

THE CONCEPT OF A 'FIDUCIE FONCIERE POLYNESIENNE' - SOME COMMENTS

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The special spiritual bond that connects many in French Polynesia to their land cannot be underestimated or challenged and is well documented. In order to address the issues that arise the Polynesian authorities must reconcile the atemporal, intangible and universal truth of the exact sciences and legal science with the cultural. One practical approach being considered is the introduction of the French concept of 'fiducie' to the law of French Polynesia for the purposes of land management. This paper intended primarily for English-speaking readers presents, after a brief presentation of the principles governing the 'fiducie' in French law, an analysis of the practical and theoretical reasons which could support the incorporation of an adapted concept of the 'fiducie' in French Polynesia.

Le lien singulier qui unit une grande partie de la population de la Polynésie française à la terre est une composante essentielle de l'appréhension de la problématique foncière dans cette collectivité d'outre-mer. Beaucoup d'espoirs ont été mis dans la création en 2014 du 'Tribunal foncier' mais son bilan reste aujourd'hui mitigé. Par ailleurs, depuis les années 2010, les autorités de la Polynésie française ont entrepris des études sur la pertinence de l'introduction de différents mécanismes juridiques qui, tout en fournissant des solutions juridiques alternatives à celles déjà prévues par le Code civil, seraient de nature à proposer un modèle durable de développement économique qui respecte la dimension identitaire de la propriété foncière en Polynésie française. C'est dans ce contexte, que l'introduction d'un modèle adapté de la fiducie des articles 2011 à 2030 du Code civil a été envisagée. Les développements qui suivent, destinés principalement à l'intention des lecteurs anglophones, présentent l'architecture générale de ce projet et en proposent une première grille d'analyse comparatiste.

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I INTRODUCTION¹

The special spiritual bond that connects a large part of the population in French Polynesia to their land cannot be underestimated or challenged and is well documented.²

In this context one of the challenges faced by the Polynesian authorities was to try to reconcile the "atemporal, intangible and universal, 'a-human truth' of the exact sciences and legal science, which is fundamentally and inherently different since it is focused on man and society".³

The provisions of the statute of autonomy of French Polynesia of 2004 officially recognise the "social embedding of rights and public policies". It is possible for local Polynesian authorities to take steps for the purpose of "preserving the ownership of land as part of the cultural heritage of the population of French Polynesia and its identity, and to protect or enhance natural spaces".⁴

1 This paper is partially derived from various working documents and reports submitted to the French Polynesia Land Affairs Department in the context of successive agreements. The authors would like to thank the French Polynesia Land Affairs Department for authorising their use. The following discussion cannot be considered as representing the official position of this Department of French Polynesia.

The running head for this paper is "A Polynesian Land Trust". That title is indicative for the benefit of English readers. It should be noted however that the *fiducie* is not a trust. A *fiducie* in French law is a contract; a Common Law trust is property.

2 See for example, B Saura *Enterrer le placenta; l'évolution d'un rite de naissance en Polynésie française* <https://ile-en-ile.org/bruno-saura-enterrer-le-placenta-levolution-dun-rite-de-naissance-en-polynesie-francaise/>. See also « Dire l'autochtonie à Tahiti. Le terme māohi: représentations, controverse et données linguistiques » (2004) 2 *Journal de la Société des Océanistes* 119, 120. Sarah Bernard et Florence Mury « Le fenua, entre renaissance culturelle et retour à la terre: vers une reconsidération des marges insulaires en Polynésie française » (2023) 287 *Suds* 275-309.

3 André S « Droit et sémiotique : La cohérence narrative » (2011) 42 *VUWLR* 331-342.

4 Article 19 of the Organic Law 2004-192 of 27 February 2004. Loi n°2015-177 du 16 février 2015, art 23 modifié par Loi n°2017-256 du 28 février 2017, art 111.

From a practical standpoint, the Polynesian authorities⁵ have chosen to proceed in successive phases⁶ – by the establishment of the 'Land Tribunal',⁷ followed by the elaboration of its specific procedural rules, then by implementing provisions for financial aid for ending the indivision of land rights⁸ and, more recently, by the strengthening of land rights in Rurutu and Rimatara.⁹

However, it is noticeable that at a time of particular social, economic, and touristic activity in French Polynesia, the combined effect of the scarcity of land and increasing construction costs is reflected in the price of housing, making the acquisition of land difficult for a part of the local population.

This situation where land has become commodified could explain, at least in part, the existence, on a voluntary or non-voluntary basis, of a continuing state of indivision of land rights. This specificity is not only the source of protracted disputes but also amounts to a continuing economic constraint on the development of Polynesian land.

So, in this context, where the cultural aspect of land ownership is gradually disappearing in favour of its commercial dimension and thus redefining the role of individual and collective identity, it is obvious that the contemporary conceptual and theoretical framework for land rights in French Polynesia can no longer be limited to a mere cultural and sociological approach.¹⁰

5 As the law governing successions in French Polynesia falls within the State competence, the French legislator has amended art 827 of the French Civil Code to allow judicial partition of succession to be made per capita in French Polynesia where the mass subject to partition includes immovable property belonging to several successions and where such property (1) cannot be easily divided or allocated in kind due to the large number of undivided co-owners; (2) cannot be easily shared or allocated per capita due to the obvious complexity of identifying, locating or involving all the undivided co-owners within a reasonable timeframe and at a reasonable cost.

6 To name a few.

7 See arts 449-2 and 449-39, Délibération n° 2017-100 APF du 12 octobre 2017. L. Ellul Curetti - S. Grand « L'Établissement D'une Juridiction Des Terres, Une Spécificité Polynésienne » in *La terre en Polynésie: La propriété foncière à l'épreuve des liens de parenté* (Université de la Polynésie française, Actes du Colloque des 23 et 24 septembre 2021) 89 Sandrine Sana-Chaillé de Néré Dr.

