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CATEGORY «NOTARIAT». ONTOLOGICAL CHARACTERISTIC

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Notariat, as a central term, which creates whole concept of the Ukrainian notarial system, is considered in the scope of this article as a product of law reality. The scientific research of the notariat is based on its ontology as a philosophical study of being, specifically based on the ontology of law and law reality. Existed definitions of the notariat, which are based on its functions or aims, are criticised in the article as an incomplete and not fully describing real state of matters. The article is focused on the idea that effective notarial legislation cannot be formed without existence of the doctrinal concept of notariat, which is consequently impossible without proper explanation of the term «notariat». Ethic of notary, as a main subject who is authorised to perform notarial activity, is considered as a logical consequence of the idea that human being determines human nature (essence) and essence of law.
Keywords: notariat, ethic of notary, ontology of notariat, notarial activity, notary.

Problem statement. Notariat as any phenomenon has its past and future, however we in terms of this investigation will be interested neither in past, which study is based on historical method, nor in future, to which we certainly will give some attention but only in conclusions and which is based mostly on methods of legal forecasting, method of scenary forecasting and foresighting. We are interested in contemporaneity of notariat, its reflection, what it is now in Ukrainian society and Ukrainian legal reality. In no circumstances we do not underestimate a significance of such classical scientific methods used by legal scholars in their studies as formal logical method, historical method, comparative method and other. However, it is attempted to figure out the essence, nature of the concept of notariat in present investigation.

Notariat, notarial service and notarial legislation are drawing increasingly more attention lately. In such a way of late a little more than fifteen years in Ukraine have been published dozens of scientific, research and practice, practice and educational works, which subject was a notariat and separate questions, which are in one way or another concerned with notarial activity. Among such papers of native scientists and researchers, fundamental works of M.M. Diakovych, S.H. Pasichnyk, L.K. Radziievska, S.Y. Fursa, Y.I. Fursa, V.M. Chernysh and other's should be noted. Maybe today a bibliography of works devoted to notariat has a full right to obtain a status of separate research, which rules out a possibility to remember all authors and all works devoted to notariat in terms of the present paper.

Separately the attention should be paid by legislator to notariat in Ukraine, its role and functions in legal system of Ukraine. Notariat legislation became an object of reforms, changes and improvements at the legislative level as well as at the level of subordinate legislation. Over the first six years of the existence of the Law of Ukraine «On Notariat» it was changed only twice, whereas over the last fifteen years it was cardinally changed almost forty times.

In 2004 a new instruction on the procedure for execution of notarial actions by notaries of Ukraine in order that Ukrainian notariat meets the requirements of new stage of private law development in Ukraine in light of coming of Civil Code of Ukraine, Economic Code f Ukraine and Family Code of Ukraine into force. The instruction 2004 determined processual questions of notarial activity and was last but one version. A current edition of this procedural document is represented in the Procedure for execution of notarial actions by notaries of Ukraine (2012).

In turn, procedural questions of notarial activity are determined by Rules on notarial practice, which, starting with 1994, were changed twice, in 2008 and 2010. One of the crucial stages became an adoption by Ministry of Justice of Ukraine of 24 December 2010 of the Conception of reformation of notarial system in Ukraine.

Analyzing a gradual increase of attention from the direction of scientists and researchers to notariat, it is appeared a quite appropriate question on the occasion of its causes and essence of notariat as a phenomenon. It means that notariat as certain phenomenon and element of legal system of Ukraine, legislation system of Ukraine and legal reality is one of the hundreds similar phenomena; however an attention exactly to the notariat is increasing from year to year.

Analysis of recent studies and publications. Scientific research results and investigations of question of the notariat essence in different aspects of its consideration were conducted by V.V. Barankova, Klaus R. Wagner, M.M. Diakovych, L.V. Yefimenko, Y.V. Zhelikhovska, V.V. Komarov, P.V. Krashennikov, M. Merlotti, S.H. Pasichnyk, L.K. Radzievska, I.P. Fris, S.Y. Fursa, Y.I. Fursa, V.H. Heinz, T. Halliwell, B.V. Hoeter, V.M. Chernysh, V.V. Yarkov and other.

