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NOTARIAT IN THE LAW OF EUROPEAN COUNTRIES: PART I – HISTORICAL REVIEW

Notary is a son of Themis who
fairly tends towards balance between
public and private interest

Outline of the problem and aim of the article

The principal objective of this article is to provide a description and review of the legal status of the notary in the law of European countries in its genesis.Modern civil [latin] notary is provider of «public fides»[1]an important representative of a legal profession who is not only authenticate deeds, sign certificates and powers of attorney, giving them state recognition and probative value but also play a role of an impartial legal adviser. The last one function, in some jurisdictions, develops into advocacy authorities, such as notary-advocate in Germany. This description surely cannot be used as an impeccable one definition, but it can be used as a legal outline for the purpose of this article.

It is obvious and undisputable that national legislation which regulates organisation and maintenance of the notarial activity is not possible to overview within the scope of this article. It can be the subject of individual research and book, but not the article.

Consequently, it leads to the problem of choice which can be formulated like – Which national legislation should be chosen for the most appropriate and substantive overview of the legal status of the notary in the law of European countries?There are no doubts that this problem can be resolved variously. For instance, the most widespread approach among researchers was adopted from Zweigert and Kotz, provides research of the French, English and German lawas the exemplary exponents of the three major legal families traditionally recognized within Europe [10, p. 18]. Nevertheless we should not limit us with those mentioned countries. Beyond doubts that those countries are, as it was said, the exemplary exponents but they are not all that should be regarded. Made choice is based on the historical aspectwhich first of all provokes to disclose genesis of the notary profession and its evolution through centuries.

Analysis of recentresearches and issues

It is necessary to point out that history of notariat in European countries and in the world in general was subject of different issues. Among recent researchers of this topic are S. Fursa, T. Halliwell, V.G. Heinz, B.W.Hoeter, N. Karnauk, M. Merlotti, P. Malavet, M.L. Shea, W. Smithers, A. Suminaand others.

Main material

I. Historical review

There is no agreement on the question of what and when werenotary and notary profession firstly mentioned. Some of the researchers believe that we should consider ancient Egypt as the earliestreference of the legal documents in private [civil] law, such as wills and contracts with property, which had to be sealed by public officials. It seems to be the first glance of one of the present notarial function of notarising [authenticate] contracts with the help of state seal.

On the other hand, Hammurabi's Code, referto some of the ancient written deeds which, as an Egyptian one, were related to conveyance of property andhad probative value in the court.In Classical Greece there were publicofficials known as ***singraphos*** and ***apographos*** whose function was to authenticate contracts signed between citizens.

Notwithstanding, if it is considered in a such way,the fact should be admitted that the emergence of notary function, in its various types and forms, is owing to the social necessity of written evidence in commerce and other civil relations. In this context we can partly refer and agree withMs.Nussdorfer who

[1] Public fides–hereinafter the term which describes public trust and publicpower (authority) to authenticate, attest, certify and provide legal certainty for the parties of legal relations and therefore maintain probative (evidentiary)value to all documents which were signed by them and notary.

claimed that: «... notaries were thought necessary to such transactions only because of the new forms of public authority and the new appreciation of written evidence elaborated in the medieval faculties.»[5, p.1].It is more likely vice versa;the new forms of public authority came as the logical consequence of the social necessity of not only written evidence but written evidence which has probative force provided by the state through the notary. There is however, considerable debate and inexact information about the full attributes of each of the mentioned public officials, and conclusions as to their contribution appear mostly anecdotal [4, p. 407].

In the Roman times different notarial functions which are exist in the present days were maintained by a few officials: the tabularii; the tabelliones; the scribas;thenotarii. The **tabularii** were in their origin public officials charged with the census and responsible for the custody of the census documents. The **scribas** were government employees responsible for custody of judicial documents used by the praetores (the Roman judges charged with resolving civil lawsuits). They also drafted official resolutions.

