

Part III

Conclusions

Conclusions of the White Paper as a Base for the Regulation of the Property Rights

I

Despite the fact that the Property Rights – consecrated in almost all the constitutions all over the world – naturally encompass both movable and immovable goods, it is currently verified that the later – the real estate properties – include a whole class of assets **corresponding to something between 50% and 75% of the “national wealth” of each country.**

Besides the relevant *motivations* that the ownership or the utilization of this kind of goods provoke, and always have provoked, in the populations — *motivations from which it is proved to be derived the very dynamics of all the industrial activities and of the economy of each nation*¹, *the physical and documental existence of these assets and of their ownership correspond to the collaterals, real and indispensable, for their financial conversion in circulating capitals*², with which, thus, it is *significantly extended the expansion of those individual economies.*

The global dimension of this kind of assets, as before quantified, is enough to give a perspective of the importance of the trading operations that, with them, can be done and that currently and actually have place in each one and in all the countries, with the correspondent expression in the normal importance of the commercial, financial and industrial activities, forming, as such, *the biggest of all the specific markets*³ and of their global whole.

And it is so, naturally in the condition that “the product” which is traded in it (the real estate property), can anyway be subjected — as it arrives with any other market — to a certain *standardization* in its real contents, which correspond in its common essence, as it is well known, to the PROPERTY RIGHTS.

In the financial markets, the outcomings of the “black Friday” in 1929, with the crash of the New York stock exchange, the consequent

¹ According many studies of distinguished authors as the Profs Douglass North, Mancur Olson; Richard Pipes, David Landes.

² According to the famous theories of Hernando de Soto.

³ According a recent inquiry of “The Economist”.

falling of values, the raising of the bank deposits, the loss of trust in any moveables, and their reflexes in every economy, implied the structuring of the whole lending activities in every country, with the organization of a “banking system” in each one of them, under the control of a “central bank”, exactly with the mission of avoiding any first symptom of that chain of nasty events (fall of the currency values and loss of the public trust in it). And this structural solution proved, in the long run and everywhere, to be efficient and surer.

But, in the property field (despite the fact that, as said, it is predominant in the whole “national wealth”), the strong financial crisis in the end of the 80’s in the United States⁴, which had its origin in the *crash of the real estate values, has not been felt, till now, as sufficient for promoting the same type of stabilizing structural arrangements* — that has been taken in the financial markets

Indeed this crash had just been prompted by a sudden recess of the demand for the correspondent goods, simultaneous with a prolonged over-supply in an ambiance of excessive private indebtedness (having as collaterals this type of assets) and of growing interest rates

If it has not had the universal repercussion of that one of the “black Friday”, that real estate crisis has even been followed by similar situations in other countries and in other occasions.

Indeed, if it is already recognized that any trouble in the *currency value* will have consequences with strong importance in the running situation of the correspondent national economy, it is not yet accepted that a parallel trouble in the *property value* will produce a similarly strong effect in the evolution of the same national economy.

And this kind of consequences is even less clarified in the sphere of the aggregate economies⁵, as it is the case of that of the European Union, mainly as it shall be after the next integration in it of a relative influent mass of national economies, in which the *private property* have been abolished along some decades, and has not yet been sufficiently restored in its legality and regulation.

And, since this danger of coincidence — between that indebtedness and the fall of the real estate values — goes on currently existing in different countries⁶ that enjoy the lowest interest rates after many years,

⁴And for instance in United Kingdom, as it is referred in the quotation of “The Economist” in the following note 11.

⁵In its issue of 5-11 June 2004 in the page 12, the same “The Economist” reckoned that any possible fall in the real estate prices, of the type of that which was reported at the time in different countries around the world, would have a much heavier thrust into the world economy than the then menacing rise of the oil prices.

⁶See “The Economist”, 10th -16th January 2004, “Monetary policy : The trouble with bubbles” page 11 : “How central banks should respond to *surges in prices of*

this situation may constitute — in view of the future and inevitable rising tendency of those rates — a *very menacing situation*, not only for the real estate industry but for the whole corresponding economies as well.