Marking-out of heretofore unsolved parts of general problem. It should be agreed with the thought of L.V. Yefimenko that the concept of notariat and notarial activity are not to be related to those, which have already obtained their final scientific-legal definition [1, p. 32].

In spite of increase in interest of the notariat from the direction of researches, a lot of problems and questions of notariat remain unanswered; one of them is the category of «notariat» and its ontology, which gives an opportunity to determine the essence of notariat as being phenomenon. Heretofore there is no common concept of notariat in scientific literature, and, as result, no conceptual understanding of notariat essence. While inves-

tigating a notariat in such a direction guided by reflection method, we certainly try to answer the question «What is the notariat?»

First of all, it should be understood that the absence of common ontological characteristic of notariat at least at the doctrinal level without mentioning the scientific, is a guaranty of stable basis for notarial legislation. Such conclusions' grounds are the statement, with which we agree, that Ukrainian legal system pertains to the tradition of continental law system, a significant influence on which is made by regulations of legal doctrine. At the same time, taking into consideration the present doctrinal novels and changes in the positive civil law of Ukraine, an increase of judicial practice's role and formally unacknowledged judicial precedent in Ukraine should be acknowledged.

Formulation of aims of the article (problem statement). The aim of the article is to investigate a notariat as phenomenon of being and product of legal reality, to determine ontological characteristics of notariat.

Key research findings. The common position among the former Soviet Union scientists is the perception of notariat in its triad [2]:

1. As system of authorities and officials endowed with corresponding powers to perform notarial acts;
2. As a branch of legislation or legal institution, which regulates a notarial service;
3. As science and tutorial course (discipline) that studies theoretical principles of notariat.

At the same time, such perceptions do not provide understanding of the essence of notariat as a phenomenon, i.e. its ontology. Determining the notariat in the scientific sense, the authors relied generally on functional approach, stressing that the notariat is manifested primarily through those functions, which it called to execute. In other words, notariat is recognized by us through its manifestations, which in turn can only be seen in the execution by relevant subjects a notarial activity, certain notarial functions assigned to them. Such an approach is right, from the our point of view, however it doesn't display the necessary complex representation of notariat based on the fact that only function performed by its subjects can be analysed.

So S.Y. Fursa writes: «Any activity must have a definite purpose, which determines organizational principles and procedure for its implementation. Regarding notarial activities an author considers as appropriate to distinguish the notariat functions, at which achievement is aimed notarial activity. At the same time a notarial activity cannot be considered in isolation from state functions» [3, p. 17].

In turn, V.V. Komarov and V.V. Barankova determine notariat as an institution that provides protection of the rights and legitimate interests of citizens and legal persons by notarial actions on behalf of the state [4, p. 41]. It should be noted that this approach is too narrow because it limits the area of notary activity exclusively with the volume of notarial acts, while the area of notary activity, as one of the subjects carrying out notarial activity is much broader and covers the provision of legal consultations, provision of technical services related to activities of unified and public registries, handling of inheritance cases before the issuing of certificates of inheritance right, which, under certain conditions, cannot even be issued, and other actions.

Another position is held by the authors of the textbook «Notariat v Ukraini», who define it as a legal institution designed to provide non-judicial protection and protection of rights and legitimate interests of natural and legal persons, local communities and state through the notarial acts execution by authorized bodies and officials within indisputable legal relations [5, p. 12].

Determining the notariat V.M. Chernysh in his dissertation stressed that the notariat – is a legal institution, the structure of which is determined by public functions of specific written drawing up of an act of private expression of will [6, p.62]. Notariat, as V.M. Chernysh writes, is an institution of indisputable jurisdiction. Latin notariat – is an institution of private law, which structure is determined by public functions of legal professional, which subject is specific written drawing up of an act of will expression of subjects of private law under rules of law taken from the Roman law in form of indisputable jurisdiction as a part of preventive justice [6, p. 73].

