

INTERNATIONAL UNION OF LATIN NOTARIES

XXIII INTERNATIONAL CONGRESS OF LATIN NOTARIES

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THEME II

“THE NOTARIAL FUNCTION IN MAKING LAW”

International Co-ordinator: Mr. Federico Guasti (Italy)

CONCLUSIONS

Report on the Activities of the Committee for Theme II

The Conference Committee for Theme II held its meetings on Monday and Tuesday, morning and afternoon. Thursday morning was devoted to preparing the summary report drawn up by the International Coordinator.

Contributions to the issue came from the representatives of 25 Notary Bodies of whom, 21 submitted papers.

Upon opening the sessions, on proposal by the International Coordinator, the Committee appointed Nestor Perez Lozano (Argentina) as Deputy Chairman and Pascal Chassaing (France) as Secretary of the Committee.

During the first two days, all the participants, with priority being given to those who were submitting written presentations, contributed their reports orally while others contributed written summaries of their reports.

At the end of the second day, the Committee Bureau, consisting of the International Coordinator, Federico Guasti acting as Chairman, Nestor Perez Lozano - Deputy Chairman and Pascal Chassaing - Secretary, was expanded for the drafting of the summary report. They were joined by some of the participants who had contributed written papers to the Committee's work, in particular: Gerd-Jürgen Richter (Germany), Federico Magliulo (Italy), Nicole Pankert (the Netherlands), Lucila Ortiz De Di Martino (Paraguay), Roman Sowinski (Poland) and Ana Fernandez-Tresguerres Garcia (Spain).

At the end of the works of the Committee, the International Coordinator submitted a summary report to the Conference at the plenary session held on the afternoon of Friday 5th October.

On that occasion he pointed out that, at first sight, the issue might have seemed to be excessively general, but on a closer look, it did provide leads for a more thorough examination of some specific aspects such as the juridical standpoint and the policy of notarial groups. However, in order not to broaden the field of research too much and in order to keep the discussion focused on the subject matter of the Conference, he had decided to develop the issue mainly as a reflection focusing on future prospects in a rapidly evolving juridical and technical context.

The reports submitted dealt with the issue mainly from two different viewpoints:

- from the standpoint (direct) of a notarial deed as source of rights and duties that are freely negotiated by the parties, thus becoming binding on the parties and against third parties; in particular, new contract rules produced by notaries in their efforts to provide solutions for circumstances that are not provided for in existing legislation;
- from the standpoint (indirect) of the more or less explicit participation by notaries and by relevant institutions in the evolution of private and trade law, in response to the changes occurring in civil society, in economic relationships and in negotiating techniques. Such participation occurs as a result of "practice" namely the repeated and constant use of the same type of deed or contractual clauses for regulating socially important situations which, as regards the notaries, come about as a result of the cooperation provided by the official notary bodies to the legislator.

The reports submitted by some Countries supported a long-standing tradition in Latin notarial groups, focused mainly on the former aspect.

In the reports by Countries where notarial functions have been introduced or re-introduced recently, the emphasis was placed mainly on the latter aspect since they are more sensitive to changes that have occurred in Private Law in recent years, considering however that since these notaries have been in this profession for only a relatively few years, a 'practice' has not yet emerged.

Other speakers dealt with both aspects, since there had been no specification within the broad context of the conference issue as to which of the two was to be given priority; but perhaps this had been intentional, leaving it up to each Country to choose the standpoint that best suited its legal reality.

Then there was a small group of papers supporting the view that the notarial function is marginal and does not itself create law.

In any case what emerged from the reports submitted and above all from the discussions held during the Congress, is that the law-creation capacity by notarial groups is a characteristic which is peculiar to the Latin notary groups where the interpretation of the law and of the will of the parties has been part of the exercise of the profession by tradition. On the contrary, in Common Law countries, notaries seem to have more of a certifying function, leaving the function of adjusting private autonomy to the legal system and of generating law (as suggested in the conference issue) up to legal experts, lawyers and judges.

