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**THEME II:**  
**LEGAL SECURITY OF THE REAL ESTATE MARKET:**  
**THE NECESSITY FOR REGULATORY BILLS**

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## Introduction

As place of exchange of the properties and services, the legal business needs stability and anticipation so that those who project in the future, by putting money in a business sector, can gain from their investment.

The real estate sector does not distinguish itself by this search for profit which characterizes common companies and families which put in the real estate investment considerable amounts of money. While for some, it is a matter of gaining interest from their income through real estate investments; for others, the purpose is to get a lifetime household "a roof " by refunding a real-estate loan during thirty years.

This stability and anticipation emanates from the legal security which exists within a country, enables a favorable legal and safe environment for financial undertaking in the real estate sector. The legal security is thus an important factor that influences the economic behavior of real estate investors and stakeholders. Therefore, it is primarily important to know the nature and the size of this market. Indeed, the law and the social facts interpenetrate, and adapt themselves to each other. All laws cannot be juxtaposed *ne varietur* from a country to another, without need for any adaptation.

When observing the African real estate market, we find specific features as well as common features with markets in other continents. The main common feature as a matter of fact is the transfer of land and the buildings from one patrimony to another. The specific features concern the mortgage guarantees and their acquisition modalities.

Though the main aim have common features from one market to the other, land in Africa has a particular importance tantamount to tradition<sup>1</sup> changes which prevailed up to the second half of the 20<sup>th</sup> century and which are

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<sup>1</sup> V. M. Penant, The native land property in Cameroon, in Rec. Penant on 1945, Doct. P. 63, quoted by S. Meloné, note under C.S. COR .judgement No 54 of May 23<sup>rd</sup>, 1972, Cam Rev.. of law 1974, No 5, p. 60.

gradually making way to modern<sup>2</sup> modes, due to the influences of the European colonization.

By the way, the laws and rules guaranteed by Constitution protect the right to real estate property and organize the modes of exchanges such as the sale, the donation, the sharing, the joint possession and the protection of real estate. Real estate professions are increasingly regulated as concerning access and the conditions of practice. As a center of real estate transactions, notaryship sees its organizing and functioning rules renewed by state authorities. And the Chambers of Notaries in Africa share their experiences amongst themselves so as to optimize the practice of the profession and moralize behavior of stakeholders when signing the notarial acts.

The real estate sector is not congealed; it is in perpetual evolution. This dynamism must be controlled and accompanied by the Notaryship so that real estate transactions in Africa enjoy legal security which will promote its growth due to its credibility.

In order to establish its stability and an eventually expansion, it is important to analyze the real estate market (I) in all its components, as well as examine the stakes of regulation (II).

## **I- THE AFRICAN REAL ESTATE MARKET**

The existence in African of real estate market is not to be proven any more. But before handling its security (B), it is important to see into its current situation (A).

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<sup>2</sup> J-L. Vivier, land laws in Burkina Faso, Rec. Penant on 1998, p. 327 (" law N 14-96 of May 23rd, 1996, reorganizing agrarian and land creates " the national land domain of Burkina Faso (art. 2), which is the property of the state " (art. 4) ").

## **A- The characterization of the real estate market**

As usually presented, the real estate<sup>3</sup> market is the frame of formal or informal space in which the real estate transactions start, are negotiated and executed between, either private individuals, professionals, or between private individuals and professionals. It is the junction between the offers, - purchases or rents, - and the real estate needs.

The real estate market is influenced by several elements: the geographical situation of the property (urban zone, rural zone), its cost (low, average, or high), the financial mechanisms (loans with wages or without, with or without preliminary personal investment), the incentive tax system or not, the stakeholders and the regulations (land and state-owned regime, the status of the leases and the rules of town planning). These elements are marked by their diversity in different countries.

The **land status** differentiates between sub-Saharan Africa and the Maghreb. And in each of these regions, it is neither uniform. However, there are similarities amongst them. Since the advent of the independences, young States undertook a large-scale legislative work. This implied the identification of all the lands so as to facilitate State control over them, their redistribution and their use. It also implied an adequate equilibrium between the secular rights of the populations on their lands and those of the new states. It finally implied, reintroducing the vast customary lands in the economic and trade domain, as they are more or less occupied by the village communities, through the introduction of the notion of private property right as well as to emphasize rules concerning proof for real estate ownership. Generally speaking, it implies

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<sup>3</sup> The real estate market is " a mutual agreement (although intermediaries generally are implicated) where the buyers and the sellers, and also the owners of real property are stakeholders".

drafting relevant bills for land in order to stimulate the socioeconomic development.

