

LATIN NOTARY: PRINCIPLES AND THEIR IMPLEMENTATION IN UKRAINE

ЛАТИНСЬКИЙ НОТАРІАТ: ПРИНЦИПИ ТА ЇХ РЕАЛІЗАЦІЯ В УКРАЇНІ

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The activities of the notary and its self-government bodies in modern Ukraine constitute a system of complex, interrelated legal principles and norms which determine the functioning of the notary as an institution for regulating civil relations. At the same time, in practice, there are problems in the notary environment that require constant improvement of both the fundamentals of notary legislation and the forms of its organization. In view of the above, there is a need to constantly search for new, more advanced, optimal forms of notary activities in the Ukrainian context. The above can be achieved only by studying the historical experience of the notary institution in Europe in general and in Ukraine in particular. The article analyzes the basic principles of the Latin notary, which are the foundation of notarial practice in countries that adhere to this legal system. The authors consider several classifications of notary principles, paying attention to their essence and role in ensuring legal security and stability of civil life. The study analyzes in detail such principles as publicity, notary independence, notarial documentation, principles related to notary ethics and others, as well as their interaction with legislative and legal norms. In addition, the paper offers recommendations for improving national legislation aimed at enhancing the functioning of the notary, increasing its efficiency and adapting to the current challenges of legal regulation. The introduction of a new ideology of functioning, first of all, of notary principles and their organization of professional self-government is defined as one of the main tasks of the reform, during the implementation of which it is necessary to achieve a state where the notary, realizing the purpose of a democratic social state based on the rule of law, will be able to provide conditions in the country for the realization of the rights and freedoms of citizens, as well as to provide them with a wide range of notarial services. The authors also draw attention to the fact that the modern Ukrainian notary in many of its manifestations is indeed a Latin-type notary, although in some areas it needs to be improved and foreign experience borrowed.

Key words: notary, notary in Ukraine, principles of notary, legal status of a notary, notarial activity, Latin notary

Діяльність нотаріату та його органів самоврядування в сучасній Україні становлять систему складних, взаємопов'язаних правових принципів і норм, що визначають функціонування нотаріату як інституту регулювання цивільних відносин. Разом з тим на практиці у нотаріальному середовищі існують проблеми, які потребують постійного вдосконалення як основ законодавства про нотаріат, так і форм його організації. Враховуючи зазначене, існує необхідність у постійному пошуку нових, досконаліших, оптимальних в українських умовах форм діяльності нотаріату. Досягти вищевказаного можливо лише за умови вивчення історичного досвіду функціонування інституту нотаріату в Європі загалом і в Україні зокрема. У статті аналізуються основні засади латинського нотаріату, які є фундаментом нотаріальної практики у країнах, що дотримуються цієї правової системи. Автори розглядають кілька класифікацій принципів нотаріату, приділяючи увагу їх сутності та ролі у забезпеченні правової безпеки та стабільності громадянського життя. У ході дослідження детально аналізуються такі принципи, як публічність, незалежність нотаріуса, нотаріальна документованість, принципи, пов'язані з дотриманням етики нотаріуса та інші, а також їх взаємодія із законодавчими та правовими нормами. Крім того, у роботі запропоновано рекомендації щодо вдосконалення національного законодавства, спрямовані на покращення функціонування нотаріату, підвищення його ефективності та адаптацію до сучасних викликів правового регулювання. Запровадження нової ідеології функціонування, насамперед, органів нотаріату, а також їх організації професійного самоврядування визначається одним із основних завдань реформи, в ході реалізації якої необхідно досягти такого стану, коли нотаріат, реалізуючи призначення демократичної соціальної правової держави, буде здатний забезпечити в країні умови для реалізації прав і свобод громадян, а також надання їм широкого кола нотаріальних послуг. Також авторами звернути увагу на те, що сучасний український нотаріат в багатьох своїх проявах дійсно є нотаріатом латинського типу, хоча в деяких напрямках і потребує удосконалення та запозичення зарубіжного досвіду.

