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Preventive administration of justice – an economic catalyzer for the future.
An analysis of the economic relevance of reliable and transparent public registers

I. The Context

When I suspended my academic life in late 1978 to work in development projects as a legal advisor to governments, first in Chad until 1979 and then in the Central African Republic from 1981 to 1988, the order of the day and the following decade was structural adjustment under the Washington Consensus. The World Bank and other financing institutions shifted from big infrastructural projects in the fields of electricity, transport, agriculture and health to State reform and governance. Bad governance and public regulation were identified as crucial obstacles for sound and sustained economic growth. Their removal would set market forces and innovation free and act as a catalysis for economic relations and sustainable development. When results were disappointing and inconclusive at best, the role of the State and the pursuit of public, societal interests by public bodies came back to focus. As early as 1997, the World Bank insisted that "[f]ar from supporting a minimalist approach to the state, […] development requires an effective state, one that plays a catalytic, facilitating role, encouraging and complementing the activities of private businesses and individuals"[1].

However, when the Soviet Union and the communist vision of society imploded, economists and reformers reiterated the triumphant 'the-market-does-it-all' battle cry and pleaded for massive and swift privatization, including of land, self-regulating laws irrespective of an institutional framework and a dramatic curtailing of the State apparatus. Again, the results were disappointing and mixed at best. It turned out that the States that had followed the advice of rapid privatization most faithfully lagged behind, and those who had chosen a more prudent path, insisting on a strong public policy and support, turned out to be more competitive and innovative in the medium and long run.

Each time the insistence on an unfettered market relied on the empirically invalidated and erroneous assumption that private actors would behave like the fictitious *homo oeconomicus* of neo-classical economic theory, i.e. rationally, fully informed, law abiding and far from exploiting market power and information asymmetries, that they would try to conduct their affairs and realize profit in fair competition, transacting in good faith with equally fully informed and equally powerless partners, and that they would not try to make profit *tout court*, without moral and legal constraint, and also exploiting political positions of power for their private advantage.

The assumption is far from reality. I witnessed personally, in my role as adviser to governments, during both historic events and evolutions, that on the one hand side, a market cannot unfold its potential without a State that expresses and implements the public interest, and that on the other hand side, a State that defines strength as its capacity to confine and dominate the expression and interaction of private interests on the market is doomed to decay.

These personal experiences are corroborated by a more general observation. There is ample empirical evidence that societies without a meaningful sovereign State exercising public authority, which leave economic activities fully to private interest groups, fail in their quest

[1] Former World Bank President James D. Wolfensohn, Foreword to the World Development Report 1997 – The State in a Changing World, 1997

for sustained wealth and social peace, as much so as States that command the economy at the discretion of the political rulers.

I therefore subscribe to the observation of D. Acemoglu and J. Robinson who have explained in a widely discussed book: "Inclusive economic institutions foster economic activity, productivity growth, and economic prosperity. […] Inclusive economic institutions require secure property rights and economic opportunities [...] Secure property rights, the law, public services and the freedom to contract and exchange all rely on the state, the institution with the coercive capacity to impose order, prevent theft and fraud, and enforce contracts between private parties. To function well, society also needs other public services: a transport network so that goods can be transported; a public infrastructure so that economic activity can flourish; […] The state is thus inexorably intertwined with economic institutions, as the enforcer of law and order, private property and contracts, and often as a key provider of public services"[2].

These are recent publications. However, their insights and conclusions have nothing original, revolutionary and do not deviate from classical liberal writing. In fact, one of the fathers of the political economy of liberalism, Adam Smith, did not only create the metaphor of the "invisible hand" operating in market relations and guiding private actors to a contribution of the general welfare by pursuing their individual and egoistic interest in benefit and profit. He also insisted on the 'visible hand' of the State, which has to provide for all works and institutions that are advantageous for the society at large, but do not generate profits high enough to compensate the costs of private entrepreneurs, such as defence, transport, health and education, and which therefore have to be financed by public contributions, taxes by all citizens, in proportion to their wealth and capacity[3]. Smith could have relied on Jean Bodin, who had written some 200 years before him, in 1583, that the State's role and task was to build and repair roads and bridges and other public buildings, entertain places of education and learning and to eradicate the "two worst evils in any State, namely unemployment and poverty".[4]

All this is what we would call today physical and social infrastructure.