From the effective implementation of these reforms which by the way introduced land registration, the rate of registrations remains very low in the whole sub-Saharan countries. This is due to administrative red tapes, prohibitive costs of procedure and ineffectiveness or even the absence of land registry. These difficulties explain why most of the plots of land in urban zones have precarious titles which are source of legal insecurity. Paradoxically, the dynamism of the transactions concerning these plots of land, subject matter of precarious titles, is such that some countries and council assumed the right to register them and subsequently proceed to their transfer. This is why some municipalities, proceed to plot sharing without respecting preliminary formality of the registration in the State registry in Mali, Benin or Guinea. Yet, without this formality, stakeholders cannot be legal owners, or resell these plots of land to the private individuals. The buyers only become simple customary holders to whom the rights were not purged. This does not prevent them from reselling in their turn thus transmitting that insecurity.

To this insufficiency of laws implementation, is added the recent phenomenon of land cornering by some national and international investors. Africa States themselves sometimes encourage this phenomenon by granting emphyteutic leases on plots of land of the national domain to investors to implant agro-industrial exploitations on them. Yet, these lands are not *res nullus* in sociological term. They belong to the ancestral customary heritage of the rustic communities which have been settling there for time immemorial and which make their living out of it.

As a matter of fact, three categories of lands remain, with an uneven guarantees offer to the real estate market: the lands of the national domain on which the State assumes the management, the lands exploited and occupied by

the traditional communities and lands definitively held by individual persons and institutions.

The **constructions market** contrast from traditional buildings with ancestral techniques of construction, to the modern buildings which use sophisticated technologies of construction. The ancestral constructions are of low added-value, because they are precarious, are negotiated at a low rate, whereas the modern ones are sold at high cost depending to their geographical location.

The domain of modern construction develops alongside with the self-construction of new stakeholders who are property developers. With their multiple skills, they intervene in the erection of buildings, either as service providers, or as investors. They put on sale buildings which provide legal and technical guarantees. On the legal plan, a first-time homeowner of a property can benefit from a title deed at the signature of the agreement. On the technical plan, he can benefits a construction-insurance, a ten-year term guarantee and the assumption of responsibility, according to state laws.

As a matter of fact, the traditional constructions are bought as blocked lands building, while the modern constructions usually meet craze and are completely sometimes sold on plan at high costs. In some countries, these prices are so high that middle classes citizen cannot afford them even by means of a real-estate loan.

Indeed the financing of real estate is rather singular in Africa due to the fact that the loans are scarce and the debt capacity of the borrowers remains very low. The scarcity of loans is partially due to the fact that commercial banks lowly grant loans for real estate purpose as its refund is of long term (20-30 years). Then, some countries have created financial institutions specialized in the property loan. But their contributions are rare and the interest rates, which are situated between 18 and 25 %, are among the highest of the world. On the contrary, the candidates for property ownership, in their majority,

have no access to credit due to the fact that they cannot offer guarantees based on definite title deed, such as the land title.

In addition to these causes, the **tax system** is unsuitable for the real estate. The payments due to the state are very high when registering real estate property such as sales, loans mortgage and the acquisition of building materials.

Also, due to the impossibility to assure the financing of real estate for a large number of the citizens, the capital flows are orientated towards the pursuit of profit, thus favoring the property speculation. Indeed, in the passed decades, the prices of real estate increased in most African countries, thus increasing the need for the populations to stabilize the social structure. Therefore, accommodation in Africa cities has become unbearable as the costs of the rents and the purchase prices of real estate are more and more expensive<sup>4</sup>.

Generally, buildings are financially considered as a safe investment. Because the majority of capital bearers buy land and build on them in order to make profit. Others, in period of economic uncertainty, invest in the acquisition of prestigious buildings. The property **speculation** also mobilizes the real estate values with the aim of realizing immediate high profits. In every case, the realization of a large-scale property deal requires very important funds, be it in the construction of a hotel, a building with offices or a real estate used for housing or with mixed use. The real estate thus tends as a means for money laundering for those who cannot prove the origin of their capital.

