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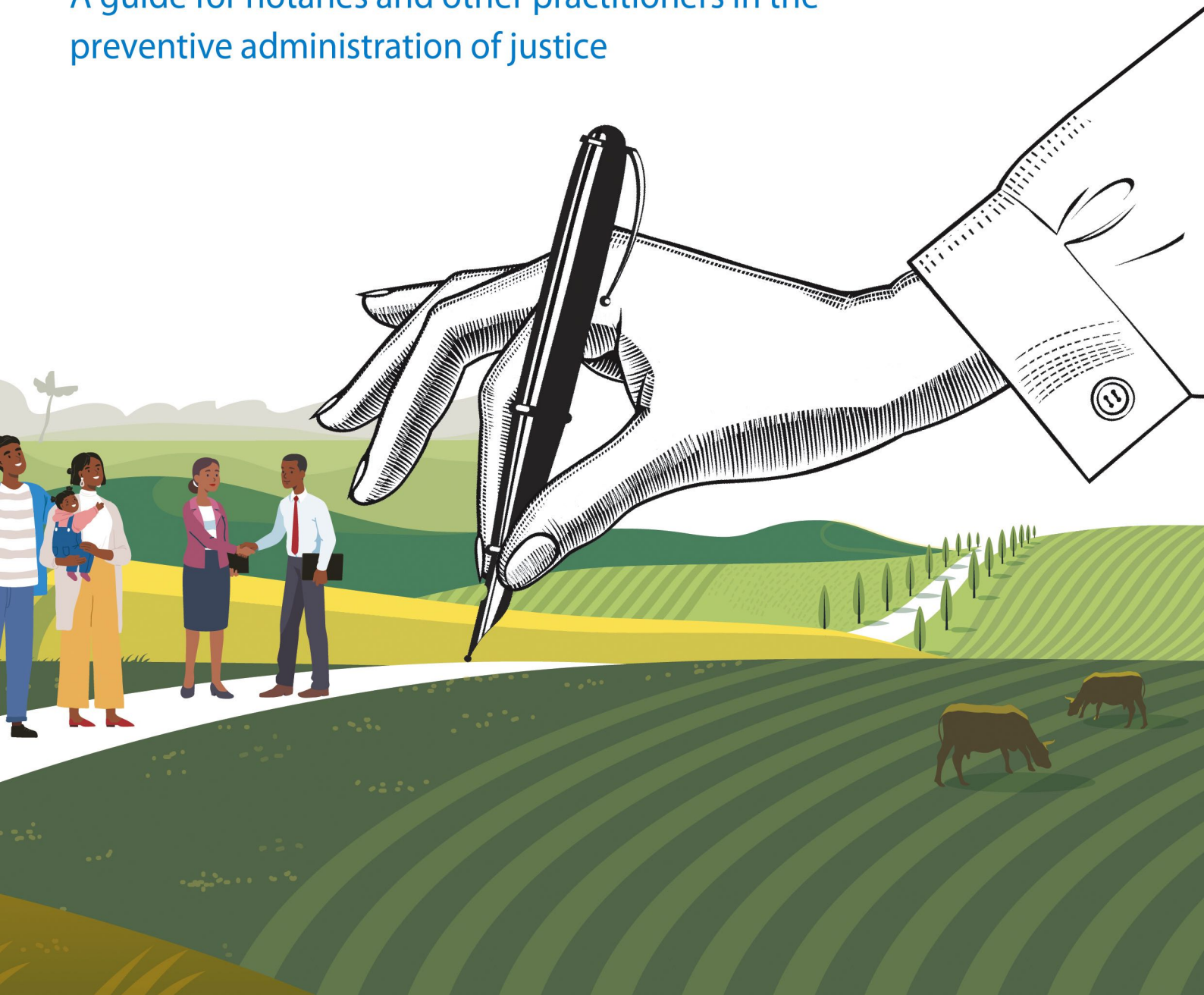
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Responsible governance of tenure and preventive justice

A guide for notaries and other practitioners in the
preventive administration of justice



This work is a co-publication of the Food and Agriculture Organization of the United Nations (FAO) and the International Union of Notaries (UINL).

The FAO Governance of Tenure Technical Guides are part of FAO's initiative to help develop capacities to improve tenure governance and thereby assist countries in applying the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. The FAO Governance of Tenure Technical Guides are prepared by technical specialists and can be used by a range of actors.

They:

- translate principles of the Guidelines into practical mechanisms, processes and actions;
- give examples of good practice – what has worked, where, why and how;
- provide useful tools for activities such as the design of policy and reform processes, for the design of investment projects and for guiding interventions.

For more information on the Guidelines and FAO's activities on governance of tenure visit: www.fao.org/nr/tenure

Responsible governance of tenure and preventive justice

A guide for notaries and other practitioners in the preventive
administration of justice

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This publication is intended to support the use of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. It is not intended to contradict the language of the Guidelines as endorsed by the Committee on World Food Security on 11 May 2012 nor the role of States in their implementation.

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Foreword

The *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT; also referred to in this guide as the Guidelines) were unanimously adopted by the Committee on World Food Security (CFS) in 2012. The Guidelines constitute an unprecedented consensus on principles, recommendations and good practices for improving governance of tenure (FAO, 2012). They provide guidance on how to recognize, protect and support legitimate tenure rights and their holders, including extra-legal or informal individual and collective tenure rights, as well as those arising under customary and indigenous governance systems.

The recommendations in the Guidelines are highly relevant to actors involved in the field of preventive justice – most notably notaries, registration officers and other practitioners. The present technical guide aims to build on the abstract concepts laid out in the VGGT and develop these into key recommendations for the improvement of tenure governance. The primary goal of the guide is therefore to show how the concepts and principles of the VGGT can be operable in the daily work of practitioners of preventive justice.

This guide also aims to raise awareness among notaries and other practitioners in the field of preventive justice of how their work contributes to the overarching goal of food security for all and supports the progressive realization of the right to adequate food in the context of national food security. The guide also promotes close cooperation between decision-makers, practitioners and scholars working in the field of preventive justice, in accordance with the VGGT.

This technical guide is a product of the fruitful collaboration between FAO and UINL. Since signing a memorandum of understanding in 2016, the two organizations have honoured their commitment to cooperation in many projects, most notably a project undertaken in conjunction with the German cooperation organization (GIZ) focusing on the issue of gender equality and land rights in Southeast Europe. That project illustrated both the importance of the preventive administration of justice as a concept and the key role that notaries, as independent public legal officers, can play in promoting it – and ultimately, in achieving the recommendations laid out in the VGGT and the Sustainable Development Goals (SDG; United Nations, 2015).

In the context of this collaboration, FAO wishes to point out that, in publishing this guide, the Organization does not seek to promote any particular system of preventive justice, the construction and implementation of which fall under the sovereignty of States.

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Under the supervision of Jean-Maurice Durand, this guide benefited greatly from contributions and peer review by Sofia Espinosa Flor, Morten Hartvigsen, Naomi Kenney, Javier Molina Cruz, Romyana Tonchovska, Tomas Versinskas, and Margret Vidar from the Food and Agriculture Organization of the United Nations (FAO). It also benefited, under the supervision of Lionel Galliez, from contributions by Willy Giacchino, Elena Bevilacqua and Rita Caffelli.

The UINL Member Notariats, national chambers and consultants also contributed significantly to this guide by providing examples of good practices.

The guide was given a final technical review by Jean-Maurice Durand, Naomi Kenney and Sofia Espinosa Flor, edited by Rebekka Yates, and publishing support by Yasmine Iqbal. Illustration and layout by Francesco Zampaglioni.

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Acronyms

ANCERT	Notary Certification Authority (Spain)
CNUE	Council of the Notariats of the European Union
COMJIB	Conference of Ministers of Justice of the Ibero-American Countries
CRIDON	Notarial Research, Information and Documentation Centres (France)
CRPD	Convention on the Rights of Persons with Disabilities
CSN	Higher Council of Notaries of France
FAO	Food and Agriculture Organization of the United Nations
GIZ	German Agency for International Cooperation
IberRed	Ibero-American Network for International Legal Cooperation
IT	Information Technology
MICEN	Electronic Central Minutier of French Notaries
NALO	National Aquaculture Legislation Overview
NGO	Nongovernmental organization
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
ONCE	Spanish National Organization for the Blind
SAFER	Land Development and Rural Settlement Corporations (France)
SDG	Sustainable Development Goals
TSS	Simplified and secure title
UINL	International Union of Notaries
UN	United Nations
UN-Habitat	United Nations Human Settlements Programme
UNODC	United Nations Office on Drugs and Crime
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

1

Introduction



1. Introduction

The *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT) were officially and unanimously endorsed by the Committee on World Food Security (CFS) on 11 May 2012, following two years of broad consultations and one year of intergovernmental negotiations. The VGGT are a comprehensive tool aimed to provide states and non-state actors with global means to promote responsible governance of tenure of land, fisheries and forests – with tenure being understood in an extensive way, that includes public and private tenure but also communal, indigenous and all sorts of informal forms of tenure.

Although the central objective of the VGGT is to provide food security for all and support the progressive realization of the right to adequate food in the context of national food security, the correlative achievement of sustainable livelihoods, social stability, housing security, rural development, environmental protection, and sustainable social and economic development for all globally is also at stake.

The standards for practices laid out in the VGGT serve as a reference framework for the development of policies and activities in favour of the responsible governance of tenure; this technical guide aims to turn the VGGT guidance into detailed recommendations, from two main angles:

- The contribution that notaries, registration officers and other practitioners can bring to the discussion for law-making, implementation of legal frameworks and legal support, considering that law is fundamental to translating international standards into real change.
- The identification and promotion of good practices to be applied by notaries, registration officers and other practitioners (also useful for governments, civil society and all actors involved in the governance of tenure of land, fisheries and forests).

It will also explore the opportunities that systems for the preventive administration of justice offer for implementing and advocating for the principles laid out in the VGGT, and how such systems can benefit from the VGGT guidance to improve legal practices.

1.1 What is the preventive administration of justice?

One of the fundamental principles of the VGGT is that tenure rights must be guaranteed and protected by the state based on the concept of the rule of law.

The rule of law requires that rights are protected by the judicial system in cases of conflict, particularly through adjudication and with fair compensation whenever there is an inevitable diminution or deprivation of rights. However, litigation is not the only way that rights are established and protected. Clear and transparent definition of individual rights, their registration in public registers and comprehensive advice for the parties when they make decisions with regard to such rights (transfers, partitions, mergers, etc.) may, in real life, be even more important as means of protection; these are likely to prevent conflicts from arising in the first place, particularly given that only few conflicts lead to litigation. Litigation is not and should not be the primary way to create and protect rights.

States and parties should recognize that unregulated markets do not always serve important societal values, including social, cultural and environmental values. The control of market transactions is an important issue in the VGGT in relation to land-based investments (see VGGT, paragraph 12). Under the VGGT, paragraph 12.6, states should provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment from risks that could arise from large-scale transactions in tenure rights. Such safeguards may include ceilings on permissible land transactions and regulation of how transfers exceeding a certain scale should be approved. In this context, elements of preventive justice are a highly effective means of regulating markets, especially in order to allow weaker and vulnerable parties to acquire tenure rights and make use of them in a protected environment.

The preventive administration of justice aims to prevent conflicts by delivering services of justice before conflicts arise in order to protect the rights of citizens without the cost, burdens, duration and uncertainties associated with litigation. While all legal systems include some aspects of preventive justice (e.g. through requirements or options of registration of tenure rights, formalities of incorporation of companies, probate or guardianship proceedings, etc.), formal authentication requirements tend to be more pronounced in legal systems belonging to the civil law tradition and less widely used in common law jurisdictions. Even within each legal tradition, the concepts and elements of preventive justice differ greatly from jurisdiction to jurisdiction – presenting a very diverse picture across the world.

The prevention of tenure disputes is a central goal of the VGGT. Due to the diversity of options available and considering the path-dependency of each legal system, the VGGT cannot be expected to offer precise tools that can be implemented directly. Rather, they define goals to be achieved and principles to be respected and protected without stipulating specific means for realization of these: hence, the ambit of this technical guide is to bridge this gap and to make the VGGT accessible to all practitioners in the realm of the preventive administration of justice.

This guide aims to reaffirm to practitioners that the preventive administration of justice is not an end itself (as it might occasionally be perceived), but serves an important purpose in the context of responsible governance of tenure and contributes greatly to the effective protection of the tenure rights of women and men. It aims to show all practitioners how they can use the VGGT and the concepts underlying them

in their daily activities in order to be more effective in protecting tenure rights from the beginning.

Notaries, who are independent public legal officers, play a key role in the system of preventive justice. They not only offer professional advice to citizens on many topics, with a specific focus on land tenure rights, but they also support the state in the fulfilment of various tasks in the public interest. Although the nature of their duties, their organization and their competences vary greatly from one legal system to another, notaries are often the first (and sometimes only) legal practitioners that citizens will encounter when they want to access, create, modify and transfer their tenure rights. Having a delegation of public power together with high legal professional qualifications, notaries should focus strongly on the promotion of justice in a broader sense, going beyond any affiliation to their respective clients. Their position and professional skills allow them to be excellent potential change agents, able to promote and use the VGGT to improve governance, to ensure the rights of women and men, and to prevent conflicts. This technical guide aims to show notaries specifically what they can and cannot do for that purpose, how to work responsibly, how to improve and what positive impacts the preventive administration of justice can have on governance of tenure. The advice proposed in this guide also aims to be as practical as possible.

1.2 Scope of this guide

This technical guide was developed in collaboration with UINL, which is an international organization whose membership comprises notarial organizations or “notariats” from 91 countries spread across the whole world (for a list of all members, see www.uinl.org). Given the important role that notaries play and the potential that their network represents, the guide will have a special focus on civil law notaries and their duties.

However, the use of this guide is not limited to notaries. It will be particularly useful to other practitioners in the field of the preventive administration of justice, most notably registration officers, but may also prove useful for judges, corporate in-house lawyers and attorneys – particularly when they are dealing with aspects of preventive justice and working with notaries and registration officers. Furthermore, the guide will show how the VGGT and best practices based on the UINL experience can be used by public authorities and legislators in order to establish new or improve existing elements of preventive justice. The word “notariat”, which is the original Latin word, will be used throughout this guide to denote the institution or body representing notaries in each country (for example, the notariat of Serbia) or, more broadly, the function itself or notaries at a global level (for example, the social utility of the notariat, the notariat’s actions around the world).

The aim of this technical guide is to raise awareness and improve understanding of the contribution that professionals in the field of preventive justice can make to achieving the goals laid out in the VGGT. Practitioners should understand that by exercising their

function responsibly and striving to implement best practices wherever possible, they can make a considerable contribution to improving the living conditions of citizens in their countries, to eradicating hunger and poverty (which eventually lead to conflict and environmental degradation) and to achieving sustainable livelihoods, housing security, rural development and environmental protection for the benefit of all citizens. However, the guide also goes beyond awareness raising, in advocating clearly for responsible governance of tenure through the use of the VGGT by all notaries and other legal practitioners worldwide. It identifies challenges and showcases good practices from all over the world in order to give specific guidance as to which elements can be implemented to achieve these goals. Particular care was taken during the drafting process to ensure the participation of notaries from all continents.

Lastly, while this technical guide has a strong focus on the tenure of land, it also includes concepts and good practices of relevance to fisheries and forest tenure, as these are covered by the VGGT. Notaries may, for instance, deal with private forestry, properties on coastline, estate crossed by rivers or other sources of water, concessions of aquaculture. In all such situations, notaries should verify that the tenure of those resources is in line with the national legal framework and international standards. They should also acknowledge the specificities of such resources regarding world food security and global sustainable development, and to inform and advise the parties about their rights, the limits to those rights and the duties related to them.

1.3 Preventive justice as a legal requirement

While all legal systems that follow the rule of law provide for means of curative justice to protect their citizens in the case of a breach of their rights, the provision made for elements of preventive justice varies – sometimes greatly – from system to system, both in degree and type. Legislators have to make their own choices as to whether, how and to what degree they wish to implement elements of preventive justice, depending on their history, cultural background, political, social and economic circumstances.

Just like curative justice, preventive justice (as a form of justice) must rely on legally binding rules that are enforced by legal means. However, as important as these elements are, effective preventive protection of tenure rights can only be achieved based on suggestions, recommendations and good advice. This insight is particularly important to understanding the role of notaries, who are key actors in the preventive administration of justice: on the one hand, the notary is an independent advisor who is consulted by the parties by their own choice, and in this regard is very similar to an attorney or solicitor; on the other hand, very much like a judge, the notary, as a public, impartial officer of the law, creates an authentic instrument that becomes part of the legal order based on a public legal procedure, very similar to a judgment.

The notarial authentication of legal acts can serve many useful purposes, which are laid out in detail in chapter 2.3 as the functions of authentication.

The rules which have to be observed depend on which purposes the legislator chooses to follow for each type of contract or act. Legislators may choose to follow:

1. many or all of the functions described in chapter 2.3 by requiring full notarial authentication (creating a public authentic instrument);
2. some functions (for example, by merely requiring the certification of signature or solemnization of a private agreement); or
3. none of the stated functions, by not imposing any formal requirements for the recognition of private act and agreements.

On the one hand, systems with a high number of full authentication requirements (mainly in the fields of real-estate law, inheritance law, family law and company law) have notaries as public officers of the law who, in their training and role, are very similar to judges. On the other hand, in systems that rely on the mere authentication of signatures and have no full authentication requirements, notaries are often not even legally trained professionals. While this guide will focus on notaries as public legal professionals and attempts to illustrate the full scope of (potential) notarial activity, it does so without prejudice to the decisions that legislators in different legal systems may prescribe as to the types of procedures. The functions performed by notaries can and sometimes are performed by other public officers of the law (such as judges, judicial officers, registration officers, public attorneys etc.). Accordingly, as the functions and duties described in this guide, insofar as they are applicable in a given legal system, are mainly performed by notaries, the term “notary” will be used throughout this guide. However, this will also apply to other public officers in the preventive administration of justice even though they are not or cannot be defined as “notaries” *stricto sensu*. Although many of the recommendations and suggestions made will also be of interest to private advisors, primarily attorneys (solicitors, lawyers and so on) and corporate lawyers, their specific role falls outside the scope of this guide as they are not public legal officers; their role is addressed in detail in Technical Guide No. 5, *Responsible governance of tenure and the law: a guide for lawyers and other legal service providers*, with a particular focus on private actors.

In order to address the specific situation of actors in the field of the preventive administration of justice this guide will assume that legally binding authentication and registration requirements exist. Such assumptions are necessary in this guide because the role of preventive justice cannot be properly understood without reference to binding legal rules. However, countries and legal systems around the world differ in many ways. Therefore, although there are many good reasons to adopt (strong) elements of preventive justice (many of which are laid out in this technical guide), legislators will have to decide for themselves which elements of preventive justice are appropriate in their own legal systems. This guide tries to show the range of possible ways in which elements of preventive justice can be used to promote good governance of tenure, as well as to motivate the actors in this field, in particular notaries and registration officers, to understand their important role and to establish and improve best practices for good governance of tenure.

1.4 Outline of the guide

After the introduction presented in Chapter 1, Chapter 2 will analyse the concept of preventive justice from the perspective of the VGGT to assess its contribution and relevance to the responsible governance of tenure. The guide will first show that preventive justice is a concept integrated into the VGGT core principles (2.1). Then, it will focus on the elements and characteristics of preventive justice implementing those principles – registration (2.2), the functions of (notarial) authentication (2.3), notarial ethics – as well as their overall economic relevance (2.4).

Chapter 3 will show how the ideas laid out in the VGGT can be used as an inspiration for the practice of preventive justice, in particular when states are considering implementing, improving and expanding elements of preventive justice in their respective legal systems. This chapter will present some practical examples of improvement of tenure governance thanks to preventive justice tools used consistently with the VGGT (3.1). Digitalization, being a process that needs to be ruled by the State to be efficiently and responsibly implemented in each country, will be dealt with in this Chapter (3.2). Then, it will demonstrate how notaries can act as agents of change to improve the quality of preventive justice administration while implementing the VGGT in law and in practice (3.3).

Lastly, Chapter 4 aims to invite all practitioners in the preventive administration of justice to cooperate and engage in advocacy to enhance their own practice and the entire system of administration of preventive justice. This chapter will primarily address chambers of notaries (4.1.) and show how they can contribute to improving preventive justice and mainstreaming the VGGT on a collective level, while also cooperating with the State (4.2.) and other professionals (4.3). Last but not least, it will highlight what can be achieved through international cooperation (4.4).

The conclusion (Chapter 5) will summarize the insights gathered in this guide and reflect on ways to think ahead to address the challenges of the future.

Throughout the chapters, the guide is illustrated with examples of challenges encountered, together with the solutions that were introduced in each case. Those examples could be considered to be good practices of preventive justice and can be used to better develop the role of all practitioners in their respective legal order.

2

Preventive justice and the VGGT: contribution and relevance



2. Preventive justice and the VGGT: contribution and relevance

This chapter will focus on the interconnection between preventive justice and the VGGT. It will illustrate on the one hand how the principles of implementation in the VGGT apply in the preventive administration of justice (2.1), and on the other how preventive justice can be a support for those principles (2.2).

2.1 How are the VGGT principles of implementation relevant to preventive justice?

The “Guiding principles of responsible tenure governance” set out in paragraph 3 of the VGGT distinguish between “General principles” and “Principles of implementation” (see VGGT, paragraphs 3A and 3B respectively). Ten essential principles of implementation that contribute to the responsible governance of tenure of land, fisheries and forests are identified. These principles promote access to justice for all and peace through the prevention of conflicts.

Principle 1 - Human dignity: recognizing the inherent dignity and the equal and inalienable human rights of all individuals.

The notion of human dignity is very broad in the VGGT. Essentially, it is about treating everyone with respect, even in the case of people who have broken the law, for instance (such as squatters), or who have non-recognized legitimate tenure rights (as is the case for numerous indigenous peoples) or informal tenure rights.

The *Universal Declaration of Human Rights*, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, sets out a common standard of protection of rights for all peoples and nations. Human dignity is a core value of human rights, as is shown in article 1 of the *Universal Declaration of Human Rights*: “All human beings are born free and equal in dignity and rights.”

In relation to legal aspects, the equal exercise of their human rights by all individuals should therefore be at the centre of any function, including for practitioners involved in the preventive administration of justice. The fact that preventive justice is not concerned

with open conflicts or violations of these rights, does not make adherence to them any less important – rather, it is a duty to make sure that all parties are fully aware of their rights and that any violations are prevented.

Protecting and respecting the right to land, whether urban or rural, is fundamental as it can ensure human dignity – for instance, through the right to property or to secure access, including in the case of vulnerable or indigenous people. It should be noted that there have been recent developments and progress towards officially recognizing the right to land, such as in Art. 17 of the *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* (UNDROP), adopted by the United Nations General Assembly in 2018. The VGGT themselves, which foster the recognition and protection of all legitimate tenure rights and of their holders, were an important step towards the recognition of a universal right to land.

There is a strong connection between land and individuals. There is a physical and economic connection, because land is necessary for life, livelihoods and economic subsistence and growth. But people are also connected to “their” land in a more profound, cultural and sociological way that relates to their life, heritage and identity – this is sometimes even perceived as a sacred connection, such as when evoking notions such as “the land of the ancestors”. Land and spirituality are also recognized to be closely linked.

This multi-aspect of land is well described in the *Framework and Guidelines on Land Policy in Africa - Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods*:

To the vast majority of societies in Africa land is regarded not simply as an economic or environmental asset, but as a social, cultural and ontological resource. Land remains an important factor in the construction of social identity, the organization of religious life and the production and reproduction of culture. The link across generations is ultimately defined by the complement of land resources which families, lineages and communities share and control. Indeed, land is fully embodied in the very spirituality of society. These are dimensions which land policy development must address if prescriptions for change are to be internalized (AUC-ECA-AfDB Consortium, 2010).

Respecting the cultural and social elements of land rights for future generations is essential, in order to understand and meet the economic and personal needs of all people. Such fundamental needs – and therefore rights – include food security, environmental security, and economic security. Land can serve as a credit instrument, is of substantial value and is ultimately a means to promote growth and social advancement. Finally, preserving human dignity with regards to land refers to a need for legal certainty and the prevention of rights violations, such as forced eviction or abusive expropriation.

Notaries should therefore connect closely with the communities they serve and understand that the existential meaning of land, fisheries and forests goes well beyond its economic value, to prevent people from any deprivation of human dignity through land tenure processes such as reallocation or expropriation.

Principle 2 - Non-discrimination: no one should be subject to discrimination be it under the law and policies, or in practice.

The principle of non-discrimination is an essential element of the rule of law. Violations of this principle are contrary to the law and can be a cause of severe conflicts in the future.

Notaries, being public officers, should always be prohibited by law and by ethics from discriminating against users in the delivery of their services. Authentication activity may not be refused on the grounds of origin, religion, gender or any other kind of discrimination. Notaries may only deny their public services if the act is incompatible with their official duties, or when an act implies the fraudulent circumvention of laws, third parties or public authorities (*UINL Deontology and Rules of Organization for Notariats, article 16*).

However, the functions of preventive justice go beyond merely prohibiting open and direct discrimination. Practice shows that, although non-discrimination is typically guaranteed by the law and rules are drafted in a non-discriminatory manner, there is often a large gap between the situation according to the law (*de jure*) and the actual situation (*de facto*).

As the example in Box 1 and others like it show, a fair contracting situation for all the parties should be ensured by creating a level playing field between them: practitioners should ensure that the parties who might be subject to discrimination are fully informed about their rights and offered assistance in the exercise of these rights. In this context, the added value of notaries could be centred as much as possible on identifying and addressing risks prior to providing the authentication. Subject to their duties under national law, notaries should make sure that legal obligations are entered into on fair and transparent terms, that they are feasible and respected in practice and that all parties comply with their legal and contractual obligations.

Box 1. Notaries initiate the recognition of cohabitation partners (Italy)

In 2013, in response to the request of a growing number of citizens, the National Council of Notaries in Italy created a "cohabitation contract". This comprises a written notarial authentic agreement in which the couple, heterosexual or same-sex, defines the rules of their cohabitation regarding the assets, the dwelling, the contribution to domestic life, the maintenance in case of need of the partner, rental contract and ownership. It is even possible to set up a common or separate property regime. The Italian notariat raised political and public awareness on the subject throughout the country (through events, guidelines, press release and so on).