The notarii was a person skilled in stenography most likely as a court secretary does today.All of them except **tabelliones** were public officials. The tabelliones, on the other hand, were private professionals who wrote and kept wills and other legal documents. They developed sufficiently by the time of Emperor Justinian's rule to be mandatory drafters of contracts, required to prepare minutes of the transaction called the scheda [4, p. 410] and hence the evolution of the liberal notarial profession had begun.

II. Period of transition

Thus, after gradual fall of the Roman Empire,independent jurisdictions have started to emerge. The Roman law would more often becomeas the law science.As a result, conjunction of Roman laws and German laws with a huge impact of the Holly Church and its canons produced the contemporary European [latin] notariat. In the early 9th century, the Frankish emperor, Charlemagne, appointed commissioners to collect the taxes four times a year. He directed these itinerant justices to appoint «notaries» to accompany them on their rounds[1, p.2]. At that period in the history of notariat, notaries were personal public officials of Lothar the king of Lombard. Nevertheless, it is still a topic for discussion whether notaries of medieval times can be regarded as true representatives of legal profession in our modern legal outline of it.»Notaries» drafted «written documents as evidence of legal transactions» following traditional Roman forms, which continued to influence on the Germanic Lombard codes of medieval Italy.[4, p. 413]As a result of the increasing influence of the Catholic Church during this period, the popes started to appoint notaries. William Durand, one of the most important of the liturgical writers and the secretary to Pope Gregory X wrote in his speculum that «A notary public appointed by the Emperor or the Pope or by someone to whom they have granted this special privilege, may perform his office and draw up instruments anywhere, – even in France, Spain or England.»[1, p.2]Nonetheless the legal status of the notaries was not unambiguous.They were esteemedindividuals whose documents were acknowledged internationally. All this was owing to the public function which notaries were providedby virtue of regarded «public fides». The concept would be literally translated as «public trust» or «public faith» which in this context mean to belief; credence; trust. Thus, the Constitution provides that 'full faith and credit' shall be given to the judgments of each state in thecourts of the others [4, p. 440]. Besides, «public fides» is one of the reasons why notaries are very often a subject of comparison with judges that is why, it was a time in a history of notariat when notarial function,as a bunch of functions, was provided by judges.

III. England

It is claimed that first notaries appeared in England in the 11th and 12th Centuries were Italians appointed by either the Emperor or the Pope, and were recognisably involved in areas of law which the Common Law and its Courts, at least until then, had not taken over, i.e. essentially in the areas of family law and inheritance law dominated by the Church, as well as – in the case of the Papal Notaries – of ecclesiastical law itself. The first two Notaries practising in England and of known identity were a certain Swardius (active at the time of King Edward the Confessor) and later a Master Philip (1199) [9, p.5]. But the most influential notary of this period was Rolandino, who in 1234 published his work entitled Summa ArtisNotaria. It is important to note that Rolandino used both «notarius» and «tabellio» in his works suggesting that the terms had become synonymous in their reference to a specific professional[4, p. 419]. In 1279, the Pope authorized the Archbishop of Canterbury to appoint notaries. Not surprisingly, that most of these notaries were members of the clergy. This practice continued until 1533 when, as a result of the Protestant Reformation, power transferred from the Pope to the Archbishop of Canterbury in England. Up until the first statutory regulation of the Notarial profession in 1801 by the Public Notaries Act, the office of Notary had been gradually extending itself into new areas, in particular into several specialised areas of commercial law (shipping, bills of exchange), into areas of law with

an international dimension, and in particular into the area of conveyancing (purchase agreements, mortgage documentation), in all of which areas the English Notaries gradually achieved a dominant position, at least in London, where England's economic activities have traditionally been concentrated. The London Notaries had joined the Company of Scriveners where they had dominated until the case of Harrison v. Smith (1760) [9, p.6]. This case initiated proceedings which were not in the favour of scriveners [notaries]. Such civil law countries as Italy and France,regulated notarial activity by legislation of the various city-states, for instancelaws of the city of Paris in the times of St. Louis in 1270. The most impeccable notarial legislation of those timeswas in Spain (Catalonia).