Apparently, the vital interrelation between private activity and public physical infrastructure is particularly patent with respect to land: its sustained use, be it for purposes of habitation or of agricultural and industrial production, depends on 'roads and bridges', public utilities as well as robust state institutions and law that protect the general interest and balance private interests.

In this perspective, the German government implemented a programme, after the implosion of the soviet economy, to assist in codifying market friendly and socially equilibrated law, in building public institutions and especially an independent judiciary, and in facilitating both a curative and preventive administration of justice by training and supporting judges, lawyers, notaries and bailiffs.

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[2] D. Acemoglu/J.A. Robinson, Why Nations Fail – The Origins of Power, Prosperity and Poverty, 2012, pp. 75/76; in the same vein J. Tirole, Economie du Bien Commun, 2016, p. 24; I have tried to develop my thought in R. Knieper, Nationale Souveränität – Versuch über Ende und Anfang einer Weltordnung, 1991, Teil II

[3] A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, 1776, Book IV, Chapter 2 (for the invisible hand) and Book V, Chapter 1 (for the public works)

[4] Jean Bodin, The Six Books of the Republic, (Les six livres de la République, 1583), Sixth Book, Chapter 2. Bodin insisted in particular that poverty reduction programs were necessary in regions were the land was not fertile.

II. The administration of justice

1. The curative administration of justice

Indeed, one of the central pillars of social infrastructure and public institutions is the judiciary. The legitimate pursuit of egoistic interests and individual preferences does not add up to the common wealth. Conflicts are inevitable. They have to be decided by independent instances, courts and tribunals, in application of the terms of contracts and the law, and the decisions must be enforced against recalcitrant parties. History teaches that the costs of self-enforcement by private parties are prohibitive and terrible.

Throughout history, this is a recurrent and almost non-controversial topic. To quote Adam Smith again: "Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in enforcing the payment of debts from all those who are able to pay. Commerce and manufactures, in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government."[5] Contemporary economists such as Douglas North echo this finding. After his studies of economic history, he came to the conclusion that the "inability of societies to develop effective, low-cost enforcement of contracts [is] the most important source of both historical stagnation and contemporary underdevelopment in the Third World"[6].

In consequence, international Conventions such as the European Convention on Human Rights (ECHR) as well as national Constitutions define the affordable access to neutral, objective and law applying justice as a basic human right, to be guaranteed by the State through the maintenance of a judiciary as an independent branch of government.

2. The preventive administration of justice

While the necessity of curative justice is widely recognized in theory and practice, the concept of preventive justice as a catalyst for the detention, the use, the employment as security for credits, and for a productive exchange of land and its products, is less readily accepted. That may be so – in a broad brush – because jurisdictions with civil law traditions adhere to it conscientiously, while common law jurisdictions establish different priorities.

In 2017, I have conducted an empirical study for the International Union of Notaries (UINL) on "The Economic Relevance of Notarial Authentic Instruments", which relates to an important aspect of the administration of preventive justice, together with reliable public registers.[7] The empirical evidence presented in this paper is derived from there. The study

[5] Adam Smith, Book V, Chapter 3

[6] D.C. North, Institutions, Institutional Change and Economic Performance, 1990, p.61-63

[7] Rolf Knieper, The Economic Relevance of Notarial Authentic Instruments, 2017 (http://www.bnotk.de/Bundesnotarkammer/Internationales/UINL/Studie_Notarielle_Oeffentliche_Urkunden_Prof_Knieper.php)

covered Andorra, Argentina, Austria, Belgium, Bulgaria, China (PR), Colombia, Congo (Rep.), Costa Rica, Croatia, Estonia, France, Georgia, Germany, Guatemala, Hungary, Italy, Korea (Rep.), Kosovo, Lithuania, Luxembourg, Mali, Morocco, Portugal, Russian Federation, Slovakia, Turkey, United Kingdom, Uruguay and the USA.

The fundamental issue of preventive justice is legal certainty. In his seminal book on "The Mystery of Capitalism", Hernando de Soto has described and analysed the reasons for success and stagnation in different parts of the world.[8] He has come to the conclusion that 'legal property', the secure title to an asset and in particular to land, are indispensable prerequisites for a secure living and sustainable economic activity through transactions.