8 See Deliberation n°2016-105 APF of 27/10/2016 instituting individual aid with a view to encouraging the end of joint ownership of property. Application order n°1899 CM of 22 November 2016 as amended.

9 H Paoletti « Le Particularisme Foncier des Iles de Rurutu et Rimatara au sein de la Polynésie Française » (2019) 25 *Comparative Law Journal of the Pacific*. « La Mise en Œuvre de la Loi du Pays Visant à Organiser le Titrement de Certaines Terres Sises à Rurutu et Rimatara, Archipel des Australes, Polynésie Française » (2021) 26 *Comparative Law Journal of the Pacific* 97.

10 Part of the population of French Polynesia still considers that some provisions of the Civil Code which relate to land are not well aligned with what is widely called 'Polynesian land customs'. See IV- Conclusion and n 43.

A nuanced and multifaceted approach is needed which considers the role of individual and collective identity, and the complexities of modern property relations. Any proposed reforms must also be considered as elements of a more general reflection on a clearly defined model of economic development. In other words, the establishment in French Polynesia needs pragmatic modern land ownership laws which reconcile practicality, legality, and legitimacy.¹¹

It may be observed that there are similar trends and challenges all over the South Pacific where land is increasingly being treated as a commodity to be exploited for financial gain rather than as a shared resource.¹²

A brief and broad comparative law perspective¹³ indicates that the civil law tradition (which prevails in French Polynesia) tends, even if the very notion of property appears to be increasingly less absolute, less exclusive and individualistic and influenced by usage rights,¹⁴ to put the emphasis primarily on the notion of ownership as an individual right to provide maximum legal and individual security over immovable property.¹⁵

By contrast, where the English legal tradition is applied in states and territories of the South Pacific¹⁶ the concept of ownership focuses more on the economic utility

11 R Calinaud *Le foncier en Polynésie française – Comment réconcilier pratiques, légalité et légitimité?* Sous la direction de T Bambridge (Editions Univers Polynésiens – AJPF, 2009).

12 See for example Spike Boydell "*Land the 'Pacific Way': customary land use, indigenous values and globalization in the South Pacific*" in Alan C Tidwell, Barry Scott Zellen (ed) *Land, Indigenous Peoples and Conflict* (Routledge, 2016). Naren Prasad *Régimes fonciers et développement économique dans le Pacifique in Studies and Reports of the Section of Cultural Research and Management* (Etudes et rapports de la Section de recherche culturelle et gestion – No 9, 1999).

13 Y-L Sage « Droit foncier en Polynésie française : et si comparaison était (un peu) raison ? » in Angelo et al (dir) *Droit Foncier et Gouvernance Judiciaire dans le Pacifique Sud : Essais Comparatistes/Land Law and Judicial Governance in the South Pacific : Comparative Studies* (2011) Hors-Série Volume XII New Zealand Association of Comparative Law, 59-80.

14 On this issue, see the detailed analysis of J-F Joye, « La Propriété Collective, Un Nouvel Horizon Pour L'usage Du Foncier En Polynésie? Réflexion À Partir De L'exemple Des 'Communaux' En Métropole Française » in *La terre en Polynésie La propriété foncière à l'épreuve des liens de parenté,* (Université de la Polynésie française, Actes du Colloque des 23 et 24 septembre 2021) 158.

15 S Piedelievre « Feu la théorie de l'unicité du patrimoine » *Solution notaire hebdo*, 10 mars 2022, n°8, p 1.

16 G Powles "*The Common Law as a source of Law in the South Pacific: Experiences in Western Polynesia*" (1988) 10 *University of Hawai'i Law Review* 105. J Corrin "Customary Land and the Language of the Common Law" (2008) 37 *Common Law World Review* 305. See also M Galey « La typologie des systèmes de propriété de CR Noyes; Un outil d'évaluation contextualisée des régimes de propriété privée, publique et commune » in Christoph Eberhard (dir) *Enjeux fonciers et environnementaux. Dialogues afro-indiens* (Institut Français de Pondichéry, Pondichery, 2007) 89-125.

of land than on its purely legal perspective. This explains the multitude of possible legal forms such as fiduciaries, pools, private equity, and land trusts for using, possessing, or exploiting real estate. These entities have transformed the way property is owned and managed, making it impossible to speak of property in a uniform manner.¹⁷

A large part of what is known as Polynesian land law falls within the country's statutory area of competence. It is therefore not surprising that the Polynesian authorities have sought to draw inspiration from the solutions adopted by their Pacific neighbours but without totally departing from civil law.

Starting in the 2010s the authorities of French Polynesia have undertaken studies on the relevance of the introduction of different legal mechanisms which, while providing alternative legal solutions to those already provided by the Civil Code, would support a sustainable model for economic development and address the identity dimension of property in land in French Polynesia.¹⁸

Among those proposals¹⁹ was the idea of the introduction into the law of French Polynesia of the concept of a *fiducie* which is codified in arts 2011-2030 of the Civil Code. Those articles do not apply in French Polynesia.

Broadly speaking, the challenge for the Polynesian authorities in introducing this concept was to be able, within their 2004 statutory competence, to propose to public and private Polynesian landowners a legal contractual mechanism which would:

- (a) be culturally adapted for the management and the transmission of their land rights;
- (b) without compulsorily disposition of land, ensure the development and the optimal use of available land.
- (c) provide a mechanism with the capacity to control land speculation in relation to Polynesian-owned land notably by those in indivision; and
- (d) be a means of reducing the number of cases before the Land Court.

