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**GENDER EQUALITY AND WOMEN'S RIGHTS: THE ESSENTIAL ROLE OF THE NOTAIRES IN
IMPLEMENTING AND DIFFUSING *DE JURE* LAW**

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Abstract

Once *de jure* laws are adopted, the challenge for states lies in ensuring that the people, particularly those targeted by the rules of non-discrimination, can benefit from them. How can the state reach these people, inform them, provide legal services to them and ensure uniform and impartial application of the *de jure* law on the entire territory and to the entire population? In reaching these goals the civil law notaires can make a huge difference.

As a legal professional, the notaires must apply the *de jure* law and thereby meet its requirements; they are also subject to the highest standards of impartiality, ethics and professional conduct. The notaire represents all parties to a real estate or other legal transaction.

Among their legal obligations, the notaires must check the status and ability of all parties to the transaction and obtain their free and informed consent. They will not hesitate to meet in private with a party in order to ensure that the expressed consent is not given under duress or due to that person's ignorance of his or her rights.

Key Words: Gender Equality, Women's Rights, *De jure* Law, Land access, legal profession



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INTRODUCTION

This presentation is part of a broader academic research project on legal research methodologies and the importance of expanding sources of information in comparative law research. In fact, the traditional research methodology in comparative law is the documentary research that enables the academic jurist to compare the texts of law (or legislation) of different States to draw his findings and conclusions. This traditional methodology can lead the researcher to different results from the reality experienced by the population who is subject to these laws, since he will not always be able to detect the ineffectiveness of a *de jure* law and the existence of a real and generalized practice *de facto* on the territory studied. Our project, which is still in the preliminary phase, aims to raise awareness among the researchers to the existence of *de facto* situations and the importance of obtaining information from related sources and ground analysis without hesitating to use related disciplines such as economics, sociology, anthropology and history. The objective is not only to understand the law, but also to understand the context in which it applies or should apply, and its effectiveness or lack thereof.

We will present at the 2017 World Bank Conference on Land and Poverty a reflection on the added value of the civil law notaire in a State that wishes to promote the knowledge and application of its *de jure* law. The genesis of this reflection happened during the preparation of the foundations of the previously stated research project.

In recent years, many States have amended their laws to reduce inequalities between men and women and to adopt gender-friendly provisions. These changes are particularly evident in terms of home ownership, matrimonial and inheritance law. The statutory law in force in a territory is called *de jure* law.

The work of international organizations has been instrumental in these domestic law reforms. Under the leadership of the United Nations, the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) has led several States to review their matrimonial and inheritance rules to ensure equal, or at least better rights for women. Particularly with regard to land, the *Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT) developed under the Committee on Food Security (CFS) of the Food and Agriculture Organizations of the United Nations (FAO) require non-discriminatory legislation against all individuals as tools to address issues of hunger, poverty and land affordability.

Despite the adoption of these new laws in many states, changes have been slow to materialize for several reasons. In some cases, new laws are not publicized to the people, who lack access to reliable sources of information. In others, the population does not have a sufficient level of education to fully understand and be aware of the new laws and the changes they bring. On the other hand, because of a state distrust or a simple resistance to change, people on the ground continue to follow the laws and customs previously in force. Finally, despite knowledge of these new laws and the rights they grant, the targeted population is unable to enforce them. The main reasons are the lack of access to justice or lack of sufficient financial resources to bring forward necessary administrative or legal proceedings.

Notwithstanding the origins of the difficulty in implementing these laws, the result remains the same: older discriminatory laws and practices (especially those targeting women) continue to be applied. This is called *de facto* law, the “law” that applies in fact on the ground. Fully aware of the huge difference that can sometimes exist between *de jure* law and *de facto* situation in a territory, the VGGT requires both *de facto* and *de jure* results when examining the implementation of the guidelines. VGGT principles must be reflected both in *de jure* laws and *de facto* on the ground. Thus, a state which has adopted laws and policies in compliance with the VGGT but without significant results on the ground will not be considered compliant with the voluntary guidelines.

Once *de jure* laws are adopted, the challenge for States therefore lies in ensuring that the people, particularly those targeted by the rules of non-discrimination, can benefit from them. How can the State reach these people, inform them, provide legal services to them and ensure uniform and impartial application of the *de jure* law on the entire territory and for the entire population? In reaching these goals, the civil law notaire can make a huge difference.

As a legal professional, the notaries must apply the *de jure* law and thereby meet its requirements; they are also subject to the highest standards of impartiality, ethics and professional conduct. The notaire represents all parties to a real estate or other legal transaction.

Among their legal obligations, the notaries must check the status and ability of all parties to the transaction and obtain their free and informed consent. They will not hesitate to meet in private with a party to ensure that the expressed consent is not given under duress or due to that person’s ignorance of his or her rights.

By their impartiality and their essential advisory duty, the civil law notaries are perceived as the legal advisor of the family and the community. They stand by their clients throughout their lives. Their daily availability and interventions out of court, in a non-litigious context, make the notaires

a trusted third party with a great proximity to the communities they serve. In this regard, the notaires are the best legal experts being able to close the gap between *de facto* and *de jure* law and to make *de jure* law accessible to people who need it the most.