In the present times, in which the participation and the reciprocal influence of each economy in the global one is more and more felt (due to the growing fluidity and to the mutual relationship),

- on one hand, in view of the beneficial consequences which has been registered through this *mutual economical relationship* (reflected in an expansion of the world economy never obtained before)

but, on the other hand, in view of :

- *the lack of coordination and incongruences within the different national legislations on the subject,*
- *the breach of the normal market rules,*
- *the lack of convenient enforcement of the Contractual and Property Rights,*
- *the frequent risk of falling of the property values in economical environments with an enlarged home ownership,*

situations which still exist in this so important sector, according to the preceding chapters of this WHITE PAPER (the *Introduction* and the *Countries' Reports*), it is considered as opportune, convenient, and even indispensable, the establishment of a

Regulation of the Property Rights

In this way it is supposed to be possible to give practical effectiveness to what it is stipulated in the Art 17 of the European Chart of Fundamental Rights and of the draft of the European Constitution, having in mind the “possible need of regulation of the referred Rights, *for reasons of general interest*” as it is stated in the relative texts.

And this is exactly the case, not only in the aim of preserving in them, as said before, everything which is proved as indispensable for the individual and collective prosperity of the nations, but also to define the guide lines to be adopted in these conformity, regarding the main aspects of their enforcement, having in view the relationships :

assets, such as shares and houses, over and above their impact in inflation, has become a hot issue for central banks everywhere”.

- of the owner with the possessed good
- of the owner with possible users of the same good
- of the owner with the Community to which he belongs or with any of its members
- of the same good with the whole economy where it is included, regulation for which the *following bases* are proposed.

II

Despite it implies a collective education (gradual and more or less extended according the economical development of each country) the intension of the following proposal is to create, as an objective, *a complete autonomy and freedom of individuals and governments regarding their decisions* regarding the PROPERTY, balanced with an also complete responsibility for the respective consequences in their ambit and abroad.

From this objective derive the following basic principles :

1. The establishment and maintenance of a perfect *freedom of contracting*⁷ in the relations among individuals, institutions and Public Administrations without coercions or limitations for all the participants.

⁷Under any present and democratic citizenship, it is also assumed that the State, the collective entities and the private individuals must be taken as *operatively free, economically aware and sufficiently responsible* to accept the obligations which make part of the contracts that — by their own will — they have agreed upon among them , without any previous (and even less, further) *prerequisites and restrictions* (frequently dictated by the State) to that contractual freedom.

These *prerequisites and restrictions* are considered as being unacceptable in the *conditions of human maturity* (the so called “majority” at the age of 18 years) in which the correspondent democracies grant the right of vote to the citizens as such, considering them in those conditions of awareness and responsibility, which must be parallelly adopted in this other context.

It would be a paradox if, for instance, a certain person, with his completely free vote, would be considered, on the one hand, appropriate for taking part in the decisions about the legitimacy of abortion or the entrance of his country in the European Union, and if, on the other hand, it would not be ascribed to him the required maturity for fixing, freely and without the State guide lines, the value and the time span for the renting of his flat.

The State is, thus, must not be allowed to have a systematic intervention in those private relationships among the citizens, *only under the contractual point of view*, through an invoked role of “protector” or of “tutor”, concerning individuals belonging to groups of persons that are supposed socially or economically handicapped, intervention that powerfully obstacles the normal running of the markets.

This is especially envisaged regarding the bad consequences of this intervention for the *general and global interests* of the peoples, consequences that it is proved these

2. The lawful concretion of those entailments, with the legal corresponding rights and engagements, in parallel with those inherent to the *private property*⁸, except for reasons of proved collective interests and within limits, conveniently, well defined in their whole, and *internationally publicized*.
3. The strengthening of the principle of *free competence*, as the best way for the stimulation of the performance of persons, institutions and governments.
4. The recognition of *the market* — resulting from the interaction of offer and demand — as the only base for definition of the property values in each moment and in each place.
5. The acceptance of the *enlargement of the demand source area to the international and world dimension*, and of all the aims it may have, including the investment of capitals in search of better yields.

... since it is of the generalized collective trust on the perennity of this principles that depend the economical and social stability and the progress of the human communities⁹.

