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Recovery Faith On The Real Estate Sector

The present world crisis shows the need for legal certainty and for a reliable system for the transfer of real property, that preventively limits the scope for litigation while keeping itself fundamentally effective, fast and safe.

The failures that gave rise to the present crisis in my opinion were as follows:
failure of the model of the individual who makes perfectly rational choices, and of the "do-it-yourself" methods especially about mortgages related to real estate, which was the foundation of neoclassical economics; this means that when it is a question of primary interests (housing, health, liberty), the "*laissez-faire* option" which is indifferent to asymmetries is inadequate; the market will not reach an optimal state of knowledge, and errors of judgement bring about "gaps in optimalism" which must be overcome by non-market means.

Knowledge is an existential value that guarantees trust between citizens and liberty. A citizen without information is a citizen without an opinion, because he does not have the knowledge to decide. So true equality and civicness must be implemented by requiring models of transparency and strengthened information to eliminate the information gap.

Never like nowadays a function of preventive justice has been needed, by offering certainty in the transfer of rights through the valid recording of transactions in the system of public registers, and guaranteeing the safety and legality of transactions and therefore of the system, without burdening the State.

Balance in negotiations cannot be achieved without the advice and control of an independent legal specialist who is disinterested and offers the client who is not able to bear costly consulting structures a genuine service that actively aims for his understanding and awareness of the commitments he is entering into.

Other ambiguities come to attention:
- in depersonalised global markets with faceless international actors, the traceability of data on persons and things is crucial: unscrupulous individuals can perpetrate "identity theft" or "property and mortgage fraud" as seen in US, stealing the name and/or house of others, by taking advantage of the effective non-existence of systems for certifying persons' identities, of the unreliability of data in land registries and of the absence of guarantees on the web;
- non-application of controls to uphold general principles and essential values: speculative impatience in the present has imposed short-term results, instead of thinking in solid long-term existential expectations. But, learning to live together necessarily has a long-term horizon, because acting always brings with it the responsibility of participating in the construction of one's own community;

- affirmation of a model of legal decision-making in which the cost/benefit approach sees any legal sanction as a component of the price ("*law-as-price approach*"), in a framework of indifference to values, so as to obtain in the "here and now" reduced costs, but which ends up with a misinterpretation of efficiency, with protection only for those who are able to pay the fine.

Everybody should agree that this century needs a set of *legal standard* of basic principles, grounded in the values of transparency and monitoring; laws are a means for transferring those values to the economy ("rule of law").

Value is created by the secure "transformation" of goods and assets into formal legal ownership title attesting to the legitimacy of the economic resources, fixed in the stable, reliable, enduring and standardized certainty deriving from the certification of the legal document that represents them: in this way, title acquires qualities similar to the universal nature of money (*moneyness*).

This principal result, which frees up the user's resources and energy, can only be ensured by a jurist who is institutionally neutral.

The model works if there is the certain possibility of monitoring and tracking securely what happens to those ownership titles having *moneyness* in the paper-trail, through the public civil-law registries. Indeed, every country has a register named "land register"; but beyond the same name, only a land register, as the civil law ones are, can be really useful, because legal steps are recorded in a qualifying sequence whereby only the consistency of the preceding title with the succeeding title confers legitimacy and enforceability (so called *registration system*). Only this arrangement that certifies conformity of right and ownership, and the graduation of priorities, prevents litigation about ownership and renders title insurance useless.

Otherwise it is only a mere archive on the Anglo-Saxon model, useful only as a repository for documents (the so called *notice system*): but the unreliability of the uncontrolled input data makes it necessary to look elsewhere for a surrogate for certainty, by way of insurance, which however permits a purchaser to recover his money but not the lost asset, and has its own costs as well.

The error in certain proposals is to imagine reducing costs without appreciating the intrinsic value that form adds to the quality and security of legal relations, particularly with regard to its real users, those indirect but end users who are judges (*Judges as users*).

So every improvement initiative must propose reforms that increase the confidence that a magistrate called upon to judge has in an institution and in the product of its actions. This model minimizes the costs of providing the judge with the evidence necessary to convince him.

The positive external effect is a reduction in the call for judicial services by contributing to the legal peace, which is a public value.