Summary Report and Conclusions

1. The notary's function and the creation of law

In general the 'law-generating role' that is inherent in the function of notaries when they are called upon to regulate legal and private law relationships through the drawing up of authentic deeds that are binding for the parties and on third parties, some of which enforceable, is taken for granted.

These are deeds whose authorship lies exclusively with the notary and they are drawn up after the will of the parties has adjusted to the existing legal system, in compliance with the limits imposed by the latter on negotiation freedom and taking into account the typical nature and/or irrevocable and/or unavailable nature of some rights and duties.

This occurs upon request by the parties (whether they be natural or juridical persons), who confront themselves with the constant evolution of circumstances and needs in such fields as the economic area, the family, people and the settlement of hereditary assets.

Usually it is the notary who is the first jurist to face the new juridical figures in the area of private law in a 'non-litigation' setting and who caters to the need of regulating them in concrete contracts.

In seeking to understand the real scope of the application of the law and of its innovations, and in seeking to coordinate them with the existing system, the notary often identifies new cases. And these are the outcome of a creative interpretational effort without which the regulations would end up not having adequate room for application. It can be stated, however, that the activity of the notary in applying the law is always in some respects creative, because, even when it does not lead to the creation of new transactional figures, it is always aimed at identifying the true meaning of a legislative text, and since the notary is the first to be responsible for such application, he is also the first to interpret the law.

2. Evolution in time of the law-creating function.

As to the scope of this role, there has been an evolution in time as a consequence of several factors: the legislator is increasingly paying attention to the needs and interests of the community and not only of individuals; in addition in the economic field there has been a move away from specialty toward standardization, from individual contracts to standard contracts, from contracts resulting from adhesion to standard contracts; in a nutshell, attention is moving away from case-based contracts which – albeit invoking general principles – protect above all the interest of the individual, towards contracts that protect groups (consumers, savers, utilities users, the users of services, etc.), or that result from the globalisation of the economy, also as a consequence or technical developments in the areas of Information Technology, Communications and real-time data transmission.

In this respect the situation of the European Union is emblematic, where the Community laws on these issues seem to aim at strongly compressing the role of the notary as creator of law.

This system of common regulations can be expected to be widened to countries outside Europe as a consequence of globalisation. Furthermore, these phenomena are compounded by the easier and widespread access for the public to sources of specialized and/or obligatory information and to the body of laws that tends to be extremely detailed for some business areas.

This entails a reduction, but not a total compression, of the boundaries within which the notary can have recourse to creativity and to his experience and professional ability as legal expert, in adjusting transactions to the contractual will of the parties on a case-by-case basis in the effort of equitably settling the parties' respective interests.

3. Characteristics of the creative function and role of the organizations that represent notaries

Alongside the above phenomena, that could be defined as compressing contractual freedom, economic and social relationships evolve and hence there arises the need to regulate the new legal circumstances that arise, they too being the outcome of the evolution of needs, interests and relationships among people; new forms of the rights of ownership, new types of agreements and relationships between economic groups, consortia among enterprises, new forms of enjoying and using real estate and financial assets, fiduciary relationships, management of family assets, private associations, non-profit organisations, provisions in the case of sudden incapacity, protection of the natural family, provisions as to the use of one's organs, regulations governing hetero- and homosexual relationships, etc. are only some examples of the evolution of new circumstances that notaries have to cope with.

However, all the reports submitted, seem to agree on the fact that the inevitable shortcomings in the legal systems and the delays of the legislator in adjusting the regulations to the new arising needs and to an ever-changing reality, still offer broad margins for creative activity assigned to a legal expert having characteristics that are typical of the notary of the Latin type, who is closer to the needs of the people and fully immersed in the economic and social reality of the community.

That is to say a legal expert who is not the rigid custodian of laws in codified form, but a person who knows how to interpret the most authentic aspirations arising from the context in which he operates, thus facilitating the implementation of the natural law that identifies with the desire for equity and justice arising spontaneously, and at times unwittingly, from society. This desire can be met by the notary when he is called upon to shape legal transactions within a framework whose mainstays are the worthiness of the interests at play and the unfailing respect for the common good and the moral sensitivity of the society of which he is part.

