

How to remedy the problems generated by undivided real estate inheritance to improve land and property management: the case of French Polynesia

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SUMMARY

The Polynesian government is having difficulty implementing a sustainable development strategy for the entire territory. Faced with the problem of land control (80% of the land area is privately owned), it decided to issue a call for tenders in 2020. The objective was to bring together external expertise to make progress on the subject.

The Higher Council of French Notaries was then selected, in particular for its commitment to integrating and collaborating with a community of experts, including notaries, teacher-researchers specializing in land tenure... and surveyors.

During the 15 months of the mission, which ended in July 2022, the surveyors, along with notaries and teacher-researchers, worked to meet three major challenges:

- securing private property titles ;
- to develop a collaborative system between the land administration, professional and actors;
- to propose new tools for managing undivided property.

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1. INTRODUCTION

The Polynesian landscapes of paradisiacal islands bordered by turquoise blue lagoons make us dream and are equalled only by the warmth of the welcome, the kindness and the smile of their inhabitants.

French Polynesia, an autonomous overseas territory, extends over a territory as large as Europe in the middle of the Pacific Ocean. 118 islands, 75 of which are inhabited, are divided into five archipelagos (Society Islands, Tuamotou, Australs, Gambiers and Marquesas). The island of Tahiti is home to 80% of the 280,000 Polynesians.

The Polynesian people are attached to ancestral tradition. They have a deep respect for the land of their ancestors. The sacred land receives women who have just given birth with their placenta.

2. THE LAND CONTEXT IN FRENCH POLYNESIA

This visceral attachment to the land is not without creating land problems that are difficult to overcome. Inheritances are only very rarely purged. As land remains the property of the forefathers, most properties are nowadays in joint ownership. It is a major challenge to identify both the undivided interests and the undivided owners, taking into account land ownership and civil status. For the oldest indivisions, the original title, the Tomite, dates back to 1852 when King Pomare handed over the land to France while conferring land rights on the occupying families. This title defined the property from the barrier reef to the top of the mountain via the ridges of the valley. Civil status, for a long time an oral tradition, changes when a person moves from one island to another.

This situation is blocking the development of the country, so the government is looking for solutions to solve this problem of indivision. Although all Polynesians state loud and clear that they want the land to remain in joint ownership within the family, everyone wants to own the land on which they have built their house, in total contradiction.

In 2020, a tender was launched to find answers to the issue of undivided ownership by drawing up a master plan for land affairs for the next 15 years. The Conseil supérieur du notariat, through its association CSN International, and the Ordre des géomètres-experts were selected at the end of this call for tenders to share their concrete operational expertise. The team is made up of academics and Polynesian actors.

After three missions conducted from July 2021 to March 2022, we were able to interview all the key players in the land sector, including the Polynesian government, the assembly of the country, the elected representatives in the parliament of mainland France, the administration in charge of land and all the land professionals, including notaries and surveyors.

3. THE CHALLENGES POSED BY UNDIVIDED REAL ESTATE INHERITANCE

All these hearings enabled us to understand the extent of the problem and the shortcomings of land management resulting from history. The mission formulated legal, technical and institutional proposals in order to facilitate the management of undivided property and the elimination of undivided property that paralyses the economy of French Polynesia, while reinforcing land security.

Although Polynesians are attached to the land of their ancestors, they increasingly wish to leave indivision. To get out of this situation, they generally choose legal proceedings out of mistrust of the notary's office and because of the legal aid accompanied by the AISI (individual aid for leaving indivision) given by the government, which makes the procedure less costly. Given the large number of land-related problems, the civil courts have had to show initiative by creating a specialised land court and, in response to the remoteness of the territories and the difficulties of travel for those subject to the law, setting up mobile judges who travel to the archipelagos accompanied by their Polynesian clerks and assessors who help them understand the language in particular.

But the judges are not at the end of their task as all the Polynesian jurists. They are confronted with a law coming from two distinct sources: the law defined by the French state and the laws of the country elaborated by the government and the assembly of Polynesia. Each authority has specific competences such as the laws of persons or justice belonging to the State, and the land to the Country. Moreover, any French law that does not include an extension of application to overseas territories complicates the mechanism a little more. As long as a consolidated land code is not put in place in the territory, the law will be fragile.