IV. Germany

In Germany, in 1498, the Imperial Diet held at Freiburg resolved to reform the notarial system and to restrict the official examination for admission to the notarial profession to matters of knowledge and expertise. Then in 1512, the Imperial Notarial Order was issued by Emperor Maximilian I. According to this law contains the fundamental principles relating to the office of Notary: The Notary should record both the place and time, as well asthe contents, of the transaction and read out word for word the record thus made, have it approved and put his signature to it (ss. 3, 11 and 14 Imperial Notarial Order). The Imperial Notarial Order also contains provisions concerning the production, content and form of notarial instruments, the creation of protocols, and finally, the legal acts which are to be carried out with notarial involvement (production of wills, granting of powers of attorney in litigation, acceptance of instruments for appeals). At the same time, the imperial edict prohibited the involvement of Notaries as legal advisers to any party in matters in which they had already been involved as Notaries[8, p. 5]. Thus adherence to the principle of impartiality in notarial profession could be traced in The Imperial Notarial Order. It also established that German notaries are bound to held their own office and provide authenticity and evidentiary force to the documents, signed by them, via public faith given them by German state. Then due to The Imperial Deputation Act (1600) notaries were given additional functions related with court proceedings. According to this act they could be called to attend witness testimony.Then in civil law countries was «a period of silence» in the notary legislation which could be presumably due to the huge amount of different wars.

It should be mentioned that owing to the fall of the First German Empire (1806), which was caused by the set of wars, German notarial profession was practically faded yet it was also a period of reload of the German notariat.

Consequently it led to different types of notaries and dispersing of notarial functions. Among them were «the full-time notary» (who were public officials and whose law model was perceived from French law); «the Solicitor-Notary» (who emerge due to the Prussian law who worked in the Bill (promissory note) Courts); «the Judge-Notary» and «the Civil-Servant Notary» (who were members of the State of Baden-Wuerttemberg).

Before the World War II began, 1937 the new Imperial Notarial Order was issued and finally all notarial functions were accumulated in one profession – full-time Notary. Although, according to the social necessity and expediency Solicitor-notaries could also be appointed in a certain land [8, p. 6]

V. France, Italy and Spain

The next significant step of the development of the notarial legislation and notariat as an institution was French notarial law – The LoiVentose (1803) which is claimed to be considered as revolutionary in notarial legislation.

The new French Notaries Act was comprised of two chapters containing 69 subdivisions. The first chapter was headed Des Notaireset des ActesNotaires, the second was called Regime du Notariat. French notaries became public servants, officers of the courts[2, p.3]. The LoiVentose defined notaries as «Notaries are the public functionaries established to receive all acts and contracts to which the parties must or wish to invest with the character of authenticity attached to acts of the public authority, and to assure the date of them and to keep them on deposit and to deliver exemplifications and certified copies of them»[7, p.31]. It was prominent law due to the fact that status of the notary in the state and among other legal professionals was finally determined.The LoiVentose also set the essential rules of providing notarial activity such as list of professions or activities which were incompatible with notarial practice, description of the notarial seal, list of requirements which should be observed by the applicant, rights and liabilities of the notary, limits of the numbers of notaries in the specific region of the state, etc. It was also set on the lawlevel that thenotarial seal gave authentic status to the document issued by the notary, and validity anywhere in the country.

The LoiVentose and other connected legislation, entrusted French Notaries exclusive function (power) to draft all documents of authentic character and probative force for extra-judicial use.It also set notaries civil, disciplinary and criminal liability. French notaries were liable for damages arising

from malpractice, negligence, incompetence, or fraud [2, p.3].

This French law masterpiece, which is «the mother of all modern Notary Acts»[2, p.3],still remained exemplary to the present days, of course with substantial changes which make this law applicable to present needs of the French people and society.

Other noteworthy laws in notariat were adopted in Spain (1862) and in Italy (1913). Spanish law established notarial public function, also, as The LoiVentose law, set of requirements for the applicant such as specific formal education connected with notarial activity, limits of the numbers of notaries, etc. The Italian Notarial Law establishedthat notary was required to obtain a law degree and practice for at least two years, and pass an exam. Exactly the same procedures, with the only difference in the length of practice,are established nowadays not only in the law of civil law notaries but also in common law notarial systems.