Without legal certainty, transactions are limited to a very small group of people of neighbours, relatives and other people one trusts. Only a transfer from pure factual possession to legal ownership through a publicly accepted and documented title to property enables impersonal transactions, the securing of credit, and economic growth. Legal certainty attenuates transaction costs that are unavoidable in the real world which is not dominated by personal loyalty and trust but by impersonal monetary exchange. It is not populated by *homines oeconomici* but by real humans who are not fully informed and act under conditions of uncertainty, who are not only driven by a market-rational risk/reward calculation but act – under the conditions of a restrictive rationality – either in a co-operative or opportunistic manner, either in compliance or non-compliance with the law, and who abuse their market power or suffer from it.[9] Indeed, in such a real world the security of property and 'the effective, low-cost enforcement of contracts' are fundamental requirements of the sustainability, dynamics and fairness of market relations a sustained economic and social development.

While the importance of legal certainty is generally recognized and the criteria and functions with respect to the protection of property and the facilitation of transactions cross common law and civil law lines, legal institutions and organizations, which are meant to serve these purposes, vary widely.

With some exceptions, common law jurisdictions trust private initiatives for transactions with regard to land: Buyers and sellers of land collect information by each hiring a realtor/broker, and a solicitor/lawyer and/or a conveyancer; they conduct (and pay for) a formal title search, and they execute (and pay for) a title insurance. Business partners of companies rely on certificates of good standing and legal opinions.

Again with some exceptions, civil law jurisdictions rely on instruments of preventive justice and assume that the creation and maintenance of legal certainty are in the public interest and thus in the realm of social infrastructure. In a recent judgment, the European Court of Justice (ECJ) confirmed the concept and the conviction

> "that the land register is of crucial importance especially in certain Member States which operate a system of civil-law notaries, particularly in property transactions. In particular,

[8] Hernando de Soto, The mystery of Capitalism – Why Capitalism Triumphs in the West and Fails Everywhere Else, 2000

[9] Richard H. Thaler describes the real world in fascinating detail and perspective, in: Misbehaving – The Making of Behavioural Economics, 2015

> each entry in a land register — such as the Austrian land register — alters rights, in so far as the rights of the person who has requested that entry arise only after the corresponding entry has been made therein. Maintaining the land register thus constitutes an essential component of the preventive administration of justice in the sense that it seeks to ensure proper application of the law and legal certainty of documents concluded between individuals, which are matters coming within the scope of the tasks and responsibilities of the State.
> In those conditions, national provisions which require verification, by recourse to sworn professionals — such as notaries — of the accuracy of entries made in a land register contribute to guaranteeing the legal certainty of property transactions and the proper functioning of the land register and relate, more generally, to the safeguarding of the sound administration of justice, which, in accordance with the case-law of the Court, constitutes an overriding reason in the public interest."[10]

The judgment concerns Austria directly but extends in substance to many other European and non-European civil law jurisdictions such as Argentina, Belgium, Bulgaria, Congo, Costa Rica, Estonia, France, Germany, Guatemala, Italy, Kosovo, Lithuania, Luxembourg, Mali, Morocco, Portugal, Russia, Spain, Turkey, Uruguay and others, which have created, mostly together with their Civil Codes, systems of notaries holding a public office, being independent of the parties and establishing public, authenticated instruments and/or public registers whose correctness and completeness is publicly guaranteed, and where notarial authentication of transactions in relation to land is mandatory.

The duties of civil law notaries are comprehensively circumscribed by law. They extend to both parties. The notaries have to identify the identity, the legal capacity and the power of attorney of the persons appearing before them and have to decline acts that are legally void, illegal or evidently intended to pursue prohibited or dishonest ends. In the course of the authentication procedure, they must explore the intention of all parties involved, determine the factual situation including the marital status of the parties involved, instruct on the legal implications of the transaction and reflect their declarations clearly and unambiguously in the deed. Furthermore, they are required to ensure that errors and doubts of any of the parties are prevented or alleviated and that inexperienced or unsophisticated parties are not being taken advantage of. Doubts and ambiguities in the articulation of intent must be discussed. They must inform the parties about the legal implications, consequences and risks of their declarations of intent and the contractual agreements contemplated, while also advising them on potential problems concerning performance safeguards. Whenever they have reason to believe that a party may be assuming a risk which, as a result of his/her inexperience, he/she is unable to properly assess, they must actively caution that party in order to ensure a 'level playing field' for all parties involved. This expanded duty to caution is intended to ensure that the declaration to be authenticated is based on careful consideration and reflects true preferences. Based on the intention so ascertained, they must then formulate proposals for the deed to be drawn up.