L.E. Yasynska, determining a notariat, deprives it of systemacy and reduces it to an authority that on behalf of the state executes functions to protect rights and legitimate interests of citizens and legal persons by performing notarial acts. And since the protection of rights and legal interests of citizens and legal persons is one of the state functions, respectively, notariat is a public authority, which operates in the field of civil legal relations [7, p. 168]. Notariat clearly is a system that is also a subsystem relating to the legal system of Ukraine. Notariat is formed by subjects executing the notarial activity and are located in close cooperation with each other and each of them is simultaneously in several relationships with other similar systems in the legal reality, for example, a system of financial monitoring. However, such an interaction between the subjects engaged in notarial activity and financial monitoring is possible only in the presence of the necessary conditions – the client (person), which asked for the notarial service.

Based on the research, L.E. Yasynska concludes that a notariat is inherently the link that connects the civil society and the state, because it operates on the border of private and public spheres and has the unique dual nature. On the one hand, the notary acts as the authorized representative of the state, executes public functions and acts on behalf of the state, and on the other – as a professional, independent legal consultant of the parties, which enables to balance and harmonize rights of citizens and state [7, p. 184].

Fully agreeing with the thesis about the dual nature of the notariat, we cannot agree with the interpretation of this duality. Notary really can be called an authorized representative of the state as a source of public authority that executes public functions and acts on behalf of the state but not in its interests. In our view, this dualism consists in the fact that subject that performs notarial activity must objectively seek to balance public and private interests in his activity without going beyond

his rights. Thus a subject, who carries out a notarial activity, performing certain public functions on behalf of the state, is one of those subjects that must act only as a leveler that prevents the system of private and public interests to reach a bifurcation point, after which the entire legal system will reach an unstable condition. This is where appears the metafunction of subject, who carries out a notarial activity within the limits of economic circulation. Definition given by L.K. Radzievska and S.H. Pasichnyk is measured by definition given by positive law, namely the legislation of Ukraine defines a notariat as a system of authorities and officials entrusted with the duty to certify the rights and facts that have legal meaning, and perform other notarial acts stipulated in this Law, in order to provide them with legal authenticity [8, p. 7].

Further development of the legislative definition of notariat is found in the Y.V. Zhelikhovska within which it was proposed to amend Part. 1, Art. 1 of the Law of Ukraine «On Notariat» and put it as follows: «Notariat in Ukraine – is a system of authorities and officials entrusted with the duty to certify the rights and the facts that have legal meaning, and perform other notarial acts stipulated in this Law, in order to provide them with legal authenticity, as well as to exercise and protect the rights and legitimate interests of individuals and legal persons» [9, p. 40]. Notariat as a protective institution whose activities intended to further achievement of justice objectives, and at the same time prevents the occurrence of legal disputes by preventing violations of civil rights and interests of natural and legal persons to ensure their proper implementation [9, p. 153].

Certainly, guiding by the law of K.F. Rouille of complication of organisms' system organization, it must be said that the constant complication of social relations and development rates of economic relations lead to permanent complication of system of legal regulation of these social relations at the level of a positive law displayed generically in all legal reality and particularly in notariat. However, a simple concept extension of notariat in legislation will contradict the general philosophical principle of parsimony, which in other words is «Occam's razor», and in accordance to which there is no necessity to needlessly increase essences.

In further determination of the concept of notariat Y.V. Zhelikhovska stresses that notariat has as its objective, which is concretized in tasks and implemented by functions, a protection of guaranteed by the Constitution rights and legitimate interests of nature and legal persons by execution of notarial actions by notaries on behalf of Ukraine [9, p. 53].

Generally agreeing with logical construction of aim specification through the formulation and objectification of tasks and aim implementation by performing of certain functions, it seems that such an interpretation of the aim of notariat is too narrow and restricts its nature.

First, using only natural and legal persons as potential consumers of notarial services is not consistent with the concept of law subjects in general and civil law in particular with the manifestation of highly realistic approach to law [10, p. 18].

Second, although the notary acts as a central subject that performs notarial activity but he is not the only subject of this activity. Even limiting with positive law, such subjects as consular offices and diplomatic representations, which are also authorized to perform certain notarial activities, should be taken into account.

