

The Code Pastoral of the Islamic Republic of Mauritania

Return to the Sources:
Revival of Traditional
Nomads' Rights to Common Property Resources.

Le Code Pastoral de la République Islamique de la Mauritanie : Un exemple parfait de législation traditionnelle

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Abstract

Over 75 % of arid Mauritania's agricultural output stems from nomadic herding, whereas 90% of all budget and donor support for agriculture flows into sedentary agriculture (mostly irrigated rice in the Senegal River Valley). The legislation prior to the Pastoral Code ignored the specificities of pastoralism. The forest code has been copied from tropical countries, and the land law embodies Roman Laws' exclusive ownership, ill-suited for nomadic livestock raising.

Prompted by increasing encroachment of farmers into their rangelands, herders have formed associations in self-defense and, in 1996, initiated the drafting of a pastoral code to regulate their specific concerns.

Nomadic herders in arid regions have to follow the clouds: they need space to be able to find grass, wherever it may grow. The herds need access to water- irrespective of the ownership of the source. Geographic and husbandry constraints force herders since old times to migrate through vast areas: east-west during the fertile winter months and north south into neighboring countries during the dry summer (hivernage).

Traditional rules, and the Islamic Law, which originated in the Nedj, a desert area of Saudi Arabia bordering the Red Sea, recognize these customs. Consequently a group of tribal leaders and herders, joined by Islamic scholars, encouraged by GTZ, have drafted a text embodying these rules and reflecting the necessities dictated by reality, especially mobility.

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The Code excels in its clarity, brevity and beauty of the language. Its 46 short paragraphs define the objective, lay down the basic principles and provide for conflict resolution. State tribunals are envisaged as third and last resort only.

The text refrains from outlining detailed solutions and refers to known procedures instead, for instance the priority of access to water, or damage compensation. By resorting to mediation and arbitration, the Code relies on social pressure instead of the absent state executory-might for its enforcement, since what the people know to be right has now become law.

Dissemination of the code in poetic form, a traditional form of promotion of rules among the Arabic and Fulbe tribes alike, and in pictogrammes familiarize the population with the new-old rules.

The Code has been enacted by Parliament in 2000, was published in 2002, its implementation Decree in 2004. Publication did not come easy, though, and needed pressure from the World Bank to be achieved. The code met government opposition because it cuts across a number of established “truths”: returning power to the herder on site – as opposed to the owner of nomadic cattle in the capital; originating in a grass-roots movement – as opposed to the etudes of the western trained lawyers; providing freedom of range and access to water, contradicting the existing laws, which have not been amended simultaneously.

The provisions of the Code are respected, however, whereas the “modern” laws are ignored in the countryside.

Résumé

Le pastoralisme représente plus que 75% de la production agricole mauritanienne, mais l’agriculture sédentaire reçoit 90% du support budgétaire et des bailleurs de fonds destiné à l’agriculture (surtout pour les champs irrigués de riz dans la vallée du fleuve Sénégal). La législation en place avant le Code ignore les spécificités du pastoralisme: le code forestier fut copié des pays tropicaux, le droit foncier reproduit la propriété exclusive du droit romain. Ces règles ne sont pas applicables à l’élevage.

Les pasteurs ont été forcé de s’associer pour mieux se défendre contre l’envahissement constant des paysans de leurs terres, et ont commencé en 1996 à formuler un Code Pastoral adressant leurs problèmes.

Les pasteurs nomades des régions arides suivent les nuages afin de trouver les pâturages nécessaires. Les troupeaux ont besoin d’eau - peu importe à qui appartient le puit. Ainsi, les éleveurs sont contraints de couvrir de vastes espaces d’est en ouest durant les mois fertiles d’hiver et du nord au sud durant les étés secs (hivernage).

Les règles traditionnelles respectent ces contraintes, ainsi que le droit musulman, originaire du Nedj, la région désertique d’Arabie Saoudite au bord de la Mer Rouge.

Encouragés par la GTZ, quelques chefs tribaux, éleveurs et juristes se sont joints pour élaborer un texte incorporant ces règles, et reflétant les nécessités imposées par la réalité, notamment la migration.

Le texte brille par sa clarté, brièveté et beauté du langage. En seulement 46 paragraphes, le Code clarifie son objectif, définit des principes de base et réglemente de façon sommaire la solution des conflits – prévoyant le recours aux tribunaux comme ultime ressort.

Le texte n'a pas besoin de prévoir des solutions détaillées puisqu'il peut se référer à des procédures connues, tels que les priorités d'accès à l'eau et les dédommagements. Par l'introduction de la médiation et de l'arbitrage, le Code peut prendre base sur la pression sociale pour garantir son exécution, au lieu de dépendre du pouvoir de l'état (absent), car ce que la population reconnaît comme "juste et bon" est devenu droit.

La dissémination du Code sous forme de poème et de pictogramme familiarise les populations avec les anciennes règles devenues droit. Ces formes traditionnelles de propagation sont connues chez les tribus arabes et les Peuhls.