At the end, it seems that the current legislations do not take into account the complexity of the real estate. Some simply regulates the access to the land property without thinking to regulate the mechanisms of production and marketing of buildings as well as the spatial development of the African cities. Only some countries have texts which govern the co-ownership, the real-estate development. Even in the countries which have these legislations, they are either underestimated or are simply not implemented.

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## **B-The necessity for legal Framework**

The real estate market would be secured in Africa if all the stakeholders contribute to confer legal and technical guarantees. On the legal plan, the harmonization of rules governing the land and state-owned domain is desirable so that the peoples of these States enjoy comparable guarantees otherwise close. It is therefore important to know the stake of lands and their implementation throughout Africa.

In other words, it is advisable to create enough harmony between the ownership of inherited customary land and the states management as from their independences. The rules of this management have to contain a statutory scheme enabling to obtain the “full real estate property ownership” based on the delivery of land title to those who request it, especially when they intend to build on it.

The construction and the ownership of a built building need legal security in Africa. In this respect, it is important to gather **technical, material and legal guarantees** to avoid uncertainties over such an investment that may make its **sustainability** precarious. At the threshold of a real estate project, every builder drafts a projected balance sheet. It has so many constraints but as it is essential to respect it. Indeed, the choice of the location of a construction in the district of a city influences the density of the standards to be observed. A real estate investment can be implanted only on a building renowned land. It is however important to distinguish the material constructability and the legal constructability in order exactly estimate the quality of a building land.

By the way, are unbuildable unless specially admitted, all lands exposed to a natural risk such as the flood, the erosion, the collapse, the earthquake , and all the parts of the public domain classified as such and the areas ecologically protected such as defined by the legislation proper to the management of the environment. Some lands are unbuildable considering the rate of insecurity which they are exposed to, due to industrial activities or the grave nuisances

emanating from the industrial or acoustic pollution, and from those who can affect public health or the local cultural values. Their determination is made by the administration in charge of urban planning or the municipal authority.

The legal constructability ensues from information contained in administrative acts and informs the private individuals about the use of the land. The planning certificate has a major importance for that purpose because it favors the delivery of building permit.

The contracts of real estate property ownership need a renewal so as to protect all those who acquire a built building such as the sale contract of buildings to be built, the contract of real-estate development and the rent-proprietorship. It is due to this that the co-owners of the built buildings has authority to be embedded by favoring the construction of high buildings and, correlatively to mitigate the extensive development of cities. Because, the African cities, in a general way, develop in a anarchy way without urbanistic coherence and in non respect of rules of development. They are form by the overlapping of several plots which do not respect the balance sheet of responsibilities promulgated by competent authorities

The real estate occupations need to be regulated through Africa, to organize the conditions of their exercise. As for the meantime the stakeholders many without their skills and their morality are proven true. This increases the factors of insecurity.

## **II-THE REGULATION OF THE AFRICAN REAL ESTATE MARKET: EXISTING GUARANTEES AND PERSPECTIVE**

The regulation of the African real estate market remains dependent on classic guarantees (A). The future thus has to be scrutinized after sketching the outlines of this regulation (B) with existing guarantees.

## **A- The Existing guarantees**

### **1-The necessity of the intervention of the notary within the real estate market: the notarial act, the instrument of guarantee between the parts**

The main role of the Notary profession is to give evidence, with rigor and seriousness, of the truthfulness of acts and agreements which bind the parties: the principle of the authenticity is expressed in practice not only in the formal plan, in particular during the elaboration of an act, but also with the facts, in particular as for the contents of the act.

Therefore, following the example of all the countries of civil-law culture, the authentic act, in Africa, is the one which was established by a competent publicly appointed official, acting in the forms required by the law. It binds all until registration of forgery of what the Publicly appointed official made or noticed personally, according to his functions and it is valid until proved otherwise.

The notarized authentic act is thus traditionally a tool or a mode of irreplaceable proof thanks to its convincing character and an effective instrument thanks to its enforceable character. Besides, before its writing, the Notary has the obligation to proceed to the control of the legality and in the " check of the information which will appear there; he thus presents before anything else, all preventive virtues thus contributing to the minimization of the risks of dispute.

So in countries like Senegal where it is properly implemented the dispute concerning the authentic acts containing sale of building represents only 0,02 % pending before of the disputes the courts. The number of conflict there relative is also very low in Togo.