In the sequence of these principles, it comes for the Governments a need of intervention in the real estate markets, with the more reduced extent it can be possible, corresponding precisely to the following points:

A) Guarantee of the *property rights enforcement* (within the legal bounds necessarily defined in each country, but duly published and divulged) and of the freely established *contracts enforcement*, with the quick correction of the possible infringements through the judiciary and the police

Under this point of view and having in consideration:

- a growing complexity of the social, political and administrative structures inside which we live;
- the resultant *rational ignorance* at which individuals may be subject regarding their contractual;

prerequisites and restrictions to the Property Rights always cause to the potentialities of economic and social development of the communities, as it is documented in the two first chapters of this WHITE PAPER.

⁸Contractual and property rights here jointly and parallelly considered, according not only with some classic authors as James Madison, but also with many present academicians, as it is the case of Ronald Coase and Mancur Olson.

⁹According to the principles sustained by Ronald Coase.

In this concern, and having in mind

- the *growing complexity* of the political, social, and administrative structures inside which we live,
- the *resulting rational* ignorance to which, under many aspects, the individuals are normally subjected in these contractual relationships before engagements

and in face of

- the volume, dispersion, diversity, and variable trustfulness of the informations that shall be allowed to them,

it is here pleaded the adoption — as a complement to the present regulation — of *a series of contract models, or formularies, for every type of contract concerning properties, in which the private individuals or collective entities may come to intervene.*

In the relative texts, all the possible options will be contemplated in each case, *not missing to assign, to each possible contractual party, the freedom he shall have to adopt (or not) any of the correspondent clauses, and to introduce in them the values and delays that are supposed to be more convenient to his interests.*

These decisions, in any case, shall be taken after having had the possibility of being acknowledged of the contemporary running market values, through the publication of the relative data, as proposed in V-(2).

B) In the *social role, which belongs only to the states*, with its own resources and through the appropriate measures, to *provide the real estate properties, indispensable for the use of the more deprived layers of the population*; these layers must be well defined regarding the social-economical characteristics of the individuals encompassed in such a way that in each moment this protection must correspond exclusively to those which have no possibilities of self-sufficiency inside a competitive economy, not only because, on the one hand, they are thus dispensed of the collective effort to the common progress, but also because, on the other hand, the (state) resources used to give them that protection must be retired, in growing quantities, from the whole of those that can generate development.

C) The creation of spaces of public utility (as roads, parks, schools, official buildings, etc.).

D) The preservation of the environment.

E) The *collection of taxes* on this kind of assets and on this sector of activities, in a balanced proportion related with that of the other sectors, and compatible with their economical profitability, in a way that it does not invalidate, as a form of investment, its possibilities of competition in the capital markets.

F) The establishment of a *maximum competition, transparency and performance of the real estate markets* in the territories under its governance with the possible *regularity of prices*, values and charges regarding the PROPERTY, through the more reliable, actualized and complete collection, treatment and publicity of the information on this matter, in a national and international enclosure.

III

In view of the characteristics of the *market economy* in which are included — individually and collectively — the countries in the intention of which the present norms are made, and for *all the value aspects* related with the types of goods to which they are referred, it must be *considered those which result, in each moment and in each local market, from the normal running of the correspondent free, competitive and local markets.*

Having this principle in mind and in what concerns real estate properties, *it must be excluded from the criteria to be established in the Communitarian regulation, the adoption of any type of processes aiming the analytical determination of their values*, whatever can be the logic and the rationality of their conception, as much as the mathematical exactitude of the related calculations, or the good intentions in base of their creation and application.