Ключові слова: нотаріат, нотаріат в Україні, принципи нотаріату, правовий статус нотаріуса, нотаріальна діяльність, латинський нотаріат

Problem Statement. As a general rule, the term “principle” comes from the Latin word “principium”, which means beginning, basis. Thus, a principle is something that underlies a certain theory of science, a person's inner conviction, a basic rule of behavior [8]. Regarding the provisions of the current legislation of Ukraine on notarial activities, it should be noted that, unfortunately, the special Law of Ukraine “On Notaries” of September 2, 1993, the principles of notarial activities are not disclosed, or, to be more precise, the concept of “principle” is not used at all. In this regard, we believe that all available definitions, disclosure of the essence and content of the principles reflect the doctrinal provisions of scientists [7]. Therefore, they need some clarification.

Analysis of recent research and publications. Certain problems of implementing the fundamental principles of Latin notary

have been repeatedly considered in the scientific works of such domestic scholars as K. Bilko, A. Guledza, M. Dolynska, M. Dyakovysh, O. Kryshchuk, S. Kovalchuk, I. Nevzorova, O. Starchuk and other researchers. However, the study of the implementation of the principles of Latin notary in Ukraine, taking into account foreign experience, as well as the improvement of notary legislation on an ongoing basis, remain relevant. Accordingly, this necessitates further in-depth research in this area.

Summary of the main material. One of the inventions of civilized society is the system of Latin notary. In the scientific literature, this state of affairs is called “free notary” in the form of a “free profession” [3]. In this article, we will consider the principles that relate not only to notarial activities as such, but also to notarial self-government in a certain way.

The activities of the notary and its self-government bodies in modern Ukraine constitute a system of complex, interrelated legal principles and norms that determine the functioning of the notary as an institution for regulating civil relations. At the same time, in practice, there are problems in the notary environment that require constant improvement of both the fundamentals of notary legislation and the forms of its organization. Given the above, there is a need to constantly search for new, more advanced, optimal forms of notary activity in the Ukrainian context. In our opinion, the above can only be achieved by studying the historical experience of the notary institution in Europe in general and in Ukraine in particular. The formation of Ukraine as a state governed by the rule of law, in our opinion, should be accompanied by further development of the system of Latin or free, independent notaries revived in 1993. Here we would like to emphasize that we are talking about the revival, not the establishment of the Latin notary model. The Latin notary is realized in the form of a free profession, and, secondly, it performs a public social and legal function on behalf of the state. In the context of our research, it should be noted that an important step towards the development of Latin notaries was the admission of the Ukrainian Notary Chamber, first as an observer, and in 2013 as a permanent member of one of the most authoritative international associations - the International Union of Latin Notaries, which in 2015 became the International Union of Notaries. Turning to the analysis of the principles of the Latin notary, we consider it necessary to focus on professional self-government, in which the Notary Chamber of Ukraine is central, since the latter's activities are also based on these principles. The Notary Chamber of Ukraine is a non-governmental, non-profit professional organization that unites all notaries of Ukraine on the basis of compulsory membership in accordance with Article 16 of the Law of Ukraine "On Notaries". In addition, the Notary Chamber of Ukraine in its activities is guided by the Constitution of Ukraine, the Law of Ukraine "On Notaries", other legislative acts and the Charter of the Notary Chamber of Ukraine, which is its constituent document [10].

Accordingly, members of the Notary Chamber of Ukraine may be persons who have received a certificate of the right to engage in notarial activities. Members of the Notary Chamber of Ukraine have the right to: participate in the work of notary self-government bodies in the manner prescribed by the Charter of the Notary Chamber of Ukraine; to elect and be elected to the bodies of the Notary Chamber of Ukraine in the manner prescribed by the Statute of the Notary Chamber of Ukraine; to participate in the work of any body of the Notary Chamber of Ukraine with the right of advisory vote; to apply to any body of the Notary Chamber of Ukraine with a request for information about its activities and to receive information; to protect their professional and social rights; to make proposals for improving the activities of the NPU; to terminate membership in the Notary Chamber of Ukraine on the grounds provided for by the Law of Ukraine "On Notaries" and the Charter of the Notary Chamber of Ukraine, etc.

