УДК: 347.961

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NOTARY AND COURT IN REPUBLIC OF TAJIKISTAN: THE LIMITS OF A RELATIONSHIP

У статті сформульовано характеристику нотаріату як інституту попереджувального правосуддя, з'ясовано деякі аспекти взаємодії нотаріату із судовою владою, висвітлено специфічні риси взаємовідносин нотаріату і суду у Республіці Таджикистан.

Ключові слова: нотаріат, суд, нотаріальна діяльність, судова система, процесуальна форма, інститут правосуддя.

Among the rights and freedoms guaranteed to every citizen by the state, the constitution provides the right to qualified legal assistance. Such assistance is also foreseen and assigned in the notary. Notary is intended to protect the rights and the legitimate interests of citizens and legal entities by committing to acts of notarial status stipulated by the legislature. Notarial acts are applied by notaries working in the state's notary offices or in private practice.

In a legal mechanism that ensures rule of law and order within a state, notary institutions play an important role. Notary, being a non-judicial form of protection of civil rights and interests stipulated by law, is in accordance with the European Parliament's resolution related to organs of preventive justice. In accordance with the document of the Congress of International Union of Judges, notary function lies primarily in the fact that the notary has the official authority to certify legal acts, impartially inform the parties about the

substance and the legal consequences of these acts and to carry out real efforts to prevent disputes.[1]

Political power is based on a separation of legislative, executive and judiciary powers. In this regard, the court is the only body that can exercise judiciary power by virtue of the principle of separation of powers.

As for the notary bodies, their role and position are not specified in the Constitution and as a consequence, there is no consensus in the academia regarding this issue.

According to Gafurov H.M. "Among law enforcement institutions that ensure citizens' and legal persons' access to justice and the effective protection of their legitimate rights and interests in regard to judicial review and resolution of cases, notary is of an increasing importance".[2]

Undoubtedly, carrying out right a defending function, the competences of the above mentioned institutions differ from one other. If as a rule, the jurisdiction of the court consists of debates on rights, the notary only legally enforces and approves the law in order to prevent further dispute.[3]

Subjects exercising these powers - are people who possess a degree in law, have experience in legal practice and have passed the qualifying examinations for occupying the related positions.

These persons are assigned to act on behalf of the state, after which the judge becomes a public authority and the notary, a representative of the state.

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[1] See: Notarialnyi vestnik. 1999, N 4/5, s. 44-45.

[2] See: Aktualnie voprosy sudebnogo prava, prokurorskoy deyatelnosti I presecenie prestupnosti v Respublike Tadzhikistan. Dushanbe, Maorif va farhang, 2013, s. 182.

[3] Mikele de Silvia. Precedenty evropejskogo suda po pravam celoveka. Rukovodyashie prinsipy sudebnoi praktiki, otnosyasheysya k Evropejskoy konvensii o zashite prav cheloveka I osnovnykh svobod. Sudebnaya praktika s 1960 po 2012 g. SPb., 2014. s. 461-462.

There are no age limits or a determined age at which one can engage in notarial activities at the legislative level, in contrast to the age limit that applies to individuals who can exercise judicial power.[4]

Judges as well as notaries are independent, objective and impartial and only ensure the respect of the law. Any interference in their activities is simply unacceptable. There are also prohibitions concerning their engagement in any other activity except for scientific, artistic and academic activities.

The activity of the court is of exceptional nature. The activities of the notary in some cases can be performed by other entities such as local authorities, consular missions or institutions.

With the aim of preserving, confirming or providing other evidences at the request of the person concerned, if there is reason to assume that the presentation of these evidences in the future will be difficult, their provision is possible. Court and notaries perform this specific activity almost identically, except that as a rule, the notary is usually concerned prior to the reach of proceedings to the court, and the court is concerned afterwards. Although there is no legal prohibition for the notary to provide evidence after the proceedings have reached a judicial body.