17 G Chouquer *Le foncier, entre propriété et Expertise* (Presses des Mines, Paris, 2019) 320.

18 S Schiller « La fiducie, au secours de Tahiti » in *15 ans de la fiducie : Bilan et perspective de réforme* (Sous la direction de Aline Cheynet De Beaupré, Patrice Hoang, Sabrina Le Normand-Caillère, Bruno Robin de Malet, LexisNexis, 07/2023).

19 On some of the propositions including the introduction of the concept of 'trust' in French Polynesia land law, see Y-L Sage avec le concours de la Direction des Affaires foncières de la Polynésie française *Droit Foncier En Polynésie Française. Bref Examen Critique Et Propositions De Réformes* (2013) 'Ex Professo' CLJP 157. Also '*Droit foncier en Polynésie française : et si comparaison était (un peu) raison?*' above n 13, at 78.

In February and May 2022²⁰ a draft *loi du pays*,²¹ 'the legal vehicle which represents "the emblematic expression of Polynesia's accession to constitutional autonomy",²² was submitted to the Polynesian Land Affairs Department in order to introduce an adapted and customised version of the French concept of *fiducie* into the Polynesian legal corpus.²³

What follows is a statement of the rules governing different forms of *fiducie* in French law, and the rationale that could support the introduction of an adapted concept of *fiducie* into Polynesian law.²⁴ By way of conclusion, options are discussed which, by complementing the measures already in place, could contribute to the development of an original land law in French Polynesia.

II AN OVERVIEW ON THE NATURE AND STRUCTURE OF THE FIDUCIE IN THE FRENCH CIVIL CODE

The *fiducie* was introduced into French law by law no 2007-211 of 19 February 2007 – Article 1 JORF 21 February 2007 – and codified in arts 2011-2030 of the Civil Code.

The *fiducie* is a contract by which one or more persons (the constituent) transfer all or part of property that they possess to another person (the fiduciary) who, during the life of the contract, has the responsibility of dealing with the property for a specific purpose for the benefit of one or more persons (beneficiaries) and at the end

20 See Y-L Sage *Rapport Convention N° 10933/Med/Daf Modifiée*, Feburay/May 2022. Report and a draft *loi du pays* together with the various related implementation decrees, to which should be added the additional works commissioned in parallel in 2023 by the Polynesian Land Affairs Department, the findings of which have not yet been made public.

21 Articles 139 et seq of the 2004 statute of French Polynesia. A *Loi du Pays* is "a rule made by the local legislature but with a status less than that of an Act. There is no direct equivalent of the term in the Common Law, although the Ordinances passed by subordinate legislatures in the British colonial system give some idea of the status of a *loi du pays* within a hierarchy of legislation. A *Loi du Pays* of French Polynesia has a constitutional status different from that of a *loi du pays* of New Caledonia". A Moyrand and AH Angelo (2022) 29 *Comparative Law Journal of the Pacific* 131.

22 A Troianiello « Droit constitutionnel local. Le nouveau statut d'autonomie de la Polynésie française (loi n° 2004-192 du 27 février 2004 portant statut d'autonomie de la Polynésie française) » (2004) 60(4) *Revue française de droit constitutionnel* 833-860. A Moyrand « L'avènement de La 'Loi Du Pays' En Polynésie Française » (2023) 29 *CLJP/JDCP*.

23 As at April 2024, draft legislation had not been presented to the Assembly of French Polynesia.

24 M Grimaldi « Rapport De Synthèse » in *La terre en Polynésie: La propriété foncière à l'épreuve des liens de parenté*, (Université de la Polynésie française, Actes du Colloque des 23 et 24 septembre 2021).

of the contract, to return to the constituent the goods transferred to the fiduciary.²⁵ The goods transferred to a fiduciary in this way form a patrimony which is separate and distinct from the personal property of the fiduciary; it is called a "patrimony of affectation".²⁶

The contract of *fiducie* can provide for the transfer into a patrimony of affectation of –

- (a) movables or immovables of any kind,
- (b) real rights such as usufructs or bare property interests,
- (c) securities such as those which guarantee a creditor's rights over property,
- (d) personal rights such as choses in action and intellectual property rights.

25 The comments, articles and chronicles devoted to the *fiducie* since the beginning of 2007 are numerous. A few recommendations for readers to reflect on are:

Yaëll Emerich "The Conceptual Foundations of France's Fiducie Faced with the Trust of the Common Law: Between the Law of Contract and Property Law (Les Fondements Conceptuels de La Fiducie Française Face au Trust de La Common Law: Entre Droit Des Contrats et Droit Des Biens)" (2009) 61 *Revue Internationale de Droit Comparé* 49-71. F Barrière "The French fiducie, or the chaotic awakening of a sleeping beauty" in *Re-imagining the Trust Trusts in Civil Law* (Cambridge University Press, 2012) 222-257. Gdanski M & Pichardo-Angadi T "The French law on fiducie and its application to banking and finance transactions" (2007) *Journal of International Banking Law and Regulation*. The pioneering work of Claude Witz *La fiducie en droit privé français* (préf Dominique Schmidt, Economica, 1981); M Grimaldi « La Fiducie: Réflexions sur l'Institution et sur l'Avant-Projet de Loi qui la Consacre » *JCP (N) Doctrine et Jurisprudence* (1991) art 335085; « L'introduction de la fiducie en droit français » in *Les transformations du droit civil français* (Universidad externado de Colombia, Revue de droit Henri Capitant) 30 juin 2011, n° 2; C Larroumet « La loi du 19 février 2007 sur la fiducie. Propos critiques ». Dossier 'La fiducie', *D.* 2007, 1350. 'La fiducie', dossier *D.* 2007, no 20, p 1347; « Le contrat de fiducie et l'opération fiduciaire », dossier *Dr et Patri* juin 2008. B Mallet-Bricout « Fiducie et propriété » in S Bros et B Mallet-Bricout *Liber amicorum Christian Larroumet* (Economica, 2009) 297-327. S Schiller 'S'approprier la fiducie... enfin !' (2011) in *Actes pratiques et stratégie patrimoniale* 4-47; « Retour sur des utilisations réussies de la fiducie » (2013) 228 *Dr et Patri* 33.