There is a double level of production of external factors, not only within the contract, but also external to the transaction: it is the economic theory of "double-sided markets", where the positive action of the "professional fiduciary service platform" connects two groups of users (parties to the transaction; third parties), because it reduces potential future transaction

costs for those who are currently third parties, i.e. potential mortgage lenders, or tomorrow's buyers, indeed the general public, in a double level of factors: the direct one between the parties to the contract, and the indirect one having to do with third parties.

The market, then, must have rules for control and supervision; the response should be global in its awareness, but national in its implementation, in the sense that it is not true that “one fits all”, a single model cannot be adopted, but the homogeneous nature of the principles fixed by the international community must be adapted to the history and the tradition of the national territories.

The basis for a modern framework of general values of justice is the primacy of the law, as opposed to the supremacy of the power of economic interests, that ensures that the "product" is not polluted and opaque, and has not been tampered with.
Infact a legal system that is truly an “area of justice” is not satisfied with pure economic models, as subjects them in advance to a “legality test” as a function of rules of justice and certainty.

This asks to be arbitrated by a neutral validation function who scrutinizes up-front the interests that are to come into play using the criterion of imperative rules, and is based on “private independent professional infrastructures with an inescapably public mandate” which, as “agencies trusted to knit up social relations", provide protected spaces for citizens by way of knowledge and proximity (*TTP-Trusted third party*).

So the service paradigm which I am referring to, should be the “public agency” relationship between client and professional (*K.J. Arrow)*, at least with respect to a number of highly specialised and sensitive “products” for those who are not sufficiently expert, as this leads to an “optimalism gap” because the user lacks the knowledge necessary to make decisions (ignorance, uncertainty, asymmetry of information), and must delegate his freedom of choice to “knowledge workers” who possess specialist knowledge.

The seriousness of the consequences of errors of judgement means that where it is a question of the primary/existential interests of the individual (as real estate sector surely is), the market solution is intolerable.

Non-market remedies must be used, consisting of compensatory rules under the aegis of the State.

The element of guarantee that re-establishes security is the personal relationship of trust. Reciprocal trust between individuals has an economic value: the asymmetry is overcome through the cognitive substitution of ethics and trust in the competency and good faith of the professional.

Such type of fiduciary trust must be enabled by public authorization; it is not sufficient to possess a technical ability.

The civil law tradition, offers a best practice model of:
- actuators of fiduciary professional representation in the territory, of the interests of people, such that:
- are a guarantee of the general interest in business,
- oppose direct commercial exchanges where the stronger party always wins,
- defend the user/s' liberty of choice in a disinterested manner,
- by virtue of a sort of social proxy to:
- right the asymmetries that weigh on weaker parties,
- at the same time safeguarding the imperative values of the State so that the dissociation between "rights of the citizen" and the "consumer" is reassembled.

The structure of the "civil law - or latin - service model" stabilizes the market according to a system of checks and balances based on "impartial legality" underpinned by the concept of justice as a generalized value.

This requires that an independent function carry out a legality check in an *ex ante* pattern, before matters enter the legal arena and thereby create consequences for all those involved. This is the role of gate-keeper, a public operator-third party, checking legal documents that are

presented at the "gates of access to legality" and subjecting them to the "test of legality".

Why public?
Actually the point of balance of this preventive system cannot be left to private operators and their legal champions (whose maximization of their selfish own profits is legitimate of course), but are in permanent conflict of interest with common values.
Rules governing the trusted Latin professional,
- as a private independent specialist consultant, to whom functions of a public agency have been outsourced,
- authorized by way of strict entry requirements,
- in a system of penalties especially for the professional's reputation which induce the agent to (prefer to) carry through the interests entrusted to him,
give an optimal model because marry the maximization of the efficiencies of private action and public honour and the minimization of the inefficiencies of the public function.

This positive function has a value in economic terms, and is pro-market, because the assignment of strict responsibility resolves the problem of the allocation of risk regarding legality, relieving users of it, and moves toward a model of society that seeks a high degree of competitiveness but wants it to be subject to the principles of sustainable development and balanced growth; to stabilize the market by providing a system of checks and balances.

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