7th World Notariat University
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FREEDOM OF PARTIES TO ARRANGE THEIR OWN AFFAIRS

Work Summary
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For this legislature the theme chosen by the Union as the common thread of the work of our university is the freedom of parties to arrange their own affairs that will be studied this year and the next.

Perfect example of the schools of thought that forge legal traditions, this concept draws its origins from philosophical thinking and is one of the concrete examples of the 17th century *Enlightenment Philosophy*, before being largely upheld by French philosophers in the following century.

As you are all aware, this school of thought also greatly influenced the founding fathers of U.S. independence, in 1789 led to the French revolution and a few years later largely inspired one of the first great "Civil Codes" (known as the Code Napoléon);
The main ideas put forward by this philosophy still govern a large part of our western societies and are largely reflected in the same definition of human rights worldwide.

Michel Grimaldi briefly recalled the main principles: notion of individuality, the principles of natural and sacred rights, the self-determination of man, individual freedom and the social contract, which are the central and intangible elements of any reflection.

In the field of Law, these philosophical ideas have largely contributed to the development of the concept that is of interest to us here, namely the freedom of parties to arrange their own affairs, and this through a number of key founding principles:

- The existence of natural human rights that protect individuals and have to be imposed on law-makers; universal declarations of human rights, such as those adopted since U.S. independence, the French revolution or the founding of the United Nations, which are living examples of their application;
- The concept of social contract suggesting that individuals should accept the constraints needed to live in a community, but agreeing themselves clearly to the necessary limits to their individual freedoms;

- The importance of the will of the individuals which is an essential element of their consent or refusal to form a contract,
- The supremacy of this will, that in most cases is sufficient in itself to form a contract, thus envisaged as private law applied rigorously to the parties; and this is where the principle of *consensualisme* (principle whereby a simple agreement of parties without further formalities is sufficient to establish a contract) saw the light of day and today largely imbues our civil law legal systems.

Hence, what immediately emerges is that the principle of the freedom of parties to arrange their own affairs actually permeates all areas of civil law, but through solutions or with limits that are far from being fixed.

Indeed, like any cross-sectoral philosophical concept, this principle has influenced our legislations to a varying extent, largely permeating many areas of law or, on the contrary, remaining extremely limited, even ignored, in others.

Starting from the late sixties and, nowadays at an increasingly faster pace, our societies have witnessed developments where, as we were able to acknowledge together, the freedom of parties to arrange their own affairs has often been a key concept, and even a powerful driver of the legislative reforms introduced to take societal developments into due account.

Therefore, for us, notaries, proximity legal practitioners at the service of our fellow citizens, but also officials with a public service mission, the choice of this study theme for the work of our university was obvious, as it concerns so many areas of our day-to-day activity.

Growing individual freedoms, the recognition of the rights of minorities and even the declining role of states many of the reasons for the rising importance of the freedom of parties to arrange their own affairs in our present-day world.

Over these four days, our debates provided numerous examples of these developments and of course I will begin, first and foremost, by briefly summarising them, describing them through some examples.

However our debates also helped highlight the growing freedoms granted to individuals, source of more and more decisions and choices each day, which our fellow citizens certainly need to be helped with, but also protected undoubtedly.
I will later try to underscore why our function as notaries is, in my view, particularly suitable to accompany these far-reaching legal changes in our societies.

I – Developments regarding the scope of the freedom of parties to arrange their own affairs

Let's us begin by discussing how the scope of this freedom has developed.
Actually, I speak of developments, but as you noticed throughout our debates, I should immediately talk about the growing scope of the freedom of parties to arrange their own affairs.

To try and classify these various extensions, to begin with I would like to describe the most evident ones which I would qualify as direct extensions, when they concern changes in legislation authorising new freedoms or putting an end to prohibitions, before discussing indirect extensions that are the outcome of changes to our legal organisation or the opening up of our national systems to foreign law.

