

# Le mystère du droit foncier

## Sens et non-sens d'une politique volontariste de généralisation de la propriété privée de la terre dans le décollage des économies des sociétés du "Sud"\*

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### Abstract

The generalisation of land ownership (*propriété foncière*) has been an ongoing debate in development policies for over a century. This debate does not concern property in general, but focuses on *propriété privée* (the French equivalent to private ownership) that, according to Article 544 of the French Civil Code, the Code Napoléon, is "the right to enjoy and to dispose of things in the most absolute manner, provided the laws and regulations in force are respected"<sup>1</sup>. Its distinguishing feature is the discretionary character of land alienation, the fact of rendering "one's land" external (*étranger*) to oneself and to a group. And, because the pre-colonial and colonial histories of the societies of the "South" differ widely, the consequences of this alienation have to be assessed case by case.

This paper considers that land security is only incidentally linked to the detention of land titles and to the more or less absolute character of the conferred right. The real guarantee can only rest in the public authority that represents the general interest. If this authority is weak, absent, corruptible, hesitant or unduly dominated by the interests of a minority, no title can guarantee the security of transactions as long as a minimum consensus does not legitimate the exercise of the invoked rights. This consensus regarding the *puissance publique* ("public power"), the State in its contemporary version, relies fundamentally on the manner according to which the diverse actors of the "land law game" (*jeu foncier*) imagine this intervention and legitimate its implications. Indeed, there are societies with strong state traditions, and others that disregard it or do not spontaneously trust it.

In the present case, we should remember that *propriété privée* is an invention of and for the market economy and that its generalization is thus linked to the existence of a generalized market. In the absence of a generalized market, *propriété privée* not only lacks efficacy but is even dangerous: a sledgehammer to crack a nut. Any policy of generalisation of *propriété privée* would be a nonsense in all societies where the market is not generalised and where there is thus an incomplete "marketisation" (*marchandisation imparfaite*) of land. It should be noted that this reality must not be seen as a handicap. It can constitute support for a development model that would respect the new requirements of the world economy.

In order to understand all the implications, this paper revisits classical political economy and the land law history of French and British societies confronted with the requirements of capitalism. This will permit us to identify the double relationship of ownership / *propriété privée* as law of the market and as land law (*foncier*), as markets of ownership rights (*droits de propriété*). Indeed, there is no market without ownership, and there is no ownership without a market.

In situations where the market is not generalised, and cannot be generalised in the mid-term, and where land transactions, when authorised, do not rely on ownership rights (*droit de propriété*), the situation must be managed such as it presents itself, in a complex but nevertheless coherent way. We are facing the coexistence of diverse legal regimes that are necessary in order to secure the modes of living and the activities of the members of the concerned societies. This pluralism has implications that need to be addressed. In order to shed light on the mystery of land law, an approach is required that is different both in nature and scale from the mimetic policies of the generalisation of private

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*The Mystery of Land Law. Sense and Nonsense of a Voluntaristic Policy of Generalizing the Private Ownership for the Take Off of the "South's" Economies.*

<sup>1</sup> "le droit de jouir et de disposer des choses de la manière la plus absolue à condition de respecter les lois et règlements en vigueur"

ownership (*propriété privée*).

If the solution stemming from the imagination of the reformer, when confronted with all other imaginations, cannot have the beauty of “purity”, such as proposed in Book 2 of the Civil Code of 1804 dealing with *biens* (goods), it must articulate and render operational legal mechanisms that concur with the stability of exchanges and with the pacification of society. It must be compatible with the demands of modernity, while inscribed in the continuity of endogenous representations of land law (*représentations foncières endogènes*). The concepts of *patrimoine* (common heritage) and patrimonial management (*maîtrises patrimoniales*) can constitute a conceptual framework for sustainable development approaches that could offer solutions addressing contemporary issues. Indeed, the contemporary issue does not consist in globalizing absolute and exclusive private ownership (*propriété privée exclusive et absolue*), but rather in mobilizing new forms of “patrimonial management”, the principles of which remain to be translated into day-to-day legal regulation.

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