Using two concrete examples of inheritance and matrimonial law, we'll demonstrate how civil law notaires can contribute to the implementation of the *de jure* law in the poorest and most remote communities. This is possible through their proactive intervention in the accession of ownership and transfer of land titles with a concern for gender equality and women's rights protection. By their advisory duty and their professional and ethical obligations, civil law notaires can be the most accessible legal experts as well as powerful allies in this time of change. In common law jurisdictions, a category of lawyer with these qualities would be a nice addition.

CASE STUDY: TWO ILLUSTRATIONS OF THE POTENTIAL IMPACT OF CIVIL LAW NOTAIRES IN PEOPLE'S LIVES

A- INDIA : DOWRY AND INHERITANCE RULES

India's case is very interesting for our subject. A *de facto* situation persists despite legislative efforts throughout the years to change practices. We must note that the *de jure* law is slow to gain its effectiveness, specifically in non-urban areas.

THE DOWRY PROHIBITION ACT, 1961

The Indian government legislated against the practice of the dowry in 1961 by the adoption of the *Dowry Prohibition Act*¹. The law prohibits any payment in goods or money made to the groom's family or relatives (but gifts to the spouses are still allowed). The practice has not stopped and a regulation was adopted in 1985 in order to put in place a list of presents given to the spouses. The objective was to keep track of the donations made at the time of the marriage and their provenance¹. Section 3 of the Act states that the presents are not a dowry, so a list becomes essential in the consideration of compliance or violation of the law.

The implementation or lack thereof of the anti-dowry provisions into the Criminal Code could be developed upon, however, our analysis today is not intended to provide a comprehensive statement

¹ GOVERNMENT OF INDIA, *Dowry Prohibition (Amendment) Act, 1984* (Act No. 63 of 1984) and GOVERNMENT OF INDIA, *Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules, 1985*, G.S.R. 664 (E).

of the law on the issue. A 2002 study² funded by Landesa finds that dowry practice is still very widespread in several parts of India.

The implementation of this law is unequal in Indian Territory; some areas are more problematic than others. The *de facto* situation therefore is variable depending on the location.

For the purposes of this analysis, we will focus on the broad outlines of the law and the situation on the ground. The dowry which was primarily a remittance of tangible property such as land or movable property has been transformed into the present society in payment of a sum of money in most of the cases³. It is not a sum of money given to the bride or even to the couple, but rather a payment made to the groom himself or his family to guarantee the well-being and proper treatment of the bride.

If a law came to prohibit this practice in the 1960s, it was because there were increasing abuses. It may become extremely expensive for a father to find a husband for his daughter, since her future quality of life and the guarantee of a good treatment by her husband and in-laws is dependent on the amount paid in dowry. Parents start saving from the birth of their daughter for the payment of the dowry: they sell land, get into debt, accept usurious situations to obtain the sums requested by the in-laws. Once the wedding is celebrated, the in-laws can make additional requests by threatening the security of the wife. For parents who make such sacrifices, the perception is that their daughter is thus touching her share of familial and ancestral property and thus, she does not inherit her parents upon their death. This is also the perception of her brothers who have suffered family deprivation while saving for dowry money, and who have often seen parts of the family land sold to pay for it. They also consider that their sister has received her share of the family property and that what remains is their rightful claim.

Yet, and this is the irony of the situation, the woman does not touch a penny of this dowry while her parents and brothers consider that a great investment has been made for her to become a suitable

² J. BROWN and S. Das CHOWDURY (2002). « Analyzing Women's Rights: A Field Study from West Bengal », in P. CHOWDURY (ed.), *Gender Discrimination in Land Ownership, Land reforms in India*, Volume 11, Sage Publications, New Delhi, 2009.

³ This may also vary by region. For example, in the West Bengal, very few lands or houses seem to be part of the dowry, while in Kerala, almost half of them are. N. BHATLA, S. CHAKRABORTY and N. DUVVURY, « Property Ownership and Inheritance Rights of women as Social Protection from Domestic Violence: Cross-site Analysis », in *Property Ownership & Inheritance Rights of Women for Social Protection: The South Asia Experience, Synthesis Report of Three Studies*, International Centre for research on Women (ICRW) 30th anniversary, 2006.

wife (education, payment of the ceremony, and dowry to the in-laws) and that she took her share of family assets. This is the most common argument about why a girl should not inherit her parents⁴.

THE HINDU SUCCESSION ACT OF 1956 AND ITS AMENDMENT OF 2005

In parallel with this dowry practice where *de jure* law and *de facto* situation differ, a similar observation could be made about the right of inheritance. As Uditia Chatterjee of Landesa underlined at the World Bank Conference on Land and Poverty 2016⁵, the interrelation between dowry and inheritance explains part of the persistence of the *de facto* situation phenomena in India.