26 C Berger-Tarare *La fiducie* (Ellipses, Droit notarial, 2023) 75.

**FRENCH FIDUCIE KEY MECHANISMS
(Art 2011 et seq. of the Civil Code)**



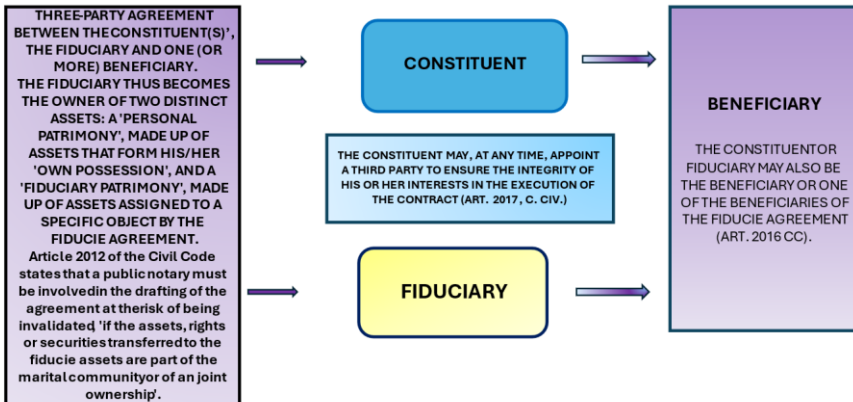
A FIDUCIE IS AN AGREEMENT WHEREBY ONE (OR MORE) CONSTITUENT TRANSFERS HIS/HER PRESENT OR FUTURE ASSETS, RIGHTS OR SECURITY INTERESTS, OR A BUNDLE OF ASSETS, RIGHTS OR SECURITY INTERESTS, FOR A MAXIMUM TERM OF 99 YEARS.

TO ONE (OR MORE) FIDUCIARY WHO, ARE KEEPING THEM SEPARATE FROM THEIR OWN ASSETS IN A SPECIAL-PURPOSE ASSET.



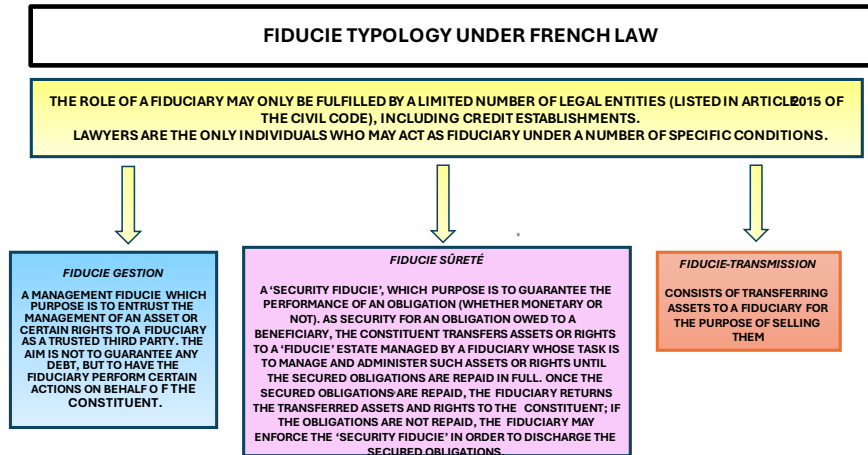
FOR A SPECIFIC PURPOSE FOR THE BENEFIT OF ONE (OR MORE) BENEFICIARY.

BASIC STRUCTURE OF THE FRENCH FIDUCIE (ART. 2011 ET SEQ. OF THE FRENCH CIVIL CODE)



The Civil Code allows for the creation of three types of *fiducie* and each addresses a different situation.²⁷

27 Barrière F « La fiducie française ou le réveil chaotique d'une 'belle au bois dormant' » (2013) 58(4) McGill Law Journal / Revue de droit de McGill 851. Berger-Tarare, above n 25, at 13.



4

At one time, it was proposed to incorporate the *fiducie-libéralité* into French law, but it was explicitly prohibited by the law of 19 February 2007 on the grounds that inheritance mechanisms existed to achieve the same purpose and that the *fiducie-libéralité* was potentially hazardous from the point of view of inheritance law.²⁸

The resulting penalties are strict: the absolute nullity of the deed, combined with tax penalties.²⁹

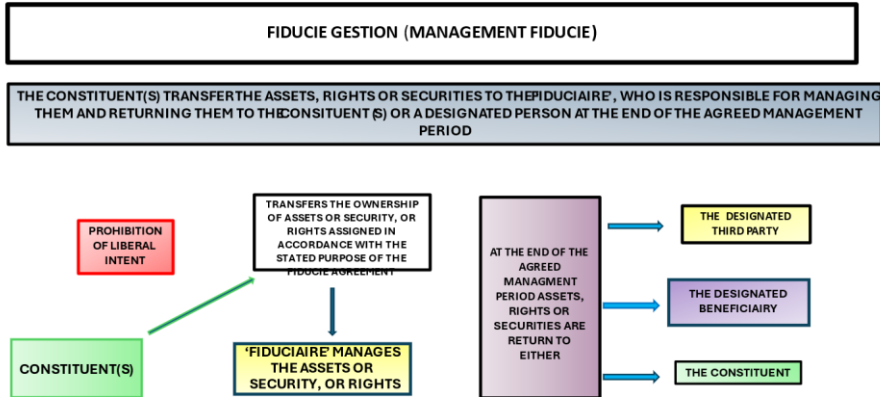
The *fiducie* for management purposes (*fiducie-gestion*) differs from the contract of *fiducie* for guarantee purposes (*fiducie-sureté*) the function of which is to provide security by transferring certain assets to a third party for safekeeping in the event of the liquidation of the debtor.