A – Direct developments

As mentioned previously, some extensions of the freedom of parties to arrange their own affairs are the direct result of new legislation introducing societal developments in positive law.
Of our debates held in the course of the week, I will recall some examples concerning newly granted or acquired freedoms and then a few examples of prohibitions that have been lifted.

1 – Extension of individual freedoms

To start with the most noteworthy developments, I would like to recall the day led by Christina Armella:

First of all, developments regarding the forms of couples, starting from the increasingly greater freedoms of organising life together (we considered: de facto unions, registered partnerships and marriage) and developments in the same notion of "couples", since more and more legislations recognise same-sex couples, at least through registered partnerships, but also often by granting them opportunity of marriage; we also noted that some legislations provide for forms of partnerships involving three or four persons ….

However, I would also like to recall an even more revolutionary extension, namely allowing individuals to choose the gender they wish to belong to and our debates concerning changing sex were very passionate indeed.

And of course, I also should include new freedoms regarding reproduction, be it assisted human reproduction or surrogate pregnancies.

One observation worth noting: these developments concern countries where legislations evolve independently from the religious beliefs of citizens.
Clearly, the same does not apply to countries where religion strongly influences family organisation and the rights of individuals.

To also examine developments tied to longer life expectancy and age-related difficulties, from the first day, led by Christine MORIN, I would like to recall the growing recognition of the effects of the freedom of parties on the organisation of the end of life, be it:

- the organisation of one's legal incapacity in advance,
- refusal of medical care,
- refusal of therapeutic obstinacy,
- and lastly euthanasia, envisaged according to cases, as discontinuing care or as assisted suicide.

2 – Lifting of prohibitions – Recoiling Public Policy

I will discuss this other current of liberalisation through the work of the third day led by Michel GRIMALDI, and I will recall by way of example:

- our passionate debates on the reserved portion of the estate, which today seems to be increasingly controversial, owing to the influence of Common Law;

- the acknowledgement that our societies seem to want to increasingly favour the will of the *De Cujus* when passing on the latter's estate *Mortis Causa*;

- the lifting of prohibitions regarding inheritance agreements (especially assignment agreements) which seem to be preferred by several legislations to help settle successions in advance through family agreements; the will of the deceased seems once again to be favoured, in some cases, in order to decide what happens to his/her estate across several generations.

B – Indirect developments

Beyond direct changes in the boundaries of individual freedom, the growing role of the freedom of parties to arrange their own affairs under our legal systems can also be seen through development currents in our respective countries: the declining direct involvement of the State, on the one hand, and globalisation on the other.

1 – Decreasing direct presence of the State: dejudicialisation / contractualisation

In many of our countries, we have acknowledged that States, and here I mean public authorities, question their exact role in modern society and think about their level of involvement in various areas of Law.

I will here describe these currents using two examples discussed during the second day:

To begin with, regarding marriage: to acknowledge that several countries now allow it be celebrated directly by notaries whose role, tied traditionally to the choice of the matrimonial regime, has been naturally extended by law-makers to include the celebration of these unions.
Owing to their standing, notaries are thus seen as an alternative to the public officials traditionally in charge of celebrating these unions; and after all, this alternative seems to be particularly appropriate/suitable, since in many countries notaries are already in charge of authenticating registered partnerships, often viewed as an alternative to marriage.

To continue, I would also like to mention the example of divorce, regarding which several countries have decided to replace judges with notaries, providing however that the separation of spouses occurs by mutual consent and in full agreement with the consequences of separation.

In these cases (marriage and divorce), these legislative developments clearly reflect the shift towards the "contractualisation" of relations within the couple; marriage is no longer a matter for Registry officers, divorce by mutual consent is no longer a matter for judges; these two institutions are a simple contractual matter among spouses; a contract which however will never be entirely ordinary, owing to its effects (vis-à-vis the spouses and third parties), and hence the involvement of a public official (the notary) will always be required.

2 – Globalisation and the incorporation of foreign law

Day after day, the globalisation of trade and the growing mobility of persons are helping to build an increasingly globalised world; the existence of a global economy, regulated worldwide, is a fact. However, the harmonisation of our rights needed to tackle globalisation is far from having being achieved and today, legal situations are becoming increasingly complex.