The Hindu Succession Act (HAS) of 1956 provides that sons and daughters have some rights in their parents' intestate succession, but the law contains many restrictions concerning the type of right daughter can get or claim. The law contains no such restrictions against the sons of the deceased. The law also contains some difference – read discrimination - if the deceased is a female or a male and the intestate devolution will be different if the deceased is the mother or the father. Finally, in the class II heirs, the male branch takes precedent on the female branch. For some example of the differences between the son's and daughter's rights, sons got a coparcener right in joint family property by right of birth, but the daughters cannot be coparceners. Inheritances of agricultural land are subject to tenorial laws at a State level and are not governed by the HSA. In parental dwelling house, no female heir can claim partition and only the unmarried, deserted or widowed daughters have a right of residence.

In 2005, the Indian Government adopted a fundamental amendment to the *Hindu Succession Act* (Hindu Succession Act Amendment - HSAA⁶) for further equal rights between males and females in the legal system. With these changes, both sons and daughters now have coparcener rights by birth in joint family property. The changes also made inheritance of agricultural land subject to the HSAA and not tenorial State laws, giving an equal coparcener rights to sons and daughters in agricultural land. Also, after 2005, daughters (married or unmarried) as well as the sons, got the right to partition and to reside in the dwelling parental house. Basically, any differences between men and women are removed from the HSAA. As in the case of the dowry, this overview is far from exhaustive, as our current statement does not attempt to analyze the law in force in India.

⁴ U. CHATTERJEE, N. KULKARNI and E. LOUIS, *Equal Inheritance as Intended By HSAA and the Realities of its Implementation: Exploring the Trade-Off Between Inheritance and Dowry*, Landesa, World Bank Conference on Land and Poverty, 2016, p. 14.

⁵ Precited, note 4.

⁶ GOVERNMENT OF INDIA, *Hindu Succession Act (as amended in 2005)*, online : <<http://chanda.nic.in/htmldocs/elibrary-new/e%20Library/hindu%20succession%20act-1956.pdf>>, (referred hereafter as HSAA).

By 2016, Mrs Chatterjee states that in some areas of India, absolutely nothing has changed. Women don't claim their rights in the succession of a parent and are not really considered heirs per surveys conducted in the field⁷. Why is this amendment so inefficient and how to ease its enforcement, mostly in the rural and remote communities?

EXPLANATION AND POTENTIAL SOLUTION

Despite the changes in the *de jure* law, *de facto* situation remains tangible in the day-to-day life. The dowry is still real and the families still consider that they give a daughter her share in the family assets by paying for a good education, a significant dowry to the in-laws and the marriage ceremony. It seems unfair for the daughter, after having received so much, to claim a share of the deceased's assets. It is perceived like stealing from the fair share their brothers are entitled to receive out of what was left after all these expenses for the well-being of a daughter and sister.

A woman who claims her share respecting the law will probably face family opprobrium (both hers and her husband's family), community opprobrium and shame. It can sometimes go as far as being stigmatized by these families and communities⁸. Some negotiations between the brothers and the sister can lead to a bargain stating that if she renounces her rights, she'll always be welcome in the dwelling parental house and her brothers will take good care of her if she ever becomes deserted or a widow. They cannot directly and legally allege the payment of a dowry to make their point because it's an illegal practice, but the social and familial pressure to renounce a claim is not less real for a daughter in that position.

The civil law notaires can make a difference in the medium term in the application of these *de jure* laws that are slow to reach their intended population. In a state where the *de facto* and customary law is used to declare men heirs of a deceased person to the detriment of the women of the family, whereas the new law (HSAA) grants a *de jure* equal treatment to all children of the deceased, the notaires would not be satisfied by the male children's assertions (that their sisters renounce her rights). Thus, they should not be satisfied with the affirmation of this sister, if it is given in the presence of her brothers and if it appears to be given against her free will or based on misinformation. To give effect to such a waiver of succession, the notaires must obtain the expression of the will directly from the person and will secure this consent by meeting this person alone to ensure that consent is not given under duress of any kind if they suspect something. Also, if the sister, in this example, expresses her fear of family reprisals for exercising her legal rights,

⁷ Precited, note 4, p. 13-14.

⁸ Precited, note 4, p. 14, 16-17.

the notaires will exercise their advisory duty towards the whole family to explain the law and its precepts.

That is why we are looking at a medium-term impact. The presence and interaction of notaires with the target community will make the *de jure* law known, educate the population about its content and obligations, and help to reduce the difficulties of a cultural and customary gap with the law. These changes are not automatic, but the presence of impartial, local jurist with an advisory duty and a public officer mission makes it easier to reach out to a more remote or less educated community, especially if they don't have access to the judicial system of court, often available in urban centers, at a great distance from their homes, with prohibitive deadlines and costs.

THE ESSENTIAL ADVISORY DUTY

Several examples of changes in the law that civil law notaires has helped to implant in the population are present in the history of civil law States. For example, in 1989 in my province of Quebec, the State introduced new provisions in the Act respecting the division of family property for married couples⁹. This novelty is called the family patrimony. Notaires, local jurists involved in the daily life of their clients, were undisputed artisans of the implementation of these legislative changes and of the imperative information to the people to demystify everything that surrounded these changes. If we look at the writing preceding the entry into force of this amendment and those which followed in the first months of its establishment, several authors feared a chaotic transition that did not happen mostly because of the notaires.