4. PROPOSALS FOR LEGAL, INSTITUTIONAL AND TECHNICAL IMPROVEMENTS

The problem of undivided real estate inheritance is well known in the French overseas departments and territories as in Corsica. As of 2018, the Letchimy Law aims to remedy particular difficulties in the field of land management in overseas territories, where land ownership is more difficult to establish due to a lack of property titles and an increase in joint ownership.

It creates a specific system for undivided property located in these territories. This derogatory system is reserved for successions opened more than ten years ago. For a sale or division, the unanimity of the undivided co-owners is no longer required. A majority of the undivided co-

owners allows the notary to act without going through the judge, subject to the rights of the surviving spouse, the minor and the protected adult. The silence of the minority undivided co-owners constitutes tacit consent. On the other hand, any opposition from one of them will hinder the procedure and trigger the judicial partition.

This law will be adapted to Polynesia in 2019 with a political will to raise the required majority to 2/3 of the undivided co-owners and to allow judicial sharing by stock. One of our proposals was to return to the 50% majority and to extend the process of sharing by stock beyond judicial sharing.

Leaving indivision and sharing is not always the desired and desirable solution, so the mission drafted a law to introduce the social interest trust, inspired by Quebec, which allows the management of indivisions while preserving the interests of the undivided co-owners who are not known at the time of the constitution of this management method.

But the legal proposal, probably the most important one, is to make it compulsory to sign and file a declaration of inheritance within a short period of time, with a tax penalty in the event of non-performance. This is the only solution that can eventually put an end to uncontrolled indivisions, but the Polynesian government is reluctant to create a tax of this nature.

Following the example of a Corsican success story with the GIRTEC, we have proposed the creation of a public interest grouping (GIP) for the reconstitution of property titles. Notaries, surveyors and the country's land affairs department would be involved in this grouping. The GIP should make it possible to speed up the titling process while at the same time diverting it from the courts. Its aim would be to establish the chain of inheritance by identifying the undivided owners.

It will eventually make it possible to draw up a notarial deed of title, which is the innovation of the notary's office in this project. The purpose of this deed, drawn up by a notary, will be to confirm the ownership rights of each undivided party without having to go to court. This deed of notoriety makes it possible to create the link between the "tomite" and the current joint owners, their occupation of the land or its non-occupation by a third party. The act of notoriety does not record the acquisition of a right but it confirms an existing right.

In order to make all the proposals effective, it is essential to strengthen the mortgage registry by creating a real file that allows the link between property and people and makes the land registration formality compulsory for all deeds and judgments dealing with real property and rights. Of course, this real estate file must now aim for total dematerialisation.

It therefore appeared necessary to strengthen the role of notaries and surveyors by providing them with the latest technological developments and by reinforcing their role (see box), by means of objective agreements signed with the organisations in mainland France. Other land-related professions must see their role strengthened, in particular genealogists. Today, they only master family genealogy, which does not allow them to respond to the scale of the problem.

They must deepen their skills in order to become probate genealogists, the only ones able to meet the needs of the notary's office, the GIP and the various land tenure actors.

Finally, an important proposal for securing land tenure is the establishment of a land information portal (PIF) that would be called TE MATA FENUA. Based on French land portal GEOFONCIER, this portal will eventually bring together all the cartographic and land data with contributions from Polynesian surveyors in particular, but also from notaries, courts and all the other players. A model on the island of BORA BORA has been produced and it is up to the Polynesian government to make it prosper.

5. CONCLUSIONS

This mission has been rich in teaching and human encounters. Land is a universal subject that ties people to a territory and sometimes leads them to wars. Current events unfortunately remind us of this. But a controlled land ownership allows to reduce tensions and to ensure an economic development while controlling the environment. And let us remember that the surveyor must be an actor of social peace, in an environment where the status quo has so far been the preferred solution for balancing particular interests and the general interest.

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