Thanks to those efforts, on 20 May 2016, the Italian Parliament finally approved the law on civil unions; this law has given legal recognition to partners and endorsed the model cohabitation contract created by the notariat three years earlier.

Principle 3 - Equity and justice: recognizing that equality between individuals may require acknowledging differences between individuals, and taking positive action, including empowerment, in order to promote equitable tenure rights and access to land, fisheries and forests, for all, women and men, youth and vulnerable and traditionally marginalized people, within the national context.

Taking positive actions to provide every citizen with equitable tenure rights and access to justice is an important aspect of the preventive administration of justice. Notaries are other practitioners within this system should take particular notice of weaknesses and take positive actions to provide weaker parties with adequate support in order for them to enjoy their rights equally. This applies especially to vulnerable groups and individuals. As recalled above, notaries may be the first and often the only legal practitioners that parties deal with in some of the most important legal decisions of their lives; this gives notaries the opportunity to face vulnerabilities in a contracting situation and restore contractual balance by enabling the weaker parties to understand and make practical use of their rights. More specifically, it is the role of the notary to empower the weaker party by providing them with institutional support, while remaining impartial towards the other party.

In the case of markets for land use and ownership, notaries should help remedy market insufficiencies and informational asymmetries between parties for mutually beneficial transfers of tenure rights which lessen conflict and instability (see VGGT, paragraph 11.2).

Principle 4 - Gender equality: ensuring the equal right of women and men to the enjoyment of all human rights, while acknowledging differences between women and men and taking specific measures aimed at accelerating de facto equality when necessary. States should ensure that women and girls have equal tenure rights and access to land, fisheries and forests independent of their civil and marital status.

Although gender equality is a stand-alone principle of implementation, it has implications for all other principles and forms part of the general responsibility of all actors to respect and apply the fundamental principles of non-discrimination, equity and justice. Women's property rights should be specifically protected and supported without regard to their status as wife, legally recognized partner or daughter.

Whenever the law is not already clear on this fundamental right, states should take measures to ensure that legal and policy frameworks provide women with equal and adequate protection, implementation and enforcement of their rights (see VGGT, paragraph 5.4). For instance, states should ensure that women can effectively enter into contracts concerning tenure rights on the basis of equality with men and should strive to provide legal services and other assistance to enable women to defend their tenure interests (see VGGT, paragraph 5.5.).

Gender-disaggregated statistics can also be of help to lawmakers; both notaries and registration officers are in a good position to collect disaggregated data on property ownership, for instance.

Supervision of land transfers through systems of preventive administration of justice allows all interested parties to better exercise and understand their legal rights and obligations and to make well-informed decisions. Upholding gender equality in notarial services can increase tenure security, by ensuring that the rights of all interested parties – women and men – are identified and protected from the beginning. This will reduce dependence on the courts to establish these rights a posteriori, with all the ensuing economic and social consequences (cost, risk, shame, fear of exclusion, reprisals...). Furthermore, in most countries women contribute greatly to economic growth through their active work in agriculture.

In their daily practice, notaries should be proactive and take into account the particular challenges that women may face and find suitable methods to address them. On the one hand, notaries will be able to provide the necessary advice and protection of tenure rights to women who seek their service; in such situations, they should inform women about their rights and create an environment in which they feel comfortable to make informed decisions without undue influence. On the other hand, notaries should take into account the rights of women and ensure the protection of their rights even in cases where women do not appear in their office. In particular, women's statutory right to a share in inheritance or matrimonial property often requires their participation. In addition, in many cases, women must be registered as lawful (co-)owners according to the applicable legal rules even if they do not directly participate in the transaction.

Lastly, the administration of justice should not only address gender equality in access to land, "but it should also achieve more gender-equitable participation in the processes and institutions that underlie all decision-making about land", as recommended in *Governing land for women and men - a technical guide to support the achievement*

Box 2. Strengthening gender equality (Southeast Europe)

In their transition from state-run to free market economies, the countries of southeast Europe (Albania, Bosnia and Herzegovina, Kosovo, North Macedonia, Montenegro and Serbia) have opted for an economic model that seeks to ensure fair and equal access of all citizens to the benefits of a free market. Their legal systems rely on the preventive control of essential economic transactions and so notarial acts are an essential requirement of the registration of property rights in public registers.

Although many women have assumed leading positions in the societies of southeast Europe, an assessment of the legal framework carried out in 2015-2016 using FAO's Legal Assessment Tool (LAT) for gender-equitable land tenure (Kenney and De La O Campos, 2016) showed that properties, in particular in rural areas, are overwhelmingly registered in the name of the husband, partner, son or brother, and identified some legal and technical barriers to women's access to land ownership.

Legal frameworks have made huge advances towards strengthening gender equality in land ownership and control. Waves of legal reforms have eliminated gender-based discrimination and provided legal safeguards for women's property rights in marriage, cohabitation and inheritance. In some cases, special measures have been adopted to give

effect to these provisions, including providing incentives for joint registration of property acquired during marriage (Arsova Mitic et al., 2019).

In Serbia, for example, a new law was passed requiring joint registration of spouses as a general rule in the registration process.

Nonetheless, a large de jure/de facto gap remained. FAO indicated that notaries and registration offices are key actors in ensuring that the law – when gender-neutral and non-discriminatory – is implemented to benefit men and women equally. In particular, women are often at a disadvantage and their interests and rights in land should be equally registered and secured.

Notaries are in a privileged position to accelerate the realization of de facto gender equality in land ownership and control, making them important agents of change. The procedure of full or partial notarial authentication is considered as one of the effective ways to protect the property rights in general and address equality through lending adequate assistance to whichever of the parties might be in a position of inferiority (Arsova Mitic et al., 2019).

In this context, FAO, GIZ and UINL cooperated on the organization of three regional multi-stakeholder's conferences - in Tirana (March 2017); in Thessaloniki (December 2017), and lastly in Sarajevo (June 2018) – and two publications – the *Guidelines on strengthening gender equality in notarial practices - South East Europe* (FAO and GIZ with the technical collaboration of UINL, 2019b) and the *Guidelines for registration officers on gender equitable land tenure - South East Europe* (FAO and GIZ with the technical collaboration of UINL, 2021).

The latter are intended to be a practical guidance document that notaries can use to strengthen gender equality in the services they provide and to build awareness among notaries in the region. They offer quick and easy steps and checklists to establish adequate due diligence, identifying and protecting the legal interests of all women in two main situations: contractual property transactions and inheritance.

Additional information can be found for practitioners wishing to know more about the gender implications in their activities, and tips on how to engage in advocacy through self-learning, proactivity and relations with colleagues and professional bodies.

This cooperation project was inspired by the journal of a notary and her concerns regarding the protection of women and their property rights.

Principle 5 - Holistic and sustainable approach: recognizing that natural resources and their uses are interconnected, and adopting an integrated and sustainable approach to their administration.

The world is experiencing exponential growth in the global population as well as ecological disasters and conflicts. More than ever, sustainability is a political and practical necessity for all governments and institutions in all tenure-related decisions that they implement.

To be sustainable, any public or private land-related project has to be well planned, secured and documented, that is to say that the project should include clear design, means for achievement, monitoring and evaluation. Only then can the adequate protection of nature and people be ensured, that is a fair, equal and reliable access to natural resources for all. This is precisely why governments should consider using elements of the preventive administration of justice in their legal system. Planning and checks of legality leads to greater security, requires all parties involved to reflect on

decisions before they are executed and allows a sustainable approach to urbanization, rural development, agricultural planning, the fight against pollution, the prevention of natural disasters and more.

Box 3. The role of notaries regarding aquaculture (Netherlands)

FAO Fisheries and Aquaculture Department have developed National Aquaculture Legislation Overview (NALO) fact sheets. These fact sheets consist of a series of comparative national overviews of aquaculture laws and regulations from the top aquaculture producing countries, and were prepared in collaboration with the FAO Development Law Service and FAOLEX. There are 65 NALO fact sheets currently available and they are reviewed every 2-3 years.

The Netherlands NALO fact sheet explains that, even though there is no specific law on aquaculture, the government can lease publicly owned lands for this purpose. Therefore, marine aquaculture in the Netherlands, which consists of extensive culture of mussels and oysters, is predominantly carried out on the bottom of leased grounds. Like land ownership, the long-term lease rights needed to proceed to aquaculture are established and/or transferred by a notarial authentic act and subsequently registered with the public registers.

Notaries and their professional organizations have a role to play in the regulation and implementation of spatial planning and in the transfer of tenure rights over natural resources from the state to private actors and legal entities, and among private actors. Notaries can contribute to this objective by implementing a full control of the legal aspects of each transaction, by informing the parties on their rights and duties regarding those resources, by clearly identifying those resources and their users, and by notifying the public power and the specific agencies in charge of their registration and protection. For example, the sustainable governance of forests relies on a strong legal control and authentication of land rights, for which notaries can provide strong support to governmental institutions, based on solid ethics and appropriate training. This will guarantee a trustworthy land rights register and therefore prevent wrongful registrations leading to illegal appropriation and exploitation of the forests for speculative interests. Prevention through clear national legal frameworks and/or local rules for the sustainable management of forests are indispensable.

Principle 6 - Consultation and participation: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

The preventive administration of justice linked to tenure rights is a process involving everyone: legal practitioners, the public administration and the rights holders. The participation, and recognition, of all interested parties should be a condition sine

qua non. In particular, in the context of decisions taken by a community for its members, participation should ensure the consent of all individuals to the transactions, as all individuals should be guaranteed impartial and full access to information and advice about the consequences of the decision they will make. Being prior to the decision itself, and so dealing with possible issues before disagreements arise and not after, is one of the core benefits of the preventive administration of justice.

The notaries' duty is to create authentic instruments that respect the law and match the requirements of the participating parties. When requested to authenticate an act, notaries do not focus solely on the formal legality of acts; thanks to preliminary consultations, they are also able to suggest legal solutions consistent with each situation, identifying all stakeholders, taking into account the current habits and customs of the region and understanding the underlying issues.

Lastly, notaries should be called upon in the legislative process to provide their feedback to lawmakers, and make recommendations for improvements and changes. Their consultation and participation in the process will lead to a better adaptation, and therefore a better application of the reforms on the ground.

Principle 7 - Rule of law: adopting a rules-based approach through laws that are widely publicized in applicable languages, applicable to all, equally enforced and independently adjudicated, and that are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.

The law should not only be applied and enforced by impartial and independent officers, but should above all be accessible and understandable to all. The law should not be opaque to its beneficiaries and users. It should provide citizens with grounds allowing them to fully exercise their rights. It is of particular importance that citizens understand their tenure rights and duties before they make decisions that might shape the future of their lives in irreversible ways. The law should evolve with society itself, leading to positive change whenever possible. However, depending on the context, the level of education and the degree of complexity of some legislation and cases, it can be very helpful for citizens to be able to count on professionals who can play the role of teachers of the law, explaining it to all users individually with full transparency, participating as such in the rule of law.

This is why the preventive administration of justice requires full territorial coverage by notaries. Whereas in countries applying the preventive administration of justice a single notary, being an impartial public officer, could be sufficient to play this role in a transaction, in other countries the support of one lawyer per interest may be required in order to avoid conflicts of interest and fragmented information.

Principle 8 - Transparency: clearly defining and widely publicizing policies, laws and procedures in applicable languages, and widely publicizing decisions in applicable languages and in formats accessible to all.

Transparency, accessibility and prior explanation are key concepts of the preventive administration of justice, as providing all parties with accessible information reduces the likelihood of future conflicts. At a regional, national and international level, transparency is an essential prerequisite for all governments and professional organizations to be able to protect any process from undue interference, including corruption. The preventive administration of justice, through defined processes and public registration, provides for such transparency.

The VGGT also underline that “States should consider using locally-based professionals, such as lawyers, notaries, surveyors and social scientists to deliver information on tenure rights to the public” (see VGGT, part 5, paragraph 17.3). On an individual level, the preventive administration of justice consists of providing the parties with valuable explanation and legal support in order that they thoroughly understand the consequences of a contract before engaging in a transaction.

In such systems, notarial due diligence includes undertaking pre-contractual checks and consultations. Public administrations should provide notaries with access to all public registries relevant to their daily work. In order for notaries to be able to fulfil their duties properly, they should seek and be granted access to transparent information on all matters regarding their practice and make this information available to their clients.

Notaries should serve as a link between public authorities and citizens, to ensure transparency, accessibility and clear understanding of policies, laws and procedures. Notaries should also ensure transparency in public registers, for example on ownership structures and the beneficial owners behind a company. As those significantly involved in the registration process, they act as a front desk of the state.

Principle 9 - Accountability: holding individuals, public agencies and non-state actors responsible for their actions and decisions according to the principles of the rule of law.

Notaries are accountable for the services they deliver and should respect the ethical rules of their function as adopted at national and international levels. In particular, the registration and conservation of archives are critical in order to maintain a high level of truthful information and to reduce the opportunity for transgressions. This should be taken seriously by the notaries themselves and also by their supervising authorities with regard to enforcement of measures.

Liability is civil, criminal and disciplinary. Civil liability should apply for any damage and harm caused either by misconduct or negligence. The circumstances in which fraudulent or negligent actions may give rise to criminal liability should be determined by law. Non-compliance with professional rules should result in disciplinary responsibility.

There should also be an appropriate system for sanctions, random inspection and supervision.

Principle 10 - Continuous improvement: states should improve mechanisms for monitoring and analysis of tenure governance in order to develop evidence-based programs and secure on-going improvements.

Continuous improvement is a requirement for any topic relating to land and people – as our societies evolve, so do the needs of individuals, and so public authorities must continually strive to find better solutions and a more efficient system of justice for all.

Monitoring is a central aspect of prevention – studying data and practical cases, and having these registered and supervised, enables governments to spot patterns and understand where an improvement is needed and how the necessary change can be initiated. Decentralized state institutions such as notaries can make it easier to implement changes.

Progress requires a strong commitment to a permanent process of capacity development, through training and mutual exchanges. Responsible governance of tenure is not the sole remit of just a few institutions, but requires an inclusive approach: it can be achieved only by knowing its multiple facets and coordinating the work among all the professionals (notaries, registration officers, cadastre officers, surveyors and so on) and individuals with an interest in it.

KEY RECOMMENDATIONS 2.1

Notaries and other practitioners in the preventive administration of justice should apply the principles of implementation of the VGGT in their daily practice by:

- Considering the multi-faceted aspects of land (not only economic, but also social, cultural, etc.), as this brings awareness of respect for human dignity in land tenure-related processes, and also of the necessity of being exemplary in the way of treating every person requiring their services.
- Providing preliminary information and non-discriminatory access to their services, and most importantly personalized, gender-sensitive legal advice and institutional support, as this contributes to equity and justice.
- Helping the state to monitor the use of natural resources, as this contributes to a sustainable approach to land use.
- Making the rules and processes understandable and accessible to all, as this guarantees transparency.
- Understanding that these are the bases for the rule of law, as well as that notaries are personally accountable and liable for the service they deliver.
- Participating in and being consulted prior to law-making and other decisions, as this leads to improvement of their practice and to the implementation of legal solutions better adapted to local needs.

2.2 Registration as a means for recognition and protection of rights

Paragraph 17.1 of the VGGT indicates that:

States should provide systems (such as registration, cadastre and licensing systems) to record individual and collective tenure rights in order to improve security of tenure rights, including those held by the State and public sector, private sector, and indigenous peoples and other communities with customary tenure systems; and for the functioning of local societies and of markets. Such systems should record, maintain and publicize tenure rights and duties, including who holds those rights and duties, and the parcels or holdings of land, fisheries or forests to which the rights and duties relate.

A further definition of registration is given in the glossary from the *Tool for designing monitoring and evaluating land administration programmes in Latin America* (FAO, 2015):

The term Registration refers to the process of entering properties in the Public Property Register, which shows that an entry, page or registration has been opened or created for a property, in accordance with legal requirements, and the registry issues it with a registration number correlating with the entry in the Registration Book of Real Rights; this is generally known as registration or registration page which establishes the subject, purpose and property right or other real rights whose details are taken from the title deed.

It is this definition that can be considered relevant in this technical guide.

Although in some countries public registration may be carried out by (publicly regulated and strictly supervised) private bodies, it remains a public function for which the state is responsible and has a duty to ensure the quality and legality of the service. Public registration should guarantee easy and affordable access to information for all, improve tenure security and largely prevent involuntary infringements due to a lack of knowledge. Public registers can also be used in mediation or in court to establish who holds the rights. Transparency of the information in and with public registries reduces asymmetry of information between the parties in any transaction.

A reliable public registry, accompanied by the principle of public faith, is therefore highly beneficial for implementation of the VGGT as it allows the recognition and safeguarding of legitimate rights and the respect of the people who hold them, which ultimately benefits the broader society.

2.2.1 What are the principles that should govern registration?

Although there are different systems of public registration, most registers within systems of preventive administration of justice are governed by the following principles:

Principle of proof and legality

The truthfulness of registered data must be verified; registration may only be realized based on reliable (public) documents, which are typically prepared and/or authenticated by notaries.

Principle of public faith

The FAO technical guide no. 9, *Creating a system to record tenure rights and first registration* (Palmer and Lamb, 2017a) describes the range of options that exists when a recording system is set up. Choices have to be made between evidentiary and conclusive systems (regarding ways to demonstrate the proof of rights) and constitutive and declaratory systems (regarding ways to acquire rights). When choosing the way in which the system will operate, governments should consider the status of the records created. In the preventive administration of justice, due to the reliability of the content of public registers, two situations can be found: either the records will provide evidence that establishes a presumption of default position on the holder of rights, or they will provide conclusive proof about the existence of the rights.

Public faith implies that the information contained in the register is presumed to be correct and third parties may rely on registered fact. It also means that the burden of proof will be on anyone who disagrees and that this burden may be very strict – in many jurisdictions, a buyer of land will acquire a full legal title even from a falsely registered owner unless it is proven that the buyer knew that the registration of the seller was false.

Moreover, registration officers are subject to the principles of impartiality and independence. Registration is a public act and in some systems (often due to the principle of public faith) can create and/or eliminate individual rights – therefore it is essential that the state ensures the reliability and veracity of the registration service. This can be achieved by: a good initial system design or by improvement of the existing system (Palmer and Lamb, 2017b); strict limitations as to the documents required for registration (for example, only publicly authenticated acts); the requirement to effect registration in person before the officer or a notary; and by strict legal control of the content of the acts in order to ensure its compliance with the law (control of the content). Due to the important legal effects and the essential value of land in a society, registration should only be carried out by specialized and qualified practitioners.

2.2.2 What elements are essential for public registers?

Public registers should provide immediate, comprehensive, accurate, legally certain and reliable information. Key government registers generally include a register of commercial entities, a civil register (in some countries the birth register, marriage register and death register are separate, and may not be connected), address register, sales-price register and property register (land registry/real-estate cadastre).

Land registration records rights relating to identified parcels of land and often includes, in addition to geospatial information on the parcel and geographical characteristics, information on transactions relating to it. In many countries, land registers typically consist of official registers in which the legal relationships of each property are publicly presented. Such land registers usually provide information about the ownership, the size of the property and any rights (such as right of way) and encumbrances (such as land charges) to a property.

Official commercial registers in the civil law system usually provide information on the legal status of companies, corporations and partnerships. Specifically, they can contain information on the legal form of the company, the object of its business activity, the registered seat, individuals with powers of representation and, if applicable, share capital of the company.

Box 4. Confronting the challenge of company hijacking (Bulgaria)

In Bulgaria, company hijacking used to be a practice by which false directors (whose names were registered in the registry using forged documents) used their registered powers to act on behalf of a company in order to transfer its assets for their own purposes. Since third parties (such as banks) could rely on the registered facts, the hijacked companies were robbed of all their valuable assets and were left with only damage claims against the perpetrators, which were often impossible to pursue.

In 2009 the Bulgarian notary chamber therefore established and legalized a web-based registry system, called "Unity", a shared database that contains notarized documents. Since 2009, each notary in Bulgaria is obliged to enter into this system an excerpt of all the powers of attorney they have notarized for transfers of real estate. The notarized documents that are to be included in this integrated notarial register include withdrawals of powers of attorney, the wills of deceased citizens, and powers of attorney that are to represent a party when handling bank related matters, such as transferring funds to another bank account, withdrawing funds, and so on. The Unity system is a software program, accessible only by notaries. Passive access has been granted to certain civil servants and bank employees for work-related purposes only; these officials can only observe specific tabs (sectors) in the register. They have limited access to information, determined and limited by law, as they are prohibited from and have no option to enter or modify any data.

In 2016, a legislative change was made. According to the new law, the signatures and content regarding company decisions have to be notarized simultaneously. Furthermore, the transfer of a partner's share shall be concluded by a contract, with the signatures and content authenticated simultaneously by a notary and entered into the commercial register after the manager of the company and grantor of right have presented a declaration form to the effect that there are no outstanding and unpaid obligations.

The "Unity" register of the Bulgarian chamber of notaries and the new formal requirements have made a major contribution to the fight against fraud and company hijacking.

2.2.3 Why authentic notarial acts are key to an efficient land registration process?

The protection offered by a registration system is not worth much if people have little confidence in the integrity of its records. Indeed, land is of such outstanding social and

economic importance that possible compensation in money could hardly justify the risk of loss of property. A legal system that permits the encumbrance and exploitation of real estate by third parties who are not part of the realm (house stealing) or the registration as managing director and the uncontrolled action for corporations by non-entitled persons (identity fraud) cannot meet these requirements.

In the preventive administration of justice, public registration officers can rely on the content of the submitted documents because their legality and truthfulness is ensured by the requirement of (notarial) authentication.

Division of labour between notaries on the one hand and registration officers on the other has proven to be a very effective way of dealing with governance of tenure. The upstream filter function of notaries can contribute significantly to disburdening the registers at their front desk, as the notary ensures that only complete and properly formulated applications are submitted to the registers. They carry out the identity and authenticity check to ensure that registration authorizations or registry applications originate from the beneficiaries and correspond to their free will. They also guarantee that parties are advised on all aspects of the act, including the registration procedure. This creates stability because parties who have been adequately advised as to their rights are less likely to (successfully) challenge such registration. Notarial acts are then subject to further verification by an independent public registration officer, who will create a public record that is fully legal and reliable, thereby providing a second, independent instance of control in the interest of the integrity of the registry.

2.2.4 Dealing with conservation of notarial authentic instruments

After an act is authenticated by a notary, it is safely stored in the archives of the notaries (before being sent to regional or national archives for long-term conservation in many cases).

The original versions of notarial acts are of a public nature and directly serve a public purpose. Through a special act of law, they are endowed with a public law status which is linked to a public ownership. The availability, integrity, authenticity and transparency of the public document, but at the same time the adequate privacy and confidentiality of the information contained in the acts, should be guaranteed throughout the entire storage period.

Therefore, in order to ensure the preservation of the act, the original of the notarial instrument stays in storage with the notary. Only copies or certified copies can be delivered, the truthfulness of the copy relying on the authority of the notary, as does the proper administration of the archives. In regard to land, this allows easy long-term tracking of the different titles of rights issued on a parcel.

The archives of a notary who retires or leaves office should automatically be transferred to their successor, or to a competent public body, under the respect of the same conditions of professional secrecy and providing the same guarantees of integral conservation. This is necessary for the permanent traceability and availability of the authentic acts.

KEY POINTS AND RECOMMENDATIONS 2.2

Public registration helps to protect and recognize tenure rights:

- Public registration is valuable because it makes information public and accessible.
- Public registers should provide immediate, comprehensive, accurate, legally certain and reliable information.
- Public registers should be governed by the principles of proof, legality and public faith.
- Trust in public registers relies on the accuracy and veracity of the information they contain. Therefore registration officers should be independent and impartial, and the information registered should be fully reliable. This is why only public documents should be presented to the registries.
- Notaries can and should ensure the validity of the documents to be registered and guarantee an efficient registration process through division of tasks and double checks.
- Archives of authentic instruments should ensure the availability, integrity, authenticity and transparency of the notarial act as a public document, while at the same time safeguarding the adequate privacy and confidentiality of the private information the acts contain.

2.3 Notarial authentication: key functions and relevance for responsible governance of tenure

Generally speaking, authentic instruments can be defined as acts that are drawn up in the required form by the notary (or, in some cases, by other public officers with similar functions) within the limits of their official duties, or by a person endowed with public faith within the scope of their competence (see *Principles of the notarial function*, Part II – *Notarial Documents* (UINL, 2005)).

The authentication procedure is in principle regulated by law. The parties involved generally submit their declarations of intent to be authenticated orally when they use the services of a notary. Minutes of the authentication process are recorded, as well as the negotiation related to the authentication. The minutes must contain all the useful personal information of the parties involved as well as their full declarations phrased in a precise and qualified legal language by the public authority. The name of the notary should also be mentioned. In many cases, the minutes are to be read aloud to the participants in the presence of the notary, approved by them and personally signed by the parties as well as by the notary. The minutes regularly contain the place and date of the meeting. In notarial practice, the parties often attend a comprehensive consultation appointment in advance, where the notary will respond to the wishes and explain the legal situation in detail. On this basis, a written draft is prepared and sent to the parties

in advance. Only when all questions have been clarified is the authentication deemed valid.

In cases where an authentication is required, this is the only way to make a contract legally effective. Just as the civil rights of the citizens require a judge to render a judgement, the right to obtain a validly authenticated contract obliges the civil law notary to perform a legally correct authentication. The following sections (2.3.1 to 2.3.7) describe the key functions of a notarial authentication that can be achieved by notaries and similar legal professionals and give recommendations for ensuring a high level of quality in securing land rights. In order to establish and improve best practices in the governance of tenure it is necessary for notaries – and everyone else involved – to fully understand the functions and purposes that underlie authentication and differentiate between these different functions and aspects of notarial practice.

2.3.1 Function of proof: a means of proof and identification

One of the most important and most widely recognized functions of notarial authentication is to serve as full proof of an act or agreement. Authentic documents create a valid proof (e.g. in a court proceeding), in particular for the following elements: identity of the person, declaration of the person, date, time and place. The facts authenticated in a notarial act can only be rebutted in a court by proof of falsification: the function of proof cannot be questioned unless the act is proven to be a forged document. This is not the case for private documents, which are only proof of their content as long as no other contradictory element is presented (see VGGT, paragraphs 11.5, 17.1 and 17.2).