These two types of *fiducie* are governed by common provisions set out in arts 2011 to 2030 of the French Civil Code with the specific rules for security *fiducie* set out in arts 2372-1 to 2372-5 of the Civil Code (security interests in movable property) and arts 2488-1 to 2488-5 of the Civil Code (security over immovable property).

28 H de Richemont, Rapport n° 11, Sénat, 2006-2007, p. 15 et p. 43.

29 Article 2013 Code civil 'A fiducie contract is void if it is based on a liberal intention for the benefit of the beneficiary'. F Tripet, 1 *La prohibition de la fiducie-libéralité: pourquoi une telle démesure?*, Gaz Pal, 21 octobre 2006, n° 294, p 6.

The contract of *fiducie* for management purposes (*fiducie-gestion*) consists in contractually entrusting the management of property rights or other ownership interests to the fiduciary and charges the fiduciary with the task of delivering the interests to the beneficiary at a time determined by the contract.³⁰

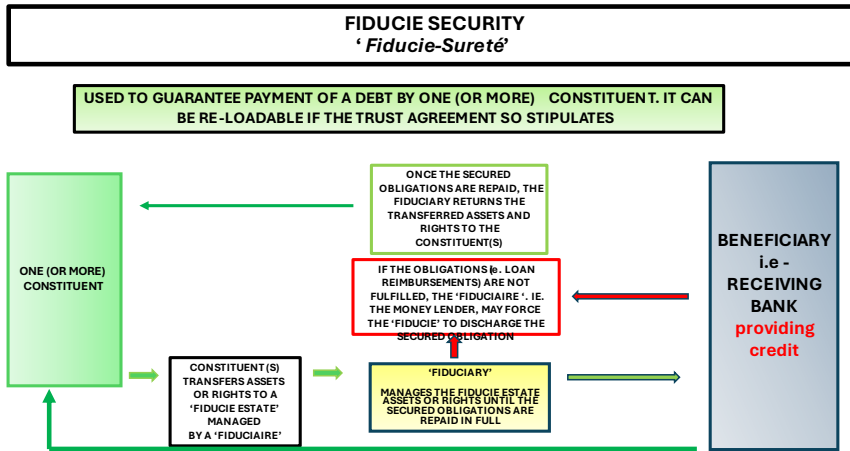


5

The contract of *fiducie* for guarantee purposes (*fiducie-sûreté*)³¹ consists in transferring a guaranteed right over the title to one or more pieces of property of the debtor for the benefit of a fiduciary who is required to pass the property on when the contract is terminated, either to the constituent who is freed of the original debt or to the creditor/lender in order to satisfy the debt guaranteed.

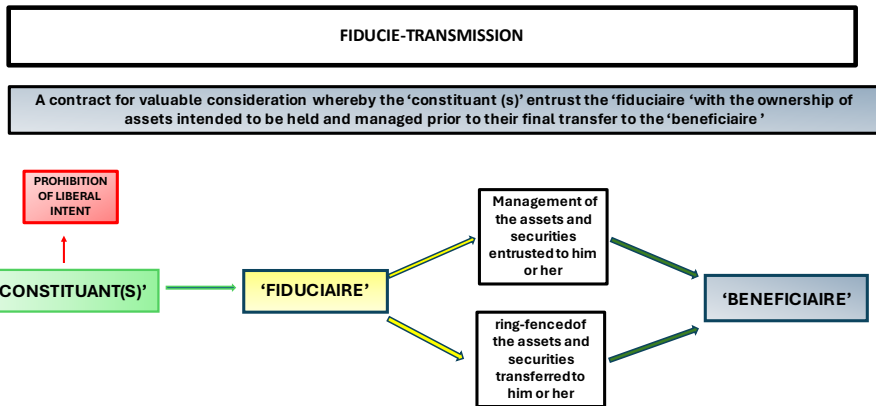
30 P Berger « La fiducie-gestion » Actes prat. strat. Patrimoniales 2011, n°1, 12 et 13.

31 F Barrière « *La fiducie-sûreté* » (2009) JCP E 1808 ; « *La fiducie-sûreté* » (2009) JCP N 1291 ; *Encyclopédie juridique Dalloz : Répertoire de droit civil* « Fiducie ». M Wachter, A Raynouard, 'La fiducie: tout savoir sur la « reine des sûretés', Deloitte, 1 juin 2022, <https://blog.avocats.deloitte.fr/restructuring-fiducie-tout-savoir-sur-la-reine-des-suretes/>.



3

The contract of *fiducie* for transmission of property (*fiducie-transmission*) consists in the constituent, during his/her lifetime and outside of the usual succession rules, transferring to a third person the management of property so that at a given date the property in the *fiducie* can be transferred without cost to a beneficiary.³²



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32 D Parent, 'La Fiducie, Outil Patrimonial De Gestion Et De Transmission', numéro 168/ mars 2019. RLDC 6556. H Fabre, 'La fiducie comme alternative au mandat de protection future ou comme outil de transmission', Dr et patr, mars 2012, n° 212, p 56, II-B.