As a result of this work, the judges as well as the notary each constitute specific acts. If for the judges, these acts are judicial acts (judgments, decisions, judicial orders and etc.), then for the notary, these acts are notarial acts. Both the first and second have their own requisites, without which they can consider formalization inappropriate.

There are also differences in the binding degrees of judicial and notarial acts. Court orders, judgments and decisions have an obligatory character, binding everyone, and if necessary, enforced by a system of enforcement proceedings and bailiffs. Notarial acts, with

[4] Shumeiko E.S. Podgotovka grazhdanskix del k sudebnomu razbiratelstvu: Avtoreferat dissertatsii kand. Yur. Nauk. Saratov, 2010, s. 20.

some exceptions (e.g., notarized agreement on the payment of alimony and executive inscriptions), do not have any executive power leading to execution obligation and enforcement by the concerned party, only judicial acts have this capacity.

Despite this fact, a notarized act has a particularly probative value because the person constituting the document gives an oath that presumes that information contained in the act is reliable. Oath as a requirement is obligatory both for the judge and the notary.

Payment of state fee (both for judicial and notarial activity) and notarial tariff is a necessary condition for the commitment of both bodies with specified authority.

Moral and ethical standards that should be respected by these subjects are included in the relevant codes for judges and notaries.

Financing of judicial and notarial activities of public notaries is done through funds allocated by the state and private notaries earn their financial income through committed notarial acts.

It would even be evident to specify business relationship aspects of legal institutions such as courts and notaries. A notary is required, by the request of the court, to issue a certificate of notarial acts in relation to its activities. According to Art. 16, one of the fundamental principles of notaries consists in the duty to keep its activities in secret, the court may release a notary from the obligation of secrecy, if there is a criminal case against the notary related to the commissions of notarial acts.

Notarial activities are controlled by judiciary institutions. It is customary to distinguish two types of control, direct and indirect. The first type of control is used when a complaint is filed in court by a person who feels that a notary has not properly carried out its function or has wrongfully refused to comply. Indirect control is used when the court examines cases which are associated with notarized acts.

The court and notary institutions are very similar in their legal nature, but there are some differences that are necessary, otherwise

these entities would lose their identities and be deprived of their legal significance which they presently benefit from.

A number of elements distinguish the profession of notary in the notarial system from other legal practitioners.

Firstly, notaries work in the field of evidentiary law, in charge of creating evidence in civil affairs (in the broad sense). Notary creates written acts in a qualified form, with special probative value that is directly reflected in the consequences of non-compliance with the notarial form.

Secondly, notary services in the system of civil jurisdiction is carried out in an indisputable manner. Notary works in the non-adversarial field which is undisputed jurisdiction. The notary is a disinterested adviser of parties, it helps to identify their will and in the event of a conflict situation, when steps taken by a notary for the rapprochement of the parties were not successful, the notary is obliged to withdraw and recommend to the parties to refer to a court for the resolution of the dispute, since the resolution of disputes in civil jurisdiction is the prerogative of the court.

Thirdly, access to the notarial profession is associated with increased qualification requirements for the notary order of appointment (except for the presence of higher legal education degree, is required a license to obtain the right to perform notarial activities, an internship to obtain a license or appointment on a competitive basis).

Fourth, the notary performs public law functions on behalf of the state that engages its legal status as a person in the service of the state and the society. Due to this, the notary shall not be entitled to choose with whom he wishes to work and is required to provide expert legal advice and assistance to any person who solicits it. The notary's public status is confirmed: notary serves to protect the rights and the legitimate interests of citizens and legal entities, stipulated by legislative acts of notarial nature which guarantee the probative value and the public recognition of notarized documents. Performing

notary functions on behalf of the state determines the public legal status of notaries.

Fifth, the public legal status of notaries emphasizes the need to carry out their mandate only as a member of the Chamber of Notaries, a professional association that enables notarial professional development and monitors the proper performance of notaries on the behalf of the state.

Sixth, notaries that are private practitioners, describe their working manner and activities as self-financed and self-organized. However, notaries are accountable to and controlled by public authorities and institutions of the notarial community.