The presence of notaires (or common law, a jurist vested with powers similar to those of a civil law notaire) in rural or more traditional communities in certain regions of India would certainly not have a magical or immediate effect. But notaires would contribute, by their inescapable advisory duty, to 1) educate the population about the prohibition of the dowry and its implications - including in criminal law; (2) inform about the succession reform of 2005, both a) upstream of death - enabling the owner of the property to rely on the law or to opt for a personalized estate planning by writing a will – b) in the settlement of an estate - by notifying all members of a family likely to receive a share of that inheritance of the rights and obligations arising therefrom and c) of the equal right provided for in the law between the male and female heirs of the deceased. This advisory duty directly adapted to the people will contribute to reducing the persistent disinformation on the legal rights of each one with respect to the *de jure* laws.

⁹ We must point out that free union (marital cohabitation without any marriage (legal or religious) or legal boundaries) is widespread in the province of Quebec.

Participants in the focus groups conducted for the Landesa field study did not have a good knowledge or understanding of the intestate succession rules, nor of the changes that since 2005 have undoubtedly made an equal inheritance right to the girls and boys of the family¹⁰. Thus, during their lifetime, parents did not opt for a personalized estate planning because they believed that the law was in accordance with their own wishes - without realizing that the *de facto* situation was more convenient to those wishes than *de jure* law. After the death, the girl who claims her share, as *de jure* law grant her the right to do, go against perceptions and traditions – *de facto* situation. She is blamed or worst for that first by her brothers, then by her sisters-in-law, sometimes also by her community and her own in-laws.

Indeed, *de facto* popular perception is that ownership of the land goes to the boys who have the corollary obligation to care for aging parents - a task that the married daughter who has gone to live with her husband will not assume. It is therefore perceived that a girl claiming her share under the 2005 law dip in both baskets, especially if a substantial dowry has been paid to her in-laws for her marriage¹¹.

In this sense, the notaires can provide the population with the necessary information on the law and on the principles, that support the 2005 amendments. In doing so, they will not hesitate to provide information on the dowry and its prohibition. Without dowry, the 2005 amendment is much better justified and if equal inheritance rights still seem unfair or "too much" for the girls in the family, it is because, despite a prohibition dating back over 56 years, dowry is still very present and the sums involved in a dowry are still growing.

If a member of the family refers to the payment of an earlier dowry to explain that there should be a waiver of her inheritance rights by the married sister, it is the duty of the notaires to explain that the violation of a law cannot serve to justify the violation of a second one. It is a basic concept of law that you cannot rely on your own wrongdoing to justify another¹².

THE VERIFICATION OF THE PARTIES' STATE AND CAPACITY AND THE VALIDITY OF THE CONSENTS

The civil law notaires has the task of verifying the legal status and capacity of the parties involved in the acts he receives and of ensuring the validity of their consents. In the context of intra-family succession in India where a sister renounces her *de jure* rights for the benefit of her brothers, the notaires must ensure that it is a free and informed consent and that the renouncer does so in full

¹⁰ Precited, note 4, p. 17.

¹¹ Precited, note 4, p. 16.

¹² *Nemo auditur propriam turpitudinem allegans*

unconstrained or fearful of retaliation, whether based or not. It is indeed possible for a person of full age and free to exercise his or her civil rights to renounce these rights, although it must be a genuine renunciation and not one given under duress.

To validly receive such waiver, the civil law notaires must meet with the renouncing party, verify his identity and, through frank dialogue with her, establish the validity of the waiver expressed. They will not hesitate to ask for a meeting alone with this person if they perceive that she feels uneasy to express herself in the presence of her brothers or other family members who could cause her to feel undue pressure. In no case a declaration by the brothers that their sister renounces can lead the notaires to accept this situation. Since they have an obligation to apply the *de jure* law, without a real waiver, they would then make an inheritance devolution in favour of all the children, brothers and sisters.

The duty of impartiality implies the notaires must restore the balance between the parties when they find that one of them is in a position of vulnerability. Therefore, we brought the precision that they could ask to meet alone with the renouncing girl to validate the profound quality of this renunciation. This attitude is accompanied by a duty to advise all parties, including the party in a position of authority, to explain the reasons for what may be perceived as favoritism.

THE PROBATIVE VALUE OF THE AGREEMENT OBTAINED

Moreover, the acts received by notaires are authentic and difficult to undermine in court because the notaires, in their mission, verifies precisely the capacity of the parties, the quality of the consents obtained, and the respect of the *de jure* law. Without being a quick and instant solution, the presence of notaires and notarial estate regulations will help to make known the *de jure* law and to change social perceptions both on the dowry and on the right of the daughters of the family to a share in parental and ancestral property.