III THE RELEVANCE OF IMPLEMENTING A SPECIFIC CONCEPT OF THE FIDUCIE INTO FRENCH POLYNESIAN LAND LAW³³

"Laws are applied well and are adapted and effective only if they engage with the deep culture of those to whom they apply".³⁴ This reflection is common sense but it should also be remembered that it is affected in French Polynesia and New Caledonia by the contemporary perception that the populations of these two overseas collectivities³⁵ may have of the legitimacy of the transposition of exogenous legal models from the former colonising power.³⁶

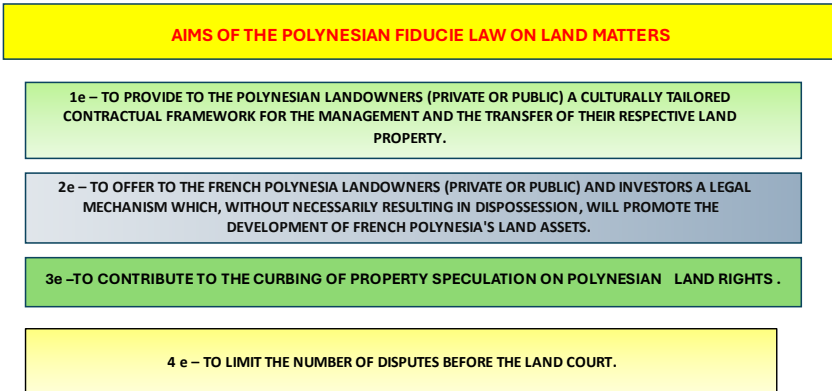
Having made this preliminary clarification, and focusing solely on the legal context, it must be observed that the possibility of implementing a 'Polynesian land fiducie' falls within the field of the statutory competences of the government of French Polynesia because it would not change the present regime relating to legal capacity nor that relating to the status of any individual.

33 The following comments are purposely intended to be descriptive and it explains why diagrams are attached.

34 Marie-Anne Frison-Roche, *L'esprit des lois* de Montesquieu ; *Essai sur les lois du Doyen Carbonnier* in 'Le Transfert Du Droit Civil, Une Opportunité Pour La Nouvelle-Calédonie' (Colloque organisé par le Congrès de Nouvelle-Calédonie, 29 March 2012).

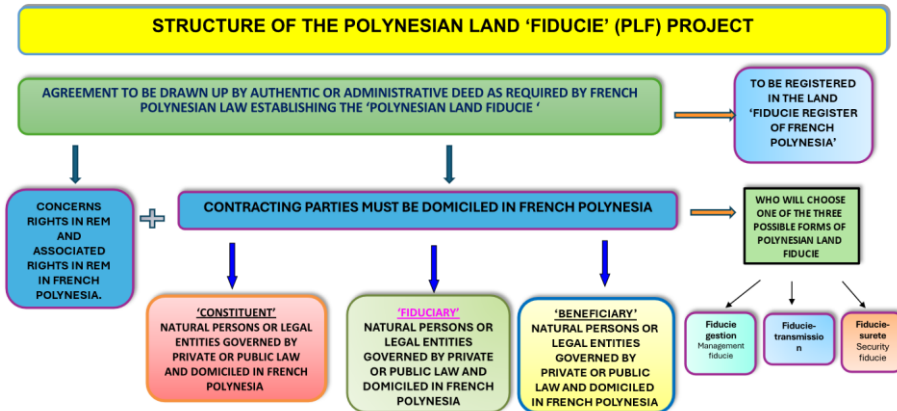
35 "Overseas collectivities" are the territories covered by art 72-3 of the Constitution of the French Republic.

36 Jennifer Corrin Care "Colonial Legacies?" in Jennifer Corrin Care (ed) *Sources of Law in the South Pacific* (1997) 21 *Journal of Pacific Studies* 43-54. See the Samoa example, S Tcherkézoff, « L'impact Des Influences Juridiques Exogènes Sur Les Relations Traditionnelles À La Terre Le Cas De Samoa » in *La terre en Polynésie: La propriété foncière à l'épreuve des liens de parenté* (Université de la Polynésie française, Actes du Colloque des 23 et 24 septembre 2021) 177. On the influence of French law in New Caledonia, see in this volume C Bouix « L'Emprunt Du Droit Civil Français Par Le Droit Civil Coutumier Kanak ».



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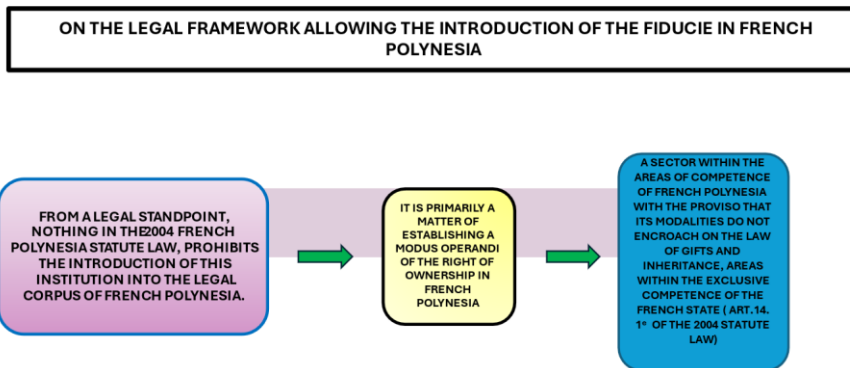
Simply put, the introduction into the local law of a 'Polynesian land fiducie' would be an adaptation of civil law provisions relating to contracts and obligations relating to the exercise and the organisation of undivided rights and even the rules governing agency, privileges, and mortgages, all of which are areas within the legal power of French Polynesia.



8

At the conceptual level a 'Polynesian land fiducie' would borrow from the general architecture of the French law on *fiducie* in that it would be conceived as an operation by which one or more constituent(s) have decided to contractually organise the

management or temporary transfer of real rights or of accessory real rights of a present or future nature.