And this because the implicit *unexchangeability* of those criteria and of the values, deducted through these *theoretic and speculative ways*, will tend to substitute, *constantly and in every moment*, privately or officially, those which are practically resultant of the real influence — *permanently evolutionary* — of the normal running of the markets related with real estate (of land, of buildings, of construction, of capitals and of leasings) since these values are *the only ones that can allow to quantify, impartially, actualizedelly, objectively and without biased intentions, the correspondent portion of the wealth.*

In this matter and in what concerns the public administrations, it seems to be essential that, by them, it will be treated independently and separately:

- the indispensable needs of impartiality, actualization, objectivity of the appraisals as much as the integrity, competence and responsibility of their authors, by reasons of general economical interest,
- and the needs, may be equally indispensable, of the wealth redistribution, through the fiscal policy or through any other administrative means, by reasons of social interest similarly obvious, but whose satisfaction is of the exclusive obligation. charge and responsibility of the governments

The adaptation of those goods — in those circumstances with certain values (possibly more reduced) of use or ownership — to other uses and /or to other value levels which may be found as being more convenient by the administrative authorities *for reasons invoked as being of collective or general interest*, (as mentioned before in the points (b), (c) and (d)) must not be legally obtained but in the following conditions :

1. Through the *normal acquisition*, with the best price by means of which this acquisition is possible in the running situation of the local market, acquisition after which the desired standards of use or value may obviously be established by the buyer entity ;
2. Still through the proper running of the same free markets, but *influencing their evolutions* through the introduction in them of an additional offer, adapted and sufficient for giving place to desired value reduction, if it is the case, in the same way that the central banks condition the bank interest rates through the *open market* operations.
3. In the case of the adoption for a certain good, of *another type of use*, it cannot be administratively imposed to its owner differently from that with which the same good was bought, or is being used in the moment, except through the acquisition procedure, before referred ;
4. This acquisition shall have the *compulsory character of an expropriation* (eminent domain) — always by reasons of public and general interest — *but only in the case in which the subject good is undoubtedly in conditions of monopoly*, that is, in the case in which only it can serve the fulfilment of those needs of general interest¹⁰. In these circumstances, if after the expropriation (which

¹⁰ According to the thesis of the Prof. Boudewijn Bouckaert of the University of Gant in “*Introduction to the Analysis of Property Rights : the Civil Law Approach*”.

must have place within a maximum period of one year after notification of the owner) it is not possible, by unforeseen reasons, to give to the property the utilization that justified that expropriation, the expropriator entity is obliged – unless the owner desists from this right — to reverse the transaction done before, without no more charges to the ex-owner but the devolution of the payment done to him.

IV

Concerning the countries which must be considered as coming in the EUROPEAN UNION, both regarding the before exposed principles of enforcement of the Contractual and Property Rights, and regarding those principles concerning the normal running of the market economies, it is admitted to them a period of 3 years for the necessary adaptation of their juridical and administrative structures (property registration, cadastre, etc.), in such a way that, after this period, they can be considered in conditions of participating frankly and being totally beneficiaries of the advantages of the mutual relationship that these new conditions will provide to everybody in the global property markets.

To the countries that, despite been already inserted in the market economy, maintain yet in their legislations some norms and processes that hinder or even impede the normal functioning of this type of economy, at least in some aspects of the real estate activities corresponding for instance to the leasing of urban properties, it must be fixed the same delay for the establishment of regimes of transition capable of determining the respective adaptation to this normal functioning of that type of economy in this field, also for the enforcement of the remaining principles here exposed.

V

To define the role of the governments corresponding to the point II (f), similar conditions that correspond, in the financial field, to the “central bank” of each economy regarding the defence of the “national currency”, it is considered of critical importance, in the *property field* of the same economies, the creation of an entity — say, a “NATIONAL PROPERTY INSTITUTE” — with regulating functions of the correspondent assets and the control of operations worked up with them, having also parallel activities aimed to defend the National Wealth, with similar independence regarding the other departments of the State, by means of the following missions :