Le Code fut approuvé par le Parlement en 2000, publié en 2002, et son Décret d'application pris place en 2004. Pourtant, la publication n'était pas évidente et nécessitait la pression de la Banque Mondiale. L'opposition du gouvernement s'explique par les faits suivants: le Code donne pouvoir aux pasteurs – non au propriétaire de bétail en ville ; l'initiative de rédaction comprenait des associations pastorales – et non des avocats éduqués en ville ; le Code assure la migration des troupeaux et leurs accès à l'eau, et contredit ainsi les lois en place, qui n'ont pas encore été modifiées. Cependant, le Code est respecté, tandis que les lois dites modernes sont régulièrement transgressées .

Tradition is not to watch over ashes.

Tradition is about keeping the flame alive.

Henry David Thoreau.

I. THE ECONOMIC AND ADMINISTRATIVE CONTEXT

THE ECONOMIC CONTEXT.

Agriculture represents up to 30 % of GDP for Sahelian countries. About 75% of agricultural activities involve livestock raising. In Mauritania, the figures were 27 % and 71%, respectively in 1996. In comparison, mining contributed 1% less to GDP: 18 % *versus* 19%². Even so, livestock raising received far less funds by donors and government than sedentary agriculture³.

The Code is the first law regulating nomadic livestock raising. This is remarkable, because "the pastoral system"⁴, based on mobility (*la transhumance*⁵) constitutes the economic activity best adapted to arid areas. Only mobility enables the exploitation of scarce, widely scattered and shifting water resources, grazing grounds and saltlicks (*amersal*). Mobility ensures the sustainability of cattle production while preserving the ecosystem.

THE ADMINISTRATIVE CONTEXT.

Traditionally, nomads were the ruling elite in the territory now known as Mauritania. Livestock, notably camels, were the backbone of the region's survival. The nomads' culture evolved around the herd. Rainfall, grazing grounds and watering places dominated life.

The arrival of the French changed this. A sedentary colonial power, the French administration distrusted nomads because they are difficult to identify, let alone to tax.

² Mauritanian *Office National de la Statistique* (ONS) - as reported in Elke Boehnert and Ould KHTOUR, (1999, unpublished).

³ The World Bank funded agriculture with approx. 150 million USD over the last 30 years. Of five credits, only one was dedicated to herders, disbursing only 10 million USD. Recently herders received more attention, *see*: John Hall & François Le Gall, WEST AFRICAN PILOT PASTORAL PROGRAM (WAPPP): PROGRAM ACHIEVEMENTS AND FOLLOW-UP (1997) <http://www.pppoa.org>.

⁴ Defined in: Angelo Maliki Bonfiglioli, "AGRO-PASTORALISM IN CHAD AS A STRATEGY FOR SURVIVAL", World Bank Technical Paper Nr. 214 (1993), box 4 page 29 as: "The pastoral system is an economic production system based on the herd, ...considered as capital, an element of wealth, and as a factor of production...susceptible to produce revenue. At the heart of this system the pastors search for strategies to satisfy, in an unstable environment, a minimization of risk objectives..."

⁵ "transhumance" was defined in an earlier draft of the *Code* as: "la 'transhumance' est le mouvement cyclique et saisonnier des animaux en vue de l'exploitation des ressources pastorales d'un territoire donnée ". (Art.3, alinéa 4, version 1998).

The Mauritanian administration has inherited this attitude. Neglect of herder's interests has been further aggravated by misguided donor intervention. Donors funnel their money through the sedentary administration. Encroachment of planters into range land areas, unsuitable for rainfed agriculture, was the consequence. This trend is responsible for substantial productivity loss⁶.

Until recently the literature on dryland agricultural development ignored pastoralism. The value of nomadic livestock rising is now being recognized, though, as they are using marginal resources and "turn wasteland into food"⁷.

Legal traditions also account for the neglect of herders.

II. OWNERSHIP v. USE RIGHTS

Roman Law formed the western mind as to the meaning of "ownership": an exclusive possession of a *res*, the right to do whatever one pleases, to the exclusion of everybody else, including willful destruction.

The same applies to land. The "owner" may, at his sole discretion, exclude the use of the land he owns by others - irrespective of whether he uses the land himself. Such legal system serves agrarian societies with sedentary farmers well. Intensive agriculture requires capital investments and work, and therefore needs protection against strangers harvesting fruits they have not sown.

Given the influence of the Roman law on the French *Code Napoleon* of 1801, it is only natural that the French colonial power imposed this legal system on Mauritania. Such an approach is ill-suited, however, for a population following a nomadic lifestyle.

Nomadic use rights may be defined as "permission to use a common resource intermittently." The concept of exclusivity is not involved. Whether the resource base stretches over a vast area and is

⁶ H. E. Dregne & N. T. Chou, *Global desertification dimension and costs*, in DEGRADATION AND RESTORATION OF ARID LANDS (H. E. Dregne ed., 1992) quoted in: Dryland Degradation and Poverty, contribution by Sara J. Scherr, University of Maryland, to the World Bank sponsored Round Table "DRYLANDS, POVERTY AND DEVELOPMENT", June 15 and 16, 1999 in Washington, DC, Summary of Proceedings, edited Nov. 1999, page 69, 70. Scherr expressly renders "conversion of rangelands to grain production" responsible for accentuated land degradation.