If it is a priority for the Indian government to put forward the effectiveness of the laws in question - and by passing these laws it becomes clear that it is the will of the government to be more neutral in the treatment of gender - to encourage the intervention of notaries or lawyers invested with the same powers in the process of settling family estates would contribute greatly to this objective. For the time being, the ban on dowries introduced since 1961, as well as the amendments to the inheritance rules adopted in 2005, are merely pious wishes that do not produce concrete results mainly in rural or remote areas.

THE INDIAN CASE STUDY CONCLUSION

We believe that in the medium term, the repetition of information about dowry and the devolution of succession by accessible, competent and impartial jurists will contribute to a better understanding of the paradigm shift and the breakdown with customs of the Indian population. In addition, as time passes, there will be an increase in cases where girls receive their share of the inheritance, because all the parties involved will have received adequate information on the law and its sanctions. This second result should have an exponential impact. The more equal succession settlements will succeed without dramatic retaliation, the more girls will feel safe to claim what the law offers to them.

The notaires makes the *de jure* law accessible to the public without the need to appear in court and spend heavy and expensive costs in the justice system. Notaires can move towards communities to provide their legal services and thus contribute to access to justice for all. As a public officer, they are vested with certain powers delegated by the State but they are not an official of the State and does not work for it. They work for the parties who are their clients and thus, they ensure that their legal services to all parties are done with impartiality.

Finally, the notaires will also be able to provide estate planning services for landowners so that, in their death, their wills will apply and not the law developed by a government that may not share the values and opinions of its subjects. Could the growth of estate planning and testamentary successions crystallize the *de facto* inheritance practice of the family? This is possible because a parent can exclude his daughters from his will. *De jure* law and the common-law principles enshrine the freedom to test¹³ and the notaires must respect the law, all the law.

Could this situation lead to missing the target of non-discriminatory treatment of men and women? For a time, undoubtedly! But in societies/States which have adopted the devolution of equal succession to girls and boys, it often took no more than one generation for a custom to disappear in favour of this principle of gender equality¹⁴. In these societies, the reasons a parent may have for forbidding a child from his or her estate are not related to his or her gender, but to his/her person and the actions that the child took during his or her parents' lifetime. In addition, if the practice of dowry actually fades, the perception that the daughters of the family have already touched their due

¹³ The freedom to test is an ancestral common law principle and is also stated expressly in Indian *de jure* Law, at first in Indian Successoral Law of 1925.

¹⁴ This was the case in Quebec. The notaires no longer discerned any discrepancy in the treatment or in the shares that a parent intends to leave to his children, daughters and boys in a will. If a child is written off, it's not because of a gender issue.

will fade as well. At this point, we agree with the premise that the survival of the dowry is a direct and persistent link with the difficulties of access to the succession's estate¹⁵ for girls.

If the result is not instantaneous, our proposal has the merit of starting a movement of change. This movement can be described as non-existent now and the persistence of the dowry alone is irrefutable proof that the solutions introduced since 1961 are not enough.

B- HAITI: DIFFERENT CHALLENGES – SIMILAR *DE FACTO* RESULTS FOR WOMEN?

In Haiti, there is also an important gap between what the law provides (de jure law) and what applies to everyday people's lives (de facto situation). In contrary to the Indian case where two customs (the dowry and the preference of the male line) were prohibited by laws afterwards, the situation in Haiti is represented mainly by the weakness of the legal system and its prohibitive costs. Thus, the population interacts per de facto code of conduct which, we must point out, does not create chaos¹⁶. This non-compliance to the de jure law in some territory does not create a situation or areas of lawlessness. Contractual relations remain stable, since much of the population takes part in the de facto situation¹⁷.

Haiti is exposed to a systemic instability of its government and its institutions accompanied by periodic natural disasters that contribute to undermining from efforts for infrastructure consolidation.

Regarding land tenure, in the year 2000, it was learned that only 5% of the Haitian territory was mapped and cadastrated¹⁸. The political instability that has occurred since then and the events such as the terrible earthquake of 2010 certainly did not help improve the situation. Under these circumstances, it is easy to understand that although the government has targeted the modernization and standardization of its land system as a priority in 2012¹⁹, it cannot devote all the necessary resources to the cadastral mapping of its territory in the actual context.

¹⁵ Precited, note 4, p. 3, 20.

¹⁶ B. James DEATON, Liam KELLY and Atsu AMEGASHIE, « The Nature of Property Rights in Haiti: Mode of Land Acquisition, Gender, and Investment », University of Guelph, Washington, World Bank Conference on Land and Poverty, 2016, p. 9. On that matter, see also G.R. SMUCKER, T.A. WHITE and M.E. BANNISTER, *Land Tenure and the Adoption of Agricultural Technology in Haiti*, CGIAR Systemwide program on Property Rights and Collective Action, International Food Policy Research Institute, 2000; P.C. BLOCH, V. LAMBERT and N. SINGER, « Land Tenure Issues in Rural Haiti : Review of the Evidence », *Land Tenure Center Research Paper No. 98*, University of Wisconsin Madison, 1988; and R. ELLICKSON, *Order Without Law : How Neighbors Settle Disputes*, Cambridge, Harvard University Press, 1991.

