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Vortrag ‚Land and Poverty', gekürzt

History, including the history of World Bank lending, teaches lessons about the dynamics and sustainability of economic growth. The market does not do it all. Ideas and ideologies to the contrary are based on the 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.

Ever since Jean Bodin in the late 16th century[1] and Adam Smith in the 18th century[2], thinkers of political economy have insisted that without physical and social infrastructure and economy based on money cannot develop. We witness today that whenever and wherever public expenditure for infrastructure decreases, unproductive public expenditure for repression increases.

The administration of justice is part of social infrastructure. Nobel prize laureate Douglass North studied economic history and 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"[3]. And in the wake of unsuccessful structural adjustment programs and shock therapies of privatization, the World Bank confirms in its World Development Report 2017 that "empirical studies have revealed the importance of law and legal institutions to improving the functioning of specific institutions, enhancing growth, promoting secure property rights, improving access to credit, and delivering justice in society."[4]

The administration of justice has a curative and a preventive aspect. 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.[5] 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.

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.

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[1] Jean Bodin, The Six Books of the Republic, (Les six livres de la République, 1583), Sixth Book, Chapter 2.
[2] 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)
[3] D.C. North, Institutions, Institutional Change and Economic Performance, 1990, p.61-63
[4] The World Bank, World Development Report 2017, 2018, p. 83
[5] Hernando de Soto, The mystery of Capitalism – Why Capitalism Triumphs in the West and Fails Everywhere Else, 2000

Most 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. For instance, the European Court of Justice (ECJ) confirms the concept and the conviction that the maintenance of public registers and the guaranteeing of their accuracy by notaries "constitute 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."[6]

The duties of civil law notaries are comprehensively circumscribed by law. They 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; 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; they are required to ensure that inexperienced or unsophisticated parties are not being taken advantage of; 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. Civil law notaries are exposed to liability when they fail to advise the parties correctly before authentication. The efficiency and enforceability are assured by mandatory insurance and public guarantee funds. They operate under a system of public supervision and disciplinary sanctions which reach from simple warnings to the revocation of the accreditation.

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. Through the presumption of correctness, the document creates legal certainty, and opportunistic negotiation strategies of actors on the market, as described by Williamson[7], are thwarted.

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.

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, empirical evidence documents that litigation in land-related relations is very significantly reduced in jurisdictions with notaries and public registers. Italy reports that disputes before courts with respect to real estate are "close to zero"; Germany reports 0.69%

[6] European Court of Justice, Judgment of 9 March 2017, paragraphs 58-59
[7] *O. E. Williamson*, The Economic Institutions of Capitalism, 1985, p. 47.

of cases for possession and title of land and Lithuania 0.1%. Conversely, in the USA, where real estate transactions are in the hands of lawyers and realtors and no register protecting good faith exists, 3.6% of all cases before courts concern title or boundary disputes.

As to challenges of notarial instruments before courts and claims against notaries, Italy reports 0.003%, Colombia 0.02%, and Lithuania reports one case against a notary since its independence almost 30 years ago. The European Commission for the Efficiency of Justice (CEPEJ) concludes "that the pre-emptive filter of the notary screens courts from a large amount of extra workload."[8] Again in comparison, the American Bar Association (ABA) reveals that for the years 2012 to 2015, real estate matters accounted for 14.89% of all claims against lawyers.[9] That is the second most important category of malpractice claims, of which "32.66% relate to the preparation, filing and transmittal of documents."[10]

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."[11]

Peter Murray has conducted a study in 2007, where he compared costs of conveyance in civil law with notaries and common law jurisdictions without. 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).[12]

I believe that these costs have not changes dramatically. I add data which I have collected myself in 2017 for other jurisdictions. [13] Each time for the 250,000 € sales price scenario, they amount to 2% in Argentina, 0.98% in Belgium, 0.3% in the PR of China, 0.4% in Colombia, 0.18% in Croatia, around 0.5% in Italy, 0.45% in Lithuania, and around 1.75% in Mali.

[8] CEPEJ Study, p. 9
[9] American Bar Association (ABA), Standing Committee on Lawyers' Professional Liability, Profile of Legal Malpractice Claims 2012-2015, September 2016, pp. 11-13
[10] ABA Study 2016, p. 27
[11] 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
[12] 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
[13] Rolf Knieper, The Economic Relevance of Notarial Authentic Instruments, 2017

When comparing the data, we realize that cost effectiveness is not an element inherent in the common law or the civil law system. 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.

Finally, it may be recalled that a systematic codification is an efficient element of preventive justice, when formal title to property of movable and immovable assets as well as other *iura in rem* such as encumbrances and mortgages are clearly defined, rights and obligations in contractual relations are firmly established, and when procedures of public registration of rights to land are provided for.

This assumption is 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.[14] 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 USD[15], with a population of 323,157,513[16]. This leads to a per capita private expenditure, measured as total turnover on the legal services market, of 1,352.30 USD.

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

[15] Legalexecutiveinstitute.com/wp-content/uploads/2016/1

[16] www.census.gov/data/datasets