Notaries and similar professionals typically have very few investigative powers themselves and rely on the information as it is presented by the parties – however, by duty, they should apply the highest professional standards, check all information provided for plausibility, ensure the presence or representation of all the concerned parties (notably the presence of women when dealing with transfers of a property of the conjugal community) and request that parties amend incomplete information.

The VGGT provide in paragraph 12.11 that agreements should be documented and understood by all who are affected and all relevant persons should be informed about the (full) content of the contract. Even when full authentication of the entire agreement is not legally required, notaries should encourage the parties (for their own benefit and for the public good) to include all essential parts of their agreement in the act in order to achieve a higher degree of legal certainty and make full use of the legal skills of their notary. Therefore, according to most laws, in order to protect the parties involved and ensure legal certainty and evidential value, it is obligatory to notarize all elements essential to a transaction. This means that, for example, in the case of the donation of a house (say by the parents to a child), any agreed user rights, compensations due to sibling(s) and other details of the agreement cannot be tacit elements, but have to be authenticated as integral parts of the agreement as such.

The complete and unambiguous recording of the parties' will in the contract, as well as all ancillary restrictions, justifies the enhanced probative value of notarial acts. It is therefore of utmost importance that special care is taken when ensuring that the concluded agreement is recorded correctly and in its entirety.

Full authentication creates a reliable basis not only for structured disputes – in court or out of court – but most of all for other administrative purposes, such as in valuation (see VGGT, paragraph 11.4.), taxation (see VGGT, paragraph 19) and in the fight against money-laundering and corruption (see VGGT, paragraph 6.9).

Box 5. Use of notarial authentic proof in court (China)

Preservation of evidence through authentication can be used in court proceedings. For instance, in 2016, a notary office in Shanghai, **China**, received a special request for preservation of evidence for watermelon growers who had noticed that their products were getting smaller and smaller. A company not far from the river in which the growers pumped water, was suspected to be discharging wastewater overnight into the river. The growers called on the notary's office to keep proof of the analysis of various tests on the water of this river. In such cases, the notary ensured the preservation of evidence of facts relating to violations of environmental protection regulations.

Similarly, in April 2020, farmers of 465 households from 49 villages and 5 towns in a county in Hubei Province suffered from significant losses as the seeds of "black beauty" watermelons, which they had planted in greenhouses of 998 mu (approximately 66 hectares), were fake seeds. They decided to file a collective lawsuit for compensation. In order to fix the fact of infringement, they applied to a notary office for preservation of evidence. The notary office conducted on-site measurement, counting, photographing and picture recording. In accordance with the notarization law of the People's Republic of China and relevant notary procedure rules, the notary office issued more than 120 notarized certificates concerning preservation of evidence, provided legal aid to farmers, and waived notarized fees of more than 50 000 yuan.

2.3.2 Function of validity: ensuring the substantial validity of the act

Whereas proof, transparency and identification relate to the formal aspects of a document, the function of ensuring validity refers to the substance of the act. Notarial duties should mostly go beyond mere certification of the signatures of the parties.

Reliable authentication ensures that the act is in accordance with all applicable legal rules. For example, rules on aspects of capacity – that is, that the parties are able to make legally binding declarations, rules relating to the limits of contractual freedom and the observance of the more flexible principles of good faith and contractual fairness (such as regarding restrictions on the limitation of liability, or transfers of the burden of proof, especially when standard form contractual clauses are used by dominant parties). Just as it is the duty of a judge to hold each party accountable to these rules and standards of the law, it is the duty of a notary to ensure that these rules are observed at the drafting or authentication stage.

It is important to note that, especially when dealing with the elderly and persons with disabilities, determining the required capacity can be a demanding task, which can mostly be achieved through personal interaction with the parties. For that reason, the notary should be personally involved in as many aspects of the transaction as possible. Furthermore, notaries should, while forming their own decision about the capacity, discuss as necessary with experts such as physicians (particularly psychiatrists), social workers and nurses who may provide information about medical aspects when dealing with the elderly and people with disabilities. However, the legal support and final decision on the validity of the consent should be determined by notaries themselves.

2.3.3 Function of warning and advice: providing legal advice and promoting free, prior and informed consent

States should make sure that, while imposing authentication requirements on parties, they also guarantee that parties are offered the best, most qualified and readily available advice to resolve their legal issues. Although authentication requirements may vary from situation to situation and from jurisdiction to jurisdiction, notaries' duty to advise should begin with the first introductory contact with the parties, continue with a (personal) consultation to discuss different options for the legal implementation of the parties' intentions and lead to the elaboration of a meaningful draft instrument. That draft then forms the basis of the procedure of authentication *stricto sensu*.

The notary should present different ways of achieving the objectives pursued by the parties and explain the legal implications of each option. The notary has to present the solution that is safest of several options, taking into account the law and jurisprudence at the time of authentication. Consequently, notaries should draft the contract themselves rather than merely giving validity to a contract prepared by third parties. Full notarial authentication should require the notary to be in full command of all legal aspects of the contract at hand and be able to explain and modify each contractual clause, regardless of whether it was supplied by the parties or suggested by the notary. This requires a degree of experience and knowledge that can only be provided in those specific areas of the law with which the notary is entrusted. The notary should therefore take full responsibility for the draft and be liable for negligently caused damages resulting from their advice. Consequently, all the parties, although free to consult with other experts, can rely fully on the advice of a single trusted and impartial legal expert in the relevant field of law, saving both valuable time and additional cost.

Furthermore, notaries often have a duty to oversee the performance stage of the contract. This means, above all, ensuring that all parties are present or represented and have equal access to information and communication with the notary, and that the obligations made by the parties under the contract are performed and fulfilled in practice as it was agreed upon in the contract. In the performance stage, the notary must make sure that i) all relevant changes are registered in the respective public registers ii) notifications to third parties and/or public authorities required by law are

made, iii) necessary approvals or authorizations are gathered and iv) that unsecured advance-performances (such as payment of the price without appropriate security or transfer of title without appropriate security) by the parties are prevented. Even in legal orders and situations in which the notary is not required by law to take over such duties, they should offer such services to the parties to make sure that the parties' intentions are not only recorded in the notarial act but also performed in practice.

Because the notary has a duty to inform, advise and validate the legal capacity of the parties, notarial authentication can also guarantee that all parties to the contract are able to give their free, prior and informed consent. FAO technical guide no.3, *Respecting free, prior and informed consent – Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition* (FAO, 2014) sets out practical actions to respect and protect free, prior and informed consent, particularly of the communities at risk of being deprived of it:

concern about the long-term social and environmental implications of accelerated land acquisition has grown, and international human rights and standard-setting bodies have begun to explore and apply new norms and procedures designed to help regulate this process. The aim is not to discourage investment and prevent the development of new farmlands, but rather to ensure that such expansion occurs in ways that respect rights, secure favourable and sustainable livelihoods, and divert pressure away from areas that are crucial to local livelihoods and have high conservation value.

Notarial authentication is one of the suggested steps in the process of respecting free, prior and informed consent (FAO, 2014). Notaries can support the respect of free, prior and informed consent at multiple stages, i) by identifying the rights-holders through interview and consultation, ii) by ascertaining the legal status of the land (through the consultation of data in public registers and other local knowledge), iii) by providing access to independent information and advice, iv) by helping parties reach an agreement (playing their role as facilitators or mediators in this case and making it effective (thanks to enforceability), and v) by planning remedy and conflict resolution (through the drafting of specific clauses and using their mediation skills).

Chambers of notaries also have a role to play, by supporting their members on complicated legal issues. Partnerships with academia or research institutes may be established for that purpose. Questions to be addressed may concern specific issues of national law, or cases in foreign or international law – for example, determination of the marital status of a cross-border couple or justification of the existence and representation of foreign companies.

Box 6. Legal research institutes in support of notarial activities

Many notariats have created institutions with legal research capacities that can be consulted by notaries if they encounter in their daily work difficult legal problems requiring further research that they cannot solve by themselves. Examples include the Consultation Centre of the Federation of Belgian Notaries in **Belgium**; the Notarial Research, Information and Documentation Centres (CRIDON) in **France**, founded in 1962; the Deutsches Notarinsitut

and Universities centres of notarial research in **Germany**; the Notarial Institute in **Hungary**; and the ICONE Institute established in **Switzerland** in 1997. Moreover, notary chambers of **Algeria, Costa Rica, Mongolia, and North Macedonia**, for instance, have set up committees of retired notaries, senior judges, professors and/or other legal experts that can be consulted by their members. In **Puerto Rico**, notaries can also consult the Supreme Court special commission of experts.

2.3.4 Function of protection: protecting the weaker party

Providing access to justice for all includes the mission to empower the weaker parties to fully exercise their rights, understand the issues at stake and consequently make appropriate decisions. Nevertheless, notaries are not be allowed to police the entire content of the contract, nor can they cancel out free market powers to the benefit of the weaker party unless legislation specifically imposes such protections.

Laws should however allow and even oblige notaries to take into account legitimate interests of the weaker party (as in labour law, consumer law, landlord and tenant legislation, and so on), including interests that relate to third parties that are not directly involved in the contract such as legitimate rights of the spouse, partner, family members and others who are not shown as holders of tenure rights in recording systems (see VGGT, paragraph 11.6). This could be imposed as a requirement for the validity of transactions (see VGGT, paragraph 12.12).

For instance, in cases where the applicable marital property regime requires the consent of spouses even if they are not registered, it will be the legal duty of the notary to identify such rights and include the holders of such rights in the transaction process. A failure to do so may often cause the invalidity of the transaction and/or liability of the notary.

Depending on the context, “weaker parties” who might need special protection could belong to diverse categories of people – girls and women, children, minorities, indigenous peoples, persons with disabilities, people with no access to education or information, consumers, etc. For instance, notaries should offer institutional support to people with disabilities for them to be able to properly exercise their rights, and in particular to ensure that the notarial authentication procedure does not imply any de facto restriction to their legal capacity (see Box 7).

Box 7. Notaries and the *UN Convention on the Rights of Persons with Disabilities (CRPD)*

The CRPD, signed on 13 December 2006, is a pioneer convention leading to a change in paradigm from the traditional model based on the “replacement” of the person, to a model of human rights based on the intrinsic dignity of all persons and which champions a “support” system.

Article 12 of the CRPD is the cornerstone for the exercise of rights by persons with disabilities, as legal capacity, understood as the capacity to act, is an essential precondition for enjoying and exercising all rights on the basis of equal opportunities. A report submitted to the UN General Assembly in December 2017 highlighted the importance of

the notarial judgement of capacity in this new paradigm; paragraph 77 expressly states that in the performance of their duties, “notaries make assessments of the capacity of individuals entering into legal relationships” and specific reference is made to the notariat as an authority for the exercise of rights (UNGA, 2017).

In this context, in 2019 UINL published a *Notarial guide of good practices for people with disabilities*: the notary as an institutional support and public authority in English, French and Spanish. This guide examines the impact of the CRPD on notarial activities and how notaries can support its further implementation in benefit of the recognition of the legal capacity of all people with disabilities (UINL, 2019a).

Another category of person that could be considered as vulnerable are children. Notaries should respect the legal frameworks and restrictions established in order to protect minors, but they should also go beyond simple observance of the law and engage actively for the recognition and exercise of children’s rights, specifically on land (see Box 8).

Box 8. The role of notaries in protecting children without identities (Cote d’Ivoire)

The “ghost children” or “invisible children” are estimated to be more than 230 million in the world. They are deprived of most of their fundamental rights, including the recognition and registration of their identities. Owing to their lack of registered identities, these children cannot access basic public services such as healthcare or education, and become victims of people trafficking or sordid abuses. In terms of tenure rights, they cannot be recognized and registered owners nor holders of tenure rights.

The notaries of **Cote d’Ivoire**, in collaboration with the Francophone Notariat Association and the United Nations Children’s Fund (UNICEF), are involved as part of their social public service function in legislative reforms and action plans intended to alleviate this situation, notably through the implementation of an effective civil registry. Some of the solutions suggested to strengthen the civil registry are training, information and digitalization.

Notaries work daily with civil status information and need certificates to fulfil their duty of certification of identification. Being familiar with this matter, Francophone Notarial Association suggested that specific commissions be set up in each problematic country, under the supervision of the national chamber of notaries, in order to implement processes for generalized birth registration and regularize birth declarations made outside of legal deadlines (Dejoie and Harissou, 2014).

In real-estate property development contracts, «The weaker party» may enjoy legal protections as a consumer (if we think of a typical business to consumer situation). The weaker party may be making a once in a lifetime decision with little or no legal or technical experience in the field, and is often facing a very experienced developer. In such cases, notaries should use their influence on the stronger party to ensure that fair contractual terms are used (for example, requiring a developer to offer financial and performance guarantees). The duty should go beyond mere observance of legal rules and include the duty to create an environment in which every party is invited and free to express their opinion on accessible and transparent information, and is assisted in transposing such interests into actual terms of the contract (see Box 9).

Box 9. Contractual clauses created by notaries become consumer protection law (France and Germany)

There are many examples, in which notaries have developed contractual clauses and mechanisms that protect the consumer, which have later become standard requirements in the field.

In **France**, since 1953, notaries have contributed to the creation of 87 laws, 17 decrees, 8 ordinances and 1 regulation of the European Parliament and Council. Notably, the technique of the sale off-plan, where the buyer purchases the property before it is actually built up, came from notarial practice and propositions. Indeed, in the aftermath of World War II, France had considerable housing needs. Yet, the current law did not offer sufficient guarantees for buyers of off-plan property. The Notariat therefore developed legal techniques to secure buyers and their financing, while allowing the developers to carry out the constructions. The specific elements of the sale off-plan were designed by notaries in 1965; they then integrated a working group set up by the Ministry of Justice and the Ministry of Public Works, which led to the promulgation of Law No. 67-3 of 3 January 1967 relating to the sale of real estate to be built and the obligation to provide a guarantee for construction defects. This law is considered to be the founding law of real estate development. Equally under **German law**, payment by instalment in real-estate development contracts is strictly regulated: a developer may only ask for such a degree of instalments that corresponds to the amount of work delivered. Before such limits were prescribed by the law, they were developed by notaries together with developers who wanted to make sure that their contract will withstand fairness-tests by the courts and to inspire trust with the parties.

Box 10. Cooling-off periods in consumer contracts (France and Germany)

In many jurisdictions, such as in **France and Germany**, in consumers contracts (i.e. contracts between businesses and private persons), notaries must ensure that the private person has had sufficient time to deal with the object of the authentication beforehand. If the contract is a real estate purchase agreement, the notary has to provide the purchasers with the draft contract at least ten days (France) or two weeks (Germany) before authentication. This ensures a preventive cooling-off period in order to allow consumers to appreciate their commitment and the legal, economic and personal consequences.

Lastly, the weaker party may also refer to family farmers in a contractual relationship with global corporations. Notaries in charge of drafting and authenticating such contracts should always have at heart to protect the legitimate rights and interests of the farmers. They could do so through specific clauses in the act, financial securities and the setting-up of supervision means (see Box 11).

Box 11. Protecting the rights of farmers (China)

In China, in 2020, in order to speed up economic development and new rural construction, a village in Hubei Province was directed to lease more than 400 acres of non-essential farmland to a plant research company for the development of gardens and the planting of flowers and other industrial crops. In their overall work on the land lease contract, notaries collected several data (planning maps from the land management department, approvals issued by relevant departments, rural land contract and land operation right certificate and proof that the leased land is not basic farmland), then protected the farmers through

specific clauses within the lease contract: stipulation that the lessee should, in the first 5 years and in instalments, pay all lease fees for the entire leasing term of 21 years; agreement on a mandatory enforcement one month after the due date if the lessee fails to pay the lease fees in full and on time; supervision of the use of the land by the village committee.

2.3.5 Function of relief of curative justice

In delivering all of the above-mentioned benefits, preventive administration of justice can also help to relieve curative justice, as providing legal security *ab initio* can prevent tenure disputes. In their daily work, notaries should act as contractual mediators so that, ideally, all relevant points of conflict are identified and resolved before the definitive signature.

2.3.5.1 Role of (mandatory) authentication requirements

Notaries should and regularly do exercise mandatory preliminary checks, and in many cases even oversee the execution of the contract in the performance stage. Studies have shown that the percentage of notarial documents challenged before a judge is very low.

Civil law notaries create legal certainty by an *ex ante* identification of persons, verification of facts and law, and authentication of documents. They do not interfere in market relations but set a secure frame to facilitate their peaceful and undisturbed establishment and execution (Knieper, 2017).

Moreover, 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" (Arruñada, 1996). A recent analysis by Antonio Capiello of the involvement of notaries based on the data provided by the World Bank's Doing Business Reports (DBR) indicates that – even though the DBR recommend to make notarial authentications optional – jurisdictions which require mandatory notarial authentications achieve significantly better results, particularly in less developed jurisdictions (Capiello, 2019).

To fulfil their preventive function, notaries should be strongly involved in the preparation and follow-up of the acts. Where their duties are restricted to mere formalities, notaries should strive to offer as many additional services as possible, including the preparation, drafting and oversight of the performance stage (from which many disputes may arise between parties), wherever this is appropriate. Even when such a consultation is not prescribed by the law, parties should be offered an affordable and accessible option to receive the necessary legal advice when this is determined to be necessary or useful in a particular context.

Moreover, notarial authentic acts are often enforceable in their nature and regularly replace a court judgment. By allowing for immediate execution of certain obligations, notarial authentic instruments prevent unnecessary litigation in cases where a party is not denying its obligation under the law but merely unwilling to perform it.

Box 12. Study of litigation after the introduction of the notariat (North Macedonia)

In 2017, the notary chamber of the **Republic of North Macedonia** commissioned a study to quantify the improvements in the legal system after the implementation of a Latin notariat that assessed the work of the notaries over the previous 19 years. Among other findings, the study found that complaints as to damages or annulment were filed against notarial authentic acts in only 0.006 percent of cases and that only about 0.5 percent of notarial decisions in inheritance cases were contested (Manevski , 2017).

In cases that do end up in court, expertly drafted acts can make the subject matter of the case more accessible and allow the judiciary to concentrate on the underlying legal issues without having to spend time collecting evidence and interpreting imprecise terms of contract.

2.3.5.2 Dealing with non-litigious cases

Preventive justice is primarily intended to improve the situations of citizens, who are spared not only the costs but also the uncertainties and stress of litigation in relation to elements that often form the foundations of their life (real-estate, inheritance, family law). Citizens should be able to plan their projects on the basis of transparent and reliable tenure-related information, specifically in case of transfers outside of the circle of trust represented by families or small communities.

The “dejudicialization” process, also called contractualization or the freedom of parties to arrange their own affairs, is another good example of how notaries can help to relieve the courts of non-litigious cases where there is mutual consent and balanced and impartial legal advice. Such cases may include adoption cases above the majority age, agreement on matrimonial property regime, change in matrimonial regime and divorce without conflict (generally when no minor children are involved).

Box 13. Notaries entrusted to deal with agreement on matrimonial property and consensual divorce (Slovenia)

The Family Code in the Republic of **Slovenia** came into effect in April 2019. It provides for the possibility of notarial agreements on matrimonial property and consensual divorce at a notary's office. On the one hand, the Agreement on Matrimonial Property allows spouses to agree by mutual consent on the content of their matrimonial property, setting rules that differ from the default legal regime for the time of the marriage as well as for the event of a divorce. These agreements are entered into matrimonial property registers run by the chamber of notaries of Slovenia. On the other hand, spouses who wish to divorce and have no joint children who they need to take care of, can, if they agree on the main consequences of the divorce (division of their joint property, use of the couple's housing, financial support, etc.), agree on their consensual divorce in front of a notary. The marriage is dissolved with the authentication and there is no need for a court decision.

2.3.5.3 Notaries as facilitators of alternative dispute resolution

In the exercise of their functions, notaries are often confronted with delicate situations likely to become conflictual (divorce, inheritance, real estate sales...) and, whenever suitable, should be allowed to provide for alternative dispute resolution solutions before any judiciary case is pursued.

First, notaries should learn through their daily practice the art of reconciling the wills of antagonistic parties at the time of signing the notarial authentic act. If no legal requirement exists, they should consider inserting mediation, negotiation or arbitration clauses in the contract, with simple and effective procedures. For instance, requirements for parties to go through a mediation process (chaired by a notary, for example) before going to the court could be agreed upon in the contract.

Secondly, when disputes arise relating to authentic notarial instruments, parties will often contact the notary to ask them for advice. In this event, notaries should give objective answers and guidance to the parties, and offer to help negotiate a settlement agreement. This can help resolve disputes at a preliminary stage (see VGGT, paragraph 21.1).

Thirdly, the VGGT recommend that states strengthen forms of alternative dispute resolution (see VGGT, paragraph 21.3), especially at a local level, and suggest that states use implementing agencies with their technical expertise to resolve disputes (see VGGT, paragraph 21.4). The notaries, often referred to as the “amicable settlement magistrate,” should build on their neutral position and extensive legal expertise to ensure fast and effective mediation. This can be usefully combined with adjudication in order to resolve disputes between non-registered holders of legitimate tenure rights and third parties with a claim to their legitimate property. It might be considered more efficient to resolve tenure conflicts through a reasonable settlement than by imposing legal solutions that, because there were not discussed among the parties, may appear inappropriate.

Box 14. Notaries as arbiters (Germany)

An example of soft law rules are the rules of arbitration published by the German Notarial Association (Deutscher Notarverein), which offers a court of arbitration and rules and procedures for the efficient resolution of disputes, as well as competent arbiters (including but not limited to experienced notaries) specializing in disputes relating to notarial law.

Box 15. Mediation through notaries (France and Germany)

The **German** legislator has allowed the German states (Länder) to provide for mandatory mediation before claims can be brought before a court. Notaries have the legal competence to act as mediators, in particular in cases relating to the consolidation of the tenure laws of the former German Democratic Republic with those of the Federal Republic of Germany after reunification.

In **France**, the notarial chamber provides citizens with a mediation service prior to court trial. The notary-mediators must have undergone specialized training and have no professional or personal ties with any of the parties. 14 mediation centres are disseminated throughout the entire territory.

2.3.6 Providing enforceability

In many countries, due to the specific authentication procedure and the comprehensive information provided to the parties, the beneficiary can proceed with enforcement of their claim against the debtor on the basis of the authentic act without entering a prior court proceeding. Notarial acts can thus have the same effect as a judgment.

Particularly with regard to real-estate mortgages, the option of an expedient enforcement proceeding diminishes the risk for the lender. This might therefore lead to a reduction in the cost of the loan, facilitating the purchase of land and increasing the volume of investment for the benefit of the citizens. Notaries should be aware of their special public powers in this area, which allows for an expedient settlement of conflicts but must be exercised with great diligence and only after thorough instruction of the parties lest it cause very direct infringements on the rights of parties.

KEY FUNCTIONS OF (NOTARIAL) AUTHENTICATION

The role of notaries in a legal system should be to:

- Document legal acts and provide proof of the essential elements of a legal instrument (proof as to the identity of the person, declaration of the person, date, time and place), and thereby to enhance transparency.
- Ensure the full substantive validity of the legal instrument.
- Ensure adequate information and transparency to all parties and promote the free, prior and informed consent principle where and when appropriate.
- Offer full, impartial and qualified legal advice to all parties with regard to all legal aspects of the act.
- Protect weaker parties, enabling them to understand and exercise their rights and protecting them against exploitation of their position within the framework of the law.
- Reduce litigation, to the benefit of the citizens and businesses as well as of the legal system itself.
- Enable parties to create legally enforceable instruments.

2.4 Notarial ethics: fundamental principles in the service of responsible governance of tenure

Although the functions and purposes of notaries and similar professionals vary throughout the world, a number of key elements and common ethical principles of the notarial service can be identified and recommended on a general basis.

The *Deontology and Rules of Organization for Notariats*, adopted by the General Meeting of UINL member notariats in Lima, 8 October 2013, set out the fundamental values on which the notariat should be based over time, and the features of notarial ethics and notarial organization that are considered to be the cornerstone for a well-functioning notariat.

"They are principles studied and disseminated for over sixty years by UINL, which comprise the subject matters that have affected social reality and relate to the action of notaries in the fields of ecology, information technology, money laundering, the protection of personal data, the culture of legality and, of course, the social dimension of the notariat (UINL, 2013)."

Other regional organizations, such as the Council of the Notariats of the European Union (CNUE), consistently have their own codes of ethical conduct: the *European Code of Notarial Conduct* (CNUE, 2009) aims to guarantee European citizens and businesses the same protection, legal certainty and effectiveness in both cross-border and national operations.

Notarial deontology is particularly consistent with the VGGT, in particular with the principles of implementation as set out above (see VGGT, part 3B). For instance, the *UINL Deontology and Rules of Organization for Notariats* states that, in exercising their function, "Notaries have to promote Human Rights and, in particular, respect for life, food and the environment (clean water and air) and contribute to the sustainable development of society based on solidarity", including the promotion of equity and justice (see *UINL Deontology and Rules of Organization for Notariats*, article 18, and VGGT, part 3B.1).

Notaries can implement the VGGT in their practice in many different ways, in particular: using them as guidelines in their daily work, softly influencing private tenure governance decisions or advocating through their professional organizations for positive changes to the legal systems. The aim of this section is to explore the parallels between the VGGT and notarial function and ethics, and to foster implementation of these standards.

2.4.1 Performing a public function...

First of all, notaries perform a public function. Regardless of whether the exercise of their function is organized privately by the notaries, as is the case in a large majority of jurisdictions, or within a state-sponsored environment, notaries are not simply legal advisors as members of a free legal profession (like advocates or tax advisors).

Their work includes the exercise of public powers delegated by the state to confer authenticity to the documents they draft.

With regard to promoting responsible governance of tenure, this public function is essential. It guarantees access to notarial public services for all citizens and control through public supervision. This is also why in some cases notaries have particular duties – conferred by the state authorities – to promote specific policies, report transactions, request specific information, collect taxes, etc.

Due their allegiance to a public oath of service and their qualifications, notaries can readily be used as decentralized public agents in many contexts. Both notaries and their chambers, but also public authorities throughout the world, should make use of this particular position for all relevant public policy purposes.

2.4.2 ...while being independent and impartial

Although they are public officers, notaries are independent actors and typically not part of the administrative structure of the state. This independence affords individuals the option to seek autonomous, confidential and impartial advice before they make recorded decisions. The independence of such advice increases the trust of the parties in the legal order, which becomes more transparent and accessible to them.