¹⁷ B.J. DEATON & AL., precited, note 16, p. 7, 10.

¹⁸ G.R. SMUCKER, precited, note 16.

¹⁹ *Laurent Lamothe Officially Launches the Land Reform in Haiti*, Haiti Libre (September 8th, 2012), online: <<http://www.haitilibre.com/en/news-6591-haiti-politic-laurent-lamothe-officially-launches-the-land-reform-in-haiti.html>>.

Theoretically, real estate transactions should be part of a legal process (de jure) to establish legal titles invested in all required aspects of security and enforceability²⁰. However, the access to the legal system is concentrated in urban centers and is thus physically inaccessible to a large part of the population. Even where physical access to such infrastructure is possible, the costs of such services are prohibitive and often exceed the actual value of the land transferred²¹, especially for women²². Finally, many cases of fraud and corruption in the recent history of Haiti have contributed to a climate of suspicion towards official institutions²³.

Thus, a widespread practice of land transmission has developed - whether by sales, donations or successions - in a consensual system between individuals that does not involve either the State or the judicial system. A study conducted by James Deaton, Liam Kelly and Atsu Amegashie and presented at the World Bank Conference on Land and Poverty 2016 shows that land acquired through purchase-sale relation in the context of these *de facto* practices represents to their owners, good and valid titles, despite the absence of the approval of the governmental or judicial authorities. These owners eventually have in hand evidences that a transaction has occurred and these evidences consolidate their title security on the land²⁴.

In Deaton and al.'s study, we note that the land acquired through inheritance transmission does not produce the same title security for male and female. In fact, women perceive that the land received by inheritance is subordinated to family authorization and are likely to be withdrawn at some point²⁵. The authors argue that this difference in perception can be explained by Lockean's theory of the merit principle²⁶: It is commonly perceived that a land acquired by its labor and its money must lead to security of titles of property because this land is well deserved and is legitimately part of the patrimony of its owner. In parallel, an inherited land does not assume this character of reward, but rather an acquisition not gained, therefore might be undeserved. This differentiation of titles perception increases regarding land acquired or inherited by women. The extended study presented by Deaton and his team shows that women feel their property rights almost as protected as men in terms of the land they purchased but very little protection from the land they inherited.

²⁰ B.J. DEATON, precited, note 16, p. 8-9.

²¹ Precited, note 16, p. 10.

²² Precited, note 16, p. 20, 23.

²³ Precited, note 16, p. 8.

²⁴ Precited, note 16, p. 10.

²⁵ Precited, note 16, p. 7.

²⁶ Precited, note 16, p. 19-20; See online: <https://en.wikipedia.org/wiki/Lockean_proviso>.

Besides this major difference between the quality of title perception, there is a large proportion of land succession who goes to the male heirs of a family in an intestate context²⁷. From a gender balance point of view, what does justify this perception differentiation and what explains a very low rate of women that inherit their parents or spouses rather than the males in the family? Many women give up their inheritance to avoid creating an estate that is complex or costly to manage. Certain details make it possible to better identify the specific problems referred to this document and to suggest possible solutions.

HAITIAN DE JURE LAW

The Haitian Civil Code²⁸ as well as the rural Haitian code²⁹ is based on the French Napoleonic Code and both provide equality between men and women in matters of inheritance in intestate context. This means that in a society that applies de jure law, brothers and sisters inherit equally from their parents. Since this is not the case in fact, what does explain a small proportion of female heiresses and therefore a de facto situation contradictory to the law?

The Haitian law of succession, like French and Quebec law, which also derives its origin from the Napoleonic Code, creates an undivided property of the estate between the heirs. For non-jurists, this means that, at a person's death, his property belongs to all his heirs in equal shares. Each property is therefore the joint property of all. For agricultural land, this means that all the children of a deceased person are basically owners and that the decisions regarding this land must therefore be made in common - the law also provides for unanimity or majority type of decision³⁰.

In the context of a large family and/or in the presence of divergent views on the type of exploitation, the opportunity to sell, etc., the situation can quickly become complex and the heirs find themselves at an impasse.

The law provides a solution to this situation, which is called *partition*. The partition exists in French and Quebec law, and it also exists in common law in presence of joint properties. It can occur essentially in two ways. We will speak of a partition in kind when the property is physically subdivided so that each co-heir receives a parcel of land inherited. The other way to partition is to sell the land and share the money received from it. For some of the heirs, the option is to buy the share of their joint heirs to become the sole owner of the land received by inheritance.

²⁷ We can also see a donation by the parents to the male heirs before death.

²⁸ Adopted in 1825, not really a « new law » if we can say.

²⁹ Adopted in 1962.

³⁰ B.J. Deaton, precited, note 16, p. 9-10.

These two forms of *de jure* partitions involve the judicial and governmental systems. So, there is a necessity to go to the urban centers where these services are available, pay for the costs of these services, and expect long delays before you get either the reduced parcel of land or the full powers in the land for some and money for others. The current Haitian governmental and judicial system also makes this process uninteresting: the legal costs of such *de jure* partition can easily exceed the value of the initial undivided land³¹.