⁷ Anne-Maire Frérot, "IMPACT DE LA RÉFORME FONCIÈRE SUR LA GESTION DE L'ESPACE PASTORAL EN MAURITANIE" dans Options méditerranéennes, Série A: Séminaires méditerranéennes, # 32 (1996) p 39 *sequitur*; Esther Mwangi and Stephan Dorn: BITING THE BULLET: HOW TO SECURE ACCESS TO DRYLAND RESOURCES FOR MULTIPLE USERS, CAPRI Working Paper No. 47, 2006.

unstable (e.g. grazing areas) or whether it is fixed, (e.g. watering places and salt licks) not one single person or family is entitled to exclusive use of it because its accessibility may be critical to several users (tribes) and their herds. Exclusiveness is also not required for the effective use of the resource. A given resource may be sparse, while being also abundant, because scattered over a wide geographical area and renewable over time, if used "reasonably". The periodic nature of the resource makes it abundant when it exists (following rains), but too scarce for survival of anyone depending on its exclusive use alone (during draughts).

Nomadic use rights illustrate that property rights are power relations between people. Each tribe may exploit specific grazing grounds, possibly far apart, and which may differ according to season and rainfall. However, several tribes may share the same watering station for their livestock. "Access" therefore does not mean free access for all: who is authorized is regulated by tradition and custom.

A common property management regime, subject to well defined rules of access, guarantees optimal resource use, a "fair" sharing of exploitation to enable generation, critical for survival. According to the "property-rights-theory" of the 1960s, social controls over the use of resources in short supply define such optimal regulation⁸. These controls are established by the traditions embodied in the Muslim law *Sharia* through principles consistent with common sense and equitable burden sharing. Necessity of survival and fear of transgressing a religious prohibition enforces these rules.

The *Sharia* recognizes five principles:⁹

First, recognition of collective use rights to pastoral resources (*le caractère collectif et l'usage commun des ressources pastorales*).¹⁰

Second, recognition of the protection of vital space around villages (*la protection de l'espace (et, en partant, des ressources) vital(es) de la cité - Hima*). Nomadic camps must not be installed in this zone.

Third, prevention of damages to planted fields by stray livestock.

⁸ Daniel W. Bromley and Michael M. Cernea: "THE MANAGEMENT OF COMMON PROPERTY NATURAL RESOURCES" World Bank discussion Papers # 57 (1989), p.48,: "The Swiss summer pastures are "collectively owned" but can hardly be described as degraded; this points to a fundamental issue ...the summer pastures of Switzerland are collectively owned precisely because they are of low productivity...Notice that we did not say that such pasture lands are of low productivity because they are collectively owned". In other words: common management is the most appropriate form of ownership for optimal efficiency in use." (emphasis mine).

⁹ Introductory note of the *Code*.

¹⁰ *Hadith* by the Prophet Mohammed: water, pastures and fire are collective property (fire meaning firewood),

Fourth, the right of a nomadic herder during the annual migration (*transhumant*) to spend three nights within the vital space of villages, an exception to the rule which protects the *Hima*.

Fifth, joint responsibility of herder and farmer to exercise vigilance in the protection of livestock and crops.

State law regulating natural resources such as land, forest and water in Mauritania followed the rules of exclusive ownership, disregarding the time-honored customary and *Sharia* principles, resulting in hardships for the herder.

Access to **land** by traditional use rights was *de facto* and *de lege* confiscated by the state in favor of exclusive ownership. The central authority thus intended to demonstrate its power by redistributing land to sedentary farmers. Since the state appeared as the source of rights, these were derivative rights, stripped of all cultural and religious content. It left the space otherwise available to herders vulnerable to “trespassing” by farmers through progressive encroachment of fields into grazing zones.

Forests are regulated by Mauritanian Law No 97-007 of January 20, 1997 (*Code forestier*). Article 32 prohibits livestock to enter such recognized forest. This ban applies only to nomadic herders, because the legislation allows exploitation by neighboring village populations.

Water use is regulated in a more comprehensive and inclusive manner. The *Code d'eau* (Ordonnance 85-144 of July 4, 1985) protects access of everyone, not just herders, to surface waters by declaring them public property (*domain public*).¹¹ Conversion to private property by decree is not excluded, however, and it is left to ministerial discretion to define the limits of the *domain public*.

Recently a rebalancing of the interests of nomadic herders with those of sedentary farmers has begun. Several African herder's associations created a representative association (*L'Union Inter-africaine des Organisations Professionnelles de l'Elevage* – (U.I.O.P.E.)¹², formally constituted in December 1999 in Nouakchott, Mauritania. The drafting of appropriate legislation is one of the objectives of this associative movement.

¹¹ The conflict of interests between farmers using receding waters of ephemeral lakes in the east of Mauritania (*Hodh Al Gharbi*) called *Tamourt*, for flood recession agriculture, and nomads who water their herds there gave rise to disputes among donors supported projects (GIRNEM, funded by GTZ, and “PDIAM”, funded by the World Bank), which supported, respectively, the herders and the farmers (through financing fences around the *Tamourt* “*Goungel*”). Eventually passages for the herds were negotiated. See also the author's initiative: Technology Fosters Tradition (TFT), Norwegian funded, intended to assess custom south of Aioun: www.cbrnm.net/web/tft and www.cbrnm.net/web/tft/about/concept.html.