To ensure independence and impartiality, corruption should not be tolerated. Notaries should never be biased by any personal advantages they might obtain from a case they are dealing with. In order to protect their independence, firstly, their involvement in acts that can lead to any kind of benefits – personal or financial - for them or their direct/close family members should be prohibited. Secondly, states should ensure that notaries can achieve a fair, reliable and sustainable income in order to limit incentives to act improperly.

2.4.3 Exercising the function personally and being accountable

Notaries may associate and are mostly supported by qualified personnel. Nonetheless, the personal exercise of the function remains a key characteristic (see UINL *Deontology and Rules of Organization for Notariats*, articles 16 and 20). Indeed, the public authority of the office is bestowed upon the notary personally and it should not be possible to delegate this to another professional, a larger organization or even a corporation, such as a law firm.

Particularly in times of globalization and digitalization, citizens should have a right to rely on a personal advisor before making decisions relating to some of their most crucial or valuable personal rights and assets, and to hold that person accountable. Notaries are also accountable for their actions both towards the parties and towards the state (see VGGT, part 3B.9 and UINL *Deontology and Rules of Organization for Notariats*, article 16). If they breach their duties towards the parties, they are liable for all damages caused.

Ideally, the degree of their accountability should be spelled out by the law and specified by the courts in order to create legal security. Every case should be studied in order to enhance the law of liability and to make it as predictable as possible, so that future legitimate claims can be settled promptly. In order to ensure that citizens are reimbursed, notary laws can also require notaries to have professional liability insurance. In cases where liability insurance reaches its limits (for example, in cases of intentional breaches of the law), chambers should organize insurance funds to make sure that individuals are compensated.

2.4.4 Highest educational qualifications

Notaries should have the highest legal qualifications and should continuously update and improve their knowledge through vocational training based on the principle of lifelong learning (see VGGT, paragraphs 3B.10 and 6.1, and UINL *Deontology and Rules of Organization for Notariats*, article 15).

2.4.5 An ethical personal attitude

An ethical personal attitude in the exercise of their function is required. Notaries should refrain from any behaviour that may entail losing the confidence of citizens in the notarial institution, or that are contrary to the dignity of the notariat (in line with the VGGT recommendations, paragraphs 6.7 and 6.8).

2.4.6 Professional secrecy in notarial practice

Notaries should be subject to the requirement of professional secrecy, which inspires the trust of their users, and is consistent with their role as independent and autonomous legal advisors. However, notaries could be required to notify certain transactions, with a particular focus on measures to counter money-laundering and prevent corruption. In such cases, any exception to the requirements of professional secrecy should be transparent and predictable, both for the notary and for the citizens, in order to protect the environment of trust necessary for legal advice.

2.4.7 Ensuring social rooting

Notaries should seek social rooting in the places where they exercise their function (see VGGT, paragraph 6.7). This means they should always try to adapt to the requirements and habits of the people in their locality and do their best to help them express their needs.

Paragraph 5.6 of the VGGT stipulates that "states should place responsibilities at levels of government that can most effectively deliver services to the people." Notaries are delivering legal services to the citizens, companies and local authorities. They may therefore represent excellent implementation of this standard, provided that the accessibility of the notarial service for all citizens is ensured by the State and the relevant administrative bodies (through adequate numerus regulatus, territorial competence, authorization of mobile service and so on).

Moreover, given that good social rooting in the respective community is essential to the acceptance and successful practice of notaries, public authorities should make it possible for people from every region and of every background to access notarial training and, once they have graduated, to apply to become a notary and practice in their local community.

Finally, although social rooting is considered a benefit, it should not be transmuted into family or political ties leading to corruption. Strong notarial ethics and disciplinary measures should be enforced to prevent such situations.

2.4.8 Supporting the simplification of procedures

The VGGT suggest that procedures should be simplified without threatening tenure security or quality of justice (see VGGT, paragraph 6.4.). However, issues relating to tenure law are often complicated and can rarely be broken down to simple decisions. Rather, simplification can only be achieved on a case-by-case basis, by presenting the legal requirements to the citizens in an approachable manner and having the same qualified professional assisting in the follow-up of the full procedure.

As the front desk of the registries, notaries should make it easy for the parties to understand the law – particularly as most of the fields of law that notaries deal with will have complex ramifications, and each case is different and so requires an individual assessment. The duty of a notary is not to passively answer the questions of the parties, but to actively ensure that they understand the issues at stake and to empower them to make informed and unbiased decisions in the exercise of their tenure rights.

2.4.9 Contributing to equal and affordable services for all

Notaries should be available to all parties and should provide them with institutional support regardless of their personal situation or of the economic value of their transaction.

In addition to this, notaries are obliged to carry out authentications; they may only refuse to carry out their public services if the act is incompatible with their official duties, namely in acts that are pursuing purposes that are not permitted or are conducted in bad faith (see UINL Deontology and Rules of Organization for Notariats, article 16).

The modalities through which equal and affordable access to notarial services can be assured are presented below. Ultimately, this aspect is also linked to access to justice for all.

Financial affordability

Assessment of the economic relevance of an administration of justice system

Protecting rights and providing a justice system based on the rule of law always entails financial costs – for the state and for citizens. All systems – those based on preventive justice and those that rely on curative justice – must reflect on how best to keep those costs affordable, particularly for the most vulnerable people, in order to fulfil the requirements of the VGGT.

The costs of preventive elements such as authentication and registration are typically regulated by law and as such, predictable and fairly distributed. These are considered as regular and inevitable transaction costs (for example, registration and notary fees). The costs of ascertaining and identifying rights in cases of doubt, and the costs of litigation, on the other hand – which are often very hard to predict in any individual case – are considered as extraordinary, unlikely and avoidable, and are often disregarded when comparing the costs of transactions and tenure governance. However, when elements of tenure governance are assessed from an economic point of view (which can lead to very useful insights for states and other stakeholders), all relevant costs and externalities should be taken into account, even those that might not be immediately present, in order to ensure an undistorted picture.

In preventive justice systems notarial authentication and registration fees are borne largely by parties engaged in a transaction, while in non-notarial systems they are borne to a greater extent by third parties such as potential business partners or state authorities. In both systems, there are certain trade-offs between the types of costs. In notarial systems, authentication costs incur before registration, which renders superfluous (significant) costs for title search, title insurance, legal opinions and/or certificates of good standing. In non-notarial systems however, these latter *ex post* costs are unavoidable, yet *ex-ante* costs are not eliminated completely either as the notary is typically replaced by the solicitors/lawyers that must be engaged by both parties. It is also important to note that although title insurance, which is usually used in after-care justice systems as a surrogate for the lack of reliable registers, may ensure monetary compensation, it does not guarantee the acquisition of the property as such, which is often essential to the individual.

Economic studies have shown that although formal requirements of preventive justice create *prima facie* additional visible transactional costs, the overall cost of conveyancing is not higher *per se* in jurisdictions that require notarial authentication when the overall costs are compared with the costs typically encountered by parties in systems with no, or low formal requirements (Murray and Stürner, 2010; Knieper, 2017; UJNL, 2019; Cappiello,

2020). Rather, according to the findings of Rolf Knieper there are “good reasons and historical experience to suggest that preventive justice through the authentication of important documents creates legal certainty and legal peace at individual and social costs lower than ex post protection strategies and litigation” (Knieper, 2017, p. 77).

Establishment of a tariff

Notarial advice should be affordable to all citizens who need it. In the land market, notaries should be accessible and offer the same quality of service to every party regardless of the value of the transaction. This cannot be achieved through an unregulated environment for the provision of legal services and so a fair and regulated tariff should be established. According to article 51 of the UINL *Deontology and Rules of Organization for Notariats*, “fees of Notaries shall be regulated by means of rates fixed by law or in lack thereof, by Chambers or Professional Associations” and “rates have to assure... general accessibility to citizens.”

The VGGT do not address the question of fees directly but ask states to make tenure-related support and advice accessible through legal aid (see VGGT, paragraph 6.6.). Notarial fees should not be based on the time and effort applied to an individual case, but could be set based on the value of the transaction: in this context, citizens with lower value transactions will pay a lower fee for the same quality of advice, while charging higher fees for higher value transactions will allow notaries to be able to cover the costs of their office and ensure their financial independence. This is similar to how other state institutions cover their costs – the value based tariff embraces the positive aspects of progressive taxation.

Taking into account the non-commercial, public nature of the office, the UINL *Deontology and Rules of Organization for Notariats* states that “rates shall not allow for any reductions or discounts leading to unfair competition based merely on price, to the detriment of the quality and independence of the service” (article 51). However, where necessary and in accordance with national laws, notaries should have the option to offer reductions and pro-bono advice for disadvantaged persons (for instance, people with disabilities, people in situations of dire poverty, the elderly) and smallholders in zones where the market value is extremely low (for instance, in favelas or lands in desert areas). Many national laws allow or even require notaries to reduce or waive fees in specific cases.

Moreover, it is not just holders of registered and recognized tenure rights who will seek the services and advice of a notary. Often parties such as a spouse, a child or perhaps even a holder of non-registered or legitimate customary tenure rights, may need legal advice but have little or no financial means. In such cases, notaries should use all means available to them to assist such parties, such as offering free initial advice and reducing, deferring or waiving fees (subject to the national legal requirements).

Costs should therefore not be prohibitive, and should be adapted in each region of the world and to each situation. The more accessible the notarial service is for citizens, the lower the costs to them of using the service. For instance, they do not need to

leave their work for too long, they do not need to pay high transport costs, and so on. Improving digital access should also be part of the solution when looking to lower the costs. Lowering costs helps to promote legal certainty by encouraging all people to actually formalize their rights.

Box 16. Reduction of fees for the most vulnerable (Belarus, Belgium, Hungary and the Republic of Korea)

In **Belarus**, about 11 percent of notarial acts each year are performed with the application of benefits for payment. Cases eligible for payment exemption or reduction are established by the resolution of the Council of Ministers and include disabled and elderly citizens. In addition, the notary chamber of Belarus, territorial chambers and the Minsk city notary chamber have the right to exempt from payment of the notary tariff in whole or in part other persons not specified in this resolution (UINL, 2020)

In **Belgium**, a Notary Fund was established by law in 1999 to grant a reduction in fees to specific citizens, under certain conditions. All notaries have to contribute to this fund. Regarding the notarial act of purchase, homebuyers who are acquiring a modest first family home and finance their acquisition for at least 50 percent of the value by means of a social loan, receive a reduction of 250 euros on fees. The law also provides for a 50 percent reduction on the loan act fee for social loans. The same fund is used for renunciations of succession drawn up by a notary, when the net assets of the estate do not exceed EUR 5000. The declaration of renunciation is established and registered free of charge and exempt from payment of writing and publication fees.

In **Hungary**, when a notary draws up an authentic act for a person who is not able to read or write, the notarial tariff must be reduced by 50 percent. In the event of drawing up a last will or power of attorney for a person whose health condition can affect the payment of the notarial tariff, the notary can reduce it by up to 50 percent.

In the **Republic of Korea**, some applicants are exempted from the notarization fees: first, recipients under the national basic living security act (whose recognized income level is less than 30-50 percent of the standard median income); secondly, persons eligible for support under the single-parent family support act (that is, parents who are supporting their own children and are either unmarried, or are bereaved of, divorced from, or abandoned by their spouse, or have a spouse who has lost their ability to work for a long time due to a mental or physical disability, a spouse who is an inmate in a correctional institution or medical treatment and custody institution, or is in military service).

Box 17. Examples of digital solutions to lower costs of notarial services for the most vulnerable and people located in remote areas

In **Belgium**, the Federation of Belgian notaries (FEDNOT) has extended its existing land registry application making it possible to obtain automatically and thus more quickly, the certificate that provides certainty that a property can be purchased at a reduced rate of registration duties. This reduced rate applies to property below a certain price and aims to allow more vulnerable citizens to acquire their own property..

Geographical accessibility

In terms of regional accessibility, a notary should be easily accessible to every citizen, even those living in remote areas (see VGGT, paragraph 6.4.). Notary chambers and/or ministries of justice should make sure that even in remote and rural areas there are offices occupied by notaries who conform with the highest standards of the role.

There could be a number of solutions to ensure that all citizens can receive qualified legal advice throughout the whole national territory. This can be achieved through reasonable distribution, by encouraging notaries to offer branch offices, service days in remote villages, mobile services, and/or home visits when necessary.

Box 18. Mobile services to access remote areas – the example of Colombia

In **Colombia**, the mobile notarial bus "Mi Notaría" provides Colombians located in the most remote and difficult to access areas with frequent notarial services since 2016. The bus is equipped with technological tools such as satellite communication, and also has an elevator for people in situation of disability. "Mi Notaría" bus receives an average of 1 million users during its annual tour of more than 300 municipalities in Colombia.

Also, the State and/or the professional body should create incentives to encourage notaries to apply for positions in remote areas in the first place – such incentives may include chamber membership fees or mandatory contributions to pension fund fees based on turnover rather than a flat fee for all notaries, income supplementation for notaries in smaller offices and other forms of redistribution of income (based on the principle of financial solidarity, UINL *Deontology and Rules of Organization for Notariats*, article 33). A strict limitation of positions (*numerus clausus*) may be considered necessary in order to maintain the profitability of smaller offices and territorial competences could prevent concentrations in the main urban areas. A (redistributive) fund for notaries in rural and remote areas could also be created in order to allow them to stay there even if the acts they do are not profitable. Another good practice regards career management. Notaries should be allowed to change their positions and be transferred to another town based on predictable criteria such as seniority. In this way, notary candidates who benefit from the latest legal knowledge and have already acquired good experience through professional internships during their notarial training will be encouraged to ask for appointments in rural areas and smaller cities when they first apply for a notarial position. Such a system can encourage excellent legal practitioners to serve in remote areas if they see the prospect of changing to a desired area later in their professional life and so ensures a high quality of legal service in such places. Once notaries are rooted in their local community, they might wish to stay there or decide to move on after several years of service. In this scheme, positions in larger urban centres should be accessible only once one has served in a smaller community before (see example in Box 19).

Box 19. Serving first notary position in remote/rural areas (Indonesia and Spain)

In **Indonesia**, the notary candidates apply for a position within a chosen province through an online system. A candidate may only apply in particular districts within the province defined by the letter D, determined by the government depending on the number of people, the estimated need of notaries, the banking sector abilities, the economic activities and development etc. Districts A, B and C are opened to more senior notaries that have obtained points through continuous training to move up.

In **Spain**, the request for a notary's office is resolved through a contest. The territory is divided by a "notarial demarcation" which determines in which towns there must be a notary, if so how many, and what class the notary's office is (first, second or third, depending on factors such as the number of inhabitants or transactions). Each year, the notarial contest includes the vacant notaries' offices that have not been covered in the previous contest and the vacancies that have occurred since. The appointment depends on two criteria: the "first shift", which gives preference to the notary with the longest seniority in the notarial career over the most recent one, in strict order of admission; the "second shift" which gives preference to the notary with more seniority in the class of the notary's office that is requested.

Reaching out to all users

As far as it is appropriate and subject to national law, notaries should promote the accessibility of their office (see VGGT paragraph 6.3) by reaching out to individuals that might need their advice but are not accustomed to consulting a notary. For example, notaries and their professional bodies could organize open days, give presentations, write articles about their practice, maintain presence on the internet, etc.

Notaries should also offer favourable working hours, appointments outside their office where appropriate (and when the law authorizes it) it and facilitate the use of modern technology.

Box 20. Reaching out to the population through a national advice day (Argentina)

Since 2013, the Federal Council of Argentine Notaries has been organizing an annual Federal Advisory Day. It takes place on a given day of the year in several locations in all provinces of the country simultaneously. Its main objective is to bring the notaries' services closer to the community by raising awareness about issues of notarial concern. Consultations are given at no cost by notaries of all provinces, even beyond the bounds of a particular authentication situation.

Accessibility includes the willingness to engage with citizens of all backgrounds and age and to understand their needs. The notary should strive to be seen as a partner empowering all citizens to enjoy and exercise their tenure rights. Notaries should therefore engage in missions with specific groups of vulnerable people (such as the elderly, the consumers, persons with disabilities, people in hospital) or marginalized people (such as indigenous people, refugees or prisoners for instance). Notaries should notably acknowledge the multiculturalism of the community they serve and take all necessary means to give whenever possible legal expression to people in their native language.

Notaries should fully advise the parties on all relevant aspects of the act they authenticate. In a typical authentication situation, the notary does not charge a separate fee for his/her advice as it is normally covered by the authentication fee. However, parties may seek the advice of the notary without a particular authentication in mind and notaries should be open to offer such consultations.

Box 21. Commitment of the notariat to support the community (Colombia, Italy, Lebanon, Mexico and Viet Nam)

In **Colombia** in 2019, the notariat set up a social day for the provision of notarial services in the El Buen Pastor Prison of Bogota, using the mobile notary's office "Mi Notaría" (see Box 18). More than 160 cases were dealt with, on various topics: power of attorney, authorization, civil registry of birth, civil marriage, consultations on family matters, acknowledgement of extramarital children, inheritance declarations, and so on. For the inmates it was an opportunity to resolve a number of problematic cases.

In **Italy**, numerous initiatives in support of access to notaries for people in situations of vulnerability have been promoted by the Notariat since 2008. Collaboration with consumer associations led to the realization of multiple guides on the protection of the socially vulnerable, presented during meetings and an open day in 60 cities. Free notary advice desks have been set up in 149 towns and cities for specific groups of citizens: victims of usury and racketeering, prisoners, abused women, consumers support administrators. Information meetings are held for the elderly and on the protection of the rights of people with disabilities.

In **Lebanon**, one and a half million Syrian refugees have come to Lebanon as a result of displacement due to the war in Syria, which began in 2011. Confronted with this tragic situation, the Lebanese notariat contributed to the protection of human rights and real estate property of the Syrian citizens. In close cooperation with General Directorate of the General Security and the Ministry of Employment, they regulated the residence of Syrian citizens on Lebanese territory through the authentication of takeovers, powers of attorney, work contracts, and other acts duly signed so that Syrians can obtain residence cards and work permits in Lebanon. Furthermore, Lebanese notaries ensured the signature of powers of attorney for the management, preservation or even the sale of real estate property on Syrian territory.

In **Mexico**, in 2019, notarial authentic acts were written and authorized by Mexico City's Notary 153, Jorge Sanchez Cordero, in in Mayat'aan and Nahuatl, two of the main indigenous languages of the country. He recalled "It is an unprecedented act in all the Americas, it is the first time that a notarial instrument is made in these indigenous languages, it is a watershed." The notarial authentic acts were presented in the framework of the International Year of Indigenous Languages, proclaimed by the UN. The president of the College of Notaries of Mexico City, Not. Marco Antonio Aguirre, said that these acts claim the human right of indigenous peoples to express themselves in their native language: "language, beyond being a means of communication, is a means of cultural conservation and diffusion, and that is why we want to contribute to the population through the social function we have always had" (Secretaria de Cultura de Mexico, 2019).

Another example is given by the Notary Law of **Vietnam**. The notarial services can be performed outside of the notarial service providers' offices in case the clients are the elderly, people who are physically unable to travel, people who are detained or serving prison sentences, or people who cannot go to the notarial service providers' offices with good reason.

KEY RECOMMENDATIONS 2.4

Notaries should contribute to implementation of the VGGT through their function and ethics:

- Notaries are public officers appointed by the state to perform a public function, which they personally exercise and are accountable for, both towards the parties and the state.
- Notaries should have obtained the highest possible legal qualifications and have undergone thorough vocational training.
- Any behaviour leading to loss of confidence in public services should be avoided and notaries should promote human rights, equity and justice in their practice.
- Notaries should be independent and impartial and should respect professional secrecy, within the limits of transparent and predictable public requirements such as money laundering risk alerts.
- Social rooting should be encouraged because it leads to better understanding of local needs and therefore to the provision of adequate services.
- Notaries should be accessible to everyone, everywhere, and should ease legal procedures for their users, empowering them in their decision-making process and ensuring a complete follow-up.
- Notaries can serve as decentralized agents for the promotion of public policies throughout the national territory.

Notarial activity should provide for equal and affordable access to justice for all:

- All relevant costs and externalities should be taken into consideration when different legal concepts or instruments are compared, in order to assess the fairest and most affordable solution for all users.
- Any user should be able to afford notarial services; notaries should be able to afford to advise people with no or poor financial means.
- The notarial public legal service should be accessible to all citizens, regardless of their personal and economic situation.
- Geographical accessibility should be ensured; notaries should be available in every part of the territory, however remote.
- Insofar as it is appropriate, accessibility should include digital access, which may also lead to cost savings.
- Notaries could reach out to all individuals and communities that might be in need of their services: people with disabilities, children, indigenous communities, refugees, and so on.

3

**How should the VGGT be
an inspiration for preventive justice?**



3. How should the VGGT be an inspiration for preventive justice?

As discussed above, the system of the preventive administration of justice can make a major contribution to the goals of the VGGT and promote the implementation of the VGGT worldwide. The VGGT seek to:

1. improve tenure governance by providing guidance and information on internationally accepted practices for systems that deal with the rights to use, manage and control land, fisheries and forests.
2. contribute to the improvement and development of the policy, legal and organizational frameworks regulating the range of tenure rights that exist over these resources.
3. enhance the transparency and improve the functioning of tenure systems.

(see VGGT, paragraph 1.2).

This section will showcase good practices in preventive justice to show how the VGGT can inspire changes in legislation and help overcome challenges in practice in order to improve tenure governance (see section 3.1). Particular focus will be placed on the adaptation of the preventive administration of justice in line with the VGGT in the digital era (see section 3.2).

The final part of this section will then conclude on the different ways that notaries and other practitioners in the preventive administration of justice can act as agents of change, advocating for greater consideration of the VGGT throughout the whole governance of tenure (see section 3.3).

3.1 The preventive administration of justice based on the VGGT: some examples

The system of preventive administration of justice can be a support for application of the VGGT and vice versa – the VGGT can be an inspiration for introducing or enhancing elements of preventive administration of justice in a legal system. As is true for any kind of legislation, any such introduction must be adapted to the specificities of each legal system.

Introducing a system of preventive administration of justice does not necessarily entail switching from one legal system to another. In other words, the clear distinction

between civil law systems (focusing on the preventive administration of justice) and common law systems (based on ex post control) is no longer as obvious; globalization has increased the interactions between both systems and their instruments, and recognition of foreign practice has become compulsory in various national, regional, and international private law. Preventive justice can therefore be a very useful (additional) element for enhancing responsible governance of tenure regardless of the origins of the legal system of a particular jurisdiction.

This section aims to showcase some examples of both change in legislation with the involvement of notaries and best practices leading to a better governance of tenure through the introduction or strengthening of elements of preventive justice.

3.1.1 Easing access to justice: implementation of one-stop-shops

The VGGT advocate for the simplification of procedures in order to ease the access to justice for all. Administrative processes should be simple, clear, streamlined, contextualized, and easy for rural communities to read and use to claim and defend their tenure rights (see VGGT, paragraphs 6.6, 10.4, 11.3).

In this regard, one-stop-shops have several virtues, including accessibility, simplicity and security of land tenure. A one-stop-shop eliminates unnecessary legal and procedural barriers related to tenure rights. Especially in regions with weak or little infrastructure, the one-stop-shop saves a great deal of time and money – in terms of transportation, administrative procedures and so on (see Boxes 22 and 23 for examples of successful implementation of one-stop-shops).

Box 22. Single Land offices (Madagascar and Mongolia)

In **Madagascar**, land policy is based on bringing together "the legal and the legitimate". A new policy was introduced with the objective of setting up decentralized land management, so as to enable titles to be issued within a short period of time and at costs within the reach of all Malagasy people. This reform was undertaken by the 2006 Land Act, which establishes the legal regime for untitled private property, based on the computerization of land information in a local land use plan managed by an agent of the communal land office, enabling the commune itself to gradually establish its own land cadastre. The results are quite impressive. Over the past century or so, only 400 000 land titles had been issued in Madagascar, with the rate of issuance being 1500 from 2004 to 2014 at an average cost of 370 euros with no less than 24 steps required to be titled. Since the single land offices were set up in a small part of the territory, 200 000 applications for land certificates had been submitted and more than 143 800 certificates issued within a maximum period of six months, at an average cost of 20 euros (Mbaye, 2014).

In **Mongolia**, the state project "Smart Ulaanbaatar" enabled state and public services – including social insurance, social care, civil registration, land and property relations, tax, notarial services, banks and others – to render their services at one-stop centres within a shorter time and with less burden to citizens. As of today, a total of 386 entities (287 administrative entities in the capital city and 99 government implementing agencies) are located at four integrated locations, and each of the 21 provinces of Mongolia has their own one stop centres.

Notaries should act as an even more enhanced one-stop-shop, by not only taking care of all procedural steps of a transaction but also, by virtue of being a legal expert, giving impartial legal advice to the parties at the same time.

Box 23. Notaries involved in one-stop-shops (Serbia and Togo)

In **Serbia**, since 2019, notaries have been the only authority authorized to register mortgages. Previously, citizens were obliged to visit the property registration office four or five times in order to register a mortgage; now they only have to visit the notary office once to get the service completed.

In **Togo**, an audit of the Togolese land tenure system carried out by the Higher Council of Notaries of France (CSN) in November 2008 assessed serious land tenure insecurity in the country (land conflicts represented more than 70 percent of the cases registered in the country's courts) and suggested elements of land reform for urban and rural areas. In November 2018, the Togolese Parliament adopted a new law on land tenure and state ownership in the Republic of Togo (Mbaye, 2014). The law established the creation of single land offices and digitized archiving of land data, in order to prevent multiple sales of the same parcel of land. It also introduced new measures on the sale or exchange of land or buildings, including a prohibition of the sale, transfer or exchange of any property that has not been registered beforehand. The land transaction must now be approved by a notary who ensures, beforehand, the real existence of the property, as well as the authenticity and legality of all the documents involved. The single land offices were set up in 2019. The digitalization of land titles and the creation of the "e-foncier" platform now allow all requests, all fee payment and property transfer files to be submitted online. As a result, entire transfers are now completed in six hours instead of the 2 to 5 years it took in the past. Registrations and divisions of land are now completed in an average of six months instead of the 3 to 10 years they used to take.

3.1.2 Accessing transparent and reliable information: improving public land registers

Having access to transparent, reliable land tenure related information is extremely useful not only for citizens but also for state authorities. The VGGT advocate for states to: take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights (see VGGT, paragraph 3.1-1). States should also safeguard legitimate tenure rights against threats and infringements and should protect tenure right holders (see VGGT, paragraph 3.1-2).