However, in Mali, as concerning precarious titles, the notarial act, in spite of its numerous advantages, is the subject matter of numerous disputes

mainly because of the bad organization of the council state-owned administration. Indeed, the absence at this level of a reliable and effective system of revelation of real rights (absence of land books) explains this situation of legal and financial insecurity.

However, in spite of these disparities within the real estate market, the notary insures a legal security by his diverse controls and verifies the conformity of contracts with the current bills. He shows impartiality in the elaboration of act which is a means of security of the translative acts of law and the guaranteed grips. This act guarantees a certain economic value and insures the security of real estate investments from the investigations beforehand made by his ministry on the real estate market.

In the framework of a real-estate loan, the authenticity of notarial act will enable the preservation of the lender's interests and those of the debtor the debtor as well.

The appeal to notary thus contributes to protect the real estate loan which certain, liquid and due character of which could not be any more questioned by the debtor or the joint debtors. Besides, the duty of advice of the notary to the debtor will enable to draw the attention of the latter on the extent of his commitments.

The Notary will thus insure that the guarantee suited to the operation is taken according to the legislation and the current practice. That contributes to generate and to strengthen trust in the granting and the use of property loans.

Besides, the intervention of the Notary will prevent the bank from being exposed to the hazardous legal proceedings which characterize the courts, without considering the incidents of procedure proper to any judicial dispute.

Finally, the rigor and the transparency of the authentic act enables in the global vision of the Notary and in the long term, to respect the equality between the parties to in business contract, or the equality within the real estate market and therefore the conflicts are prevented.

So in the African real estate market, the characterization and the stakes which we saw above, the authentic act answers both fundamental concerns that are the transparency and security.

The need for **transparency** has become a necessity for the African real estate market, because this business is too often the paroxystic outcome of rough legal and financial practices that lack rigor and transparency.

Yet, these qualities are the origin of the credibility and the security of the real estate market. The Notary, the publicly appointed official, and the notarial act, allying transparency and rigor, can confer on the translative contracts of property right real estate, the credibility and the security required within the concerned market.

Indeed, when for example a construction company or a real-estate development produces a file abroad containing statutes, reports, or contracts with the notarized form, it is immediately collected by his colleagues who know the requirements and the advantages of notarial acts.

It is thus naturally that the presence of the notary's practice in all the French-speaking countries of Africa is a factor of development of the exchanges within the real estate market and within the harmonization of the legal practices. It therefore contributes to bring an important guarantee.

Thanks to the efficiency of this instrument that is the authentic act, the Notary offers to the stakeholders of the real estate market the legal security in their contractual relationships. Indeed, he" gives to acts concluded in front of

him: certain date, probating value superior to any other paper and enforceable value amounts to a judicial decision depiction in the last resort.

These characteristics are put and dedicated by the law in most of the notary chambers of sub-Saharan Africa.

The **security** ensues from conditions of writing of the authentic act and from characteristics peculiar to authenticity. Indeed, the control of legality by the Notary insures the security of the real estate business.

He looks for the most relevant ways to reach the result wished by the parties, in the respect for the applicable law. Then, he cannot just record the will of the parties; but he has to help them to formulate it, to choose the modalities of their agreements with the exact consciousness of the legal, fiscal and social consequences.

The aim of the control of legality thus is to insure that all the bills of law and order which apply to the agreement are respected.

This preliminary level is extremely important in the prevention of disputes. Certainly "nobody should be ignorant of the law ", but in Africa this assertion is argued. Indeed, the high rate of illiterate or little well-read, powerless citizens in front of the complexity of the law, the fact that she must permanently and relentlessly be taught and popularized.

Accordingly, the Notary is bond to verify the assertions which come within his/her remit and from whom he can require the proof. Apart usual checks (quality and capacity of the signatories, the regularity of the powers, the name of the properties and the origin of property, the control of legacy also extends in the financial transaction.

The Notary by bringing the legal security to real estate transactions, also bring the financial security to all parties in a real estate act. Indeed, as member of legal profession invested with the confidence of all the parties, the Notary is at the heart of real estate operation; by then, it serves rather often as financial

receptacle during a real estate transaction. He stays up, at this level, at the fact that all the parties are financially satisfied.

Besides, the Notary has guard's role and of supervisor of the financial transactions which take place during the conclusion of acts which he receives. As such, he will verify the origin of funds and will make sure that these do not result from fraudulent or illicit activities.