The duties of the members of the Notary Chamber of Ukraine include the following: to comply with the requirements of the Law of Ukraine "On Notaries", the Charter of the Notary Chamber of Ukraine, the Rules of Professional Ethics of Notaries and to implement decisions of notary self-government bodies; to pay monthly membership fees in a timely manner to ensure the implementation of notary self-government in the manner and in the amounts established by the Congress of Notaries of Ukraine, etc. In the course of exercising its powers, the Notary Chamber of Ukraine should implement a vector aimed at forming a positive image of a notary in the society. We agree with the opinion of O. Solomakhina, who believes that representation becomes the main task of the management of the Notary Chamber of Ukraine and each notary, and also the mandatory representation of the Notary Chamber of Ukraine at any meetings, confer-

ences that may in some way affect the interests of the notary, where members of the Notary Chamber of Ukraine should not only participate, but also be obliged to form their vision of the notary's potential and its advantages and, most importantly, to convey it in an accessible form to any audience [9].

The establishment and functioning of notaries in Ukraine on the principles of the classical Latin notary is possible under two conditions. Firstly, proper, well-developed legal regulation with elements of state regulation; secondly, self-regulation, i.e., the introduction of appropriate rules developed by the notary corporation itself on the basis of elements of self-government. It should be added that the Notary Chamber of Ukraine is also a source of compliance with the moral and ethical standards of notaries in Ukraine. Pavlova Liudmyla [5]. At the same time, a notary is obliged to promote a positive public opinion about the notary profession, participate in the development of legal relations in society and ensure legality in civil law relations. As for the basic principles of the Latin notary system, they were approved on January 18, 1986 by the Bureau of the International Cooperation Commission of the IUN and the Permanent Council in The Hague on May 13, 14 and 15, 1986. These Principles are a direct result of the work of the congresses held by the IUN since its foundation. They relate to the activities of notaries and their functions as an instrument of public service [4]. The principles are systematized, which allows, firstly, to refer to them without referring to the conclusions of the Congresses; secondly, to clarify their meaning and obtain a working tool that serves as a guide for notaries in countries that are not yet members of the Union. We believe this provision is justified and fully support it.

It is worth noting that all European legal systems are characterized by the existence and development of the Latin notary; secondly, these countries have established a mechanism whereby a notary, due to the public nature of his functions, simply has no right to refuse to perform a notarial act to an interested person; thirdly, guided by the principles of independence and impartiality in his activities, acting on behalf of the state and personally responsible for the proper performance of notarial acts, the notary becomes a key actor in protecting the rights of individuals. Based on the foregoing, we can identify a number of features inherent in the notary in these states: it reflects the public law nature of notarial activity; it is a normative, historical category that has emerged and developed over the course of centuries of history; it is an element of human culture and national heritage.

Today there are about 20 principles of Latin notary. The latest version of them was approved by the Assembly of Notaries of the IUN in Rome in 2005. The Principles are divided into four groups: a) the notary and his/her official duties; b) notarial documents; c) organization of the notarial profession; d) notarial deontology.