It is simpler, under these circumstances, to understand that, in parallel with a *de facto* land transfer system; an undivided *de facto* system of “informal partition” developed. The heirs make unregistered agreements between them in which they grant the exclusive use of certain parcels of the integral land. From a *de jure* law point of view, the undivided property ownership still exists, but *de facto*, each heir exploits the plot he has targeted in this informal and "out-of-law" partition.

As legal undivided ownership remains and that access to justice is expensive and difficult for women, women heirs do not feel they got the right to make decisions about the land received in inheritance. In fact, women perceive their rights are not protected and that they can face expropriation at some point. They also often feel the need to obtain the consent of the family or hesitate to make investment in these lands. If the property title is threatened, the interest of making a property productive is less present as the women fear it can be withdrawn at any time³².

TRUST IN INSTITUTIONS (JUDICIAL AND GOVERNMENTAL)

In Haiti, notaires and land surveyors who could be major artisans and key players in the land inheritance and land registry reform are victims of public distrust of governmental and judicial institutions. The population prefers to move forward with *de facto* agreements that are proved to be worthy of appealing then to trust these public officials for land transactions.

This suspicion may be justified by past actions of these professionals or by a simple amalgamation made by the population and which applies its doubts to all the bodies who may have a link with the governments. In Haiti, notaires and land surveyors are public officers invested with certain powers by the State³³. In this way, it is normal that the population associate them with the state they received power from. But not all the notaires duties are related to the State representation. Notaires are also independent jurists who must perform their duties with utmost impartiality and by ensuring

³¹ Precited, note 16, p. 10.

³² Precited, note 16, p. 5, 15-20, 30.

³³ See online: <http://www.mjsp.gouv.ht/Pro_judiciaire.htm>.

an irreproachable advisory duty to the parties into the legal acts which they officiate. They are not an official of the State and not the representative of the State but an impartial legal expert.

Several projects are on the table and serious collaborations are in place to help and frame this modernization and formalization of the land tenure prioritized by the government since 2012, but the lack of resources and the lack of confidence of the population in the government representatives and legal counselor like the notaires slows down the process.

In addition, notaires are not distributed uniformly throughout the Haitian territory. In some area, notaires are not present and meeting with a notaire involves a long journey to an urban center or to another region, in addition to all the delays and costs associated with their intervention.

The implementation and emphasis of *de jure* law involves necessarily a local information on the role and mission of the notaires as well as on its presence and accessibility. A mobile notaire entity can be created to ensure the presence of a notaire a few days during a month in more distant region, to decentralize the judiciary services for the benefit of the regions. Land surveyors would benefit from a similar approach.

A NOTARIAL SOLUTION FOR HAITI?

To offer *de jure* solutions to the problems raised above, the Haitian notaires must be proactive and innovative. First, they must provide better information to the public on their role and on the duties and obligations of a notaire in the performance of his notarial duties. Notarial profession must regain public confidence and part of it is by applying the highest standard of integrity such as the deontological and ethical principles adopted by the international union of notaries³⁴.

The role of the notaire is to perform the essential advisory duty and with impartiality. What was demonstrated related to the women situation in India's study case also applies here because these elements form a part of the notarial task.

The presence of a notaire helps the respective parties to reach an agreement and his role as a public officer intervenes in the probative and authentic aspect of the legal act which they draw up to reflect this agreement.

³⁴ See online: INTERNATIONAL UNION OF NOTARIES, *Principles of notarial ethics*, Mexico, 2004, <<http://www.uinl.org/148/principles-of-notarial-ethics>>.

The accessibility to a notaire must be developed, by setting up mobile legal clinics, offering regional services for a few days a month, to avoid centralized access to justice to large centers to the detriment of the rural population.

If the government's priority is really to modernize property law, lowering certain government deadlines and tariffs related to real estate transactions would also help to promote *de jure* law. Consequently, the Haitian notaires should work hand in hand with the administrative authorities to establish *de jure* law and its effectiveness. In this case, the example of the cadastral reform in progress in Quebec is important: the notaires represent a real partner in the renewed cadastral process by ensuring the constant update of real estate titles and cadastral plans. Quebec notaires are public officers but they are not perceived by the population as some creature of the government but as legal experts in property and inheritance law.

Finally, regarding the percentage of 5% cadastral Haitian territory, the establishment of a cadaster, as primitive as it can be, is essential and unavoidable to a credible turn towards the progress of *de jure* law on the property field. Many initiatives around the world demonstrated that a basic cadaster can be made at a reasonable cost and therefore becomes a milestone for the future³⁵.

Another major challenge must be addressed in the short term in Haiti to reach the goal of modernizing property law and cadaster is the question of creating a better citizenship identity system for the citizens of Haiti. We have explained above that the notaires have the legal duty and obligation to verify the identity, the state and the capacity of the clients. However, a large part of the population on the territory of Haiti does not have recognized identity documents or registration with a local authority. This situation can be complex because the notaires must ensure that the person who consents to and signs an act relating to land property is the one who has the right to do so. All the stability and validity of the process that can collapse if this corner stone is flickering.