Since The LoiVentose law was adopted every mentioned law established some similar points as, for instance, notaries should be members of the professional notarial organisation which also had rights to apply disciplinary leniency and punishment; notaries collect and organise all deeds that have been notarised by a certain notary; notaries were criminally liable person for their law mistakes.[4, p.423-424] Abovementioned three laws, Spanish, French and Italian, become a three pillars for the modern civil law notariat.

Conclusions

More than 2000 years of the evolution of the notarial profession were overviewed yet it should not be considered as impeccable, full and thorough analysis only because it is absolutely impossible to put 2000 years of the history in 10 pages albeit, some logical conclusions can be and should be done.

According to analysed documents, notarial profession and its function:

- Appeared more than 2000 years ago.At origin it was not connected with legal professionsbut the essence of function which was entrusted to the notaries and theirs predecessors very soon led different governments to the necessity of legal knowledge for the notaries.
- The earliest predecessors of modern notaries were in ancient Greece and Rome where notary's functions were dispersed between different representatives.
- Medieval notaries were under strong influence and strict control of the Holly Church and it was a private legal professional with the entrusted function to attest.
- There was a period when notaries could also provide justice and work as a judge of State or support justice as solicitors (advocate).
- Three notarial laws – Spanish, French and Italian are three pillars of the contemporary notary.
- Today's civil [latin] notaries provide authenticity, legal certainty and evidentiary force to all documents notarised by them, via public faith given them by a State.
- After all transformation that have happened with this institution, notariat supports and provides through theirs activity one the most important function of state – the power to attest and certify rights and legal facts.
- Notaries had and still have exclusive jurisdiction according to which their documents are recognised on the territory of a State.
- They are appointed bythe government and their numbers are subject to a strict control.
- Civil [latin] notaries are impartial legal advisors (which distinguish them from other advisors such as lawyers, jurisconsults, advocates, solicitors and barristers) to their clients and parties of the notarised documents who are supervised by State authorities and professional organisations. Access to a notary profession requires that the applicant has appropriate remarkable reputation, law knowledge and also passed the exam to enter profession. Other requirements are varies in different jurisdictions.
- Notaries are bound to conserve all notarised documents as an archive (protocol/permanent register) of the notary, which in some countries can be either state property or notary's property.

In the end there must be stressed that notary's authority to attest and certify gives people guarantee that their legal acts and decisions will be within the legal frame and State can be sure that all acts notarized by notary are absolutely legal and State can give its' defence to them. By virtue of this, notariat became one the most significant link between State and people, between private and public interest.

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NOTARIAT IN THE LAW OF EUROPEAN COUNTRIES:PART I – HISTORICAL REVIEW

History, genesis and development of notariat in the law of European countries are considered in the scope of an article.Such countries like Italy, Spain, France and Germany are subject of special attention because of their significant contribution.

Key words: tabelliones, notarii, notary-advocate (solicitor), notary-judge, public fidea (faith), latinnotariat.

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НОТАРІАТ У ПРАВІ ЄВРОПЕЙСЬКИХ КРАЇН: ЧАСТИНА І – ІСТОРИЧНИХ ОГЛЯД

У статті розглядається історія, генезис та розвиток нотаріату в праві Європейських країн. Особливо підкреслюється значний внесок у розвиток нотаріату таких держав як Франція, Іспанія, Італія та Німеччина.

Ключові слова: табеліони, нотарії, нотаріус – адвокат, нотаріус – суддя, публічна довіра, латинський нотаріат.

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НОТАРИАТ В ПРАВЕ ЕВРОПЕЙСКИХ СТРАН: ЧАСТЬ І–ИСТОРИЧЕСКИЙ ОБЗОР

В статье рассматриваться вопросы истории, генезиса и развития нотариата в праве Европейских стран. Особо подчеркивается значительный вклад в развитие нотариата таких стран как Франция, Испания, Италия и Германия.

Ключевые слова: табелионы, нотарии, нотариус – адвокат, нотариус – судья, публичное доверие, латинский нотариат.