Seventh, to work as a notary requires certain psychological characteristics, acceptance of a number of personal and legal limitations as well as certain ethical qualities. The profession requires impartiality, the ability to listen and to give an answer at the end. In addition, the notary must be able to say a firm "no" in cases where, despite the tangible benefits of a notarial act, it is illegal, doubtful or likely to create future conflicts which the notary is unable to prevent.

Since the notary provides legal protection, contributes to preventing disputes and future conflicts, it is an assistant of justice. Therefore, the concept of considering notaries as institutions of preventive justice is reasonable, a non-judicial institution which is designed to prevent the occurrence of disputes between the parties.

What is the basis of understanding the notary as an institution of preventive justice, what is in common between the notary and the judiciary?

Firstly, the primary goal of the notary and the judiciary is the same: to protect the rights of citizens and legal entities.

Secondly, this is a coincidence in the principle of the organization of activities:

-Court and notaries act in the field of public law, exercising their powers on the behalf of the state, although there are nuances:

the court is the carrier state's authority, a notary is not, it is a representative of the state.

- Both the notary and the judge should be independent from the state and the parties involved in the process;

- The principles of objectivity, impartiality, respect for the rule of law and the inadmissibility of interference in the affairs of the judge and the notary create guarantees not only for the well-functioning of the notaries themselves, but most importantly, for the effective protection of citizens' rights. All these common elements bind the notary with the judiciary system.[5]

Thirdly, the essence of justice is the exercise of power. As representatives of states, notaries have some powers. For example, notaries are entitled to perform executive inscriptions, i.e. actions aimed at expropriation or attribution of property.

Notary as a body of preventive justice can manifest itself in the following areas:

- For the Prevention of disputes at the time of approving the terms of the transaction and its conclusion, thereby reducing the number of preventive civil disputes;

- To avoid the need to seek justice in cases of enforcement of obligations, for example, in the following cases: repossession of property on the basis of executive inscriptions; obtain or enforce child support on the basis of an agreement on the payment of alimony; foreclosure of the mortgaged real estate on the basis of a notarized agreement;

- For assistance purposes, notaries can highly facilitate and simplify judicial procedures. In this direction, firstly, the consideration civil disputes and the process of proving in court is considerably facilitated as notarial acts are of particular probative value. Notarial acts do not have a predetermined force in the judgment, however, they have certain characteristics and are less

[5] Prikhodko I.A. Dostupnost pravosudiya v arbitrazhnom I grazhdanskom prosesse: osnovnie problemy. SPb., 2012, s. 223.

refutable than other written documents. Second, it simplifies the procedure for issuing a court order for claims based on the notarized transactions and claims based on the appeal against the notary bill.

The notary and the court is the alliance which aims not only to protect the rights and legitimate interests of citizens and legal entities, but also to support one another for these purposes as long as it is within their competences. Fruitful interaction of the notary and the judiciary (in the forms of joint discussions on emerging issues, the practice of generalization and etc.) is an important potential, which can reduce the number of disputes, to some extent relieve the courts and increase level of legal assistance provided by notaries.

Література

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2.Aktualnie voprosy sudebnogo prava, prokurorskoy deyatelnosti I presecenie prestupnosti v Respublike Tadzhikistan. Dushanbe, Maorif va farhang, 2013, s.182.

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The article is worded description of notaries as an institution of preventive justice, clarified certain aspects of the interaction with the judiciary branch, highlights the specific features of the relationship of notaries and courts in the Republic of Tajikistan.

Keywords: Notary, the court, judicial system, procedural form, the institution of justice.

В статье сформулированы характеристика нотариата как института предупредительного правосудия, выяснены некоторые аспекты взаимодействия нотариата с судебной властью, освещены специфические черты взаимоотношений нотариата и суда в Республике Таджикистан.

Ключевые слова: нотариат, суд, нотариальная деятельность, судебная система, процессуальная форма, институт правосудия.