Civil law notaries are exposed to liability when they fail to advise the parties correctly before authentication. Their efficiency and enforceability is assured by meaningful mandatory

[10] European Court of Justice, Judgment of 9 March 2017, paragraphs 58-59

insurance and public guarantee funds, which intervene in cases of lack of the notaries' funds to cover their liability.

Civil law notaries operate under a system of public supervision and disciplinary sanctions which reach from simple warnings to the revocation of the accreditation. The supervision is independent of the fact that in many jurisdictions notaries have a public office but exercise a private profession. Regularly, disciplinary bodies are the professional Association/Chamber/Council of Notaries and/or Ministries of Justice, with the exception of Hungary, Guatemala and Uruguay, where the disciplinary power is exercised directly by the courts.

The intensity of the notaries' obligations, the preventive effect of liability and the narrowly supervised deontological duties justify the evidential value of the authenticated instruments. They serve to reassure private persons – partners in a transaction as well as third parties – as well as government authorities, public and private registers as well as courts as to the accuracy of the facts and circumstances that they evidence. In a way, they create legally enforceable expectations by replacing subjective trustworthiness through objective evidence. The content of the instrument provides proof of the statements made, even if the person making the relevant statement is not trustworthy. The information contained in the instrument benefits from a – rebuttable – presumption of correctness and truthfulness. Through the presumption of correctness, the document creates legal certainty, and opportunistic negotiation strategies of actors on the market, as described by Williamson[11], are thwarted.

Entries in land registers that are of material importance for the asset situation and create or assure 'legal property' are performed in reliance on the statutorily presumed accuracy of notarial authentic instruments.

With respect to the interrelation between the authentic instruments and a subsequent registration in the context of the transfer of title, broadly described, two approaches have developed in different jurisdictions. In one approach, the instrument authenticates the agreement and consensus and benefits from a presumption of correctness, while at the same time constituting the transfer of title. Andorra, Argentina, Belgium, Bulgaria, Congo and France represent jurisdictions which practice this 'consensus principle'. A subsequent registration has but a declaratory character, albeit important since it can be evoked against third parties. In the other approach, the instrument authenticates the agreement as well. However, the authenticated consensus represents but the initiation of the transfer of title which is completed by the real act of registration, which has therefore a constitutive character. This 'real act principle' is practiced for instance in Austria, China, Colombia, Croatia, Germany, Hungary, Russia and Slovakia.

Irrespective of the historically grown differences, the authentication is the decisive prerequisite for the presumption of correctness and truthfulness which justifies the protection of the good faith acquirer or a good faith creditor in whose favour a mortgage is established.

[11] *O. E. Williamson*, The Economic Institutions of Capitalism, 1985, p. 47.

In any event, the registered owner is presumed to be the owner. An excerpt from the real estate register, which is generally issued for a token amount of money, suffices to provide the evidence required for secure and efficient transactions. Further transaction costs such as a title search or a title insurance are superfluous.

In sum, the meticulous procedure of authentication and registration, combined with the effect of public trust and the protection of good faith facilitate and catalyse transactions in relation of land, be they for the transfer of property, the establishment of other *iura in rem* such as encumbrances, the creation of secured long-term rights to land use, or the creation of collateral as credit security.

III. The preventive administration of justice and litigation

1. Litigation between parties to contracts

The eventuality of litigation adds to transaction costs and decreases the legal certainty with respect to executed contracts. The crucial objectives of notarial authentication and of registration of private transactions are the creation of legal certainty, the reduction of disputes between contracting parties, the alleviation of the burden of curative justice, and thereby a significant saving of cost and time.

In fact, the assumption that the caseload of litigation regarding property or mortgage rights before courts is very low where notaries intervene is verifiable. Already in 1996, Benito Arruñada assessed that in Spain the notary's involvement in transactions "reduces the litigiousness […] and produces a positive externality by reducing the demand for judicial services and contributing to the "legal peace" which lawyers normally consider to be a desirable public value".[12]

Still, empirical evidence is sketchy. I present here the answers to the questionnaire in the referenced study: Andorra reports that litigation with respect to real estate concerns exclusively the period of relations preceding the notarial intervention and that once the notary has authenticated the documents, no litigation is known; in Germany, the Supreme Court received 6,531 new civil law applications in 2015 of which 213 concerned real estate (140 cases concerned contracts, 45 problems of possession and property of real estate, and 28 other *iura in rem),* which is 3.26% in total and 0.69% for possession and title; in Italy, court proceedings with respect to property rights in real estate are "close to zero"; in Lithuania, courts of first instance heard 212 cases concerning the transfer of property of real estate in 2015, out of a total of 208,852 cases, which is 0.1%.

