. 1972. "Le régime domanial et foncier et le développement économique de la Côte-d'Ivoire." Paris: Librairie générale de droit et de jurisprudence.
Lund, Christian. 2001. "Les Réformes Foncières Dans Un Contexte de Pluralisme Juridique et Institutionnel: Burkina Faso et Niger." In *Inégalités et Politiques Publiques En Afrique: Pluralité Des Normes et Jeux d'acteurs*, edited by G Winter, 195–208. Paris: Karthala/IRD.
Mamdani, Mahmood. 1996. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. 1st edition. Princeton, N.J: Princeton University Press.
Moleur, Bernard. 1978. "Le droit de propriété sur le sol sénégalais: analyse historique du 17e siècle à l'indépendance." S.l.: Université de Bourgogne.
———. 1986. "La Loi Coloniale: Son Idéologie et Ses Contradictions." In *Système Foncier à La Ville et Au Village*, edited by Raymond Verdier, L'Harmattan. Paris.
Ndiaye, Abdourahmane. 2012. "La Réforme Des Régimes Fonciers Au Sénégal : Condition de l'éradication de La Pauvreté Rurale et de La Souveraineté Alimentaire." In *Réponses Radicales Aux Crises Agraires et Rurales Africaines*, 93–120. Dakar: CODESRIA.
Otayek, R. 1992. "Burkina Faso: La 'rectification' Démocratique." *Studia Africana*, no. 3: 11–26.

Ouattara, Fako Bruno. 2010. “L’inachèvement Juridique et Institutionnel et Ses Conséquences Sur Le Développement.” Ouagadougou: Cinesda.
Ouedraogo, Hubert M. G. 2002. *Commentaire Critique Du Code Foncier Guinéen*. Conakry.
Ouédraogo, Sayouba. 1993. “Quel(s) Régime(s) Foncier(s) Pour Les Aménagements Hydro-Agricole?” In *Actes Du Séminaire Atelier à Ouagadougou*, edited by J.-C. Legoupil, H. Sally, and A. M. Pouya, Ministère de l’Eau, 132–45. Ouagadougou.
de Sardan, Jean-Pierre Olivier. 1995. *Anthropologie et Développement: Essai En Socio-Anthropologie Du Changement Social*. Karthala.
Sarr, Samba. 2019. *La domanialité des biens de l’administration publique à l’épreuve des régimes fonciers traditionnels*. Paris: Editions L’Harmattan.
Scott, James C. 1995. “State Simplifications: Nature, Space and People.” *Journal of Political Philosophy* 3 (3): 191–233. https://doi.org/10.1111/j.1467-9760.1995.tb00035.x.
Speirs, Mike. 1991. “Agrarian Change and the Revolution in Burkina Faso.” *African Affairs* 90 (358): 89–110.
Tallet, B. 2009. “La Réorganisation Agraire et Foncière Au Burkina Faso (1984-2004). Vingt Ans de Décalage Entre Cadre Légal et Pratiques Locales.” In *Les Politiques d’enregistrement Des Droits Fonciers. Du Cadre Légal Aux Pratiques Locales*, edited by J.-P. Colin, P.-Y. Le Meur, and E. Léonard, 141–66. Paris: Karthala.
Touré, Oussouby. 2018. “Elaboration Du Document de Politique Foncière Au Sénégal: Leçons Apprises d’une Expérience d’implication Soutenue et Structurée Des Organisations de La Société Civile Dans La Réforme Foncière.” Comité Technique Foncier et Développement.