Thirdly, notariat in any case is not limited only by notarial actions. In this aspect, in terms of positive law, it is necessary to distinguish the concept of notarial activity that is broader than the concept of notarial action.

In this way, all above mentioned determinations illustrate notariat perception through the prism of function or purpose, not so much notariat as notarial activity or its authorities and officials.

Even in the concept of notarial authorities' reformation in Ukraine approved by the Order of Ministry of Justice of Ukraine dated 24.12.2010, № 3290/5 as a target of its approval were promoting of development of a holistic approach to the definition of the notariat functions and building a clear structure of notarial authorities... and other [11], which certainly indicates the functional orientation of notariat and again points to the influence of doctrinal regulations on the formation of positive law in Ukraine.

I.S. Fris adheres to the same opinion, saying that if concentrate attention solely on the theoretical and legal aspect of the problem, then one of the first questions should be answered is, no doubt, the functions of notariat. On proper response to this question will depend determining the place of notariat in the system of state authorities, legislative consolidation of scope of powers of notaries [12, p. 134].

More abstract color gets statement of V.F. Yakovlev that the notariat is an institution of civil society [13]. Fully agreeing with this position, however, it should be noted that this is only one of the characteristics of notariat as aspects of reality. At the same time it is an ontological characteristics, necessary but not sufficient for its complete perception.

Defensible and one that corresponds to reality and legal reality is seen the view of L.V. Yefimenko that «Modern notarial activity goes beyond its understanding only as a legal phenomenon, since processes of its social institutionalization become stronger. There is a total paradigm shift in the interpretation of the phenomenon of notarial activity (humanocentrism comes to replace a state-centric model) that objectively contribute to the strengthening of its civil legal aspect» [1, p. 32]. In this case speech already goes about the connection between notariat as a legal phenomenon, a product of legal reality and subject of the notarial activity – notary or other person authorized to perform notarial activity, since legal potential of notariat as a legal phenomenon is realized only through subjects of notarial activity and in the process of this activity.

As writes S.I. Maksymov, «the legal reality is a category to indicate a particular and relatively autonomous world of law, multi-layered system of legal phenomena, the logic of which must be considered in the process of transformative human activity. Heuristic value of legal reality as a category of philosophy of law consists in the fact that it provides an opportunity to focus not on institutional but semantic side of law, not on transpersonal mechanisms of law force but human as a subjects of law [14, p. 396].

The essence of notariat as a product of legal reality is reflected in the being and objectified in notarial activity, where are performed functions required to achieve appropriate socially important goals (aim) that originate in need of a society, which consists in personal legal deficiency in protection, defense and balance between public and private interests of individuals in economic circulation.

Such an ideal construction is able only if law elevates to personal value. Notariat is followed by category of notary (other subject assigned to carry out a notarial activity) as the only source of notarial activity and without which the latter is impossible.

This subject vitalizes notariat in reality that logically leads us to the question of notarial ethics, which needs a separate substantial investigation. The only to be noticed is that the statement of famous ancient Greek philosopher Protagoras «Man is the measure of all things» is mentioned here. Hence the conclusion arises: qualitative state of notariat in the concrete society, in reality, directly depends on ethics of notary and after it on substantial characteristics of notarial activity.

On that score valuable are researches of a school of human dimension of law where relations between human and law in its various manifestations and areas are investigated. Thus, O.V. Hryshchuk asserts that human being determines human nature and law essence and in the same time defines its boundaries and therefore defines the boundaries of the human [15, p. 3]. If extrapolate this conclusion to the notariat and notarial activity, then the human being – being of a subject performing a notarial activity – determines ontological characteristics of notarial activity. The problem situation is in possible but not obligatory conflict between socio-cultural attitudes of a concrete human – subject performing a notarial activity – and potential of a notariat, which is inherent in positive law. That is why personality of a human – a subject who performs a notarial activity – plays almost the most important role in development of the Ukrainian notariat inhabited by concrete subjects who perform a notarial activity.