III. OVERVIEW OF THE MAURITANIAN *CODE PASTORAL*

The Mauritanian *Code Pastoral* reflects Mauritanian traditions. The drafting was preceded by country-wide, in-depth appraisals of the situation "in the field". Representatives of all concerned interest groups were consulted. It is therefore supported by its' stakeholders and sponsored by the *Ulema*¹³.

The Code is a well-written piece of legislation.¹⁴ It is short (46 two or three line articles), concise, easy to read and understand and well structured. It reflects the drafters' priorities: a clear policy outline upfront and an emphasis on conflict avoidance. If conflicts do occur, a realistic guideline is provided for their resolution. The desire to solve conflict prompted the legislation. It is an age-old issue¹⁵.

THE OBJECTIVE OF THE *CODE*

The objective of the Code is a rational administration of the Mauritanian grazing range (*espace pastoral*) strengthening herder's rights. The principal concepts and rights of herding are defined. Thus, Art 10 stipulates the mobility of herders and access to pastoral resources. Pastoralism is defined as livestock raising based on permanent or seasonal mobility¹⁶, and herders are those livestock keepers who depend on mobility for their use of pastoral resources. These are defined in Art 4 as water (above and below surface level), grass and tree or brush grazing areas (*pâturages herbacés ou aériens*), and salt licks (*les carriers d'Amersal et les terrains à lécher*). Pastoral resources are common goods, accrued to the nation¹⁷. The area in which these goods occur, *l'espace pastoral*, defined in article 5, is public domain and reserved exclusively for mobile livestock keeping¹⁸. The *Code* emphasizes this essential principle by stipulating expressly that any appropriation of pastoral resources by an individual person or entity is illegal¹⁹.

¹³ *Ulema* are the authorities of Muslim faith.

¹⁴ drafted by a team of Mauritanian jurists and (Islamic law) jurisconsults, well versed in French law and the *Sharia*, advised by technical experts. For the text see: www.glin.gov or www.glin.mr.

¹⁵ See *Sourate The Prophets (Al-Anbiyâ)* (21), verse 78:

“And remember David and Salomon – [how it was] when both of them gave judgment concerning the field into which some people's sheep had strayed by night and pastured therein, and [how] We bore witness to their judgment”.

¹⁶ Art 7, Art 3.

¹⁷ Art. 8 :”Le principe de la communauté des ressources est de droit” ; Art 9 : Les ressources pastorales...appartiennent à la Nation, ... »

¹⁸ Art. 13.

¹⁹ Art. 14: "*toute forme d'appropriation exclusive de l'espace pastoral est illégale*".

This protection extends to necessary access-ways to a particular resource²⁰. Obviously, a particular resource, even though technically common property, cannot be exploited by the public when access is blocked by surrounding private property. Article 11 defines “access to the resource” as a guaranty of free access for the herder and his animals – excepted circumstances laid down by law. Article 6, furthermore, protects this access right by a lien (*servitude*).

Anticipating the possibility of large scale development schemes, the *Code* prohibits such public enterprises if they are likely to harm the vital interests of the herders²¹.

The Code avoids the issue of expropriation against compensation²² by simply attributing specific use rights to herders, instead of ownership. Also, the articles conferring the use rights expressly provide for their execution within “the limits of the law”²³. This precaution ought to forestall potential claims.

The *Code* thus creates a hybrid new right: neither full common property nor exclusive property right: it is a common property right granted by the state through a law, distinct from the recognition of a pre-existing right, and created in favor of a socio-economic group.

PASTORAL RESOURCES – WATER, SALT LICKS

Water is the most precious pastoral resource. Articles 21 through 27 regulate and protect access to water by livestock. The principle of free access to a water source is already established in Art. 4, where "*les eaux superficielles ou souterraines*" are included in the definition of "*resources pastorales*", free access to which is guaranteed by Art. 6 and 11. The *Code* defines in Article 24 places where water accumulates, and which serve to water herds as being of *utilité pastorale*. Such "*utilité pastorale*" occurs automatically by law. However, artificially created watering points destined specifically for the use by herders (*infrastructures hydrauliques et points d'eau à vocation pastorale*) have to be declared as such by administrative act. Such water points may not be physically altered by private works to impede herder's access²⁴.

Private water hauling installations on public wells automatically become public goods, guaranteeing access for herder's animals²⁵.

²⁰ Art 5 alinéa 2, Art.6 and Art.15.

²¹ Art 12.

²² Constitution of 1991, Art.15

²³ Art. 6, 7, 10, 11, 12.

²⁴ Art. 25

²⁵ Art.22

The same policy of unrestricted access for livestock applies to salt licks (*carrières d'amersal*). These may not be privately appropriated or managed, (Art 27), built-over or otherwise rendered inaccessible (Art 28).

AVOIDANCE OF CONFLICT

The *Code*'s central piece is its chapter five: *GESTION DES CONFLITS PASTORAUX* comprising eleven articles (Art 33 - 44).