The situation is different in the USA, where real estate transactions are in the hands of lawyers and realtors and no register protecting good faith exists. In a Special Report on "Civil Bench and Jury Trials in State Courts, 2005", dated 9 April 2009, the Bureau of Justice Statistics listed 1,633 real property cases out of a total of civil trials of 26,948, which is 6.1%. It is remarkable that of these 1,633 cases 963 cases, i.e. 3.6% of the total, are related to "title

[12] B. Arruñada, The Economics of Notaries, European Journal of Law and Economics, 3/1996, pp. 5ss./ 7

or boundary disputes". They do not play any significant role in jurisdictions with reliable cadastre and registers, which protect the good faith of the acquirer.

2. Judicial proceedings against notaries/lawyers

The profession of the notary is regulated. This starts with high professional entry requirements and a controlled duty to ongoing training. In addition, notaries are supervised by their professional associations as well as by State institutions. Finally, clients are protected by the notary's liability but also by mandatory insurance and guarantee fund schemes. One of the effects of these combined requirements is a low number of disputes involving notaries.

For the Member States of the Council of Europe, the European Commission for the Efficiency of Justice (CEPEJ) stated in 2014 that, indeed, "[i]t has to be noted that the percentage of notarial documents actually challenged by the parties before a judge is very low", in contrast to disputes between clients and realtors and/or lawyers[13]. Andorra reports that no disputes reach the courts; Estonia confirms that "there are practically no court proceedings against notaries in real estate matters in recent years"; in Italy, the number of court proceedings involving notaries is "close to zero" according to the answers to my questionnaire, while CEPEJ reports that "only 0.003% of notarial deeds concerning real estate are challenged before a Court every year (and the number of non-notarial contracts challenged every year before a Court is instead much higher)"; Kosovo has until now not registered any case against notaries; Lithuania reports one case against a notary, all years since independence combined.[14] Outside the CEPEJ, Colombia reports that litigation involving notaries is about 0.02% of all cases; Korea reports 1 to 3 cases per year against notaries, as compared to 50 cases against lawyers and 100 to 150 cases against realtors.

A study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, although mostly critical towards notaries, quotes two authors,[15] of whom one confirms that only one authentic instrument out of thousand becomes subject to a court dispute in Germany,[16] whereas the other asserts that in 2003 out of 4.5 million French *actes authentiques* only 4,000 gave rise to negligence claims against notaries.[17]

Given the constancy of these figures, the CEPEJ does not exaggerate when concluding "that the pre-emptive filter of the notary screens courts from a large amount of extra workload."[18]

Again, the picture is very different in the USA. A report on data collected by the American Bar Association (ABA) for the period of 2004 to 2007 reveals "a dramatic spike in lawsuits

[13] European Commission for the Efficiency of Justice (CEPEJ), European judicial systems – Efficiency and quality of justice, Edition 2016, Chapter 14 – Notaries, p. 9
[14] CEPEJ Study, p. 9
[15] P. Sparkes EU Study, "Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens" Study commissioned by the European Parliament Policy Department of Citizens' Rights and Constitutional Affairs, 2016, p. 160
[16] R. Geimer, The Circulation of Notarial Acts (XXIII International Congress of Latin Notaries) p. 7/29
[17] H. Dyson, French Property and Inheritance Law, 2nd ed, 2003, p. 8
[18] CEPEJ Study, p. 9

filed by sellers and agents against buyers, buyers against sellers and agents, brokers against title and mortgage companies and even lawyers against lawyers".[19]

The successor ABA Study for the years 2012-2015 by the Standing Committee on Lawyers' Professional Liability on the "Profile of Legal Malpractice Claims" extends the previous findings and reveals that since the 2008 subprime disaster and recession, real estate claims have dropped but still reach 14.33% in 2015. For the years 2012 to 2015, real estate matters accounted for 14.89% of all claims against lawyers, which corresponds to 6,577 out of a total of 44,185 cases.[20] That is the second most important category of malpractice claims, behind personal injuries claims. Real estate law "includes legal activities dealing with all aspects of real property transactions including, but not limited to, real estate conveyances, title searches and property transfers…"[21]. "32.66% of all errors reported relate to the preparation, filing and transmittal of documents."[22]