Within the anti-money laundering framework, the Notary is obliged to declare to the public authorities in charge of the crime prevention, any suspicion funds which could have criminal origin in a property deal. The notarial profession thus constitutes an effective and sure means of controlling of the real estate market.

## **2- The Notary as a regulator of the real estate market: instrument of guarantee; the notarial act and reliability for the State**

For any normal functioning, following the example of all the markets (financier, stock exchange etc), trust is a cardinal requirement within the real estate market. The intervention of Notary increases trust because it guarantees to parties the check by third party of the terms of the contract to insure the balance and the efficiency.

This trust is increased as the notarial profession is strictly regulated and controlled by the State which, not only being able to regulate the market, delegated him some missions of public service.

Also, Notary is an outstanding auxiliary, in terms of normalization, structuring and formalization of the economic substratum. He insures in this service the easy recovery of considerable sums for the budget, in terms of registration fees, stamp, as well as land taxes during the publicity of acts, and VAT.

Besides, since "notarial acts" create the published legal situations and modify them, they guarantee the reliability of the real estate public registers, the base for any sustainable development of the market.

***a- The direct collection of the tax, a mission of public service executed by the Notary***

This mission is delegated by the sovereign State to the Notaries because they are the epicenter of a number of financial transactions especially as concerning real estate matters. This personally makes of the Notary, a debtor of certain taxes (registration fees, real estate surplus value taxes) even if, in reality, these taxes are levied on parties in the act.

In order for the Notary to insure this mission of taxes collection, the law holds by decree fixing the status of Notary and the General Code of the Taxes, that an act can be received by him only on condition that he has a relevant accounts balance sheet for the expenses and payment concerned.

This plan of collection constitutes a guarantee and represents a cost saving important for the State which, through the Notary, has a single contact person, besides a qualified professional who engages his personal responsibility.

In case of mistake in calculation of the tax or forgetting in his collection, the Notary appears as the only debtor towards the tax authorities. He can however ask refunding to party in the debtor act.

The Notary is subjected to the duty of advice, reminds the parties on their obligations as regarding taxes (assertion of sincerity promulgated by the General Code of the Taxes and the penalties in case of dissimulation) and will watch that the legal rule is applied in a clear and precise way so that the tax is not evaded by maid or by bad faith.

However, we have to admit that in Senegal, the tax rates are prohibitive (in Senegal and in Mali, the registration fees chargeable to the buyer are 15 % of



the price of the built or not built building, in Cameroon and in Guinea the registration fees regarding built buildings is 15 % and 10 % for the built buildings, in Togo these rights are 9 % without any distinction and they are 8 % in Benin).

Therefore, a lot of transactions are dissimulated. This slows down the transfer of properties between potential buyers and reduces at the same time the scheme of taxes collection.

This is why the Notaries Chamber of Senegal made proposals to the Ministry of Finance and which led to the revision of some measures of the General Code of the Taxes which implementation was planned for year 2013.

The registration fees regarding sale of buildings are reduced to 10 %. Even if the Chamber of Notaries had proposed a reduction up to 8,5 %; this constitutes a major improvement which will not only participate in the extension of the economic activity but also and especially in the eradication of any dissimulation attempts in the real estate transactions.

Also, the real estate surplus value taxes is 10 % as regards the land titles of the private individuals but, as reasons for the fight against the speculation and the regulation of the real estate market, this rate remains at 15 % for the state-owned lands.

The Chamber of Notaries of Mali also committed negotiations with the Ministry of Finance with the aim of a drastic reduction of the rate of capital increase in value of real estate transfer which is currently at 35 % (short term) and 25 % ( long term).

#### ***b- The notary: warrant of the reliability of the state real estate registers***

The reliability of a public register becomes an economic fundamental value as far as it offers an *erga omnes* irrefutable guarantee; this implies security for stakeholders of real estate market and favors the increase of the economic exchanges.

Moreover, the economists appointed by the World Bank and the International Monetary Fund, asserted that the cause of the poverty in developing economies or those at the transitional level (Africa, East, the Eastern Europe) is not due to the lack of "land" resources, but to the lack, or to the non-reliability, of " public real estate Registers ".