The *Code* strives to avoid potential conflicts between herders and settlers, and conflicts among different groups of herders²⁶, through separation of the conflicting parties wherever possible. If conflict arises, is to be settled through arbitration. Going to court is only *ultima ratio*. (Art 39).

Avoiding conflict through separation:

The *autorité administrative* may regulate through *Arrêté* specific uses in specific geographical areas. E.g. Article 33, allows for the prohibition of planting in certain pastoral zones. Inversely, the installation of campsites in proximity to agricultural zones may also be forbidden (Art. 37). These regulations may also be enacted for certain periods of the year. The Implementation Decree encourages local conventions among the stakeholders to regulate land use (Art. 18).

Conflict avoidance through separating incompatible users is also promoted by articles 18 (authorizing the *Hakim* to regulate by *Arrêté* the planting of fields or the establishment of camps, respectively, also with only temporary force); 19 (regulating areas of permanent installation through development plans), 20 (establishment of villages in zones with potential for pastoral uses), 25 (regulating activities in the proximity of watering points), and 29, (establishing rules protecting salt licks).

If conflict does occur, however, it is to be resolved first through negotiations among the parties (*à l'amiable*).²⁷ Should these direct negotiations not lead to settlement, the second step is the appeal to a lower and, by the losing party, to a higher arbitral commissions consisting of representatives of the parties and the administration²⁸. Only if both arbitrations fail, the third step allows the submission of the case to the local court (*tribunal de Moughata*)²⁹

²⁶ Art. 44.

²⁷ Art. 33, first sentence.

²⁸ Art. 35 through 38

²⁹ Art. 39

The arbitral commissions are small and designed to find compromise. Each commission renders its verdict on the spot. Compensation is to be granted to the aggrieved party by the other party pursuant to article 37.

If the conflict does go to court, judgment is rendered within fifteen days.

The local level commissions respect the principle of decentralization. The speedy rendering of decisions mirrors the *sharia* courts, and serves the parties' interests for reestablishing peace. According to Elisabetta Grande: "*What matters is the group, and what is important is either peace within the group or between one group and its neighbors. After all, ... the legal process is designed to re-establish social peace in order to prevent feuds*"³⁰.

The Mauritanian tradition of informal conflict resolution, based on moral persuasion rather than forced execution, embodied in the Code's rules, distinguishes between the following outcomes:³¹

Itidhar: withdrawal of the complaint, and mutual exchange of excuses;

T'arguiba: symbolic amends through praise of the injured party and offering of gifts;

Sorba: collective excuse of the transgressor's clan through the visit of an important delegation to the opposed party;

Tawid: indemnification in kind or through money.

Conflicts may also arise among herders themselves, because of improperly installed campsites resulting in the commingling of livestock, or the blockage of another herd's access to their watering site. Such conflicts are to be resolved by a separate commission pursuant to article 44, created *ad hoc* by local *Arrêté*.

The rules of conduct during *transhumance* are precisely established by tradition in Mauritania:

Lemrah specifies the roaming zone of the herd during the night next to the tent of the herder/owner;

Metlag specifies the most direct access path for the livestock from camp to the grazing ground in the morning, and its return in the evening. This corridor has to remain open.

Elmessyah specifies the nocturnal grazing area.

Elmirad indicates the space between the camp and the water source. No camp may be set up there.

³⁰ Elisabetta Grande, ALTERNATIVE DISPUTE RESOLUTION, AFRICA AND THE STRUCTURE OF LAW AND POWER: THE HORN IN CONTEXT; 1999 Journal of African Law, 43, 63-70, 64.

³¹ Isselmou Abdel Kader, member of the drafting committee for the *Code* to the author in Nouakchott in 1999.

Tradition requests from herders mutual respect, hospitality and positive intervention to prevent conflicts. Every herder must install his camp so that his animals, on their march to pastures and watering spots, do not cross, commingle or otherwise interfere with the animals of another camp.

At the water hole tradition also regulates use priorities. Human needs are served first, (*Rwaya* or *Kharza*); followed by needs of herds in emergency situations. Next come cattle, then sheep and goats, finally camels. In the case of watering holes installed by villagers, the same sequence is followed, but with village needs taking priority. When two herds arrive at the well at the same time, these rules apply, with the needs of the herd that arrived first taking precedence over a herd arriving later.

The drafters of the *Code* had confidence in the adherence to “their” law because of:

* predictability. The text clearly stipulates what rights are granted to whom, while remaining flexible in addressing issues of conflict through reliance on customary regulations.

* simple institutions to implement, oversee and execute its regulations. Execution is key to any law. Imported texts and court systems generally prove to be a poor fit with local culture, tradition, learning experience and budgetary resources, and therefore fail. By allowing regress to court only as “last resource” the *Code* reduces this risk.

The arbitration rules of the *Code* split responsibility for solving conflict between the two existing centers of power: the state authority (through its local representative), and the stakeholders themselves (the litigants). Combined, they are obliged to compromise, thereby reducing friction between locals and the central power. This system also tends to guarantee the respect of established rules, since both sides limit each other’s leeway in reinterpreting them.