9

Following French precedent, the contract for a 'Polynesian land fiducie' would result from a manifestation of express will and necessarily be the object of a contract.

Adopting the principles presented by the Civil Code, a *Loi du pays* would provide that the contract for a 'Polynesian land fiducie' must, on pain of nullity, specify all the information relating to the parties to the contract, the nature of the property transferred, details of its management, and the period for which the transfer is made (eg 99 years).

In all its different forms a 'Polynesian land fiducie' contract would specify –

- (a) the precise description of the real rights transferred (if they are future rights, they must be determinable rights),
- (b) the estimated value of the rights,
- (c) the period for which the transfer is made, which cannot exceed 99 years from the date of the contract,
- (d) the identity of the constituent(s).
- (e) the identity of the fiduciary(s),
- (f) the identity of the beneficiary(s) or failing that, the rules which would allow for their identification,
- (g) acceptance by the beneficiary(s),
- (h) notification of the identity of the beneficiary(s),
- (i) the purpose or role of the fiduciary(s) and the extent of their management powers and powers of disposition,

- (j) the body of rules which enables the functioning of the 'Polynesian land fiducie' as well as those which are necessary to implement it.

The property would become part of a patrimony of affectation, which is distinct both from that of the personal patrimony of the fiduciary and that of the patrimony of each constituent.

After acceptance by the beneficiary, the contract for a 'Polynesian land fiducie' could not be modified or revoked except by agreement or by a court decision.

However, the transfer into the patrimony of affectation resulting from the contract is not definitive. When the contract comes to an end, the property in the fiduciary patrimony is passed to the beneficiaries.

The fiduciary must act for the benefit of the one or more beneficiaries for the achievement of the contractually determined goal and, failing that, there is accountability by which the constituent may require that a third party regularly oversee the management by the fiduciary.

The 'Polynesian land fiducie' is to be distinguished from arts 2011 to 2030 of the Civil Code because of adaptations which are required by the needs of the management and development of property law in French Polynesia.

Basically, the 'Polynesian land fiducie' presents a mechanism which operates within the context of the traditional concept of Polynesian land ownership.³⁷

The novel element of the 'French Polynesian fiducie' proposal relative to the French text is that, although it provides security for the various parties to the contract, it allows for the introduction of a Polynesian law alongside the rules that already exist in the Civil Code and particularly the rules relating to the contract of indivision in arts 1837-1873. That is an organisational and developmental system for land that is more in tune with the traditional idea of Polynesian land law.

It can be foreseen that in the case of indivision (whether voluntary or not) one or more of the Polynesian parties in indivision could, as constituents of a Polynesian land fiducie, agree by way of authentic or administrative act to transfer their rights relative to a distinct patrimony of affectation for a temporary period and transfer the management of that to a fiduciary (a third party who is trusted) and at the same time retain control of the property transferred and of the income it generates.

37 R Calinaud « La création des titres fonciers en Polynésie » in Actes de la 9e Conférence Judiciaire du Pacifique Sud, Papeete 21/24 Mai 1992 p 121. Notes sur l'indivision agraire en Polynésie; Papeete 1976; 'Autonomie juridique et droit foncier' (1998) 4 Revue Juridique Polynésienne (HS); "Les principes directeurs du droit foncier polynésien" (2001) 7 Revue Juridique Polynésienne 743.

The benefit of a 'Polynesian land fiducie' is limited to natural or artificial legal persons in public or private law terms who are resident or registered, as the case may be, in French Polynesia and whose land rights are also in French Polynesia. The fiduciary must also have fulfilled this requirement of residence and of a base in French Polynesia. The 'Polynesian land fiducie' must, on pain of nullity, be situated within French Polynesia.

This double requirement for validity evidences the value of the original proposal in designing novel, albeit adapted, mechanisms specifically for the management and development of Polynesian land rights.

The 'Polynesian land fiducie' extends the categories of persons authorised to set up land *fiducies* and of those who can fulfil the role of fiduciary. Therefore, while the rules in French law related to the *fiducie* operate when the subject-matter of the contract is immovable property and the contract has the form of an authentic act (that is to say, drawn up by a notary), the *Loi du pays* for a 'Polynesian land fiducie' would extend this right to the government of French Polynesia. In specific circumstances the Council of Ministers could by written administrative decision also write contracts of *fiducie*.

It is further to be noted that a *Loi du pays* relating to a 'Polynesian land fiducie' could permit³⁸ public entities of French Polynesia which have been created by French Polynesia for the purposes of regulating land matters³⁹ to be a constituent, fiduciary, or beneficiary of a 'Polynesian land fiducie'.

The 'Polynesian land fiducie' provides guarantees to the various parties to the contract as well as to third parties and to the Government of French Polynesia:

- (a) Beyond the necessary requirement of the document being drawn up by a notary or created as an administrative act are several matters which must, on risk of nullity, be in the contract of *fiducie*. These are the elements which establish consent.
- (b) The draft of a possible *Loi du pays* envisages that the fiduciary will be personally responsible for faults committed in the exercise of the role of fiduciary, and that the fiduciary must subscribe to civil insurance which guarantees the financial consequences of any professional deficiencies committed by the fiduciary.

38 In relation to the substantive and formal provisions in art 140 of the Organic Law no 2004 – 192 of 27 February 2004 which relates to the autonomous status of French Polynesia.