The definition of a notary in the first principle of the Latin notary - a notary, a specialist in law, is a public official appointed by the state, authorized to authenticate legal acts and transactions that he certifies and to provide advice to persons who have applied for his assistance - is key to the spirit and letter of the regulatory framework of the Latin notary, since its entire ideology is based on it. This principle reflects the two functions of a notary: a notary as an official and a notary as a legal advisor. The second principle is that the notarial function is public, but it is performed by a notary independently and impartially, not being part of the hierarchy of public officials or employees. This provision can be explained by the following, namely, we are talking about a relatively, not absolutely private, free notary, i.e., the notary is private in the organization of its activities, but public in its functioning. At the same time, a notary performs state functions and holds a position entrusted to him/her by the state, and accordingly, his/her professional activity is limited and subject to state control. This control is of a preventive nature. The third principle states that notarial activity applies to all non-conflict legal actions, provides the client

with legal security, prevents possible litigation and conflicts that can be resolved through legal mediation and is an indispensable tool for the implementation of fair justice.

In our opinion, the manifestation of a notary as a mediator is a separate area of scientific research. We note that we support the need to officially introduce the concept of “mediation in the legislative framework of Ukraine and to vest the function of mediator not only in specially trained persons - mediators, but also to vest this function in notaries in particular. In the context of the issue under study, the scientific opinion of M. Dyakovych is relevant, as she believes that, while for many categories of lawyers mediation may become an additional job, for a notary mediation is already an integral part of his/her work, which he/she performs by virtue of the law. In support of this, it should be noted that a notary has no right to “put pressure” on the parties or induce them to make a decision, he has no right to favor any of the parties and is obliged to support and ensure the balance of interests of the parties, including third parties involved in the dispute [2]. We believe that the involvement of a notary in mediation is not only desirable, but also extremely necessary at the current stage of development of alternative dispute resolution methods.

There are seven other principles of Latin notary. They include the following: notarial acts are acts certified by a notary; when drafting them, the notary, in compliance with the provisions of the law, interprets the will of the parties and adapts the form of its presentation to the requirements of the law; the notary is the sole author of his acts and is fully responsible for their drafting, having the right to accept or reject any draft submitted to him or to make changes to it certified copies of notarial acts have the force of the original; notarial documents have both the presumption of legality and the presumption of correctness of their content and may be challenged exclusively in court, they have evidentiary and enforcement power.

We agree with the position of L. Shevchuk that the last principle of this section is the key principle for the regulatory regulation of Latin notaries, as it proclaims the rule that notarial acts that comply with the above principles should be recognized by all states (members of the ICLN) and produce the same evidentiary, enforcement and law-forming effects as in the countries of their origin [12].

If we turn our attention to the following principles, it is clear that they define the general principles of the organization of the notary profession. In particular, the current legislation defines the conditions for admission to the notary profession, establishing the need for certain tests, but in any case, candidates are required to obtain an educational degree in law and high legal qualifications; it also establishes the scope of notary competence, the number of notaries sufficient for the proper performance of duties; participation of notaries in the notary self-government body is mandatory.

Finally, the last group of principles relates to notarial ethics. The law of each country determines the disciplinary regime of notaries under the constant control of the state authorities and the notary self-government body; a notary is obliged to be loyal and honest to clients, the state and colleagues in the profession, to keep notarial secrecy; the choice of a notary is made exclusively by the parties; a notary must be impartial, but impartiality may also be manifested by providing adequate assistance to a party that is in a less favorable position relative to the other party in order to obtain the necessary balance to conclude a fair agreement [11].

If we analyze the current legal realities, the principles of the Latin notary in terms of their implementation in domestic legislation can be divided into three groups: those that are fully taken into account, those that are partially taken into account and those that are not. Among the first group of principles concerning the definition of the notary and notarial functions, the second principle is not fully implemented in Ukrainian legislation, since it provides for the existence of two forms of notaries: public and private. The other principles are taken into account, but need to be detailed. As for the principles that define the nature of notarial documents, it is reasonable to state that most of them are implemented in the Ukrainian legislation on

notaries. As for the third group, the principle according to which the state should establish the number of notaries sufficient for the proper performance of their professional duties remains completely unrealized in the current legislation of Ukraine. The principles relating to the professional ethics of notaries are indeed implemented in national law, although some of them need to be clarified.