Suggestions for achieving this include, firstly, to add in law a clear definition of all categories of legitimate tenure rights (see VGGT, paragraph 8.2) and, secondly, to identify and register in public registers all individual and collective tenure rights, including those held by the State and by the public sector, private sector, and indigenous peoples and other communities with customary tenure systems. State administrative systems should be equipped to process applications for the formalization of all legitimate tenure rights in a systemic and reliable manner (see VGGT, paragraph 17.1). Such systems should be established by public authorities to record all important information and, for the sake of legal certainty, they should rely on authentic documents.

Whenever possible, this legal reform should be coupled with a process of digitalization, in order to allow easier and broader access to the information.

Box 24. Improving land records (The Netherlands and Canada)

The FAO technical guide no. 10, *Improving ways to record tenure rights*, p.17, mentions the example of **the Netherlands**, where, "the records on rights were established to provide publicity of transfers while the records on parcels were created to raise revenue through property taxation. The two sets of records had duplicated and inconsistent information because they were used for different purposes and maintained separately. Over time, the linkages and consistency between the two sets were improved through reforms, such as by placing their management within the same agency and requiring the parcel number to be used in acts for transfers and mortgages. (...) The records are documents, mainly notarial deeds, which are compiled in books in the order that they are submitted for recording, although all records are now in digital form. In addition, a cadastral administrative database contains information extracted from the deeds and allows for the easy identification of a parcel and the people who hold rights to it. (...) As a constitutive system, the transfer of a right through a sales transaction can occur only with a recorded deed. As a result, people who rely in good faith on the records of the public registry are largely protected: a person cannot rely absolutely on records of the public registry, but he or she can assume that what is not recorded does not have to be taken into account. Because of the high quality of information in the system, the reports provided through the cadastral administrative data-base are similar to the title records in a title system" (FAO, 2017b).

Quebec, in **Canada**, counts more than 3 600 000 real estate properties. The government has developed a modern infrastructure that makes it possible to easily and quickly identify the rights encumbering buildings so that the owners can fully enjoy their property rights. In addition, purchasers and hypothecary creditors use information from the Land Registry to assess the validity of a property title, thereby promoting the exploitation of the economic value of the properties. With the speed with which transactions are concluded, it became necessary to improve the current infrastructure for the publication of rights.

As a result, the following initiatives have been implemented in recent years:

- The reform of the Quebec cadastre and renovation of the cadastral plan began in the 1990s, and should be completed in 2021. The goal is to renumber all the cadastral lots in Quebec (horizontal and vertical) by assigning each one a unique number, as the Civil Code of Quebec indicates that the number given to a lot is its only designation and is sufficient in any document that refers to it.
- The digitalization of the land registry started in the early 2000s with the computerization of all activities related to the publication of rights: millions of pages of deeds and cadastral plans have been digitized and are now available for consultation by notaries and other users remotely. In addition, a notary can submit a registration requisition using the online registration requisition service. The procedure is reliable and secure, as it is certified by an official digital signature.

Reliable public registers can increase the level of security of tenure. In particular, the law may provide for mandatory registration of rights in a public register in order to be recognized or opposable to third parties (see VGGT, paragraph 17.2). However, mandatory registration can be a threat to legitimate tenure rights if this requirement is not supported by an effective, systematic and accessible registration system that allows

these tenure rights to be recorded and protected fairly. In this context, publicity of the rights through public land register can protect legitimate tenure right holders against forced evictions and unlawful dispossession (see VGGT, paragraphs 3.1-2, 4.5, 9.5). These kinds of improvements to the legislation and implementation of public registers can be made without converting to a brand new system. In particular, when the old system is parcel based, it may be advisable to adapt the existing system, which is already known and used by the public registration officers, and to encourage them to execute the new provisions gradually.

3.1.3 Adopting a holistic and sustainable approach: urban planning and protection of the environment

States draft laws to organize and regulate the protection of the environment and vital resources such as water, agricultural land and forests. One of the most important tools for controlling the use of land, forests and fisheries is spatial planning. Although spatial planning is a public task, it typically affects privately held land and aims to balance public and private interests.

Rules on urban planning are fundamental in order to regulate the growth of housing/living areas and the densification of main cities in order to prevent its spread over to vital agricultural and natural land plots. Several solutions for this may be encountered.

Box 25. Providing a legal framework for sustainable urbanization (France and Mauritius)

In **France**, the notariat, in collaboration with economists, academics, surveyors and urban planners, designed the ‘kit de la copropriété’ [condominium ownership kit] to help countries developing their tenure jurisdiction in relation to regulating urban densification. The kit comprises model laws (a pre-defined set of legal dispositions that states can choose to adopt in whole or in part so that they become the country’s actual national law), draft contracts and other legal tools that can be used to implement condominium ownership in a national legal framework. The kit is designed so as to be adaptable to each country’s particular needs and culture and has already been presented in Cameroon and Mauritius.

In 2015, **Mauritius** launched the ‘Smart City Scheme’, designed to create more than 15 smart cities in order to meet the challenge of growing urbanization – in 2050, nearly 60 percent of the country’s population will live in cities, compared to just over 40 percent currently. The Mauritian Government launched an international call to reform its legal regime relating to housing estates as, in its current state, it did not allow good management of the infrastructure involved in the project. The call was won by the French *Ordre des Géomètres-Experts* (Order of surveyors) and Higher Council of Notaries, and a multidisciplinary team of experts worked on three kits for the legal framework and management of Smart Cities. First, the above-mentioned kit on condominium ownership; secondly, a kit on landowners’ associations, which contains proposals for new legislation and a model nomenclature note; third, a kit on the division of volume. The legislative texts were adopted by the parliament on 9 November 2018 and entered into force from 1 March 2019. The country is now equipped with modern legislation to regulate Smart Cities.

For instance, the widely used concept of condominium ownership (“copropriété”) can be useful in densely populated urban areas. A “copropriété” can be defined as a building whose property is divided among several persons and includes on the one hand, private areas (individual apartment unit, cellars, and so on) and on the other, common elements (land, networks, roads, corridors, roofs, and so on), for which ownership and responsibility are shared. This concept is emerging in many legal systems, but more legal developments may be necessary to facilitate the efficient use of land. Moreover in many countries, permits are typically required to build new real estate, and renovate existing buildings (to comply with new safety and environmental norms). Notaries should support the state in the implementation of public spatial planning and verify its correct application to each situation. For instance, they should encourage the parties to respect responsible spatial planning and obtain all necessary authorizations to build or modify a property, or create an easement for instance, and inform the parties about the relevant legal requirements. They may also be asked to authenticate transactions that are necessary to prepare zoning and development plans (particularly at a local level), including transfers between public and private bodies. Lastly, it can be part of the notaries’ mission to monitor the legality of the envisaged use of land through a series of checks before completing the definitive transactions.

Box 26. Creation of protection mechanisms in the public interest and to protect the environment (Slovenia)

In **Slovenia**, notaries certifying a signature or drawing up a notarial act in a real estate sales contract have to follow the stipulations of the Land Register Act and check whether the contract has been reported to the competent tax authority, and tax has been assessed and paid. Land Register Permission has to be provided by means of a certificate from the competent authority about the eligible use of land in accordance with spatial planning documents and on any spatial actions that apply to the territory where the land is located. The certificate shows the type of real estate (agricultural, forest, building), whether the municipality has a pre-emptive right for that land, whether the real estate is on a protected territory under the Nature Conservation Act, is a cultural monument under the Cultural Heritage Protection Act, or is protected under the Waters Act, etc. If the certificate confirms that the land is agricultural land, a forest or a farm, the competent administrative unit issues a decision under the Agricultural Land Act that confirms the legal transaction or a certificate attesting that no confirmation is necessary. If the land lies on a territory defined as an important area, the competent defence office has to provide its consent before any type of legal transaction, and the consent has to be submitted to the notary.

Pre-emptive rights of the state and other public bodies must be respected by the notaries when drawing up the act. For instance, pre-emption rights of the state can be appropriate or even necessary in the agricultural sector in order to protect essential resources for agricultural use and prevent speculative trading of agricultural land. In this context, the notary could be missioned to notify the real-estate contract to the state. Through such a notification, the state has the opportunity to control the sale and use of agricultural land, in accordance with national law; if there are imperative reasons of overriding public interest, the state can take over the contract under the same conditions as those that were applicable in the original contract (see Box 27).

Box 27. Protecting agricultural land through pre-emptive rights (France)

In **France**, the Land Development and Rural Settlement Corporations (SAFER) were created in 1960. Their initial objective was to reorganize farms, as part of the implementation of a more productive agriculture, and to install young farmers. Since then, the SAFER missions have broadened to protect the environment, landscapes and natural resources such as water, and to support local authorities in their land projects. The law gives SAFER pre-emptive rights: they are systematically informed by notaries of sale projects regarding rural property and can buy the property in priority instead of the initial purchaser in order to resell it to another assignee whose project better responds to local development issues. The objectives of this pre-emption right are to maintain the agricultural vocation of a property; avoid overbidding on prices; encourage local development; protect the environment. SAFER exercised 1380 pre-emptions in 2018, for a surface area of 6600 ha and a value of EUR 68 million (0.4 percent of the total number of draft sales notified to SAFER).

It may also be useful to provide information about previous pollution, risks in the areas, water provision and sewerage to any user and purchaser of a building and/or plot of land, if such information is collected and documented. Tenure rights are typically balanced by duties (such as the duty to keep the land clean of pollution, or in some situations, to install necessary sewerage, or in case of easement, to provide convenient access to the beneficiary) in order to respect the long-term protection and sustainable use of land, fisheries and forests (see VGGT, paragraph 4.3). Notaries should warn the parties about potential inconsistencies between the type of land and their purpose of use; for instance, if the land is polluted, or mines are underground. They should give as much details as the law and administrative services can provide in order for people to make wise decisions.

Legal, and if not, contractual sanctions should be prescribed for cases where a land user is guilty of intended pollution and rehabilitation should be compulsory to avoid further contamination of natural resources and degradation of the whole environment. In their daily work, notaries should inform their users on such rules and sanctions even if they are not part of the core duties of instruction that notaries have towards the parties. Notaries should also advise parties on whether or not the intended actions comply with the regulation and on the consequences of such actions. From a legislative point of view, notaries should be included in the legislative process in a consultative capacity, on all aspects of relevance to their functions, including the creation of incentives. They can be integrated in task forces created for these purposes.

3.1.4 The role of notaries in land consolidation, voluntary exchanges and expropriation

In 2020, FAO produced a legal guide on land consolidation which defines land consolidation as follows:

"Land consolidation is a legally regulated procedure led by a public authority and used to adjust the property structure in rural areas through a comprehensive reallocation of parcels,

coordinated between landowners and users in order to reduce land fragmentation, facilitate farm enlargement and/or achieve other public objectives, including nature restoration and construction of infrastructure" (FAO, 2020, p 3).

Land consolidation should be highly participatory, gender-sensitive and ensure that all participating landowners are at least as well off after the procedure as they were before. Land consolidation is one of the tools that may contribute effectively to achieving the 2030 Agenda for Sustainable Development and the sustainable development goals (SDGs). It must be respectful of human rights and follow certain principles in order to, among other things, ensure the protection of legitimate tenure rights and be respectful of the environment (FAO, 2020).

The FAO guide considers three types of land consolidation in rural areas: voluntary, majority-based and mandatory land consolidation. The guide encourages countries to adopt a land consolidation process that is carried out under an administrative or judiciary procedure, whereby a land consolidation plan (also called "re-allotment plan" or the "re-parcelling plan") is approved by a public entity before submission for the simultaneous registration of property rights. In this context, the administrative decision of the Land Consolidation Commission or other body adopting the land consolidation plan should be the sole basis for the registration of the land ownership and other land-related rights deriving from the plan, as opposed to normal bilateral land market transactions. The Land Consolidation Law should provide for cost-effective registration of the changes to the property rights through submission of the adopted plan as the basis for registration, rather than through the submission of many separate documents as in normal land market transactions (FAO, 2020, p. 138). In this process, and in national systems that rely on notaries to confer authenticity on legal acts and contracts, the notaries' functions could be to ensure proof, transparency and identification of the right holders.

However, in countries where land consolidation is not currently regulated by specific provisions, the re-parcelling may be initiated and carried out by the land owners themselves outside of any public framework. In this case, the re-parcelling will follow the general rules of sale and land exchanges and notaries will perform all of their normal functions.

Furthermore, some states opt for hybrid systems, where notaries verify the original land rights of participants and their consent to the land consolidation plan before its formal adoption and registration. This is likely to be more cumbersome, but in some cases may also enhance the acceptance by parties of the land consolidation process and allow them to understand further steps (see VGGT, paragraph 13.6). Notaries' local knowledge, expertise and reputations thus come into play. Although participating in such private redistribution efforts will often be time-consuming for notaries, it is important that notaries and their chambers live up to their public function and accept such duties. States, on the other hand, if using notaries to promote such agreements in the pursuit of the public good, should assist notaries, provide necessary (if applicable simplified) procedures and ensure adequate compensation to create incentives for notaries to fulfil their obligations in the best possible manner.

Box 28. The role of notaries in rural land requisitioning (China)

Over the last 40 years, marked by rapid and sustained urbanization, the need for requisitioning certain building land has increased exponentially in **China**. In this context, Chinese notaries have been drafting compensation contracts concerning the requisition of rural land, including clauses on the economic compensation of the farmers and the resettlement of relocated villagers. Notaries then supervise the compensation and resettlement contracts implementation. For instance, in 2018, a villager in Xi'an City, Shaanxi Province had a dispute with the requisition agency over the area and value of his house built on the land. In 2020, an agricultural company had a dispute with the requisition agency over the value evaluation of more than 500 mu of economic forest. In both cases, notaries supervised and preserved the evidence during the survey and evaluation process conducted by the asset evaluation organ and the parties reached an agreement.

Expropriation is “a fully mandatory instrument, involving in most cases, monetary compensation rather than land” (FAO, 2020, p 9). According to the VGGT, expropriation should be limited to cases where land is required for public purposes (see VGGT, paragraph 16.1). In systems based on the rule of law that protect the right to private property, expropriation is an ultima ratio measure (see VGGT, paragraph 16.9) that should only be adopted if offers to acquire the required resources based on fair valuation through market transactions are not successful – particularly if holders of tenure refuse to sell their land even though a fair offer has been made. Notaries can assist efforts to create incentives to sell land by helping to negotiate acceptable terms, which may include offers to compensation in land rather than monetary compensation and rights to repurchase properties once they are no longer needed for public purposes (see VGGT, paragraph 16.5). Data collection can also provide a better overview of the sale prices for land and so be useful in cases of expropriation, to calculate the fair compensation.

KEY RECOMMENDATIONS 3.1

The VGGT can inspire various improvements in legislation and practices strengthening the preventive administration of justice:

- One-stop-shops should be considered whenever possible to simplify the procedures and ease the access to justice for all.
- Such one-stop-shops can and should also rely on digital solutions to enhance their performance.
- Notaries may be in charge of those centres and take care of the entire process for citizens from first contact to public registration.
- Public registers should be assessed for potential improvements to provide the most accurate and transparent data possible.
- They should integrate the necessary (digital) tools to record all individual and collective tenure rights including legitimate rights.

- States should make extensive use of notaries in their sustainable management: involving them in decision-making and law-making processes regarding spatial planning and the protection of the environment, entrusting them with the notification of land and natural resources transfers, etc.
- Notaries should inform the parties about all the information available about the plot of land and/or natural resources at stake: risks, pollutions, rules on their use, and sanctions.
- Notaries can help in land consolidation, redistribution and expropriation by providing proof, transparency and identification of the rights holders of such projects and supporting market-based transactions outside of specific land consolidation projects.
- They can also collect data such as sale prices in order to assess fair economic compensation.

3.2 Strengthening preventive justice and qualified legal advice in the digital age

A legal system should always adapt to new trends and address the evolving needs of citizens. Digitalization is one of those. Although it is the responsibility of the state to change the legal framework to allow digital support, circulation and archive and provide for their responsible use and efficient control, the reforms can and should be initiated or influenced by notaries and their chambers through regular consultation and feedback.

Digitalization can be defined as a process of replacing or enhancing usual means (be it human resources or material resources) with new technologies, therefore transforming a tool or process into a fully or partly digital one. This section strives to look at digitalization in terms of opportunities and challenges for the preventive administration of justice through some practical examples, with a special focus on the implementation of digital solutions in developing countries.

3.2.1 What opportunities does the digital era bring for the preventive administration of justice?

If used properly, information technology (IT) tools can offer many opportunities for improving responsible governance of tenure, sometimes even at low cost. Citizens, governments and notaries can all benefit from digitalization in the preventive administration of justice.

3.2.1.1 The key opportunity of digitalization: availability for all

For citizens, digitalization can provide enhanced access to the information needed and

the possibility of tracking land related processes and applications. As the Internet is everywhere, they might not even need sophisticated electronics such as computers – it could be as easy as opening a phone. There are now more than 7 billion mobile SIM cards registered worldwide: thanks to phones, access for the population, including the poorest, is broader (Lamb, Tonchovska and McLaren, 2019).

In that context, digitalization is therefore an opportunity to increase the availability of the service to citizens – offering wider and more transparent access to public information and, by combining virtual exchanges and physical meetings, an improved relationship with the professionals involved in the governance of tenure, easier processes for authentication and registration, etc.

Digital tools could allow a cleaner and clearer registration process while minimizing opportunities for corruption: the fewer procedural steps there are, the fewer people have the opportunity to ask for extra money in order for a tenure right to be publicly recognized. This significantly reduces costs for citizens and improves public services. The digital connections between public services such as tax authorities and land registers could also be of great use: automatic notification of change of ownership will help to eliminate data inaccuracies, prevent payment notifications being sent to the wrong person and, ultimately, enhance the collection of taxes.

For government authorities, digitalization enables better data collection and management. The global availability of tools such as smart phones can generate an impressive quantity of important data in a short period of time: *“these technologies can be used also for surveying property boundaries for the registration process, including first time registration, sub- divisions and automatic change detection.”* Digital tools can also facilitate the conservation of archives.

For notaries, full digital access to property registration archives as well as to key registers and the establishment of electronic connections with those registers should be promoted. This will not only make their actual work easier but also, in particular in developing countries or for people reluctant to use the new technologies, it could represent an additional service offered by the notary.

3.2.1.2 The benefits of having notaries implement digital tools

Both states and citizens should understand the benefits of using notaries to implement and use digital tools.

For governments, the use of notaries reduces front-office (receiving the clients) and back-office (scanning and checking the documents) work for public services; this means their staff can focus on their core administrative and oversight tasks and missions and optimizes staffing costs. This only requires implementation of a simple module – it does not need to be expensive and highly developed software to start with: *“building a complex IT system with a modern architecture will often take years and a lot of money and the existing services may not improve at all. The IT system is just a tool, like a pen, for*

doing something. It is a very advanced pen, but a pen, nonetheless" (Lamb, Tonchovska and McLaren, 2019, p. 110).

Moreover, the quality of the data delivered by notaries are of great value to public authorities: *"You don't need to wait years, as the data submitted in digital form by notaries and legal professionals are usually of good quality; the applications can go directly to the back office for approval"* (Lamb, Tonchovska and McLaren, 2019, p. 125). Notarial authentic instruments are created based on the standards set out in chapter 2, which ensures that the information submitted to the registers is correct and conclusive, and reflects the true and informed decisions of the parties.

Box 29. Better service through notaries in the digital era (Croatia)

In **Croatia**, recent changes in the legal framework have made it cheaper to effect public registrations through notaries, attorneys or lawyers rather than having to go to the property registration office itself. This benefits everyone – clients get better and cheaper access to services, while the government receives all documents in digital form and digitally signed by a professional legal expert, which ensures a better quality of applications, with preliminary checks done in the civil register, commercial register, address register and tax register.

Another very valuable contribution by the notaries is that they avoid and report errors in the registered information, such as misspellings of names, birthdays, addresses, etc. in the property registers (as the records are old and have been maintained manually for years). There should be a service for notaries to report errors in order for the quality of the data included in the registers to be continuously improved.

Finally, chambers of notaries should be proactive and work with the competent authorities to develop e-services when the key registers are not yet digitalized, and to test and report errors identified for e-services that have already been implemented. Whenever a technology is available, chambers should promote the technology to the notaries, and train and engage them in using the new tools.

For citizens, notaries can provide online advice and quick and transparent, one-stop access to public services. People can visit a notary office instead of going directly to the public administration, thereby avoiding expensive transport costs or, as stated above, multiple and/or potentially corrupted procedures. Notaries can grant them immediate access to accurate, selected information and, in an ever more complicated legal world, give them full advice. Notaries can prepare and submit an application electronically on behalf of the parties, issue property extracts directly from the property register, etc.

3.2.2 What challenges do the new technologies bring?

The opportunities of the digital era bring with them numerous challenges. These too affect citizens, governments and notaries: how to ensure data protection? How to guarantee identification through digital means? How to ensure the best possible legal advice in the decision-making process? How to prevent hacking and security failures

in the systems, which could lead to falsification of documents? How to ensure the conservation and accessibility of the documents in future as digital technologies evolve? How can transcription errors be avoided during the transition from paper registers to digital ones? How can the accessibility of information to all users be ensured, including people who are not familiar with the new technologies or who lack the economical or educational skills to use them? Should notaries be worried about ultimately being replaced by the new technologies?

3.2.2.1 Human legal advice and administrative support is still needed

Particularly in developing countries or for people in situations of vulnerability or dire poverty, nothing can replace human relationships when it comes to providing legal advice and administrative support.

Authenticity is derived not just from the notary's signature, but from the notary's explanations and their discussions with the parties to inform their consent, as well as from the clarity with which the consent is expressed. Therefore notaries do not need to worry about being replaced by new technologies; instead, they should seek to use those technologies to facilitate their daily tasks and improve the delivery of their service. Using new technologies this way will enable notaries to concentrate on their core competences and tasks for the benefit of their clients, and perhaps allow them to devote more of their time to advising clients.

Although it is technically feasible to eliminate in-person contact, this would not satisfy the needs of all citizens to access consistent legal advice, or the notaries' duty to verify legality. In particular, weaker parties – who are unaccustomed to legal procedures and whose entire livelihoods may be at stake in a notarial procedure (for example, procedures relating to the acquisition or sale of land or to an inheritance) – deserve a high level of protection, which in some circumstances the notary can best ensure in person rather than through videocalls. An in-person consultation at the notary's office can provide parties with a safe environment to express their thoughts and wishes and consequently to make good decisions about their future. Therefore, physical meetings will not be consigned to the past. However, using digital tools to allow full preparation and follow-up online could make the physical meetings more valuable and convenient for all.

3.2.2.2 Technologies as facilitating tools

All actors in the preventive administration of justice should use technologies as what they are: tools, not goals in themselves. Digitalization is becoming increasingly important for day-to-day notarial activities. Notaries across the world are playing a pioneering role in digitalization. In several countries, they keep digital archives, and use or even provide e-signatures, with notary chambers sometimes acting as certification authorities.

A full study on the characteristics of the notarial authentic act released by the UINL in 2019 noted:

Compatibility with the new technologies. The drafting of the Authentic Instrument is not in the least incompatible with the new technologies. On the contrary, their speed and adaptability greatly assist the Notary's work without compromising prior legal certainty. The Notariats of many countries are using electronic media and signature technologies today both for preparing the original deeds and for issuing duplicates, archived copies and Registry notices or communications with other public bodies. The Secure Verification Code provides access at all times to the Authentic Instruments anywhere in the world (UINL, 2019b).

Actors in the preventive administration of justice can also think ahead by studying digital tools and their potential use at a global level and through multi-stakeholders' platforms: biometric identification, blockchains, artificial intelligence, etc.

Implementation of digital identification systems, for instance, corresponds to a key mission of notaries around the world, namely the verification of users' identity to prevent fraud. Proof of identity is the first step to accessing one's rights and services. In 2018, UINL endorsed the *Principles on identification for sustainable development: toward the digital age*, produced by the World Bank:

The organizations endorsing these shared Principles recognize the potential of strengthened identification systems to support development and the achievement of the Sustainable Development Goals. We believe that creating inclusive, secure, and trustworthy identification systems can empower individuals and enhance their access to rights, services, and the formal economy. (...) However, at the same time that building identification systems – particularly digital ones – creates opportunities to further development goals, it may also create a number of challenges and risks. This Declaration therefore identifies a set of common Principles fundamental to maximizing the benefits of identification systems for sustainable development while mitigating many of the risks (World Bank, 2017).

Another example is the possible use of blockchain technology to guarantee the traceability and accuracy of documents issued by the notaries. This technology does not replace the need to keep a secure centralized archive of notarial deeds, but can be used to extend the functionality of a digital archive.

3.2.2.3 The protection and conservation of data should be ensured over time

Cybersecurity and data protection present serious challenges to be addressed as priorities when dealing with sensitive information. A technology should not be left without human supervision and so a service that is open to all without controls should not be an option. In this regard, private entities should not be allowed to own or display citizens' data without the control of the state; that is why software developments and implementation should always be publicly monitored.

In this context, notaries can make convenient intermediaries, given their status as public officers. Citizens can use notarial services to request specific public data – in this way, they can have easy access to the data they are interested in/linked with, without being given uncontrolled and unlimited access to sensitive data from other private and public persons, with the decision as to who might have legitimate grounds to access specific sensitive data entrusted to a public officer.

In addition, the security and privacy of the information contained in notarial acts must be preserved throughout the entire process, from the draft to the conservation of documents. A digital act should use a certified electronic signature that can be verified permanently. Such certificates may include confirmation of the notary's professional and public officer status. Notaries, and particularly their chambers, should control and use appropriate mechanisms to protect digital archives of notarial acts and ensure their accessibility over time regardless of the evolution of technologies. Whenever possible, chambers should own and manage the digital tools set up for notaries.

Box 30. Digital conservation and archives of notarial authentic acts (France and Germany)

In **France**, the Association for the Development of Notarial Services (ADSN), created in 1983 and controlled by the Higher Council of Notaries of France, is in charge of the electronic central storage system of the notaries of France, MICEN. MICEN is a server designed to ensure the centralized storage of all French notarial acts. It guarantees the perfect conservation of electronic authentic instruments for 75 years before they are handed over to the relevant departmental archives. Regular reformatting of MICEN, provided for by the law, and adaptation of the file format over time, allows it to keep up with technological change and ensure the durability of the data.