The preservation of these registers is organized in the public interest both for the needs for the management and for the justification of the rights of persons or institutions, public or private, and for the historical documentation of a whole country. The purpose of these public registers, in real estate matters, is to identify the owners or the real holders of rights on buildings. They guarantee to every citizen interested to have knowledge of the right real estate realities on the given property.

The Notary realizes a large number of control which could not be proceeded the registration agents land preservation.

Therefore, the formality of registration does not purge the possible defects of the act, which remains exposed to nullity actions in which he could be the subjected before its registration. Also, these agents lack competency to judge the capacity of the parties.

All the preliminary controls made by the Notary thus contribute to the reliability of the information found in the public registers.

The registration of acts was created in a fiscal purpose. The registers chronologically record, all the minutes signed in front of the Notary of the geographical area of the office so as to guarantee the real date of the act but especially to recover this tax.

The real estate matter represents a slightly more than 50 % of the notarial activity in terms of figure of business in Africa.

In Senegal, these acts necessarily have to be authentic to be registered in the registers of the Preservation of the Land property and real rights.

Section 381 of the Civil and commercial Obligations Code holds that "the acquisition of a real right results from the transfer of the title in the name of the new holder of the right".

Therefore, the Notary does not only establish authentic act but it also have a definitive and indisputable right registered in the public registers.

Moreover, contrarily to the French (land publicity regime) where in the notarial acts it is mentioned " the buyer will be an owner of the building sold as from this day (day of signature of the act) ", in Senegal (Regime of Land Preservation), it is mentioned " he will be the owner as from the transcription of the act in the Land Preservation ".

In the translative acts of real estate property or constitution of mortgage, it must be expressed at the level of the land book, the nature, the number of the land title, the situation, the volume of buildings and state of the rights and their responsibilities.

These acts can be established only in the authentic shape and deposited by the Notary himself in the Land Preservation Office after fulfillment of the formality of registration getting them certain date.

The curators have to have a register of deposit of acts on which they register day by day and in order digital technology, the deliveries made by acts and slips deposited with the aim of the execution of a formality.

Documents deposited at the office of the Land Preservation are then classified in their order of registration in the register of the deposits according to the nature of the accomplished formality. The volumes constitute the registers of the formalities, every document receives an order number corresponding to its ranking, it is the references of publication that constitutes the relative effect - formality date + Volume (binding number) + number of order.

The publications register is constituted by the joining of acts and other documents subjected to publicity. As regards the register of the registrations, it

is constituted by the joining of slips which are deposited at Land Preservation office to constitute a security.

However, some public registers in real estate domain are not assumed by the Notary, he only recognizes registered land.

A fast history is imperative to understand the land regime and the management of the public registers in Senegal.

Indeed, a decree of July 20<sup>th</sup>, 1900 introduces the technique of the registration of land property. Anyway at the independences advent, only 2 % of lands of the Republic of Senegal<sup>5</sup>were registered. The Notary intervention in real estate matter was then very minor.

On the other hand, the competence of attribution of the Notary in Mali to follow-up real estate transactions is not only restricted but is also strongly affected.

Firstly, it limits itself legally to the transactions occurring between private individuals and having for subject matter, land titles according to the law on the status of the Notary. Paradoxically, such an exclusive privilege is not dedicated by the state-owned and land Code, section 174 of which establishes

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<sup>5</sup> After the Independences, the law on the national domain is voted on June 17th, 1964 and modified in 1972 on the occasion of the institution of the rural communities to allow the standardization of the pre-existent land regimes and with the aim of redistributing lands. The Senegalese land was divided from into three state-owned groups:

The national domain which constitutes 95 % of the land and on which the Notary does not intervene; The state administered property, representing 3 % of the land and of which he is an owner who is divided into public domain and private domain: the State can grant real right and so allow the intervention of the Notary; The domain of the private individuals represents 2 % of the land. This private property is subjected to the system of registration and the exclusive competency of the Notary.

The process of registration of lands was slow in the 90s and only 8 % of the Senegalese land was registered in the 2000s, due to the desire to grant right on its domain, the State increased appreciably the percentage of the registered lands. Today, about 10 % of lands are registered and the law bearing processing of authorizations to occupy and similar securities in land titles was voted and is going to increase this phenomenon.