The appropriate combination of content with adapted institutional support characterizes the *Code*. It fosters the self regulating powers of society by giving them the space, flexibility, rules, and institutions tailored to their needs. The society can live by its own principles, and solve its problems first from within - a “bottom-up” approach. State authority only assures the respect of the rules. It does not impose new foreign obligations, or unfamiliar institutions to which the victim has to resort in order to right a perceived wrong. The Code thus embodies a concept phrased by Stephen Cornell and Joseph P. Kalt³², that institutions only work, when the system of power sharing and power generation provided

³² Professors at the University of Arizona and Harvard, respectively: "WHERE'S THE GLUE ? INSTITUTIONAL BASES OF AMERICAN INDIAN ECONOMIC DEVELOPMENT" (presentation at the World Bank spring 2000). See: Stephen Cornell and Joseph P. Kalt: SOVEREIGNTY AND NATION BUILDING: THE DEVELOPMENT CHALLENGE IN INDIAN COUNTRY TODAY; Joint Occasional Papers

therein closely corresponds to the inherent traditional understanding of what is considered "the norm". *"The key lies in culture: it is only the implicit and informal contracts of culture that stand out as the meta-enforcers of a society's mechanism of control and organization"...* *"Cultural norms are the glue that holds a society's formal and informal institutions of social control and organization together" ...* *"successful tribes have institutions that not only provide a match between cultural norms and formal structures; they are also adequate to the task at hand"*³³.

Thus the perceived weakness of the *Code*, namely that the content of rules of behavior underlying judgment in the arbitration procedure are not expressly spelled out, really constitutes its strength. Through reliance on traditional knowledge, comprising culture and *Sharia*, the drafters have combined content regulation with an institutional framework apt to enforce this regulation, acceptable in the cultural environment of its applicability. This approach marks the *Code*'s difference from the existing legislation. Ordinarily legislation follows *"the simplifying logic of the state shared by colonial and post-colonial leading elites..."*, (and falls victim to) *the illusion ...that enactments are the law, and that an enactment backed by the power of the state is enough to solve problems"*³⁴

However, the *Code* not only captures existing custom, regulations and law. It carries them forward through inclusion within a coherent and binding form. It gives tradition structure and life, respecting the wisdom that, *"in a traditional, very highly structured society...behavior cannot be modified except within the framework of already existing conventional social constraints"*.³⁵

The *Code* reflects another, almost revolutionary, notion: that different regulatory principle may be applicable to the same issue in different localities within the national territory. The colonial doctrine holds that an issue has to be regulated the same way across the entire national territory. Land- or water rights and obligations would have to be the same for everyone. This does not suit issues of land use where ecological situations differ widely and strong traditional attachment to land persists, deeply embedded in customary and religious beliefs.

Uniformity of law creates benefits only when the law attaches to identical facts, and is backed by strong executory force (effective courts).

on Native Affairs No 2002-03; Native Nations Institute / The Harvard Project on American Indian Economic Development www.jopna.net/pubs/JOPNA03_sovereignty.pdf

³³ pages 10, 16 and. 22, respectively, of the paper delivered at the World Bank *supra*.

³⁴ Elisabeth Grande: Alternative Dispute Resolution, AFRICA AND THE STRUCTURE OF LAW AND POWER: THE HORN IN CONTEXT, 1999 *Journal of African Law*, 43, 63-70, 64; C.Levi-Strauss, TRISTES TROPICQUES: *"Chez les musulmans comme chez nous, j' observe la même attitude livresque, le même esprit utopique et cette même conviction obstinée, qu'il suffit de trancher les problèmes sur le papier pour en être débarrassé aussitot."*

³⁵ Angelo Maliki Bonfiglioli, *opus cited supra*, note 4, page v (abstract) speaking of the "Sahelian agropastoralists in Chad". I would like to add *"and cultural conditioning"*.

This is not the case in Mauritania (highly valuable oasis- and irrigated lands, of shifting pastures, dryland and desert – and quasi inexistent justice system). By applying different rules tailored to different circumstances, the *Code*, accomplishes an eminently sensible thing. It adapts the law to reality.³⁶

IV. THE *CODE* AS BEST PRACTICE

The *Code* may be considered “best practice” in legal writing because of:

- 1) normal language, following the *Hadith*³⁷ of the Prophet Mohamed: “always speak to the people in such a way that they can understand you”³⁸;
- 2) short and precise articles;
- 3) clear structure: policy choices are set out first, definitions of notions with traditional/legal context are provided, and implementation arrangements are all organized in logical sequence;
- 4) content is culturally embedded in the society's tradition (as opposed to an imported ideology);
- 5) fair balance of interests of competing parties - nomadic herders *versus* sedentary farmers;
- 6) simple, context adapted institutions that take advantage of existing facilities and personal already present - avoiding the need for additional equipment, works or training.

V. APPLICATION OF THE *CODE* - PROSPECTS

The *Code* has been ratified following three months of discussion in Parliament³⁹ on the 26th of July 2000 and was published on the 15th of July 2003. The implementation decree considered necessary for application⁴⁰ was published on March 16th 2004⁴¹.