IV. Costs of transactions in the sphere of real estate

The establishment and transfer of a formal property title to land as well as its encumbering and mortgaging necessarily entail transaction costs, in search of legal certainty. Some of them "occur before the exchange. These include gathering information about prices and alternatives, ascertaining the quality of the goods and the buyer's or seller's credibility, and so on. Other costs occur at the point of exchange. These include waiting in lines, paying notaries, purchasing title insurance, etc. Finally, some transaction costs occur after the exchange. These include the cost of ensuring that the contract is enforced, monitoring performance, inspecting quality, obtaining payment, and so on. The terms "coordinating," "enacting," and "monitoring" costs refer to the time dimension of transaction costs, whether the costs occur pre, during, or post exchange."[23]

The search of legal certainty is not specific to the common law or the civil law. Both traditions, of the common law to rely on private initiative to create legal certainty and of the civil law to rely on authentic instruments and public registers, target the protection of private interests of participants on the market. The public character of the latter approach points to a policy conviction that the creation and protection of trust and good faith in private transactions through legal certainty is also a public and societal responsibility and not a hidden agenda of state bureaucracies. The authentic instrument is part of social infrastructure.

Authentication and registration are as much part of transaction costs as title search and title insurance. Whereas in common law systems authentication costs do not occur because authentication does not exist and registration costs are normally low since the probative value of registration is reduced, civil law jurisdictions do not need title search and/or title insurance.

[19] D. Silva, Legal Ease, San Jose Mercury News (California), 27 March 2009

[20] American Bar Association (ABA), Standing Committee on Lawyers' Professional Liability, Profile of Legal Malpractice Claims 2012-2015, September 2016, pp. 11-13

[21] ABA Study 2016, p. 29

[22] ABA Study 2016, p. 27

[23] J. Wallis/D.C. North, Measuring the Transaction Sector in the American Economy, 1870-1970, in: Engerman/Galman (eds.), Long Term Factors in American Economic Growth, 1986, pp. 95-148/98

The costs of one system partly offset the costs of the other system. When comparing costs of the different systems, all these costs have to be taken into consideration. The reality is grossly distorted when empirical research concentrates on the mandatory public costs of authentication and neglects the equally unavoidable private costs of title search and title insurance.

With these correct methodological elements in mind, Peter Murray has conducted a study in 2007, where he compared costs of conveyance in civil law and common law jurisdictions. He found that for the sale of a piece of land and a house built on it at a price of 250,000 €, the percentage of notarial fees and costs were 0.37% for Estonia, 1.08% for France and 0.36% of the price for Germany. The equivalent costs of conveyance were 0.72% for the United Kingdom (England and Wales) and 0.65% for the USA (upstate New York).[24]

We do not dispose of more recent data for the United Kingdom and the USA, but I am confident that they have not dramatically changed since 2007. However, I have updated the data for the European States in 2017 and found that they increased from 0.37% to 0.4% in Estonia, from 1.08% to 1.32% in France and from 0.36% to 0.42% in Germany.

I have also received data in 2017 for other jurisdictions and for a different price scenario. They are published in my above referenced study. For illustration purposes, I present here the percentages of notarial fees and costs of some of them for the 250,000 € sales price scenario: They are 2% for Argentina, 0.98% for Belgium, 0.3% for the PR of China, 0.4% for Colombia, 0.18% of Croatia, around 0.5% in Italy, 0.45% in Lithuania, and around 1.75% in Mali.

A comparison of the costs reveals the following:

Firstly, cost effectiveness is not an element inherent in the common law or the civil law system. Within the civil law jurisdictions, the majority of States demonstrates that the public policy objective of legal certainty by the administration of preventive justice is reconcilable with cost effectiveness by a regulated, tariff-based fee system. There is no indication that tariffs lead structurally to unmeritorious rents and that de-regulation rhymes systematically with cost-effectiveness. More particularly, there is no empirical indication that the involvement of a civil law notary in real estate transactions causes corruption and bribery. The phenomena of corruption and bribery cross the common law divide as much so as the usurpation of political power by private business interests. However, in a number of jurisdictions conveyance fees and costs are high as compared to others. This is neither a systemic issue nor one of professional abuse but of legal policy and the concrete determination of tariffs. Governments and the legislator must take the objective of accessible preventive justice into account when formulating their tariff structure.