In regards of the rural zone, the prevailing regime is that of the affectation of the national domain lands. The right of affectation is neither a real right, nor a right of user and the Notary is not competent on the subject. However, where the Notary has to make himself unavoidable and widen his competence at the same time, it is regarding advice and regarding support by informing and by helping the user to transform his licence to occupy in right to lease and ask for the definitive retrocession having requested the registration of these lands and having taken them out of the competence of the rural communities.

the act private agreement and the notarial act as both modes of observation, declaration, modification or extinction of the real right of real estate in the land book. This measure dedicates legally the historic end of the notarized monopoly in real estate matter consequently; the parties during a sale of real estate are free not to make notice their operations at the Notary. It is moreover confirmed by Section 108 of the same text which holds that " the mortgage can be granted by authentic act or private agreement. The transmission and the withdrawal of the mortgage take place in the same manner ".

This situation is an infringement engraves in the integrity of the notarial function as well as in the legal security of economic reports knotted during the real estate transactions. Indeed, this competence of the act private agreement, because of the numerous defects which characterize it, is a considerable risk for not only the buyers but also for the reliability of the land book; it is source of danger and dispute because it does not take advantage of the capital increase in value which goes along with the notarial intervention.

It is necessary that Malian legislator turns back, as in numerous countries, in the competence reserved for the Notary in real estate matter; social peace depends on that.

Finally an efficient land policy is one of factors of socioeconomic stability and promotion of a sustainable development of the real estate market.

It is thus necessary to pursue the duty of the land reform which will guarantee the security of land occupation and will constitute a lever mattering in the process of expansion of the monopoly of the African notary's practice.

## **B-Perspectives**

It would be desirable that our States, with the prospect of the land reforms, adopt legislations making of the Notary a major actor stakeholder of the real estate sector.

It is imperative to plead for the end of the precarious titles<sup>6</sup> and the adoption of the land title as only valid legal instrument in real estate matter.

It is also advisable to rethink the social housing by favoring the access to the largest number in favorable conditions. The social housing has to be so the cornerstone of a regulation of the real estate markets. In this trail, the development of the co-ownership appears as an alternative at the disproportionate geographical expansion of cities.

Furthermore, in regard to the faults which the western world faced in the financing of the real estate during these last two years, the time has come for our countries to start thinking of measures which will lead eventually to the creation of a mortgage market within which the mortgage titles will be transferred and will finance the real estate projects in a efficient way.

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<sup>6</sup> In this perspective, the Senegalese Chamber of Notaries participated for example in the elaboration of the bill bearing reform of the landed property as well as in the project of its application decree (adopted in March, 2011).

These land legislative reforms should be accompanied with the other reforms of bigger scale proper to this business environment as a merged formality or entitlement as held by Me Abdoulaye Harissou, as a sustainable security for the development of the real estate market.

## CONCLUSION

The analysis and the examination of this theme has enabled us to acknowledge the necessity not only to maintain the notarial act in its guarantor's role of the real estate transactions legal security but besides strengthening this eminently mattering role that the notarial profession in the regulation of the real estate market plays.

Indeed, no other actor of the sector of the real estate was not able to up to here and cannot bring so much security, guarantee to the real estate investment. On the contrary, we realize that all the real estate transactions which intervene except the expertise and except the support of the Notary are exposed to grave risks harmful to their authors.

Finally, in an economic environment in permanent change the Notary has a natural role within the real estate market. His current practice of the property law, his legal and fiscal knowledge make a major stakeholder during the key phases of any real estate transaction

Additionally, he intervenes as negotiator in his mission of search for real property for his customers, service that the African Notarial Offices is increasingly developing. He also carries out the different formalities which require the regulations, such as the registration or legal publicity.

We then understand why, in the course to insure the security of the most important transactions the public authority organized the compulsory intervention of the authenticity, on the occasion of the main acts of the civil life among which in particular the real estate transactions which are exclusively a matter of the competence of the Notary.

Therefore, in this economic environment strongly demanding of contractual security, we obviously understand all the interest which this type of preventive and compulsory justice can bring to the protection of rights and to the development of fair contractual and trade relationship.

We notice however disparities between the legislations of the various African countries. For some, it urge that the legislator for establishes standards which can breathe more dynamism to the real estate market.

The development of the profession is unfortunately compromised by the heaviness of the tax system which burdens the products of the authenticity, and which does not make it at present a really popular product, because expensive. The stake in the African notary's practice remains however that of the communication. The regulating role of the authentication is not any more to be proven, but of what use is it is if this fundamental role is underestimated by the populations.