In **Germany**, the legislator has assigned the public mission of digitalizing the safekeeping of notarial acts to the German federal chamber of notaries, which will maintain the Electronic Archive of Authentic Acts from 2022, handling approximately 7 million new documents per year. The electronic documents that are stored can be accessed and read by the notary or the chamber of notaries for a period of 100 years. The archive is stored on data centres that are certified according to recognized international safety standards. A long-term archiving format ensures the readability of the acts over time. To ensure the confidentiality of the electronic documents, every single document is individually encrypted by the notary before it is stored in the Electronic Archive of Authentic Acts.

3.2.2.4 Lessons learnt from the Covid-19 pandemic crisis

The spread of the Covid-19 virus has had important consequences for notarial activity in various countries of the world. Many notariats have examined the possibility of digital notarial authentication in compliance with the fundamental principles for the exercise of the notarial function. In this context, it should be emphasized that the direct contact between the notary and the parties should remain an essential element of providing the notarial services.

Moreover, states should always respect the principle of technological neutrality –

that is, it should be left for the notary to decide which means is appropriate in each specific situation, in order to ensure that the decision-making process is flawless and that consent is obtained freely, to identify the parties, evaluate their capacity, and in general to verify the legality of all the elements that constitute the act the notary must authenticate.

Faced with this crisis, governments might decide to allow notarial authentic acts to be concluded on the basis of a virtual appearance by the parties in front of the notary; in this case, the videoconferencing and e-signature platforms chosen should ensure a secure and high-quality interaction between the notary and the parties signing the act: sound, image and digital transmissions that allow the notary to adequately perform their functions, in particular the function of advice and protection.

The protection of users' data and the confidentiality of discussions in compliance with professional secrecy should also be a priority. For that reason, that management of such platforms should be controlled by national notarial bodies, in order to ensure their independence, transparency and security. Ideally, the company that has the technological tools enabling remote electronic signing of authentic instruments should be owned by the notarial public institution itself. If this is not the case, they should avoid being at the mercy of a monopolistic company and instead contract various qualified service providers who are accredited and approved by the national chamber or used by other public bodies with similar security standards.

3.2.3 Examples of locally adapted technologies being used to enhance service delivery

Secure ways of drawing up, authenticating, using and transmitting public authentic instruments electronically in relation to tenure rights are currently being developed around the world. The examples presented below can be considered to be good practices for using digitalization to improve the preventive administration of justice.

3.2.3.1 Public registration e-services

Simple e-services can be implemented by notaries and public registration officers to simplify many land tenure related procedures and improve access to information by progressing the digitalization of documentation. In each case, the close cooperation and proactiveness of all actors was of great help.

In Albania, the chamber of notaries worked in close cooperation with the property registration authority to develop and test new e-services to allow notaries to access the digital archive and block a property online for transfer. If the data are only available on paper, the local offices have three days to digitize and submit the digital file to the notary. If the data is already available in the digital archive, the system sends the digital files automatically without delay.

In Algeria, considerable resources have been put in to modernizing digital communication and accessibility to land-related information: digitalization of cadastre services, the use of satellite photographs for the census and identification, delimitation and measurement of plots of land.

In Cuba, a computer application to enable interoperability with public registries is currently being created. It is expected that this will be able to be inserted in the "Bienestar" platform, which is used to provide citizen services. Through this application, notaries can check several types of data and also access the citizen's unique file. This will help to improve identification of the applicant.

In Estonia, the e-Notary system is an online environment that allows electronic communication between notaries, the state and service users. Online queries can be made to more than sixteen different registries. The system is owned by the chamber of notaries and server administration is undertaken by the centre of registers and information systems, a department under the Ministry of Justice, which also provides user support, trains users and develops the system. E-notary is an everyday tool for notaries that helps them to acquire information from different databases, prepare the wording of contracts, forward contracts to various registers and monitor the implementation process of contracts. The e-Notary system has increased the efficiency of notaries' work. The e-Notary program can only be used by notaries and their employees. In February 2020, two new IT tools were launched for the notary service users. An Estonian digital identity card or a mobile-identity must be used to log in. The self-service portal allows users to view notaries' online calendars to book an appointment, submit preliminary transaction information to the notary, view and comment on draft contracts; later it will enable users to access the authenticated contract, pay the notary's and state fees, then securely obtain a legally valid electronic copy, free of charge.

In Italy, notaries can access the real estate and cadastral registers directly in telematic mode, immediately check the title or plans of a property and check whether a mortgage has been registered on the property. Notaries are also responsible for transmitting the authentic act of transfer of ownership electronically to the office of property registers and the land registry, which transcribe the act immediately. In corporate matters, after signing the act of incorporation and the by-laws, the notary directly requests the registration in the register at the Chamber of Commerce, which proceeds within one to two days.

In France, transmission to the property registry by the notary is performed through the "Télé@ctes" system, a remote transmission system accessible to all notaries and also installed in the public services concerned. Notaries carry out dematerialized exchanges between their offices and the tax authorities and public registers.

In Mauritius, UINL, and more specifically its French member, the Higher Council of Notaries of France, are currently assisting notaries with digitalization of their data exchanges with land registries and implementation of the electronic authentic act. Legislation methodology and drafting will also be provided in two main fields: off-plan sales and the supervision and regulation of two professions (condominium administrators and real estate agents).

In Mongolia, pursuant to the Amendments Notary Law dated 31 May 2019, the chamber of notaries is responsible for registration of notarial acts for the whole territory of Mongolia, for the establishment of the database for such information and registrations, and is also entitled to electronically exchange and share information and data with the state registration, taxation and other related entities. Accordingly, the Mongolian chamber of notaries is currently working with the state administration of land affairs, geodesy and cartography on technical solutions for the exchange of information between the chamber's database system and the land and cadastral database system.

In the Russian Federation, a multi-institutional IT system was introduced several years ago and so all government and municipal authorities are connected and exchange information. For cases in which the data is not available digitally, the deadline for digitalization and responding in digital form is three days. This is used for validation of passports, marriage certificates, property rights, etc. Notaries have e-services and a 24/7 help desk is available for property registration services.

Before 2019, notaries in Serbia were obliged to submit notarized contracts for property registration to three different authorities: the Ministry of Justice, the tax authority under the Ministry of Finance, and the property registration authority (Republic Geodetic Authority) under the Ministry of Construction. Since the introduction of new e-services in 2019, notaries submit the notarized contracts through a single IT system and receive digitally signed certificates from the property registration authority.

In Viet Nam, several provinces and cities have implemented digital management of notarial files, which enables notaries to review the history of a property and transactions related to it (authorization, creation of wills, inheritance, mortgage). Notaries can also consult the database on properties to see whether properties are within the government's development plans, are subject to conflict, have owners with court judgements against them, or whether transactions on the property are restricted.

Systems for tracking online applications using mobile phones have been introduced in Albania, Bosnia and Herzegovina, Croatia, North Macedonia, the Russian Federation, Serbia, Ukraine and other countries. This is a very simple e-service, which can be developed in a day without the need to have a fully automated IT system. Such system leads to more transparent administrative processes, minimizes therefore the risk of corruption and diminished the need for parties to call notaries for follow-up matters.

Finally, there are multiple projects by major international and regional organizations currently underway to set-up e-governance. For instance, the European Union has launched several projects regarding new laws on e-signature and new e-services through e-government platforms. Notably, the European Union funded e-government projects and has for many years supported Bosnia and Herzegovina to draft a new law on e-signature, establish a certification authority and develop and test several e-services.

3.2.3.2 Electronic signatures and notarial authentic instruments with online appearance

In many countries, notaries can create electronic notarial documents by replacing handwritten signatures with electronic ones using a 'signature card' that is attributed to them personally and that includes encrypted data relating to the identification and signature of the notary. The act can be prepared on the usual drafting software, the annexes are scanned and, during the appointment, the authentic instrument is displayed on a screen. After reading the deed and incorporating any amendments, the notary validates it with their signature key. Transmission of the complete act to the parties and public administrations can also be done electronically.

In Brazil, a national authorization was issued to allow divorces, inventories, shares, purchases and sales, donations and powers of attorney to be processed through the e-Notary platform. These procedures are carried out under the ICP-Brazil certification standards with the participation of the notary. Since its implementation in 2020 the e-Notary counts on the platform more than 10 000 acts, 11 300 digital notarized certificates and 1 500 notaries (Colegio Notarial do Brasil, 2020).

In Estonia, in addition to the self-service portal, a law permitting remote authentication entered into force on 1 February 2020: a person can get a notarial act authenticated from wherever he or she is via video bridge by using an Estonian identity card or mobile identity will be used to log in and sign the act.

In France, a decree dated 20 November 2020 authorized remote authentication of powers of attorney if the parties cannot physically come to the notary's office. In that event, the appearance in front of the notary takes place through videoconference: the identification of the parties and verification of their informed consent should be carried out through means approved by the national chamber of notaries. Both the parties and the notary sign with a qualified electronic signature (the highest level of security).

In the context of the transposition into national law of European Union Directive 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132, as regards the use of digital tools and processes in company law, the German, Italian and the Spanish notariats have developed a secure online procedure for the establishment of corporations. In addition to the procedure requiring the physical presence of the parties, parties will also have the option of setting up a limited liability company in an online procedure – without doing away with the public authentication and control and advice by a notary. The procedure must on the one hand be user friendly for the parties, and on the other respect the highest security standards in order to ensure a legally certain identification.

3.2.3.3 Electronic circulation of documents

Global organizations and states are willing to rely on notaries in the matter of the digital circulation of documents. This is notably the case for the Hague Conference on Private International Law (HCCH) e-apostille process, where notaries are designated by several states as the specific authorities for the certification needed to control the accuracy of a document circulating abroad.

On 1 December 2017, the chamber of notaries of Estonia began issuing e-apostilles and launched a Category 2 e-Register, as part of the electronic Apostille Program (e-APP) under the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (the Apostille Convention). Users can now apply for both e-apostilles and paper apostilles via the new notaries' website, as well as checking the validity of apostilles issued in the e-Register (HCCH, 2017).

Since 1 July 2019, notaries in Latvia are also competent to legalize public documents with apostille. Notaries are thus the delegates of the State to validate the procedure for the issuance of documents such as university diplomas, birth certificates, extracts from criminal records or marriage certificates, established in Latvia and intended to be delivered to a foreign institution in any state party to the Apostille Convention. The procedure is fully digitized. CNUE, in its announcement underlines:

"This new competence granted to Latvian notaries reflects the growing commitment of European governments to reduce their courts' workload, thereby increasing the efficiency of the administration of justice. Latvia joins Estonia, Hungary, Romania and Spain, which have already placed their trust in their notaries to issue apostilles." (CNUE, 2019).

3.2.3.4 International sharing of information

Digital communication should also be considered in terms of international and interprofessional sharing of information.

In Europe, the European Network of Registers of Wills Association is an international non-profit association governed by Belgian law, created in 2005 by the Belgian, French and Slovenian notariats. States that have a register for the recording of wills and that adhere to the European Network of Registers of Wills Association can interconnect their registers, thus enabling all European citizens to discover wills left by any deceased person regardless of the country in which that will was registered. The Association now has 20 member notariats and one partner; 14 members benefit from complete and automatic interconnection, in addition to the register of St Petersburg that allows access to information on the Russian register.

In Latin America, a collaboration agreement was signed on 17 December 2019 by the General Council of Notaries of Spain, the Conference of Ministers of Justice of the Ibero-American Countries (COMJIB) and the Ibero-American Network for International Legal Cooperation (IberRed). Under that agreement, the Notary Certification Agency (ANCERT), a technology company for which the Spanish General Council of Notaries holds 100 percent of its share capital, will design and implement the Iber@ platform. ANCERT provides a simple, advanced and qualified (or recognized) electronic signature, which is a security mechanism that makes it possible to guarantee the integrity, authenticity of origin and non-repudiation of the signed content. This online platform, with public and private access, will make it possible to manage digitally signed requests for international legal cooperation in a secure communication environment between central authorities.

It will link 500 members from different sectors of justice belonging to 22 Ibero-American states.

3.2.4 Embracing digitalization in developing countries: key elements

Although transferring public registers and notarial authentications to the digital age is a priority for many countries, the reliable and well-performing structures of the rule of law that are suitable for a free market economy have often not been fully developed in developing countries or in transformation economies that are still adapting to the free-market economy.

The specific challenge here is to embrace digitalization and – at the same time – to consolidate the rule of law and the function of preventive justice without jeopardizing the legal environment.

Some of the preconditions for benefiting from the digital era include:

- national strategies and laws on data protection and privacy should be developed;
- laws on electronic signature should be passed;
- a certification authority should be designated and authorized to provide e-signatures;
- the law on administrative procedures, the property registration law and all related laws should recognize digitally signed documents;
- e-access to registers should be authorized for notaries, as notaries' e-services are directly related to the e-services provided by the registration authorities.

KEY RECOMMENDATIONS 3.2

The VGGT should be considered when implementing digital solutions enhancing the preventive administration of justice:

- Digitalization can enhance the quality of service.
- Any digital solution should benefit citizens, the government and practitioners, aiming to make processes faster, cheaper and simpler.
- Notaries can act as a relay between the state and citizens in the delivery of digital public services – on the one hand providing qualitative data to the administration, reporting errors, and being proactive by suggesting, testing and providing feedback on new e-services, and on the other hand ensuring an easier process and expert support for citizens.
- Policies and laws should evolve to ensure a responsible use of technologies, taking into consideration the protection of data and cybersecurity.

- Technologies can provide public authorities with a great variety of data of interest for the responsible governance of tenure.
 - Technologies can greatly facilitate notaries' tasks, and digital tools for identification, communication, conservation, preparation and follow-up should be studied carefully.
 - Human supervision should never be cut out as technologies are merely tools; citizens should be protected from security defaults and the lack of personalized legal support.
 - Digital platforms for the delivery of public services should be managed and controlled by public authorities.
 - Electronic signatures and remote authentication are useful tools – in a secure and confidential digital environment and provided the notary has the right to decide whether or not the solution is sufficient to identify the person, inform them, protect them and certify their full consent.
- E-services can start from a simple online tracking system application, or digital access to a register, through to the set-up of full e-governance or remote electronic authentication.
- Digitalization is of great interest regarding interprofessional and international circulation of documents and sharing of information.
 - In developing countries, digitalization should be implemented cautiously in order not to jeopardize the consolidation of the rule of law.

3.3 Notaries as agents of change: their role in the development of new laws and procedures

Notaries can support legal reforms in line with the principles set down in the VGGT in several ways – including through their good practices, which, either through legislative changes or by setting standards in relevant practical legal literature and case law, may become part of the legal framework itself. Notaries can also be involved, through the information gathered to draw up their authentic acts, in data collection, the production of accurate statistics and the sharing of information with public institutions. At the national level, notaries should draw up proposals and communicate them to lawmakers and state administrations through their representative bodies (national chambers) and congresses. Finally, notaries can exert influence through the International Union of Notaries and other regional institutions by publishing guidance. These actions can lead the legislator to introduce a system of preventive justice within the country or enhance the existing preventive justice system and tools.

3.3.1 Assessing legal frameworks and participating in legal reforms

Legal assessments and participation are both very important in preparing legal reforms, and notaries can play a role in both areas.

On the one hand, the VGGT (paragraph 26.2) encourage states to set up multi-stakeholder platforms and frameworks at local, national and regional levels to collaborate on implementation of the VGGT. Including all stakeholders in the process of legal reform ensures that reforms are adapted to the actual current needs of the population and that the new laws are applied by all practitioners. When introducing preventive justice in a legal system, states should ensure that the policy, legal and organizational frameworks for tenure governance are consistent with their existing obligations under national and international law and have due regard to voluntary commitments under applicable regional and international instruments (see VGGT, paragraph 5.2). In this context, notaries and other professionals in the preventive administration of justice should be consulted during the law-making process.

On the other hand, notaries can use their practical experience to provide input to assessments of existing legislation and how it could or should be reformed. Since 2010, UINL has made projects related to land tenure security a priority, putting notarial expertise at the disposal of states and organizations and regularly providing governments with draft tenure law. In assessing legal reforms, notaries should have at heart the desire to help devise practical and cost effective solutions, avoiding unjustified self-promotion and conflict of interests.

Box 31. Ensuring efficient formal preliminary assessment: UINL provides a standardized document

All legal reforms should always be preceded by a formal assessment of the national legal situation, in order to ensure that the legal reform is adapted to the needs and specificities of the country. UINL has worked to produce standardized land tenure audit documentation. All UINL experts in charge of carrying out an audit of a country's land tenure system can now work from the same standardized document, which will gather all the useful information to be forwarded to the authorities in order to initiate the statement leading to the legal reform.

Notaries and similar professionals are in an excellent position to identify issues and gaps and propose changes in the law. Cooperation between notaries and the public sector should not be limited to their day-to-day work; notaries should work together in order to identify needs for development and reform of tenure law. Indeed, even in well-developed legal systems there is always potential for improvement, and so regular review of the legal system should be planned, as societies evolve and public opinion shifts. Notaries should share information with the state, should be involved in legal reforms and give feedback to lawmakers on the application of legal provisions, the need for possible amendments and on their practical implementation.

Box 32. Associating notaries to legal reforms – some examples

Globally, the notariat has been involved in various multi-stakeholder land tenure audits and land tenure reform, such as:

- **Togo:** Audit report submitted to the Minister of Justice and the Prime Minister, in partnership with the expert-surveyors (2009).
- **Montenegro:** Audit mission for United Nations Development Programme (2010).
- **Haiti:** Participation in the French inter-ministerial cadastre/land security project since 2010.
- **Viet Nam:** Submission of the audit report on land security in the country's three economic centres (Hanoi, Danang, Ho Chi Minh) in partnership with IGN International, Bull and Assistance to the Development of Exchanges in Economic and Financial Technologies (ADETEF) (2011).
- **Egypt:** Preliminary evaluation mission of the reform of the land registration system (2011).
- **Qatar:** At the request of the Ministry of Justice of Qatar, evaluation mission of the country's land tenure system and formulation of proposals for an improvement of the regulations in force for disputes at the level of the Courts of Appeal concerning land tenure (2011).
- **Madagascar:** Collaboration in the National Land Programme of the Minister of Land Management and Decentralization; audit mission (2010) and evaluation missions (2011-2012), in particular for the World Bank
- **Tunisia:** Audit of land tenure in urban areas submitted for the Marseille Centre for Mediterranean Integration (2012).
- **Burkina Faso:** Provision of expertise on the Agricultural Investment Code for the Euro-African Institute for Economic Development, chaired by Michel Rocard, an OECD partner (2013).

As far as it is permissible, and subject to the requirements of professional secrecy, notaries should share their observations and relevant data (ideally in an aggregated form so as to ensure the protection of personal data) that might be necessary for the sustainable development of governance of tenure rights and property law. In particular, notaries and their professional organizations should report on the legal problems and issues that their service users have to contend with and lobby for practicable solutions to such problems.

Box 33. Notaries at the forefront of the identification of tenure issues for the improvement of government land policies (Côte d'Ivoire and Senegal)

In Côte d'Ivoire, the notariat has developed a permanent communication channel with the Ministry of Construction and Urban Planning as well as with the Ministry of Agriculture, through which notaries submit citizens' complaints relating to potential improvements to the procedure for issuing property titles. The Ivorian notariat is also part of a chain of land actors (along with urbanists, surveyors, cadastre agents, and public land services) consulted by the government on land issues through working groups currently tackling topics such as property transfers, urban land registration, and building permits. For example, the Ivorian notariat played an active role in a seminar/workshop organized by the Ministry of Agriculture and Rural Development and the Ministry of Women, Child Protection and Solidarity, with financial

support from the European Union, entitled 'Securing land rights for women and social cadets in rural areas'. The Ivorian notariat also participated in the sessions of the property transfer working group, jointly organized by the National Investment Promotion Centre, the Ministry of Construction and the World Bank, for the development of a charter for a titling project in Abidjan, then to be rolled out in all cities in the country.

In **Senegal**, the notarial profession participates in most land-related institutions and notably within the Land Reform Commission. During the last Congress of African Notaries in October 2019 (UINL, 2019d), strong recommendations were made and transmitted to the Senegalese Chancellery, including in particular: i) recharacterizing the right to use unregistered land, recognizing that it is transferrable, seizable and transmissible; ii) establishing a streamlined system for the identification of unregistered land and its rightful occupants; iii) establishing and regularly updating a land registry dedicated to unregistered land; iv) extending the mandatory involvement of the notary to transactions on unregistered land, regardless of the nature of the contract or the status of the parties. Notaries in Senegal are in permanent contact with the Administration of Estates, Land Registries and Cadastre services. Regular consultation meetings with these various services allow problems relating to land tenure to be identified.

In any law reform, obsolete or inefficient laws should be repealed. It is good practice for any new law to clearly state which laws it supersedes and which previous laws it repeals in order to prevent confusion and problems of interpretation when it enters into force. Notaries can form part of the task force in charge of identifying the legal provisions to be withdrawn and confirming the alignment of the new law with international obligations and recommendations, such as the VGGT. Once changes have been formalized, notaries should support the new legislation and explain all the details and legal consequences to their service users in an easy, understandable and comprehensive way.

Box 34. Securing Land tenure – examples of actions of the notariat in the world

Within the framework of the cooperation between France and Haiti managed by the Haitian Interministerial Committee for Land Management (CIAT), the French Notariat participated in missions to assess the land situation in this country following the earthquake of January 2010 in cooperation with the Union of Notaries of the Courts of Haiti. These missions made it possible to draw up an inventory of the situation and the actors involved in the land tenure sector and to define the priorities to be given to rapidly secure land tenure for the benefit of the poorest. The Notariat brings its legal and land tenure expertise in the field of legislation methodology and drafting in order to draw a modern Haitian notarial law and various texts in the field of land registration and publicity. Four draft texts related to land reform in Haiti were finalized in January 2016: draft laws on the notarial activity, on surveyors, on cadastre and on land registration. Due to local political instability, these texts are still in the process of being adopted by the Haitian Chambers of Parliament.

In Southeast Europe, in 2017-2018, the German cooperation agency (GIZ), in cooperation with the German Federal chamber of notaries (Bundesnotarkammer "BNotK") developed practical, locally applicable solutions focusing on a regional exchange of experiences in the context of the project "Electronic Communication of Notaries with Public Registers" which aimed at strengthening the rule of law within the framework of the preventive administration

of justice in South-East Europe countries by setting up, through digitalisation notably, reliable registers that allow property rights in real estate and the status of companies to be determined unequivocally. The project fostered a strong cooperation between various stakeholders within individual countries as well as between stakeholders from different countries. The ministries of justice, courts, registration authorities, chambers of notaries and other relevant institutions committed themselves to the same strategy (create a modern, technically progressive but yet reliable and fair environment for transactions) and to implementing the same objective (the realization of legal reforms in order to further develop electronic communication while strengthening the preventive administration of justice). First, a strategic declaration on electronic communication of notaries and registers was signed. Second, the current legal situation was analyzed and necessary legal amendments were drafted for individual jurisdictions. Third, on a technical level, software solutions that implement the objectives were developed. Fourth, on an organizational level, the partners appointed national experts or bodies to accompany and support the aims and challenges of digitalization for the individual stakeholders.

3.3.2 Providing land tenure security in practice

The effective prevention of tenure disputes, which is at the heart of the VGGT General Principle 5, depends on how notaries exercise their function in their day-to-day practice and interpret existing laws. Notaries should be conscious of the integrity of the entire legal system and that each instrument authenticated by a notary becomes part of the legal order, and look beyond simple legal rules to the underlying spirit of the law.

On the one hand, notaries should pay particular attention to the rights of human

Box 35. Defending the rights of Indigenous Peoples and local communities – UINL commitment as a member of the International Land Coalition

At a global level, UINL is a member of the International Land Coalition, a broad and diverse network that bridges a wide range of views on land rights and governance but shares a common vision and values to catalyse joint action in country. International Land Coalition promotes a campaign called “Land Rights Now” which engages active citizens, media, communities and organizations worldwide to promote and secure the land rights of Indigenous Peoples and local communities: “Our goal is to secure these rights everywhere. Our target is to double the global area of land legally recognized as owned by Indigenous Peoples and local communities by 2020. We need to take bold action on this matter. Securing these rights is a necessary condition to eradicate poverty and hunger, to fight climate change, and to build a world of justice where human rights are protected for all” (<https://www.landrightsnow.org/fr/>) Being part of International Land Coalition’s networks, UINL can communicate with notaries all over the world on how local communities try to defend the land they worked and lived on for generations against global and often non-responsible businesses. Notaries being aware of such issues should then engage into advocacy to provide sustainable land (to live, to grow food, to work...) to the most vulnerable.

rights advocates and land activists, in particular the rights of peasants, indigenous peoples, fishers, pastoralists and rural workers (see VGGT paragraph 4.8.). They should

take measures to avoid inadvertently obliterating rights through the legal and titling processes, e.g. pastoralists' rights to graze at certain periods, rights of way, rights to gather wood and fruits, etc. Reference to the FAO *technical guides on commons and on pastoral land* can be very useful for that purpose (Davies et al., 2016 and FAO, 2016). On the other hand, notaries have an important role to play in securing the land rights of indigenous people and local communities, as they can help parties to achieve full formal and legal recognition of these rights.

Around the world, notaries have been involved in "titling" projects for over ten years. Titling can be defined as the process to deliver guaranteed property titles in order to allow all citizens, especially the most vulnerable and the poorest, to enjoy decent housing and secure property rights. Titling strives to give a formal existence to informal tenure rights. In this context, notaries have been very creative throughout the year to propose promising and innovative instruments in favour of land tenure security.

Box 36. "TSS" - simplified and secured title on land

In 2011, Notary Abdoulaye Harissou published a study "La terre, un droit humain" ([Land, a human right], Harissou, 2011) in which he proposes the creation of an original and ambitious title on Land: the so-called simplified and secured title (TSS for "titre simplifié et sécurisé" in French). The TSS is an official, simple document that every citizen, including the poorest, can obtain in a short time and at low cost. Certifying the ownership of the inhabited hut, the plot of cultivated land or the small farm, it could be bequeathed or transmitted by inheritance. To avoid the uncontrolled commodification of land and the destruction of the environment, however, it should include an inalienability clause. The creation of TSS involves various actors: surveyor, notary, sociologist or anthropologist, and computer scientist. Its issuance should be supervised, monitored and controlled by a commission including representatives of local traditional structures..