CONCLUSION

In this brief overview of two *de facto* situations in breach of the *de jure* law, we have tried to show that the civil law notaire, a public officer, has the power to confer authenticity on the acts he draws up and are therefore subjected to the highest legal and ethical standards. Moreover, the notaires are key partners for States wishing to ensure the effectiveness of *de jure* law in their territory.

³⁵ Project like Groot Kenya for example. Or with the help of a *de jure* law, see in Quebec, an *Act respecting land titles in certain electoral districts*, RLRQ, c. T-11, online: <<http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/T-11>>.

The presence of a trusted jurist on the ground will help make the law accessible to the population, help to better understand the changes and the goals they aim.

The notaires contribute effectively to the access to justice: by its presence on the ground and by reducing the necessity of going to large centers where the legal system and the courts are installed.

In this way, the notaires can become the perfect partner of local administrations (town halls, councils of villages, group of wise men, regardless of the form or forms that the population gives to their local administration). Access to justice is also satisfied by a considerable reduction in administrative constraints and delays. Indeed, when a population knows that a *de jure* law action can produce effects only several years later, the temptation to pursue *de facto* tradition is great, whereas if the legal result falls within a reasonable expectation, we believe that more people will be tempted to give it a chance.

Finally, although not free but with a cost, the work of the notaires is usually less expensive than setting in motion the whole judicial system since they act as a single intervenor in certain cases (for example, the settlement of succession), and sometimes as a public officer and legal counselor on other acts (writing and receipt of acts) and transmission belt for others (transmission to the cadastral system for registration of acts received at the first stage).

The duties and obligations of a civil law notaire depend on his local State law and his ethical code. There may therefore be some discrepancies between notaires of different States. However, for all notaires members of the International Union of Notaries, the foundations of a common code of ethics support mutual assistance and the work of notaries who are part of it. These principles can be read on the website of the Union and provide additional information to the reader who is curious to learn more about the civil law notaire³⁶

³⁶ INTERNATIONAL UNION OF NOTARIES, precited, note 34.

References

N. BHATLA, S. CHAKRABORTY and N. DUVVURY, « Property Ownership and Inheritance Rights of women as Social Protection from Domestic Violence: Cross-site Analysis », in *Property Ownership & Inheritance Rights of Women for Social Protection : The South Asia Experience, Synthesis Report of Three Studies*, International Centre for research on Women (ICRW) 30th anniversary, 2006.

P.C. BLOCH, V. LAMBERT and N. SINGER, « Land Tenure Issues in Rural Haiti : Review of the Evidence », *Land Tenure Center Research Paper No. 98*, University of Wisconsin Madison, 1988.

J. BROWN and S. Das CHOWDURY (2002). « Analyzing Women's Rights: A Field Study from West Bengal », in P. CHOWDURY (ed.), *Gender Discrimination in Land Ownership, Land reforms in India*, Volume 11, Sage Publications, New Delhi, 2009.

U. CHATTERJEE, N. KULKARNI and E. LOUIS, *Equal Inheritance as Intended By HSAA and the Realities of its Implementation: Exploring the Trade-Off Between Inheritance and Dowry*, Landesa, World Bank Conference on Land and Poverty, 2016.

B. James DEATON, Liam KELLY and Atsu AMEGASHIE, « The Nature of Property Rights in Haiti: Mode of Land Acquisition, Gender, and Investment », University of Guelph, Washington, World Bank Conference on Land and Poverty, 2016.

R. ELLICKSON, *Order Without Law : How Neighbors Settle Disputes*, Cambridge, Harvard University Press, 1991.

GOVERNMENT OF INDIA, *Dowry Prohibition (Amendment) Act, 1984* (Act No. 63 of 1984).

GOVERNMENT OF INDIA, *Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules*, 1985, G.S.R. 664 (E).

GOVERNMENT OF INDIA, *Hindu Succession Act (as amended in 2005)*, online :
<<http://chanda.nic.in/htmldocs/elibrary-new/e%20Library/hindu%20succession%20act-1956.pdf>>.

INTERNATIONAL UNION OF NOTARIES, *Principles of notarial ethics*, Mexico, 2004,
<<http://www.uinl.org/148/principles-of-notarial-ethics>>.

Laurent Lamothe Officially Launches the Land Reform in Haiti, Haiti Libre (September 8th, 2012),
online: <<http://www.haitilibre.com/en/news-6591-haiti-politic-laurent-lamothe-officially-launches-the-land-reform-in-haiti.html>>.

G.R. SMUCKER, T.A. WHITE and M.E. BANNISTER, *Land Tenure and the Adoption of Agricultural Technology in Haiti*, CGIAR Systemwide program on Property Rights and Collective Action, International Food Policy Research Institute, 2000.

https://en.wikipedia.org/wiki/Lockean_proviso

http://www.mjsp.gouv.ht/Pro_judiciaire.htm