Secondly and in support of the above, conveyance costs, be they caused by notaries or functional equivalents and registration fees, are regularly minimal when compared to the costs

[24] Peter Murray, Real Estate Conveyancing in 5 European Union Member States: A Comparative Study, Condensed Report, commissioned by the Council of the Notariats of the European Union, 2007most of

and fees of realtors/brokers. Keeping in mind that the notarial profession is regulated in most countries and realtors are not regulated, it is impossible to maintain that the fact of the regulation of a profession has a systemic upward impact on their fees and costs.

V. Codification and Costs

The overwhelming majority of the newly independent post-soviet States, but also Mongolia, the PR of China and the Balkan States, have opted for a systematic codification of their substantive civil and commercial law in Civil Codes and their procedural law in Civil Procedure Codes. German development institutions such as the GIZ were an active partner in the codification process in most of these endeavours.

Correctly, the States were not deterred by the empirically unfounded insinuations of the 'Legal Origins' theory, according to which civil law is associated with a heavier hand of government ownership leading to corruption, shadow economies and high unemployment, while common law is associated with more efficient protection of private property, lower formalism of judicial procedures, higher independence of courts and judges, higher protection of shareholders and higher income per capita, better reactions to economic shocks and higher productivity gains.[25]

Rather, they have understood that codified law that defines formal title to property of movable and immovable assets as well as other *iura in rem* such as encumbrances and mortgages, that establishes rights and obligations in contractual relations without reducing the autonomy of contracting, and that provides for procedures of public registration of rights to land is an efficient element of preventive justice. A Civil Code is a politically provided public good that creates legal certainty and predictability. It protects trust and good faith transactions and reduces transaction costs.

These assumptions are evidenced by data on the expenditure by private persons for the judiciary and legal services in common law and in civil law jurisdictions: In 2015, a study commissioned by the Council of the Notariats of the European Union covering both common law and civil law jurisdictions found that private expenditure per capita for the acquisition of legal services amounted to 460 € in 2008 and 426 € in 2010 in the United Kingdom and to 432 € and 391 € respectively in Ireland, while in Germany and the Netherlands it was less than 200 € for both years.[26]

The results are accentuated by extending the research to the USA. In 2016, Thomson Reuters Executive Institute reported that the legal services market in the USA amounted to 437 billion

[25] R. La Porta/F. Lopez-de-Silanes/A. Shleifer/R.W. Vishny, Law and Finance, in: Journal of Political Economy 106(6) (1998), pp. 113-1155; revisited in R. La Porta/F. Lopez-de-Silanes/A. Shleifer, The Economic Consequences of Legal Origin, in: Journal of Economic Literature, 46:2 (2008), pp. 285-332; I have discussed and refuted these insinuations in the study "The Economic Relevance of Notarial Authentic Instruments"

[26] H. Berrer et al., Dimensions of Legal Certainty in the EU, Study commissioned by the CNUE in 2015, pp. 8-9 and 129-137

USD[27], with a population of 323,157,513[28]. This leads to a per capita private expenditure, measured as total turnover on the legal services market, of 1,352.30 USD.

VI. Conclusion

The sustainability of market economies depends on a mutually enabling interrelation of private business activities performed in the individual's interest and the creation and maintenance of physical and social infrastructure by the State. One of the pillars of social infrastructure is the administration of justice. In most civil law jurisdictions, the administration of curative justice is complemented by preventive justice, which is aimed at securing rights and obligations, among which prominently formal title to property, including property of land. The objective of preventive justice is the establishment of legal certainty; its instruments are the codification of (land) law as well as the notarial authentication of private legal acts and the registration of title and other rights to land. Legal certainty creates conditions under which private persons are enabled to unfold their creative potential and innovative capacity without having to fear that the results of their activity are taken away arbitrarily. Legal uncertainty encourages arbitrariness and the use of market power and force, while preventive justice facilitates the pursuit of individual freedom and interest and thus acts as a catalyzer for market relations built on innovative performance.

The administration of preventive justice costs time and money. These costs are set off by a significant reduction of litigation as well as the elimination or at least the reduction of other transaction costs.

Key words: State and market; infrastructure; good faith and legal certainty; authenticated instruments; litigation.

[27] Legalexecutiveinstitute.com/wp-content/uploads/2016/1
[28] www.census.gov/data/datasets