Box 37. From informal to formal property rights (Argentina, Colombia and Madagascar)

In **Argentina**, in 1994, Law 24.374 on land regularization created a special regime to allow low-income occupants of urban buildings to access property rights on their housing. It sets up a two-step process: First, regularization thanks to a preventive registration in favour of the occupant in the Real Estate Property Registry through a notarial document; Second, consolidation after a period of 10 years by the definitive recognition of the property in the name of the beneficiary. The initiative yields socio-economic and cultural benefits. It leads to a change in the living conditions of these populations and their integration into the city. In the city of Buenos Aires, the so-called "Villa miseria" (slum areas) are affected by the regularization. Demarcation of the land on which the slum is developing, then registration of each plot and finally identification of the occupants are necessary to complete the process. In the most populated region, which is the Province of Buenos Aires, the administrative procedure as well as the authentication of the writings and the entry in the state register is the full responsibility of the notary, who voluntarily accesses this type of social work. More than 100.000 family homes were included in this program in the province. A legislative amendment introduced by Law 27.188 on "Historical Repair of Family Farming" extended to the rural environment the application of this regime originally applicable to urban areas. Therefore, farmers can also benefit from this measure for the rural property where they reside and produce.

In **Colombia**, the Superintendence of Notaries and Registry technically and legally supports the territorial entities in the process of sanitation and formalization of fiscal properties and urban slums. Inter-administrative agreements are signed with territorial entities through which the rights of possession and occupation of individuals are formalized, as well as the incorporation of institutional use goods to the patrimony of territorial entities, such as schools, hospitals, parks, municipal palaces and governments. The formalization program guarantees the beneficiaries' legal security of property, increases the possibilities of accessing national government programs (home improvement grants) and mortgage loans, and finally increases the resources of local authorities through the collection of taxes, with the aim of contributing to the economic and social development of the regions and the country.

The procedure consists notably in validating the information provided by the territorial entity to determine the legal nature of the properties; requesting a certificate of land use and risk from the Planning Advisory Office; carrying out a field visit to validate the occupation of the property and identification of the occupant; establishing a widely publicized notice identifying the beneficiaries of the program, against which an appeal for reversal may be made.

The resolution of assignment is prepared free of charge, notified personally and entered into the register. Finally, the mayors and/or governors are accompanied in the delivery of the property titles to the beneficiary population.

An example of this is the agreement signed with the Santa Marta District Mayor's Office, which is projected to start benefiting 400 families this year, to give continuity to the progress made in the previous year, when 3 500 property titles were issued. Between 2012 and 2019, the SNR has contributed to the delivery of 73 266 property titles at the national level.

In **Madagascar**, before the Land tenure reform, land tenure rights were proven by registration done by the land services, which had very little capacity for work. The high cost of this formality and the corruption of the administrations further increased the reluctance of the Malagasy citizens to ask for the issuance of their title. This has led to significant deregulation: uncertainty about land rights, lack of guarantees for investors, boundary disputes, lack of urban planning due to a lack of up-to-date information to be able to plan the territory and levy taxes, an increase in lawsuits, and so on. This is why, in 2005, the government decided to launch a vast land reform to counter this deregulation. The reform was based on four pillars: the modernization of land conservation, the decentralization of land management, the adaptation of land legislation, and a national program of communication and training in land tenure. This led to the creation of a land certificates that farmers can obtain from the nearest land office. These documents include the photographic identification of the land and the identification of the person using the land, as well as certificates from village chiefs and witnesses.

3.3.3 Collecting feedback from users

Notaries should also make sure that they gather all the relevant information from the parties in order to allow them to ensure and improve the quality of their service. Notaries and their professional organizations should foster a service culture and ethical behaviour and seek feedback (e.g. through surveys) to help them improve the quality of their service, meet expectations and satisfy new needs (see VGGT paragraph 6.7).

This may include reporting that goes beyond regular inspections carried out by supervisory bodies (see VGGT paragraph 6.8.) and offering users means of addressing

complaints – either through chambers or towards the notaries personally. Where it is appropriate, chambers might institute an ombudsman or another official to help individuals address relevant issues. As in many cases, both chambers of notaries as well as individual notaries are addressees of such standards.

KEY RECOMMENDATIONS 3.3

Notaries are in a good position to act as agents of change and advocate for the dissemination of the VGGT principles within legislation and public procedures. To achieve this, governments should:

- involve notaries in the process of making and improving laws;
- have notaries participate in the assessment of current laws;
- ask notaries to establish prior audits;
- include notaries in multi-stakeholder consultation groups.

Notaries should:

- identify areas where the policy and legal framework could be strengthened to address the challenges to tenure rights that they come across in their daily activities;
- share recommendations, observations and relevant data (within the limits of the legal framework and professional secrecy) with competent authorities and other stakeholders;
- be in permanent contact with the government agencies and ministries in charge of land reform;
- once adopted, disseminate and explain the new legal frameworks to citizens.
- seek feedback from their clients in order to improve the delivery of their services.

Notaries can also provide land tenure security in practice, by:

- helping indigenous people and local communities achieve formal recognition of their rights;
- finding appropriate solutions to address the tenure challenges faced by the poorest, such as titling, when and where relevant;
- being creative in the solutions they propose.

4

Cooperation and advocacy



4. Cooperation and advocacy

The promotion, implementation, monitoring and evaluation of the responsible governance of tenure are important segments of the VGGT and all actors are encouraged to increase cooperation and engage in advocacy through various means. Raising awareness and enhancing the use of the VGGT in relation to the preventive administration of justice can be achieved thanks to representative bodies (4.1), but also in relation with the public administration (4.2), other professionals (4.3) and international cooperation (4.4).

4.1 The role of professional bodies

The VGGT primarily target states, but they also offer guidance to all actors in the field of tenure governance, regardless of their affiliation to the state.

Professional bodies such as chambers of notaries – and in particular national or regional chambers – are crucial in the dissemination and implementation of the VGGT as important standards of practice. The chambers are invited to engage with other state actors, professional organizations, administrative bodies, governments and legislators and draw on their experience to promote sustainable tenure governance.

4.1.1 Raising awareness among their members about the VGGT

Professional bodies should promote the dissemination of the VGGT among their members.

Indeed, raising awareness and explaining the role of the notariat in the overall context of tenure security and promotion of justice is the first step in contributing to implementation of the VGGT. The promotion of soft-law instruments such as the VGGT is likely to demonstrate to all actors that notaries have a role to play in the responsible governance of tenure and duties that go beyond the application of laws *stricto sensu*.

National chambers should proactively promote the VGGT and other related instruments, such as this guide and the *Guidelines on strengthening gender equality in notarial practices in South East Europe* (Arsova Mitic et al., 2019). They can do this by providing adequate resources for publication of the material, and also by creating and sharing simple communications (such as infographics, diagrams and visualizations) and check-lists with their members, with adequate tools to fulfil their duty of due diligence. To allow greater use and easier access, materials should be made available

on well-known platforms/clouds simply and quickly. They can be relayed by regional associations, with translations if needed, and also sent to each member through dedicated correspondence. Last but not least, chambers can organize seminars, webinars, e-learning training, partnerships with universities and so on. This technical guide is just one example of a tool that chambers can use in order to encourage their members to promote their social function.

4.1.2 Continuing practice and knowledge development, improvement and training

The UINL *Deontology and Rules of Organization for Notariats* underline, in article 15, that:

Notaries have to carry out their professional activity competently and with adequate training, especially for the key functions of advice, consultation, interpretation and application of the law. As a result, they shall be required to bring their knowledge up to date both legally and technically. In fulfilling their duty of lifelong learning, they will be required to follow the instructions provided by their Chambers or professional Associations.

Box 38. Training provided by UINL

Since 2012, UINL provides young notaries with an academic training available in Spanish, French and English intended to enable the understanding and application of the concepts of comparative law and international law through the exchange of good notarial practices. The World Notariat University includes online preparatory work and an on-site seminar in Buenos Aires (Argentina) or Rome (Italy) depending on the year. The training cycle is organized around a general topic fixed for the duration of the UINL legislature, addressed through four modules: family, person, succession, estate. Additional workshops deal with the notarial function and the authentic act (digitalization, circulation, and so on).

The UINL continental academies provide vocational training on topic of interest for notaries and various professionals of the region. They consist of seminars and attract a large public (which can include civil servants, judges, university professors, international organizations representatives and others professionals) in order to exchange ideas, disseminate studies and organize workshops to communicate on the important role of civil law notaries. The American and European academies have been created a long time ago and the Asian and African academies are currently being implemented.

Finally, the UINL is building up a global virtual educative platform providing notaries with academic training and a digital library in Spanish, French and English. The VGGT and their technical guides, as well as the *Guidelines on strengthening gender equality in notarial practices - South East Europe* (Arsova et al., 2019), the *Guidelines for registration officers on gender equitable land tenure - South East Europe* (FAO and GIZ with the technical collaboration of UINL, 2021) and the leaflet on *Achieving SDG indicator 5.a.2 in the Western Balkans and beyond. Partnerships for gender equality in land ownership and control* (FAO and GIZ, with the technical collaboration of UINL, 2020) will be made available on the platform. Specific trainings and e-learning courses for the above mentioned Global Platform, Academies and Universities will also be prepared.

Both initial training and continuous training are of utmost importance for notaries, who need to be always up to date with legislative reforms, developments in case law and other developments in the legal community in order to exercise their function. Notaries' chambers should provide their members with a training offer throughout their entire careers. Knowledge and use of the VGGT should be part of the training that is promoted by national and regional chambers of notaries. This could be as part of the initial training of candidate notaries or as an element of continuous training of notaries. Training can be organized online or in situ, during specific congresses and meetings. To be effective, training should always be based on practical examples and illustrations and leave room for questions.

Box 39. Training notaries in Africa – creation of a Notary law degree (Niger)

Since its official launch on 6 December 2016, the Niamey University (Niger) Master degree in Notarial Law has been welcoming students from 19 African countries and allowing both initial and continuing training. The creation of this Master degree is the result of a partnership between the Ministry of Justice and the Ministry of Higher Education of Niger, the notarial chamber of notaries of Niger, the University of Niamey, UINL African Affairs Commission, Francophone Notarial Association, the Higher Council of Notaries of France and the General Council of Notaries of Spain. The courses are given by Nigerian and international professors and supported by training materials within the framework of the above cooperation.

4.1.3 Using disciplinary liability to monitor application of the VGGT

The VGGT can be used to interpret and substantiate legal norms or codes of professional ethics. Article 26 of the UINL *Deontology and Rules of Organization for Notariats* underlines that “either directly or through the Chambers or Associations of Notaries, the State has the power to scrutinize, check, inspect and sanction notarial activities (...)”. The VGGT themselves remind that “public and private sector parties should adhere to applicable ethical standards, and be subject to disciplinary action in case of violations” (see VGGT paragraph 6.8). Professional liability and sanctions whenever ethics are violated can be effective tools to ensure the application of common principles included both in professional codes of ethics and the VGGT. To do so and given the non-legally binding nature of the VGGT, some intermediary steps might be needed either through (administrative and court) practice, disciplinary notarial codes or even through changes in the law.

Apart from their personal liability for compensation to the parties who suffered the damages of the infringements, notaries who are in breach of legal norms should face disciplinary liability. The competent authority or body, under the supervision of the ministry of justice, should investigate each case either officially or at the request of parties reporting the infringement. Notably, the following are considered deontological infringements in accordance with the rules of the notarial code of deontology and consistently with the VGGT: signature of authentic acts or notarized documents contrary to the law, or involving the fraudulent circumvention of the law or an overt abuse of right; failure to provide assistance or professional advice or opinions to the most

vulnerable party or consumer; failure to explain the general clauses of a contract or the abusive nature of the clauses imposed by one of the parties; failure to respect human rights or drafting of acts contrary to human dignity; infringement of rules concerning the environment, urban planning, water, air, coasts, agriculture, forests or mines; failure to verify titles or registers and previous documents; loss of independence or impartiality in the exercise of the notarial function and in the drafting or authorization of acts.

Infringements should be classified depending on the gravity of the breach. The Article 57 of UINL *Deontology and Rules of Organization for Notariats* rank from modest to severe and very severe, and provide for relevant sanctions in each case (fines, reprimands, temporary suspension, expulsion).

Professional bodies are protagonists in the regulation of the sanction procedure. Indeed, in the absence of Laws, article 60 of the UINL *Deontology and Rules of Organization for Notariats* reminds that:

Chambers or Associations of Notaries shall draw up regulations establishing how sanction procedures shall be carried out, determining the sum of corresponding monetary sanctions and the length of the temporary suspension from Service.

And they also underline in the foreword that:

The infringement of ethical rules has to be punished and it is up to national Chambers to determine sanctions and related application procedures; the national Chambers will also have to establish practical procedures to ensure strict compliance with the deontological duties set out in this Code.

4.1.4 Relying on an effective chamber organization to support the dissemination of the VGGT among notaries

Counting on the efforts of the professional bodies of notaries to support the VGGT, their dissemination and implementation by notaries requires a functioning internal organization and the recognition of their duties and scope of missions by the State.

The chambers should be under the supervision of the Ministry of Justice to enable efficient organization and the achievement of common goals (UINL *Deontology and Rules of Organization for Notariats*, Title II, article 6).

Membership in a chamber should be compulsory for the exercise of the notarial function. Notaries should be affiliated to a unique national chamber or association of notaries under the supervision of the Ministry of Justice. If there are any local chambers within the country, their relationship with a unified national chamber should be clearly defined as well as the competences and duties of each.

Depending on the precise legal framework, chambers can carry out many important tasks. Article 7 of the UINL *Deontology and Rules of Organization for Notariats* establishes the following:

Without prejudice to their remit established by notarial laws, the Chambers or professional Associations of Notaries are in charge of organizing the exercise of the notarial profession, representing it, upholding its interests and accomplishing the social function of the Notariat. In representing the notarial profession, the Chambers or Associations of Notaries will be required to comply and ensure compliance with the provisions of this Code, by overseeing the proper exercise and upholding of the notarial function, among notaries and vis-à-vis third parties.

With regard to the organization of the chamber itself, the governing bodies should be elected democratically by the members (Article 7 of the UINL *Deontology and Rules of Organization for Notariats*).

The members of the governing bodies should also be required to have a spotless discipline and organization:

In exercising their functions, the members of the governing bodies of Chambers or Professional Associations will be required to act in accordance with the rules of caution, justice and equity, making sure to retain the ethics and dignity of the profession, the efficient exercise of their function and respect for the rights of individuals (UINL *Deontology and Rules of Organization for Notariats*, article 24).

Considering the rather small number of notaries for each country, the success of the work of the chamber depends highly on the efforts of each individual members. Collegiality should be promoted. Yet, effective organization should not be limited just to the professional staff of the chamber but also to the way it includes all notaries, including those who do not hold active chamber functions, in the promotion of the expertise and social function of the notariat. Chambers should be representative, inclusive and motivate all members to participate in pro-bono work in all fields of chamber work, such as training (of notaries, candidates, law students and other legal practitioners), lecturing, contributions to legal scholarship, improving services of the chamber, cooperation with other (legal) professions, international cooperation, involvement in law-making at all levels (local, national and regional) to name just some very important aspects. Article 24 of the UINL *Deontology and Rules of Organization for Notariats* reads:

Notarial bodies shall put in place appropriate mechanisms to encourage fellow colleagues to (...) foster the participation of all member notaries in the various tasks and activities to be developed.

4.1.5 Sharing knowledge, exchanging experiences and collaborative efforts

The professional organizations should explain the VGGT and emphasize efficient methods to fulfil an ethical governance of tenure. Information should be shared between notaries themselves, through their international, national and regional professional bodies.

Chambers should encourage the exchange of experiences and collaborative efforts to improve practices. They should invite members to share solutions implemented but also difficulties and challenges encountered in their daily practice. This can help solve problems identified, on the one hand, and showcase good practices, on the other hand. Such exchanges can be achieved by physical meetings but also by an efficient digital network, including discussion platforms, forums, webinars, etc.

Moreover, chambers should encourage support and solidarity among notaries. Article 27 of the UINL *Deontology and Rules of Organization for Notariats* states that “a good climate of understanding and harmony among members Notaries” shall be favoured, in particular to “help and support new notaries in the efficient exercise of their function.” This support should include the set-up of events and materials allowing to become acquainted with developments related to the exercise of the notarial function, such as the VGGT, and how to apply them.

4.1.6 Public promotion

It is important to recall that:

the publicity of the activity of notaries and the dissemination of the principles and benefits of the system of Latin-type Notaries will only be promoted institutionally by professional Associations; notaries themselves should refrain from individual advertisements that can be considered as commercial acts aimed at attracting clients (Article 29 of the UINL *Deontology and Rules of Organization for Notariats*).

Hence, professional bodies such as notary chambers or associations have the most discretion to promote the social function of the notariat, including the VGGT. Chambers should use this discretion and make the relevant information accessible to all members, partners and, most importantly, to the users of the notarial function, the citizens themselves. Websites, email newsletters and social media networks could be of great help to achieve this.

However, the principles laid out above should not prevent chambers from allowing and encouraging their members to disseminate information (that is not considered individual promotion and advertisement) in order to promote the social functions of the notariat.

Considering that notaries are typically located throughout the entire national territory and are consulted daily by many people, individual notaries form a particularly effective and accessible network in order to share important information with regard to tenure governance with the citizens.

KEY RECOMMENDATIONS 4.1

Chambers of notaries have a key role in the promotion and implementation of the VGGT as well as in the monitoring and evaluation of their use by their members.

They should rely on a strong effective organization:

- through a unique national representative body under the supervision of the Ministry of Justice;
- by answering to a strict code of conduct and reporting to their members through democratic processes;
- by requiring compulsory membership of all notaries in the country;
- by being representative and inclusive as much as possible.

They should raise awareness among their members about the VGGT by:

- providing resources and communication material easily accessible;
- organizing physical and online seminars, discussion platforms, etc;
- publishing guidelines;
- encouraging the exchange of challenges and good practices.

They should train their members to adequately apply the VGGT by:

- providing for initial and continuous vocational training;
- helping the new notaries to settle.

They should ensure the compliance of notarial practice with the common standards of the notarial ethics and the VGGT by:

- monitoring notarial activity and police infringements;
- implementing disciplinary rules;
- supervising the sanction procedure.

They should promote the VGGT to a broader public by:

- including them in their digital communications (websites, networks, newsletters, etc.)
- inciting notaries to release the information directly to the citizens.

4.2 Cooperation with the state and public administration

Paragraph 6 of the VGGT recalls that:

States should ensure that implementing agencies and judicial authorities have the human, physical, financial and other forms of capacity to implement policies and laws in a timely, effective and gender-sensitive manner. (...) States should provide prompt, accessible and non-discriminatory services to protect tenure rights, to promote and facilitate the enjoyment of those rights, and to resolve disputes (...). (see VGGT paragraphs 6.1. and 6.3).

The usefulness of notaries to the state and public administration has been largely explained above – with regard to public registers, spatial planning, legal reforms, data collection and, more generally, for communicating between the citizens, including the most vulnerable, and the State and considerably disburdening state bodies from verification and information tasks.

This section focuses on three additional areas of cooperation between notaries and the state in the preventive administration of justice, in which use of the VGGT could lead to clearer and cleaner governance of tenure: the implementation of useful additional registers, tax management and financial fraud prevention.

4.2.1. Implementing useful additional registers

Notaries receive a lot of information about private matters (custody rights, administration of assets, lasting powers of attorney, wills, etc.) and so they may suggest implementing registers to ensure the confidentiality and traceability of this sensitive information through secure databases or platforms – such as central registers of wills, central registers of lasting powers of attorney and the electronic archive of authentic acts. Such registers could be kept by the chamber/council of notaries, as an intermediate state administration, on a statutory basis under the supervision of the ministry of justice. Public authorities – especially courts (that is probate courts, custody courts) and tax and anti-money-laundering authorities – may particularly appreciate such notarial platforms because of their compliance with maximum safety standards and because they can check the relevant information they contain regularly, such as the existence of lasting powers of attorney.

4.2.2 Participating in the definition and implementation of tax regulations

Whether notaries collect taxes on behalf of the state and other public administration themselves, or assist the financial authorities in the levying of taxes in other ways (for example, by making mandatory declarations), they can be reliable decentralized agents of the tax administration. Even though they are not tax advisors as such, notaries should ideally be familiar with the tax implications of the acts and transactions they

authenticate and inform parties about their duties under the applicable tax regime.

Taxes should encourage socially, economically and environmentally desirable behaviours, such as registering transactions or declaring the full sale value (see VGGT, paragraph 19.1). Notaries should be consulted by governments during the conception and execution of tax laws and regulations, in order to fit them to the current needs and opportunities of the citizens. For example, notaries could suggest incentives for certain operations leading to better governance of tenure, such as improving gender equality by considering registration fees per property instead of per right holder in cases of registration of marital property (FAO and GIZ, 2021), and providing reduction or exemption to specific groups of vulnerable people.

Whenever possible, secured digital networks should also be set up between the tax administration and notaries in order to deal with each case easily and quickly, ensuring a high level of security and data protection and consistent information sharing.

Tax administration could also be supported by notaries in order to enhance transparency, which is a pre-requisite for strengthening the fight against criminal acts, such as tax evasion, corruption and money laundering.

4.2.3 Fighting against money laundering and terrorism financing

The VGGT place particular emphasis on transparency and the avoidance of corruption, in particular when dealing with financial investments in land. An effective risk assessment can reduce the opportunities for criminals to use land transactions for such purposes. Moreover, the International Monetary Fund (IMF) recalls that the corrupted financial flows generated by economic crime, particularly money laundering and financing of terrorism, lead to the diversion of resources away from responsible use, and that effective controls against this promote integrity and stability of financial markets.

Article 17 of the UINL *Deontology and Rules of Organization for Notariats* states that:

In the field of money laundering, Notaries shall offer their co-operation and provide all the necessary information they have to the competent authorities (...) Notification to the authorities of any doubtful transaction liable to involve money laundering shall not be considered an infringement of the duty of professional secrecy, as it makes the general interest and common good prevail.

Several of the main international organizations dealing with this topic, and specifically the Financial Action Task Force – an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction – pointed out the need to include notaries in money laundering prevention models. By virtue of being at the heart of real estate transactions in most jurisdictions, notaries are among the officers likely to identify transactions with a risk of money laundering. Furthermore, notaries are often involved in reviewing the documentation for the transfer of shares and/or for transactions that enable participation in a company's

equity. Their duties extend to the execution of private documents or opening of safe deposit boxes held at a bank that are in the name of a deceased person.

Box 40. Risk indicators in the notarial sector

To support notaries in their responsibility of identifying those transactions, the UINL developed, jointly with the Financial Action Task Force of Latin America (GAFILAT) the “Risk indicators for the notarial sector”, published by UINL in November, 2019c. The objective of this document is to provide clear and precise guidelines to help notaries to improve their processes of identification, control and analysis of notarial transactions, in order to detect those that may be related to money laundering or terrorist financing and report them to the competent authorities. The indicators have been classified taking into account the various risks that may be present in notarial transactions: risks associated with the client(s) or participant(s); risks associated with the transaction; risks associated with means of payment; risks arising from repeated transactions. In order to identify the risk alerts associated with the transaction, the main types of business in which the notary may be involved were considered, and the following were identified: commercial transactions; real estate transactions; financing transactions; authorizations, powers and appointments; minutes and recognition of signatures; other transactions.

For that reason, notaries should be guided to identify situations where there is a risk of money laundering or terrorist financing and given solutions to assist public administrations in the dismantlement of such suspicious transactions by reporting them. In this context, in 2018 UINL established the *Guide of good practices in the fight against money laundering and terrorist financing in the notarial sector*, including a range of methodologies, systems, tools, and applied techniques. It serves as a reference for the 89 UINL Member Notariats, in order to assist governments and global organizations in the prevention, detection and prosecution of money laundering. Notaries everywhere should also participate actively in technical assistance projects provided by the international financial institutions.

Box 41. Notaries as key institutions in the fight against money laundering (Spain, Peru, Italy)

In 2019, the Financial Action Task Force published the *Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing for Legal Professionals*. In that document, the Financial Action Task Force proposes a series of measures to governments aimed at combating money laundering and the financing of terrorism and protecting the integrity of the international financial system. Among these measures, it points to the Beneficial Owner Database created in 2012 used by notaries in **Spain** as a model to be followed:

the Anti-money laundering (AML) system used by Spain’s notaries represents a considerable advance for Public Authorities, which thanks to its implementation now have access to (...) a single database with information on all the public instruments and policies notarized and witnessed in the country.

The Spanish Beneficial Owner Database has identified the real owners, accredited in 86 percent, of more than 2 300 000 legal persons, both companies and associations, foundations and political parties.

In 2005, the Spanish notariat set up, pursuant to Ministerial Order, the “Centralized Body for the Prevention of Money Laundering prevention” assuming, on behalf of the notaries, obligations such as the analysis of suspicious transactions and their reporting to the Financial Intelligence Unit; risk analysis and preparation of the internal Anti-money laundering and financing of terrorism policies; definition of risk indicators for the notarial sector; training and supervision of compliance. It is made up of professionals specialized in the prevention of money laundering who analyse the transactions all notaries' offices. It has produced various guides; resolved more than 7000 notaries queries; provided training sessions; established common risk indicators; carried out sectoral risk analysis; set up remote supervision of all notaries' offices, etc. This body served as an inspiration for the creation of similar bodies, notably in Peru (see below).

In 2016 in **Peru**, the Centralised Body for Prevention of Money Laundering and Financing of Terrorism was created to contribute to the work of the Financial Intelligence Unit. Through this tool, all information on the procedures carried out by notaries are compiled in a database which data are then sent to the Financial Intelligence Unit. Detection of operations covering up the offence of money laundering was previously complicated because these actions were carried out from various notaries' offices and also because the notaries reported individually to the Financial Intelligence Unit.. The notarial chamber of Lima first signed an agreement with the General Council of Notaries of Spain for the development of centralized technological tools that allow the improvement and expansion of the collaboration of notaries in the fight against money laundering, terrorism, acts of corruption and tax fraud, among other crimes.