Therefore, the concept of the principles of Latin notary should be understood as such categories as the initial theoretical provisions, basic, guiding principles (ideas) that reflect the content and direction of its rules and are characterized by the definition of the legal status of a notary and his/her duties; organization of notarial activity and notarial self-government; norms of notarial deontology and characteristics of drafting notarial documents.

Analyzing the concept of principles, we cannot ignore the ways to improve the establishment of the principles of Latin notary in Ukraine during the reform period. The key point is the issue of transition of the national notary to the system of free Latin notary, which is due to its effective fundamental basic principles. A positive aspect of notarial activity is the freedom of choice of a notary by individuals and legal entities. The Law of Ukraine “On Amendments to the Law of Ukraine ‘On Notaries’ to Eliminate Legislative Conflicts and Gaps a certain step was taken towards the development of the Ukrainian notary as a Latin-type notary and the development of notary self-government bodies. The same legal act finally clarified the legal status of a notary as a citizen of Ukraine who has been awarded a higher legal education degree not lower than a master’s degree, who speaks the state language in accordance with the level determined by the Law of Ukraine “On Ensuring the Functioning of Ukrainian as the State Language”, has at least six years of experience in the field of law, including at least three years as an assistant notary or consultant of a state notary office, has passed a qualification exam and received a certificate of the right to practice notary [6]. There are also certain restrictions.

An analysis of foreign experience in organizing notarial activities has shown that in all countries that are members of the International Union of Latin Notaries, notaries are united in a professional organization independent of state power, whose tasks are: representation of the notary profession at various levels; resolving the issue of selection, training and organization of internships for notary personnel, establishment and abolition of notary offices; consideration of disputes between notaries; control over the performance of notarial activities. The current legislation of Ukraine also provides for the possibility of notaries to unite in regional, national, international unions and associations.

In accordance with the Charter of the Notary Chamber of Ukraine, the purpose of this organization is to unite the efforts of notaries on a professional basis to fulfill their duties and ensure their rights, represent the professional interests of notaries in state bodies, local governments, enterprises, institutions and organizations, implement and apply the fundamental principles of the Latin notary system, as well as the principles of notarial ethics, provisions of the Latin notary, protection of professional interests and social rights of notaries, promotion of professional development of notaries and provision of methodological assistance to them, protection of interests of individuals and legal entities in case of damage caused to them as a result of illegal actions or negligence of a notary [10]. It is worth paying attention to the protection of the interests of individuals and legal entities as a result of incompetent notaries. The fact is that the previous version of the Charter of the Notary Chamber of Ukraine and the provisions of the Law of Ukraine “On Notaries” did not contain any indication that the notary self-government body should perform an extremely important function, namely disciplinary control over the performance of professional duties by private notaries. As we can see, it is a positive development that in the process of implementing the principles of the Latin notary in Ukraine, the current Charter of the Notary Chamber of Ukraine establishes the said control, which is an additional guarantee of observance of the rights of interested parties in the performance of notarial acts and the performance of notarial activities

at the proper level. Another point is that a notary, as an official in the countries of the Latin notary system, is prohibited from performing functions incompatible with the position of a notary and from engaging in activities that pose a danger to his or her material interests or to persons who apply to him or her; from using his or her position to obtain documents of interest to him or her or his or her family members. In support of this principle of the Latin notary, the national legislation contains a provision, namely Article 3 of the Law of Ukraine "On Notaries", which also prohibits a notary from engaging in entrepreneurial or advocacy activities, being a founder of bar associations, being in the civil service or service in local self-government bodies, in the staff of other legal entities, as well as performing other paid work, except for teaching, scientific and creative activities, as well as activities in the professional self-government of notaries. At the same time, Article 9 of the same Law provides for the invalidation of notarial acts performed by a notary or other official in his or her own name and on behalf of himself or herself, or in the name and on behalf of his or her relatives.