However, as well human being determines the human nature and law essence, a human on the next development stage of these relations will influence on the being, change it owing to human activity, and law as an element of being will not left without attention.

Conclusions. We recognize notariat through its manifestation, which in turn can be observed only during the performance of certain notarial functions by proper subjects who authorized to perform notarial activity.

1. Notariat as a system is established by subjects authorized to perform notarial activity and who are in close interaction with each other and in the same time in several interrelations with other similar systems in the legal reality, for example, system of financial monitoring. However, such an interaction between subjects, who perform notarial activity, and financial monitoring is possible only in the presence of the necessary condition – client (person), which asked for the notarial service.

2. Notariat has a dualistic nature, which is considered in the fact that subject who performs a notarial activity must objectively seek to balance public and private interests in his activity without going beyond his rights. Thus a subject, who carries out a notarial activity, performing certain public functions on behalf of the state, is one of those subjects that must act only as a leveler that prevents the system of private and public interests to reach a bifurcation point, after which the entire legal system will reach an unstable condition. This is where appears the metafunction of subject, who performs a notarial activity within the limits of economic circulation and elements of civil society in the essence of notariat since this subject can practically be opposed to public interest when it predominates a private interest.

3. Notariat fulfils its legal potential as legal phenomenon only through the subjects of notarial activity as their only source and in the process of performance of this activity.

4. The essence of notariat as a product of legal reality is displayed in the being and objectified in notarial activity, where are performed functions required to achieve appropriate socially important goals (aim) that originate in need of a society, which consists in personal legal deficiency in protection, defense and balance between public and private interests of individuals in economic circulation.

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КАТЕГОРІЯ «НОТАРІАТ». ОНТОЛОГІЧНА ХАРАКТЕРИСТИКА

Анотація
У статті проаналізована актуальна ситуація нотаріату як явища буття та продукту правової реальності. Окрема увага приділена визначенням ноатріату, що надані науковцями, дослідниками проблем нотаріату. Зроблено акцент на недовершеності виключно функціонального чи телеологічного підходу до з'ясування сутності нотаріату. Обґрунтовано висновок про те, що сутність нотаріату як продукту правової реальності відображається у бутті та об'єктивується у нотаріальній діяльності, у процесі здійснення якої виконуються функції, що необхідні для досягнення відповідних соціально значущих цілей (мети), які беруть свій початок у потребі суспільства продиктованій особистісним правовим дефіцитом. В межах забезпечення економічного обігу, проявлено мета функцію суб'єктів, що здійснює нотаріальну діяльність, які виконуючи певні публічні функції від імені та за дорученням держави, повинні діяти як зрівнювач, що не дає системі приватних та публічних інтересів досягти точки біфуркації після якої вся правова система досягне нестабільного стану. Проаналізовано зв'язок людини та права і зроблено висновок, що людина – суб'єкт, що здійснює нотаріальну діяльність, відіграє чи не найважливішу роль у конструюванні українського нотаріату і є єдиним джерелом нотаріальної діяльності без якого остання просто немислима.
Ключові слова: Нотаріат, нотаріальна діяльність, етика нотаріуса, правова реальність, онтологія нотаріату.

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КАТЕГОРИЯ «НОТАРИАТ». ОНТОЛОГИЧЕСКАЯ ХАРАКТЕРИСТИКА

Аннотация
Статья посвящена проблемам нотариата, его онтологической характеристики как явления бытия и продукта правовой реальности. Проанализированы доктринальные и позитивные определения нотариата, которых акцентированы на функциональной или телеологической трактовке нотариата. Высказана и обосновано мнение о недовершённости подобной трактовки нотариата. Проанализирована связь человека и права на основе чего сделан вывод о том, что человек – субъект, который осуществляет нотариальную деятельность, играет едва ли не важнейшую роль в конструировании украинского нотариата. Подобное утверждение связано с тем, что субъект, который осуществляет нотариальную деятельность, представленный в виде конкретного человека является единственным источником нотариальной деятельности, без которого последняя просто немыслима.
Ключевые слова: нотариат, нотариальная деятельность, этика нотариуса, правовая реальность, онтология нотариата.