The Italian notariat carries out a constant activity of analysis regarding the Anti-money laundering and financing of terrorism. It has been collaborating with multiple financial public authorities and was the first professional association in **Italy**, in 2009, to assume the role and responsibility of anti-money laundering authorities. In 2014, it developed guidelines and Technical Rules to be followed in order to comply with anti-money laundering obligations, and created a network of delegated notaries for anti-money laundering activities throughout Italy. Among professionals, notaries are the ones who make the most suspicious transaction reports: they cover 91.25 percent of the total amount of reports sent by professionals and 4.4 percent of the total (data from the Financial Intelligence Unit 2020). In 2019, the notariat was officially included among the key institutions for the fight against corruption and money laundering in the UNODC report.

KEY RECOMMENDATIONS 4.2

Notaries should propose services to state authorities to implement policies beyond the traditional fields of cooperation:

- Notaries can manage additional databases (wills, power of attorneys, sale prices, etc.).
- Notaries can be involved in developing, implementing and applying tax laws.
- Notaries have been recognized as key actors in the prevention of money laundering and terrorist financing. They should be part of prevention models and participate in technical assistance projects established by international financial institutions.
- Specific centralized bodies, databases and documents should be available for notaries to enable them to comply with their obligations.

4.3 Cooperation with other professionals

Notaries cooperate with various professionals in the course of their day-to-day work, such as employees of public registers and the public administration, surveyors, tax advisors, public accountants, auditors, attorneys, judges, other civil servants, etc. The quality of relations between notaries, surveyors, and public registers is decisive in their daily work on land tenure issues – a project will only be completed and adapted if the process is inclusive and involves all the actors. Transparency and coordination are essential, in terms of both the actions taken during transactions, the documentation provided, and the explanation given.

Box 42. An example of inter-professional cooperation worldwide (IAJ and UINL)

Strong international cooperation has been established between the international association of judges (IAJ-UIM) and the UINL. During their last joint seminar, it was emphasized that legal certainty at supranational level is a fundamental element of development, and that such cooperation is an “example of international and interprofessional collaboration at a time characterized by the elimination of barriers between different countries and professions”. Judges and notaries pursue the same objective in the exercise of their function. Carlos Lesmes, President of the General Council of the Judiciary and the Supreme Court of Spain, inaugurated the International Seminar of the Judges and Notaries at the Notarial College of Valencia (Spain) on May 24, 2019 with the observation that:

The consolidation of the rule of law as an essential framework for coexistence, legal certainty as a key to economic progress and an adequate service to citizens as ultimate goal of our activity (...) judges and notaries are essential to a quality justice that affects citizens around the world, with legal certainty as a principle of justice, to achieve a more just world, a better world. (Carlos Lesmes, Inauguration speech, May 2019)

At a more general level, implementation of the VGGT requires inter-professional exchange and cooperation. Judges, and notaries in particular, are simultaneously delegates of public authority and part of an efficient and fair administration of justice. Whereas notaries deal with non-contentious cases in the realm of the preventive administration of justice, judges have a duty to decide contentious matters in the realm of curative justice. However, these two aspects of the legal system are very much interconnected: on the one hand, notaries’ knowledge of case law and judicial practice means they can prepare authentic acts and contracts that comply with the requirements set by the jurisprudence of the courts. On the other hand, judges must be familiar with the requirements and necessities of contractual practice, and understand the needs of the parties as recorded by the notaries, in order to deliver justice in the case.

Close cooperation with lawyers, solicitors or attorneys is also essential. Notaries can sometimes act as arbitrators or mediators before court proceedings are initiated. With regard to vocational policies, both notaries and attorneys are practitioners who provide legal advice and are subject to similar legislation with regard to many aspects of their day-to-day work. Both have practical legal skills and an intrinsic knowledge of people’s

needs and so their professional organizations are therefore very important stakeholders in all procedures relating to legal reform.

Lastly, and as part of the broader scope of legal practitioners, notaries should collaborate with all legal practitioners on implementation of the VGGT within the preventive administration of justice. In addition to this technical guide, addressed to notaries, a broader technical guide published by FAO in 2016 – *Responsible governance of tenure and the law - A guide for lawyers and other legal service providers* (Cotula et al., 2016) – translates the VGGT into practical processes and provides guidance on how to technically improve tenure governance. That guide may be used by a wide range of actors, including notaries.

KEY RECOMMENDATIONS 4.3

In order to advocate for the responsible governance of tenure consistent with the VGGT, notaries should cooperate with a broad range of professionals in addition to the usual practitioners in the preventive administration of justice: judges, lawyers, and potentially all legal service providers.

4.4 Cooperation at global level

4.4.1 International cooperation between notary chambers

International cooperation allows professionals to work on a problem so broad that neither an individual practitioner nor a national chamber can tackle it effectively alone. Close collaboration should therefore be encouraged and utilized as it is an excellent way to find broad and sustainable solutions beyond the individual level. International cooperation is thus essential to the dissemination and implementation of the VGGT.

The International Union of Notaries (UINL) is an example of such cooperation. A nongovernmental organization (NGO) that aims to promote, coordinate and develop the function and activities of notaries throughout the world, UINL currently comprises 91 Member Notariats on four continents. UINL provides its expertise to international organizations and governments in order to improve normative frameworks that affect citizens worldwide. This covers an extensive range of topics, of which responsible governance of tenure is one. When UINL is asked by governments or international organizations to provide an expert point of view or find a solution related to the responsible governance of tenure, it should use the VGGT as guidance whenever possible.

UINL has published various guidelines over the years on specific aspects of the notarial function intended to be used by notaries in their practice. For instance, between 2017 and 2019, the main tools published (in English, French and Spanish) included:

- The *Study on the definition of notarial authentic act and annex on costs* (UINL, 2019b):

this briefly sets out and clarifies the reasons why the effectiveness of the authentic instrument is superior to that of other documents, namely because it enjoys public trust. Moreover, it exposes considerations that the costs of the notarial authentic act should not be higher than the cost of comparable solutions. This study can usefully be linked to the VGGT as affordability is one of the priorities throughout the recommendations for a responsible governance of tenure.

- The *Notarial guide of good practices for people with disabilities: the notary as an institutional support and public authority* (UINL, 2019a): this guide deals with notaries' support of the Convention on the Rights of Persons with Disabilities (CRPD) for the recognition and exercise of their rights by persons with disabilities. Notaries are considered institutional support providers and authorities for the completion of rights. As vulnerable groups are at high risk of not accessing proper legal support and therefore of being deprived of their land rights, strengthened support by notaries to those in need is consistent with the VGGT.
- *Good practices on the prevention of money laundering and terrorist financing in the notarial sector* (UINL, 2018): this document has been prepared in order to facilitate notaries' compliance with the obligations established by the Financial Action Task Force regarding Anti Money Laundering and Terrorist Financing. It consists of a brief explanation of the obligations to prevent money laundering and terrorist financing to which, in accordance with the Task Force Recommendations, notaries are or should be subject, a section of general principles and a final section specifying good practices for compliance with prevention obligations. Financial flows being key to responsible investments in land, the fight against economic crimes resonates greatly with the VGGT.
- *Risk alerts in the notarial sector* (UINL, 2019c): the objective of this document is to provide clear and precise guidelines to help notaries to improve their processes of identification, control and analysis of notarial transactions which, according to their competences, allow them to detect those which may be linked to money laundering and the financing of terrorism.

Furthermore, UINL is currently working on guidelines regarding notarial activities in the digital era, including some reflections on the delivery of notarial services during and after the COVID pandemic. In drafting those guidelines, UINL should use the VGGT as guidance to implement its recommendations.

UINL encourages the sharing of knowledge and exchange of best practices and provides effective means of promoting the VGGT, such as dedicated conferences and workshops, as well as its general website and social media channels. UINL also relies on four regional commissions to disseminate locally relevant information: the commission of American affairs, commission of African affairs, commission of Asian affairs and commission of European affairs. Lastly, it is worth noting that although UINL's members are the national top-level chambers, UINL also offers individual memberships to notaries to participate in and follow its work.

Another example of regional cross-border notarial cooperation can be found within

¹ Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

Box 43. UINL/CNUE tools for citizens: cooperation at the service of the citizens

Today, many working and retired European citizens decide to live outside their countries of origin. As a result, in their new countries of residence, these expatriates may face issues such as: how to purchase property, how to deal with conditions of vulnerability or incapacity and how to handle succession in case of death. UINL and CNUE provide citizens with simple and useful answers to the most frequent questions concerning four areas of the Law (property, vulnerable persons, successions and couples).

International cooperation can also be conducted on a bilateral or multilateral basis between two (or more) national notary chambers that are considering common issues or that have borders in common. Lastly, cooperation can initially take the shape of informal bilateral contacts, later leading to formalized cooperation agreements. For example, the notariats of Southeast Europe have cooperated closely on the application of the VGGT – and in particular the principles of gender equality – in notarial practice and land tenure registration.

Box 44. “Training the trainers” – the example of a regional programme

CNUE with the support of the **European Union** sets up the training programme “Europe for Notaries - Notaries for Europe” from 2018 until 2020. The project was initiated by the European Commission with the goal to equip legal practitioners to implement EU law and foster the sense of a common European judicial culture based on mutual trust. In partnership with the national notarial authorities, 21 seminars were organized in 14 Member States. This programme responds to the European Commission’s aim to offer at least half of legal professionals in Europe the opportunity to follow European training at local, national or European level by 2020.

Box 45. Multilateral cooperation: the Hexagonale

The Hexagonale is a cooperation by the notary chambers of Austria, Czech Republic, Croatia, Hungary, Slovakia and Slovenia – all of which have a strong affiliation to Austrian-Hungarian legal traditions. They meet twice a year to discuss changes in the law and the effects on daily practice, and also to support each other with their own experiences in solving problems. During the reintroduction of the Croatian notary’s office in 1995, for example, the Hexagonale supported Croatia with their know-how and experience, especially with regard to the organization, structure and tasks of the notary chambers. Numerous joint workshops were held and Croatia was able to benefit considerably from the experience of the other members with similar systems.

4.4.2 Cooperation with international organizations

The 2030 Agenda for Sustainable Development, adopted at the United Nations (UN) Sustainable Development Summit on 25 September 2015 (UN General Assembly, 2015), is defined on a global basis – and improving the quality of tenure governance

on a global scale requires international cooperation. International cooperation will encourage all sides to share their national and regional experiences with like-minded partners in other parts of the world and learn from this experience in order to improve their respective legal systems.

Full cooperation with international institutions such as the UN and its agencies, the World Bank and NGOs – especially on land, human rights and sustainable development matters – is necessary to achieve the SDG. In this context, notaries across the world should realize their potential to contribute to the improvement of the quality of tenure governance. They should put their expertise at the service of this international network, by establishing partnerships and through the actual implementation of common projects. In particular, notaries can promote the use of the VGGT in global programmes and be agents of change to improve the responsible governance of tenure worldwide, participating in global reforms as experts, legal practitioners and public officers. Notaries worldwide should also provide international organizations with their assessment of issues when they are faced with them and suggest tailor-made solutions, explaining the interests and benefits of the preventive administration of justice to achieving the goals.

The UINL is currently a trusted partner to several international institutions in the defence of human rights, the fight against money laundering, the prevention of land tenure rights violations, the protection of the most vulnerable persons, the promotion of gender equality and more broadly the reach of sustainable development for all.

In addition to the examples spread out in this guide, here are a few other examples:

- UINL has been involved from the outset in a community of practice at the heart of the Global Forum on Law, Justice and Development that aims to develop and foster an innovative, people-centered business model that views social and environmental sustainability as a goal comparable to profit – the Human-Centered Business Model (HCBM) project. The idea of the project stems from recognition of several existing initiatives around the world reflecting the private sector's growing interest in social and environmental issues; it underscores the strong commitment of the public, as consumers, towards sustainable businesses that respect human rights. The project is an ambitious idea promoted by the World Bank and now led by the Organisation for European Co-operation and Development (OECD) Development Centre Department. The proper consideration of all individuals and the express call for the respect of human dignity at the heart of this business model are in line with the provisions of the VGGT (paragraph 3B.1). Established in 2017, today the project counts 46 partners, the vast majority from academia. The development of this new model, which has just entered the operational phase with pilot projects, takes into consideration legal aspects and regulations, stronger than in corporate social responsibility, governance, financial instruments, tax regimes, procurement and stakeholder relationships. UINL is an operational partner of the Human-Centered Business Model project and drafted standard statutes for both profit and not-for-profit companies that adopt this new model.
- UINL signed a cooperation agreement with the Hague Conference on Private

International Law (HCCH) for the implementation of joint projects, particularly in the context of the international protection of adults. In this context, UINL participates in workshops and meetings that bring together notaries, legal practitioners, judges, health and social welfare experts, academics and civil servants working in the field of adult protection. The general objective is to increase the protection of vulnerable adults in Europe and worldwide by promoting implementation of the Hague Convention of 13 January 2000 on the International Protection of Adults, and to identify different ways to complement and strengthen the operation of the Convention. The VGGT (paragraph 7.4) recalls the need to support all persons interested in the legal recognition or allocation of tenure rights and duties. In particular, this concerns the most vulnerable, such as the elderly.

- In 2018, the ONCE Foundation (National Organization of Spanish blind people) and UINL signed an agreement to contribute to the effective application of the CRPD. UINL also participates in projects led by ONCE to benefit access to justice for all people with disabilities. This is also consistent with VGGT recommendations (paragraph 7.4).
- UINL is a sponsor of and speaker at the World Bank Land and Poverty conferences. At these conferences, attended by various representatives of governments, civil society institutions and the private sector from more than 120 countries, the latest research and innovations in policies and good practice on land governance around the world are presented. They have become one of the largest international events on land governance and offer notaries a platform to share and disseminate information on their global projects (notably related to land titling, gender equitable registration, affordable justice, vertical urbanization and digitalization). In 2019, FAO, GIZ and UINL collaborated on a paper titled “Achieving SDG Indicator 5.a.2 in the Western Balkans: the Role of Notaries” (Kenney et al., 2019) which was submitted for presentation at the World Bank’s Land and Poverty Conference. UINL also participated with FAO and GIZ on the topic “Can land administration foster gender equality? From laws to action: Achieving SDG indicator 5.a.2 in the Western Balkans”. UINL was also involved in the following presentations:
 - “Towards the registry of the future Preventive administration of justice – an economic catalyzer for the future?! – an analysis of the economic relevance of reliable and transparent public registers”
 - “How to realize the potential of blockchain for land administration? An example of the use of the Blockchain by the French Notariat: enforceable copies”
 - “Emerging technologies, data ownership and privacy - embracing emerging technologies; preconditions, threshold, possibilities and guarantees”
 - “Improving interoperability of registries and open data access – digitalization of public registers and the role of legal professionals – a connection for the future”.

The journal of the Albanian notary gathering her concerns regarding the protection of

women property rights, which leads to the Guidelines on strengthening gender equality in notarial practice – South-East Europe (FAO, 2020) was presented during those works.

- On 22 October 2016, in Paris, UINL signed a cooperation agreement with UN-Habitat to intensify notarial legal expertise in the work of the agency. Following this agreement, UINL has participated in various works related to a responsible, fair and secure access to land. UINL notably participates in the Global Land Tool Network, which held numerous events with a particular focus on gender issues related to access to land, to share notaries experience and expertise in matters relating to land tenure and security. The Global Land Tool Network is a coalition of international organizations aiming to secure land and property rights for all through the implementation of pro-poor and gender appropriate land governance solutions and tools for both urban and rural contexts. According to its own definition, the Global Land Tool Network is a vehicle for the implementation of global land instruments such as the VGGT. Its network is a platform for partnerships and continuous engagement and practical solutions. UINL participated for instance in the annual meeting of UN-Habitat in Nairobi in April 2018 on the topic: "Together moving tenure security for all to the next level" and in the World Urban Forum in February 2020 in Abu Dhabi (United Arab Emirates) where they presented the condominium ownership status. The 10th World Urban Forum brought together 25,000 participants from 165 countries - public, private and non-governmental organizations - working to improve living conditions in cities. The United Nations General Assembly recognizes the World Urban Forum as the main international summit on territorial development.

KEY RECOMMENDATIONS 4.4

International cooperation is essential for the promotion and implementation of the VGGT worldwide:

- Notariats and individual notaries should consider the benefits of belonging to regional and international organizations such as UINL or CNUE, or smaller multilateral or bilateral cooperation, in order to obtain harmonized guidelines and share best practices.
- Notaries should contribute to the work of international organizations (such as those in the UN system, the World Bank and other organizations) on land, human rights and sustainable development matters.
- They should do this by establishing a working relationship with relevant international organizations (through membership, partnership agreements, memoranda of understanding etc.) and implementing specific projects such as audits, conferences, workshops, guidelines, model acts and laws, etc.

5

Conclusion



5. Conclusion

Tenure law is intended to confer rights on people and allow them to exercise these rights. However the complexity of the law, and the parties' lack of familiarity with rights and procedures, can easily lead to parties making mistakes or being misled in the exercise of these vital rights. The complex nature of tenure laws is a consequence of the complex and manifold relationships humans have with regard to their most important resources – including land, forests and fisheries – as well as of the need to balance many diverging private and public interests by law.

In order to ensure that all citizens can exercise these important rights in relation to some of their most valuable resources, preventive elements have always been of particular importance in tenure law. In most jurisdictions it is in the area of tenure law that the strongest elements of preventive justice are found. The concept of preventive justice acknowledges that rights can be recognized not only through curative means (that is, litigation and conflict) but also through their prior authentication and registration, and that this is beneficial to the interests of the holders of such tenure rights.

The VGGT present a coherent and broadly accepted set of standards for justice in tenure law. They offer valuable advice for all actors in the preventive administration of justice with regard to the tenure of land, forests and fisheries, including (but not limited to) notaries and registration officers. When properly administered, elements of preventive justice can inspire trust in the functioning of the state with regard to the protection of essential resources.

The practical recommendations and best practices proposed and illustrated in this technical guide were intended to motivate all those involved in the preventive administration of justice to focus on the core elements of equitable and responsible tenure as they are highlighted in the VGGT. Practitioners in preventive justice in tenure law, most notably notaries, can and should use the ideas, values and concepts laid out in the VGGT to improve the quality of tenure governance.

This technical guide has shown that all practitioners in preventive justice should consider the multifaceted nature of land (that is, not only economic, but also social, cultural, religious aspects etc.) and reflect on the aspect of human dignity in land tenure-related processes. The rules that govern the preventive administration of justice in general and the notarial profession in particular are based on underlying principles of justice (see chapter 2.1) and ethics (see chapter 2.4) and serve a range of particular purposes in a legal system (see chapters 2.2. and 2.3). A profound analysis of the VGGT and their meaning for preventive justice, as well as of the principles underlying the central concepts of preventive justice, namely authentication and registration, helps all stakeholders understand the role these elements play in the protection of tenure rights, and how they can be strengthened and further improved.

A majority of users – including small and medium-sized business, private individuals and particularly parties in a weaker contractual position or in a situation of vulnerability (such as women, minorities, disabled persons, consumers in business-to-consumer situations, etc.) will benefit greatly from the protection offered by the various elements of preventive justice requirements. Preventive administration of justice is an important tool for ensuring the fairness of the legal order and the accessibility of the law, by helping to create a level playing field. In this regard, the role of notaries is to protect and be of service to such weaker parties. Notaries should be aware of their responsibility as actors of public justice and strive to promote fair and just governance of tenure in their fields of activity, for example, by following the principles and examples laid out in this guide in the spirit of notarial ethic and the VGGT.

The aim of this guide was to feature both the central concepts of justice laid out in the VGGT, and a wide range of best practices from notaries across the world so as to inspire all those involved in preventive justice to perpetually improve their impact. One of the central lessons is that it is crucial to take an active part in the evolution of tenure law and governance, and to be open to social and technological developments while remaining true to the fundamental aspects of (preventive) justice described above. Notaries and their professional bodies should therefore take an active role in a given legal system, in order to enhance their impact in supporting justice in tenure law and their contribution to good governance of tenure.

These important goals require strong, effective and attentive professional bodies that are ready and willing to have clear communication with their members, the professionals themselves, and are open to the (often changing) needs of citizens and businesses. Notaries and their chambers should also interact openly with state actors, other professional organizations, nongovernmental organizations and all other stakeholders and engage in advocacy, on a national and international level.

Digitalization is a challenging but very promising process for all parts of our societies. Not just in the public field, but also for private companies and private citizens, digitalization offers significant advantages in terms of the reliability and availability of relevant information, notably in the legal field. However, proper implementation of digitalization requires large investments of financial and human resources and requires all actors to revisit well-established practices and habits. The smaller the companies or entities, the weaker the citizens, the more difficult it can be to find suitable approaches and solutions to these challenges. Given the great challenges digitalization poses – in particular for smaller chambers, smaller states and weaker or disadvantaged citizens – all notaries, as well as their regional, national and international associations should work closely together as well as with international organizations and NGOs.

Digitalization and the use of modern technologies – notably recent experiences in the COVID-19 pandemic – have brought about many important improvements and changes, but they have also highlighted the limits of technology with regard to the law. The law is and will always be a means of addressing human needs, and human needs can only be appropriately addressed by human legal practitioners who have a personal relationship of trust with the parties they serve. This notion is one that all stakeholders

dealing with preventive justice in the 21st century should keep in mind and continue to promote regardless of technological means, changes and opportunities – to remain accessible and trusted advisors serving the people of their community to improve their lives.

6

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Brazil	<p>Provision nº100 of 26 may 2020 on the practice of electronic notarial acts using the e-Notary system, creating the Electronic Notarial Registration (“MNE”) and other provisions.</p> <p>“Provimento Nº 100 de 26/05/2020 Dispõe sobre a prática de atos notariais eletrônicos utilizando o sistema e-Notariado, cria a Matrícula Notarial Eletrônica-MNE e dá outras providências.”</p>
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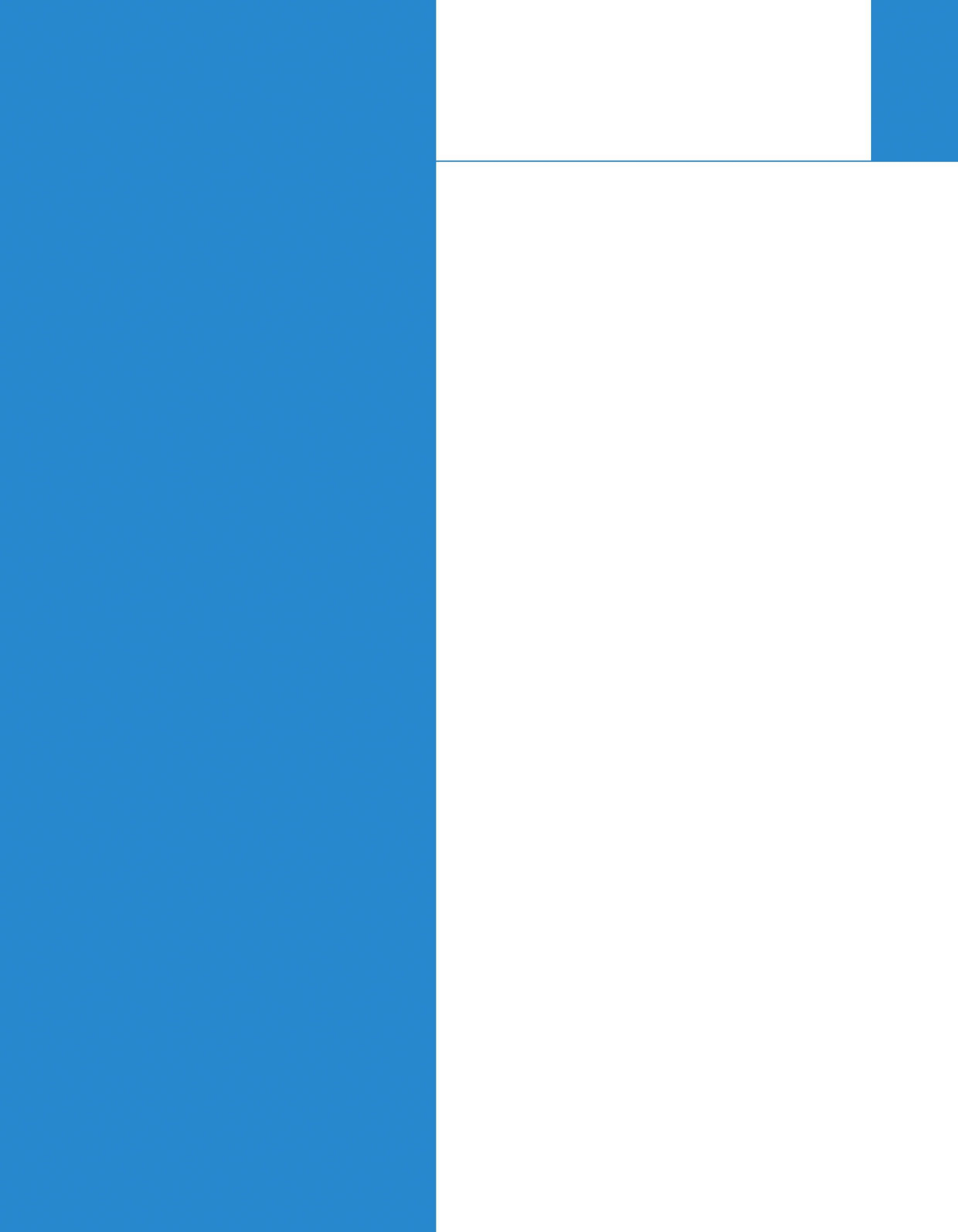
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The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security were unanimously adopted by the Committee on World Food Security (CFS) in 2012. These Guidelines provide direction on how to recognize, protect and support legitimate tenure rights and their holders, including extralegal or informal individual and collective tenure rights, as well as those derived from customary and indigenous governance systems. The recommendations of the Guidelines are highly relevant for actors involved in the field of preventive justice, in particular notaries, registry officials and other professionals. This technical guide aims to build on abstract concepts set out in the Guidelines to develop key recommendations to help professionals promote

responsible governance of tenure for the benefit of all, while fulfilling obligations in a responsible manner. This guide shows how the concepts and principles of the Guidelines can be operationalized in the day-to-day work of preventive justice practitioners, while identifying challenges and showcasing good practices. It analyzes preventive justice to assess the contribution to responsible governance of tenure and uses the Guidelines as inspiration for preventive justice practice. This technical guide is a product of the fruitful collaboration between FAO and UINL and the mutual commitment to support preventive justice practitioners while putting the principles of the Guidelines into practice and ultimately supporting the achievement of the Sustainable Development Goals.



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