1. *The registration of the physical, economical, and patrimonial characteristics of those goods* (geography and survey system, location, topography, dimensions, geological nature and hydrology, agriculture use and forestries, improvements, existing structures and their characteristics, environmental ecological and town planning implications, as much as regarding their economical, financial or patrimonial linkages, etc.) and of the correspondent individual and global values, in base of the current market prices as deduced in (2).
2. *The successive and actualized registration of all the operations constantly made on these goods* (selling-buying, transmission by heritage or donation, renting, engagements and responsibilities as loans by mortgage, encroachments, easements, liens, etc.) including the correspondent values and delays, persons or entities engaged, with mention of all the legal documents in which they are based (contracts, deeds, public grants, subdivisions, licences, etc.). This involves *the regular and periodical publication of the values* — maximum, minimum, average — related to the correspondent periods and to the main parameters and in each market zone, providing the convenient market transparency. This, again in parallel with the *control and divulging* functions of the central banks in relation to the financial activities.
3. *The process of expropriation by reasons of general, regional or national interest* from the part of the State and in these circumstances, *in exclusivity in each country* (no other entity being legally authorized to do it, for reasons of qualification and of constancy of criterions), in every case in which, for these reasons of general interest (II points (b), (c), and (d)), it shall be necessary to *change the use/allocation and/or the ownership* of the subject private goods, as such as, in the reverse sense, for the *procedures of alienation of public assets of the same nature* and that may be convenient to do, which must have place *through previously publicized public auction*.
4. The financial and economical management of the real estate properties in stock, in consequence of the stated in (3). This still in parallel with the identical function of the central banks regarding the financial state reserves.
5. *The regularization of the local real estate markets*¹¹ in the subject country, in collaboration with the regional or local authorities

¹¹The present situation (May 2004) of the British housing market — see “The

(states, regions, counties, provinces, municipalities, etc.) taking as a base the permanent actualized information gathered through (2), in the case of being noted, in the correspondent areas, some sensible and inconvenient changes of prices, mainly in the case of fall of values, through the enlarged publicity of the values attained in those conditions for the acceleration of the normal reactions of a market, this way so extended as possible. This may be accompanied, in the case of abnormal rises of prices and for reduction of the long time-span of the offer's reaction, with proposals (to the Ministry of Finance) of fiscal advantages benefiting the same type of real estate properties in the same market, and (to the respective municipalities) of licensing facilities (shortening of delays, reduction of taxes, etc.) also regarding the same type of properties and locations as incentives for an immediate reinforcement of the offer. This implies the reverse actuation in the case

Economist" May 8th-14th 2004, page 35, "Interest rates : The big bad bubble" — offers a very opportune demonstration of the consequences of the non-existence and of the lack of this National Institute of Property under this point of view of the possible regulation of the house prices: "... Another £9.3 billion (\$16.7 billion) was borrowed against houses in March, taking the amount of outstanding mortgage debt past £800 billion. House prices were 18.9% higher in April than a year ago, according to Nationwide, a big lender. Such a heavy borrowing makes high prices possible, even as high prices make heavy borrowing necessary... While the rest of the country worries about house prices, the Bank (of England) is required by law to focus on the prices of goods and services, not assets. Consumer prices rose just 1.1% in March, according to the consumer price index (CPI), well under the 2% target laid down by Gordon Brown, the Chancellor of the Exchequer. Inflation could even fall temporarily below 1% in the coming months, in which case the Bank would have to account for the aberration in an open letter to Mr. Brown... The International Monetary Fund reckons real house prices are overvalued by up to 35%. Such valuable houses provide collateral for borrowing, and borrowing, in turn, provides strong support to the economy. In the last quarter of 2003, for example, Britons took out more than £16 billions of mortgage debt, secured against houses, which they then pumped into the broader economy... Between 1989 and 1992, for example, the household savings ratio went from 4.9% to 11.9% after house prices crashed. This massive withdrawal of purchasing power helped turn a heady boom into a punishing bust. Should the Bank have acted earlier to stop the bubble inflating?... The law requires it to target inflation, and nothing but inflation, so it could not respond to asset price bubbles even if it wanted to..." From these passages, in the situation described, it rebounds obviously the following conclusions :

- the need of a house prices regulating action
- the impotence of the Bank (of England) for performing such an action
- the need of an entity in the assets field with similar functions;
- the positive effects of the regular (but not excessive) house price increases in the broader economy.

of opposite change in prices (depreciation and recession). This type of activity is again similar to that of the central banks in the regularization of the interest rates in the financial markets.