Nevertheless, we are not entirely bare in the middle of the desert: international conventions already exist, while others are in the process of being prepared, especially by the Hague Conference; with the European Union specific regulations have been drafted for uniform application throughout its territory; at United Nations level, UNICITRAL is working to unify laws regarding economic activity.

A key element present in some of these conventions is the importance attributed to the freedom of parties to arrange their own affairs; indeed, a number of international agreements have been drafted to allow the circulation and recognition of rights through the standardisation of possible choices, the standardisation of the way of expressing the foregoing freedom and the implementation of supplementary solutions if the persons concerned fail to express their preferences.

However, and to close the first part of this short summary and the list of recent developments in the role played by the freedom of parties to arrange their own affairs in our respective legislations, I would like to mention another important legal principle that is dear to us, namely the one according to which there is an exception to every rule; and given the general shift towards the strengthening of the role of freedom of parties to arrange their own affairs when concluding contracts, it is important to underscore an important exception, namely that of consumer protection rules.

These rules were discussed today, during the fourth day focusing on property law, during which Luc Weyts described the different mechanisms, such as the cooling-off period or the withdrawal period, which limit the immediate effect of the freedom of parties to arrange their own affairs.
In some cases, the consent expressed by an individual can only be validly given at the end of a mandatory cooling-off period, during which his/her will be deprived of any effect.
In other cases, the consent given immediately produces an effect, but may be withdrawn unilaterally by the person in question, thus depriving it of any effect.

II – A strengthened role for Notaries

This ends my overview and as the conclusion of our work, I would also like to mention another lesson we can learn, which concerns our function as notaries, when dealing with the freedom of parties to arrange their own affairs.

I will touch on the lesson after having recalled the acknowledgement we made together.

A – a simple acknowledgement: More freedoms = More responsibilities

This acknowledgement is simple: the growing freedom of parties to arrange their own affairs requires that citizens make more and more choices, often by means of agreements that they will be required to sign with third parties, and that they then take all ensuing responsibilities

There are, therefore, new opportunities, when it come to choice and I will not go back to the previously mentioned ones concerning end of life and gender, and the introduction of new contracts to replace administrative acts or judgments, nor will I discuss the contractualisation of divorce without judges

More and more often citizens will be alone when faced with these choices and agreements: they will have to think about the scope and consequences of their decisions, and once the latter have been settled, they will have to secure their implementation; here the role of the notary seems to be both natural and essential

B - A role perfectly adapted to these new needs

Indeed, the function of notaries makes them the privileged interlocutors of citizens faced with these choices or decisions:

- Notaries know the law, their role is to explain it to citizens and inform them about the scope of their possible choices and the ensuing consequences; to this regard, there is no doubt that in the future, the notary's mission of advising will probably be the key role of his/her function for citizens;
- Notaries are also impartial, and this quality is essential in the more and more numerous agreements in the area of family law, especially when they replace judges; this impartiality, in the broad meaning of the term, will also serve as an instrument of adapted protection when correcting an imbalanced situation that may arise when concluding a contract, when for example one of the parties is more vulnerable than the other.

However, their function also makes them essential interlocutors:

- Notaries assure the security of the agreements or acts they draft, and I will not go back to the undeniable virtues of the notarial authentic act, the legal certainty that this act gives to agreements formalised in this way, and the improved international circulation of this act (especially within the European Union);
- Through their involvement, notaries check the legality of agreements and acts concluded, and, in their capacity of public officials, they have all the necessary authority to ensure that these acts produce the broadest effects and are received directly and registered in all public registers without the need for additional checks.

My remarks will end with one sentence:
Notaries are and will be the essential guarantor and protector of citizens and the State in view of the growing freedom of parties to arrange their own affairs.

….. Our debates will continue next year in Buenos Aires and I invite you all to come to Jakarta to follow our final conclusions….