39 Whether they have legal personality or not.

- (c) A fiduciary must guarantee, by a special system, reimbursement of the money, the property or the value received during the contract; a decree by the Council of Ministers would complement this provision.
- (d) In relationships with third parties, the third parties would be protected because the fiduciary is deemed to have the fullest of powers in respect of the fiduciary patrimony, unless of course it has been proved that the third party knew of any limitation on those powers.
- (e) When the fiduciary acts in respect of a Polynesian Land fiducie, that fact must be mentioned expressly.
- (f) During the period that the trust operates, the principle of transparency of operation of the contract must be disclosed to the constituent and the beneficiary.

After 10 years of indecision, the setting up in 2014 of the 'Tribunal foncier' in French Polynesia has been of undeniable symbolic significance⁴⁰ but it is still open to debate whether, considering the full extent of the underlying sociological and cultural realities, it has fulfilled the aims of its promoters.

The results have been somewhat ambivalent. French judges generally agree that real progress has been achieved in land issues management through the land tribunal,⁴¹ but some members of the Polynesian population⁴² still consider relying on ancient usages or customs and advocate the return to a collective property organisation which would operate without the land tribunal's intervention and its application of unsuitable rules from the Code civil.⁴³

However interesting the latter approach may be on a theoretical level, it must be remembered, as R Calinaud and C Domingo-Neti pointed out, the land customs in

40 Its creation was mentioned in art 17 of the 2004 French Polynesia status document.

41 See for example L Bélanger « L'appréhension législative de la question successorale et foncière, quel outil juridique? Le partage des terres par souche » in *'La terre en Polynésie : La propriété foncière à l'épreuve des liens de parenté'*, (Université de la Polynésie française, Actes du Colloque des 23 et 24 septembre 2021). This progress could undoubtedly be enhanced if the prior mediation phase prescribed in articles 449-18 and 449-19 of the CPCPF was made mandatory rather than optional.

42 According to the latest data from the Land Affairs Department of French Polynesia (2023), 48.5% of landowning families are in joint ownership, representing almost 58% of the land area in French Polynesia. There is no precise number of the undivided lands in French Polynesia which is the source of difficulties.

43 N Tumahai, F Raoulx « La Promotion D'une Gestion Familiale Des Terres Polynésiennes Indivises » in *La terre en Polynésie: La propriété foncière à l'épreuve des liens de parenté'* (Université de la Polynésie française, Actes du Colloque des 23 et 24 septembre 2021) 149-155.

French Polynesia are "no more than 'a kind of 'mythical nebula' to which we refer to it because we vaguely think it's part of our heritage, but we don't know what it said, and we interweave it with biblical quotations and immediate personal interests".⁴⁴ Furthermore, that form of organisation will most likely be inadequate to be a viable tool for the economic development of land in French Polynesia.

In this context, one can reasonably expect that the introduction of the '*fiducie foncière polynésienne*' in the contemporary Polynesian land law⁴⁵ would provide an alternative solution to the civil law rules⁴⁶ and represent a tailored method of land management and economic development in French Polynesia.

It could also be considered as one of the concrete expressions of the contemporary movement of reappropriation of the land issues by the Polynesian population⁴⁷ and of one feature of the concept of 'Polynesian citizenship'.⁴⁸ This is a movement which could be supported by future initiatives, such as specific measures for accompanying Polynesian litigants all through proceedings submitted to the 'Land Tribunal'⁴⁹ or by the drafting in both languages (French and Tahitian) of a recollection of both substantive and procedural rules in land matters into a 'Polynesian land code',⁵⁰ in order to fulfil respect for the constitutional principle of accessibility and intelligibility of the law.

Perhaps one day there will be an Independent Administrative Authority⁵¹ whose purpose would be to regulate the land sector in French Polynesia. It would not be

44 R Calinaud, C Domingo-Neti, *Droit coutumier et coutume dans la jurisprudence en Polynésie in Coutume autochtone et évolution du droit dans les territoires français du Pacifique* (l'Harmattan, Paris, 1995) 162.

45 Y-L Sage (with the collaboration of the direction des affaires foncières de la Polynésie française) *Droit foncier en Polynésie française. Bref examen critique et propositions de réformes*, op.cit., p.148.

46 And also when implemented will be a source for original case law.

47 See Saura and Bernard-Mury, above n 2.

48 G Flosse has advocated since 1998 that the recognition of the concept of 'Polynesian citizenship' within the overall framework of French nationality will fulfil protection of the Polynesian land rights and as such represent the consecration of liberties granted to the territory by France from the 19th century and which have now been inscribed as a part of Polynesian culture. Gaston Flosse "The Concept of Polynesian Citizenship" in *Contemporary Challenges in the Pacific: Towards a New Consensus* (2001) Hors Serie Volume I, 2-3.

49 By creating a body of local civil servant called "avoués-fonciers".

50 Following the example of what has been already done in the Code de Procédure Civile de la Polynésie Française. Ture Aratai No Te Haavaraa Tivira, annotated under the direction of P Gourdon Polydroit (2021).

51 A body with legal personality which could be created by a 'Loi de Pays' according to art 30-1 of the 2004 French Polynesia statute.

subject to the authority of the French Polynesia government and its powers would be exercised impartially and free from any conflict of interest, and within the framework strictly required for the fulfilment of its mission. For example acting as *amicus curae* before the 'Tribunal foncier' or the Economic, Social, Environmental and Cultural Council of French Polynesia or being entrusted with recommendation or regulatory powers.

In this context, the '*fiducie foncière polynésienne*' may be seen, as a modest but nonetheless original contribution to the modern theory of patrimony and land tenure.⁵²

52 M Grimaldi "Théorie du patrimoine et fiducie" (2010) 77 RLDC 73. Emerich Yaëll « Les fondements conceptuels de la fiducie française face au trust de la common law: entre droit des contrats et droit des biens » (2009) 61 Revue internationale de droit comparé 49-71 and especially at p 51-52.