In our opinion, the modern Ukrainian notary in many of its manifestations is indeed a Latin-type notary, which in some areas needs to be improved and foreign experience borrowed. The adoption of the above-mentioned Law of Ukraine "On Amendments to the Law of Ukraine 'On Notaries' regarding the elimination of legislative conflicts and gaps" was a positive step towards the implementation of the principles of Latin notary in Ukraine. First of all, the legal provisions of this regulatory act bring the rules set forth in the Law of Ukraine "On Notaries" into compliance with the Civil Code of Ukraine and the realities of the practice of notarial acts. Its provisions are aimed at eliminating outdated terminology, detailing the procedure for determining the place of residence for minors and incapacitated persons, clarifying the list of persons who currently perform the relevant notarial acts and providing for the existing right of a notary to perform state registration. At the same time, the Ministry of Justice of Ukraine is announcing a large-scale notary reform that includes the following important changes. First, the introduction of an electronic notary system. This project is based on the foreign experience of European countries and aims to improve the quality of notarial acts by reducing the time for performing an act and protecting a notarial document from forgery. We agree with I. Bezzub's position that large-scale digitalization of notarial activities will contribute to: abandoning paper record books for notaries; reducing the number of documents that a person must submit to perform a notarial act; automating a number of processes in the activities of notaries; effective information interaction between state information resources; and maintaining a notarial archive in electronic form [1]. It is also planned to expand the number of actions that notaries can perform, in particular, marriage registration, divorce, securing evidence, etc. This approach will become a kind of guarantor of preventing abuses associated with raiding, in particular during the implementation of land reform. And finally, the third

direction of reforming the notary public in Ukraine is directly related to notarial self-government. Accordingly, in connection with the implementation of the transition to a unified notary public, the Ministry of Justice of Ukraine plans to delegate a number of powers to the body of professional self-government of notaries, in particular: to exercise control over the organization of the notary public's activities, office work, compliance with the rules of the Code of Professional Ethics of Notaries; to organize the improvement of the professional level of notaries; to create conditions for the uniform territorial location of notaries' workplaces. This approach will become a kind of guarantor of preventing abuses associated with raiding, in particular during the implementation of land reform. And finally, the third direction of reforming the notary public in Ukraine is directly related to notarial self-government. Accordingly, in connection with the implementation of the transition to a unified notary public, the Ministry of Justice of Ukraine plans to delegate a number of powers to the body of professional self-government of notaries, in particular: to exercise control over the organization of the notary public's activities, office work, compliance with the rules of the Code of Professional Ethics of Notaries; to organize the improvement of the professional level of notaries; to create conditions for the uniform territorial location of notaries' workplaces. The development of notarial self-government and the delegation of some functions from the state to the specified organizations is an important element of a democratic society. Therefore, we fully agree with the opinion of V.G. Shyshlenko, who believes that the introduction of a new ideology of the functioning, first of all, of notarial bodies, as well as their organization of professional self-government is one of the main tasks of the reform, during the implementation of which it is necessary to achieve such a state when the notarial profession, realizing the purpose of a democratic social legal state, will create conditions for the exercise of the rights and freedoms of citizens, as well as the provision of a wide range of notarial services to them [13].

Conclusions. The activities of the notary public and its self-government bodies in Ukraine represent a system of complex, interrelated legal principles (publicity, independence, notarial documentation, ethics, etc.) and norms that determine the functioning of the notary public as an institution regulating civil relations. At the same time, there are problems in the notarial environment that require constant improvement of both the foundations of the legislation on the notary public and the forms of its organization. Given the above, there is a need to constantly search for new, more advanced, optimal forms of notary public activity in Ukrainian conditions. The above can be achieved only if the historical experience of the functioning of the notary public in Europe in general and in Ukraine in particular is studied. Today, a number of steps have already been taken towards reforming the said institution, however, many issues require more thorough study and implementation in the norms of current legislation.

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