³⁶ The *Code* only applies to areas qualified as *espace pastoral*, hence not to oasis or irrigated areas.

³⁷ *Hadith* is the expression for the word and the behavior of the Prophet Mohammed, a source of law under the *Sharia*.

³⁸ Amadou Hampate Bâ: "VIE ET ENSEIGNEMENT DE TIerno BOKAR, Ed. Seuil, 1980, p. 127.

³⁹ Such debate is unusual and demonstrates the heightened interest the parliamentarians took in the text.

⁴⁰ This interpretation is not shared by the author.

⁴¹ Following pressure by the World Bank.

Official implementation started only in mid-2004. GTZ and World Bank funded projects integrate its content into their projects and actively promote knowledge about the law through sketches, pictogram's, community gatherings and other appropriate interventions.⁴²

Reports about the intentional respect of the *Code* – as opposed to the *us et coutumes* underpinning its regulations, are not yet known to the author, neither arbitral decisions.

The author is confident that the Code will be honored, due to discussions with local stakeholders in Mauritania, because the law embodies current wisdom on dryland management⁴³ and since it empowers local people to actively protect their environment.

VI. ENVIRONMENTAL REGENERATION FOSTERED BY THE CODE

The Code fosters mobility-essential for herders in drylands with sporadic and erratic rainfall, north of the "isohyète 400 mm", the limit for rainfed crops. The nomads are familiar with ecological necessities of drylands. They realize the necessity to protect the vegetative cover on which their herds rely. Hence flexibility and mobilityl called "*tetrag*", meaning that an area must not be overgrazed to the point where plants are unable to regenerate by producing seeds. Before overgrazing occurs, the herd moves on.

Tradition also dictates that water resources be exploited prudently. The nomads will not let their beasts drink where wells are in danger of running dry. This follows from the *principe de zesou et ghab* according to which resources should never be totally depleted, but allowed to regenerate, and according to which there should always be something left for the most needy in case of emergencies⁴⁴.

Grass actually thrives when grazed: The animals fertilize the ground through their droppings, the plant regenerates faster if not left exposed to the dehydrating forces of sun and wind, and some species of grass, bushes and trees thrive on the saliva of the animals, underscoring the symbiosis.

If *la vocation de l'homme s'est parfaire la nature*, the nomad embodies this wisdom. They do improve on the environment, being integrated into its biological cycles. They prevent desertification. The *Pastoral Code* thus promotes an activity fully compatible with sustainable environmentalism.

⁴² GTZ project "Programme des Ressources Naturelles" (ProGRN, June 2004); World Bank project « Community based watershed management project" (July 2005).

⁴³ CAPRI Working Paper No. 47, see Fn. 7.

⁴⁴ Isselmou Abdel Kader to the author, see Fn. 31.

VII. COMPLIANCE WITH INTERNATIONAL CONVENTIONS

The three UN environmental conventions: - on Biological Diversity, the UN Framework Convention on Climate Change and the UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly on Africa, all have the same basic purpose: sustainable environmental protection in order to preserve and foster human survival within the environment⁴⁵.

The objectives of the Convention on Biological Diversity⁴⁶, (Art. 1) include: "...the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits ..."

The objective of the Convention on Climate Change⁴⁷ (Art 2): "... (allow) a time-frame sufficient to allow ecosystems to adapt naturally to climate change, ... to enable economic development to proceed in a sustainable manner."

Article 2 of the Convention to Combat Desertification⁴⁸ has as objective: "...to combat desertification and mitigate the effects of drought...through effective action at all levels...with a view to contributing to the achievement of sustainable development in affected areas."

All three conventions apply to arid Mauritania. The *Code* heeds the conventions' objectives by establishing a framework for exploitation of natural resources consistent with the preservation of the local ecology, and by protecting natural habitats against destruction through farming.

⁴⁵ For graphic descriptions of the disasters befalling human society when ecological determinants are ignored see: Jared Diamond, COLLAPSE, How Societies Choose to Fail or Succeed, Viking, 2005.

⁴⁶ Convention on Biological Diversity, Rio de Janeiro, June 5, 1992; <www.biodiv.org/convention/articles.asp>. Mauritania signed on June 12, 1992, and ratified on August 16, 1996.

⁴⁷ Climate Change Convention, New York, May 9, <www.unfccc.int/essential_background/convention/background/items/1349.php>; Mauritania signed on January 20, 1994 and ratified on June 12, 1994.

⁴⁸ Convention to Combat Desertification, Dec. 26, 1996, www.unccd.int/convention/menu.php; Mauritania signed December 26, 1996, and ratified on Aug. 7, 1996.

VII. COMPARABLE LEGAL DEVELOPMENTS IN SAHELIAN COUNTRIES

Mauritania's Sahelian neighbors share its ecological characteristics, nomadic livestock raising, similar traditions and beliefs and have likewise developed, or are in the process of developing, legislation addressing pastoralism.