6. *The divulgence of the verified rates of taxation on the real estate property*, both regarding its total value (total amount of real estate taxes), and its relations (rates of taxation), either with the value of the properties included in all this sector of the “national wealth” (taxed assets), or with the total importance of *the revenues* coming from it, for convenient information of the Ministry of Finance, and for comparisons :
 - (a) with the equivalent rates of taxation applied to other types of activity in the same country;
 - (b) with those which are parallelly practiced in other countries, aspect which must be taken into consideration, having in view the catching and guiding of foreign capitals to their application in this so important field of investment¹², specially for the developing economies.
7. *The control of the normality of procedures of the economical agents in this field of activity*, within the legal and administrative established bounds, again in parallel with the functions of the central banks concerning the financial operators.
8. *The obtainment of the elements which are necessary to the exact knowledge of the value (real property) which must correspond in each economy as collateral to the monetary mass*, for transmission to the central bank for its normal functions of control (currency emissions, global credit, etc.), in a similar way on which

¹²Having in view on this subject, mainly the interest of the developing countries, it must be taken in consideration the importance of the foreign investments of this kind in the United States - importance which is evidenced through the dimension of the respective public and commercial debts - as a promotional factor of the spectacular economical expansion verified in the same country during more than a decade, under different political situations. On the other hand, it must be emphasized the fact that, if there are some decades, the predominance of the international transfers corresponded to payments of products or services, it is now-a-days constituted by capitals searching allocation in better conditions and in amounts much bigger than those for payments and even bigger than the previous total international trade financial movements. Thus, the predominant “product” (or “service”) which is internationally “traded” at present is the best possible modality of application for capitals from anywhere, and the real estate property market - due to the changes meanwhile verified in the competing stock market - may constitute, by means of the principles here pleaded, that best modality.

the lending entities do regarding the liberation of the amounts of the loans in relation with the value of the real estate assets offered as collaterals to them by the borrowers¹³.

For the convenient integration, in an European ambit, of the action to be developed in all the member countries by the here proposed “national property institutes”, we are now here also proposing the creation of a “European Property Agency”, which, in a close collaboration with all of them as its affiliates, shall assure *a real transparency and homogeneity of an only and global European real estate market* and its natural stabilization, goals which must be considered as an essential infrastructure for the future economical growth, power and prosperity of the European Union

VI

The introduction, in the here proposed regulation, of a certain number of limitations and conditions concerning Property Rights diverging naturally from the owners interests in favour of alien conveniences is, even so *when and only when they have been approved by all the concerned Community in view of confirmed collective aims and goals*.

Nevertheless, even in this assumption, *it is also considered as necessary the inclusion and the reproduction, inside this regulation, of each one and of all the dispositions containing limitations and conditions to these Property Rights, normally dispersed in the remaining articles of the law* and created to cover different and numerous collective or third person’s interests.

Indeed, once accepted this criterion, it is possible, in each moment and in each country, not only *to ponder conveniently the importance of the share of the Property Rights sacrificed this way, in turn of the advantages obtained from the point of view of the general interests* in each

¹³Corresponding, in each economy, to the need of similar collaterals that could back the respective currency, collaterals which were represented at first by gold “reserves” (“gold standard”), and later on, by “reserves” in Dollars. After 1971 this guarantee has subjected to the present inconveniences derived from the evolution of this currency (See “The Economist” of 28th February 2004, page 82 where we can read : “Since then, the world has been relied on “fiat money”, so-called because it is created by government fiat and is backed only by promises of central bankers to protect the value of their currencies. It is the value of those promises that some are now questioning”). And this displays very well the importance of this problem – uncontrolled in the present circumstances – existing at present in the world financing, for which it is here proposed the present approach of self-control, automatically adapted in each country to its specific conditions, and on the other hand, consistent with the traditional guide lines respected by every bank in granting credit to their clients (based on the value of their collaterals).

one of these other articles of law, but also to warn the same Community about the *global relative importance of that whole of limitations and conditions, gradually, individually, and separately introduced to those so critical Rights* for the whole Human Rights, and for the life in common in the resulting Society.

This prerequisite has the highest importance, having in view the *choice that must be maintained for every person to live where he must consider as being better for the way of life he prefers to adopt.*

On behalf of the
Union PanEuropéenne de la Propriété Immobilière
NERIO MARINO
President