What arises from the work of the notary is a source of law whose distinctive feature is that it is the direct expression of the aspirations of the recipients, aspirations that are made legitimate and accomplished through the intervention of the notary: in oth-

er terms, therefore, this is a law that is “needed” (bottom-up) and not “imposed” (top-down).

But new areas for this function of the notary appear to be feasible not only as a result of the individual professional, but rather of notarial groups as a structured and organized profession.

Seeking to strike a balance between the initiatives of notaries as a professional group and of the individual notary with regard to the innovation of law is going to be one of the most difficult challenges that the notarial community will have to face in coming years, and it will require the cooperation and spirit of self-imposed responsibility of each member of the profession.

In many Countries (and we hope that this can soon be true of all the Countries where the notary profession is of the Latin type), the organizations that represent our profession are already in a position to interpret the needs of the public and contribute therefore to the elaboration of uniform solutions that prove to be also most appropriate and consistent with the legal system; this can be done by collecting the contributions of all the notaries who operate across our Countries and extracting the essence of their experiences. Furthermore, on the basis of the authority that our body has, since it represents the profession, it could even turn to the legislator for clarifications and even intervene in the law-making process so as to take into account any new circumstances arising from unprecedented personal or contractual situations, or those arising from the customs and legal systems of other countries with which we come into contact as a result of globalisation of economic and social relationships.

In other terms, the creative function of the individual notary is shifting towards notarial organizations (and perhaps this is an irreversible phenomena) which are strong bodies at both the national and supranational levels. These organizations will have to become specialized, they will have to be endowed with the ability to provide uniform solutions to problems that are widespread among the users, and they must also be capable of adopting legal institutes that have proven to be successful in other countries, thus facilitating the spreading the more commonly found sound and well-grounded practice, and hence call the attention of judges and legislators to take into account the new phenomena of Private Law.

This is a function, therefore, that can justify a more pro-active stance by the notarial profession on the basis of which notarial bodies can even expect to be consulted and be called upon to participate in the law-making process. In other words, notaries can become authors and

shapers of legal private relationships in transactions between parties.

But to be able to claim this role fully, the representative organizations of notaries, both national and supranational, need to take on the premise which is exclusively that of providing the political protection of the group.

But, our authorities need to have very high level legal and professional competence so as to be able, on the one hand, to interact on an equal standing with the authorities empowered to issue laws and regulations, and on the other, transfer to individual notaries all the information required for them to be able adopt the same process

which, by becoming practice, are then bound to influence the regulatory decisions that legislators take.

4. Globalisation

This problem is discussed also at the international level. Indeed, regulations were issued recently in a supranational legal context, namely the European Union, which restrict the contractual autonomy and condition the efficacy of the contract entered into by the parties. It is self-evident that such phenomenon may considerably reduce the creative function of notaries (an example is the right of withdrawal envisaged in some instances as being a mandatory clause, even for contracts concluded with the intervention of a notary).

Therefore with regard to the work aiming at integrating the Private Law of the individual countries at a supranational level, it is important for the legislator to perceive how fundamental it is to provide for recourse to a common system of preventive justice with regard to which the notary can play a fundamental role.

5. Final Remarks

In conclusion, following from the above remarks, the Committee for the second Congress theme deems that it will be useful to emphasize the characteristics of the common model of the Latin notary, which, also with regard to professional ethics, can guarantee a supranational system having the same degree of reliability, consistently with what has occurred in some geographic areas where notarial systems are already homogeneous.

Therefore, the Committee recommends that notarial groups that are members of U.I.N.L. should acquire greater awareness of the delicate role that the notary has in contributing to the shaping of Law, both in their national contexts and in working jointly with other notaries in a supranational context, by adjusting their means of intervention with the notarial groups and with the authorities in their Countries.