A. THE MALIAN *CHARTE PASTORALE*.

The Malian *Charte Pastorale* has been promulgated in 2000, but has not yet been formally implemented, because its implementation decree has not yet been signed and published. The text was preceded by intensive in-field preparatory work. It is a clear, precise, and yet detailed law. The Mali *Charte pastorale* pursues the same policy and protects the same values as the Mauritanian *Code pastoral*, namely⁴⁹:

- (1) mobility of herds;
- (2) sustainable use of the resources;
- (3) equitable access to the resources;
- (4) decentralization and participative management of *ressources pastorales* required for the survival of the herders' animals
- (5) recognition of the tasks and responsibilities of herder's associations;
- (6) peaceful exploitation of the resources, and the avoidance of conflicts.

The *Charte* distinguishes itself from the Mauritanian *Code* in a number of ways.

First, it contains of more elaborate and detailed definitions: e.g. it defines *transhumance*, and cross-border movements (*déplacements internationaux*)⁵⁰

Second, all stakeholders have to agree on the path of the *transhumance*, and its calendar. The pathways (*pistes pastorales*) are specifically protected⁵¹ against encroachment by farmers.

Third, the *Charte* stipulates in its Art. 36, that classified forests are open to herders in accordance with the regulations leading to their establishment.

⁴⁹ *Exposé des motifs*, p 2.

⁵⁰ Art 28 through 31.

⁵¹ Art. 60 through 62.

As does the Mauritanian *Code pastoral*, the *Charte* contains detailed conflict avoidance and resolution provisions⁵². As in Mauritania, the text provides for extra-judicial solutions *à l'amiable*. However, the emphasis and the tone differ:

the *Code* provides for an appeal to a state tribunal as *ultima ratio* - when all other negotiated avenues have been exhausted,⁵³ whereas the *Charte* provides for judicial procedure as the normal conflict solution method, which must be preceded by a consultation effort⁵⁴. The different approach is more likely to foster the communal solution in the case of Mauritania, and render the consultation effort a mere formality in Mali.

Overall, Mali's *Charte* reveals a less liberal approach than the *Code*. The *Charte* places more reliance on state authorities by making actions and permissions dependant on agents of state agencies. The *Code* by contrast acknowledges that the rights herders request are already vested in them, the state authority serves their protection.

This outcome is ironic because Me. Hubert Ouadrigo, a co-drafter of the *Charte*, justified the term "*charte*" instead of "*code*" by arguing that "charte" gives more a flexible guideline whereas "code" implies comprehensiveness⁵⁵. It appears that the opposite result has been achieved.

B. THE *CODE RURAL* OF NIGER

In Niger the *Code Rural*⁵⁶, together with a number of implementation decrees, notably the Decree "*fixant le statut des Terroirs d'Attache des Pasteurs* from January 1997⁵⁷ regulates herder's rights, obligations, and interests. Contrary to the other two laws, the *Code Rural* does not only address herders, but also regulates all rights in relation to land tenure and natural resource exploitation.⁵⁸

The law has been researched and prepared since 1985. The resulting text, however, is inadequate concerning livestock raising. Respective clauses are scattered over a number of regulations. More disturbing than the form is the heavy hand of the state evident in the letter and the spirit of the law. For example, whereas Art. 5 of the *Code Rural* proclaims the principle that all rights to natural

⁵² Titre VII, art. 71 through 76.

⁵³ Art. 39 Mauritanian *Code Pastoral*.

⁵⁴ Art. 71 Mali *Charte Pastorale*

⁵⁵ Email from Hubert Ouadrigo, to Isselmou Abdel Kader and John Hall, former task manager for the Mauritanian pastoral World Bank projects (Sept. 28, 1999) on file with the author.

⁵⁶ Ordonnance No. 93-015, March 2, 1993, "*fixant les Principes d'Orientation du Code Rural* (No. 622.3 Recueil des Lois & Règlements, 2nd. ed., 1994) (Niger).

⁵⁷ Decree No.: 97-008/PRN/MAG/EL, January 10, 1997.

⁵⁸ Since about 2000 numerous endeavors are underway in Niger to legislate specifically for herders. However, despite extensive in-field research, comparable to Mali, and numerous workshops on the subject, no definite draft has emerged so far.

resources are equally protected, whether they originate in traditional rights or written law, Art. 3 of the Decree of January 10, 1997⁵⁹ stipulates: " *Les ressources naturelles font partie du patrimoine commun de la Nation. Une obligation de mise en valeur pèse sur toute personne titulaire des droits reconnus par la loi sur l'une quelconque de ces ressources.*" and its Art. 13 continues, with a certain logic, "*les communautés pastorales qui ne respectent pas les obligations légales ou réglementaires de mise en valeur peuvent être privées de leur droit de jouissance prioritaire*". A detailed procedure is set up for state agents to supervise these provisions and to order sanctions, if required ⁶⁰.

Whereas the Mauritanian Code pastoral confirms the mobility of the herders and their access to pastoral resources as a traditional, pre-existing right, we have seen that Mali, departing from the same premises, nevertheless provides for administrative interference on a larger scale. Niger has gone further in this direction, leaving the exercise of the herders' rights *quasi* at the discretion of the administration. The liberty of the herder to access "his" resource, has been changed into a revocable permission by the state.

Hans-Werner Wabnitz

⁵⁹ Decree Nr. 97-006/PRN/MAG/EL

⁶⁰ Articles 36 *sequitur*.