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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»<sup>1</sup> 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 laws as 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 aspect which first of all provokes to disclose genesis of the notary profession and its evolution through centuries.

### Analysis of recent researches 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. Sumina and others.

### Main material

#### I. Historical review

There is no agreement on the question of what and when were notary and notary profession firstly mentioned. Some of the researchers believe that we should consider ancient Egypt as the earliest reference 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, refers to some of the ancient written deeds which, as an Egyptian one, were related to conveyance of property and had probative value in the court. In Classical Greece there were public officials 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 with Ms. Nussdorfer who

<sup>1</sup> Public fides—hereinafter the term which describes public trust and public power (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.



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 instance laws of the city of Paris in the times of St. Louis in 1270. The most impeccable notarial legislation of those times was 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 as the 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 hold 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 Loi Ventose (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 Notaires et des Actes Notaires*, the second was called *Regime du Notariat*. French notaries became public servants, officers of the courts [2, p.3]. The Loi Ventose 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 Loi Ventose 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 law level that the notarial seal gave authentic status to the document issued by the notary, and validity anywhere in the country.

The Loi Ventose 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 established that 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 professions but the essence of function which was entrusted to the notaries and their 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 Holy 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 their 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 by the 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, juriconsults, 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.

## LITERATURE

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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 I – 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 I – ИСТОРИЧЕСКИЙ ОБЗОР**

В статье рассматриваются 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, нотариии, нотариус – адвокат, нотариус – судья, публичное доверие, латинский нотариат.