

Notarial Activity in the Republic of Kazakhstan: Problems and Development Prospects

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Abstract: The Kazakhstan notariate in recent years underwent the considerable changes caused by new public conditions. It passed the significant historical period, during this period the Law of the Republic of Kazakhstan "About notariate" of July 14, 1997 No. 155 and set of subordinate acts were accepted, thus normative basis is completely updated. Despite this, today's condition of regulatory and legal framework demands to create new conceptual views which have to meet the modern legal and public requirements. During the modern period in the Republic of Kazakhstan a controversial question is notariate recognition as public institute, on the basis of it notary officer should be given the status of the independent representative of the state. In turn it pursues the aim to refuse licensing and granting of notary with powers from the state. The aforementioned problems lead to emergence of various opinions in society, in consequence of which to continuous change of legal bases of notariate.

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1. Introduction

Reforming of property relations and other contractual relations was an objective factor of modern allocation of role and importance of notariate institute in Kazakhstan.

The analysis and assessment of reached in the notariate sphere allows to note that its first decade was more evolutionary. The legislative base of national model generally answering to the fundamental principles of Latin type of notariate was created just these years [1].

Today there are two main systems of notariate - Latin and Anglo-Saxon types. Distinctions in systems of notariate are explained by special features of legal families (Anglo-Saxon and Romance and Germanic) on which the called systems are based. To understand a difference between these legal families - means to define, than Anglo-Saxon and Latin systems of a notariate [2, 1] differ from each other. As just this determines correctness of choice by the state of this or that system of notariate.

Legal realities developing for today do actual many questions of further reforming of the domestic legislation. In this number of transformations the most significant represent the questions of formation and functioning of notariate of modern European type [3].

2. Methods

Research methods are the general scientific dialectic method of knowledge of social processes and phenomena, and also system and structural

approach, historical, comparative and legal, formal and logical methods.

3. Main part.

The notariate in legal system, certainly, carries out as one of the main function of rendering legal aid to many categories of citizens, and also legal entities. However, in Kazakhstan the legal nature of notariate isn't specified, the legislative base of institute is imperfect. At the same time, it is impossible to call legal policy of the state concerning a notariate univocal. There are a number of conceptual and legislative problems which constrain development of researched institute. They are connected both with current legislation about notariate, and with civil, financial, tax and other branches of the Kazakhstan legislation. Inconsistent legislative decisions in many respects are consequence of that institute of notariate, its opportunities aren't understood up to the end and not estimated completely. Such decisions are often caused by lack of basic theoretic-legal researches of the public relations developing in the sphere of notarial activity. The theoretical understanding of place and notariate role in legal system of Kazakhstan, its communication and interaction with law enforcement and other government bodies in the sphere of administration of justice, the rights and freedoms of citizens has basic value in creation of the constitutional state in our country.

In Kazakhstan, despite the active resistance of notarial community, at the beginning of 2012 admission reform to implementation of notarial

activity was carried out, namely the system of quoting of notaries was cancelled, competitive selection on holding the post of the private notary was abrogated. Passed about two years from the moment of coming into force of the specified innovations that allows formulating certain results. Today any person having the license for the right of occupation of notarial activity, has opportunity to enter in members of notarial chamber, in the presence of office premise, to pass record registration in judicial authorities and to get down to work as the notary. Thus there is no restriction of number of notaries working in the same district [4].

As of beginning of 2013 in the republic the total of notaries made 3672 persons. The ranks of territorial chambers in the reporting period were joined by 797 notaries. 207 notaries who have again entered chambers have accumulated period of work till five years, 332 notaries have accumulated period of work from five to ten years, 258 new notaries have accumulated period of work on specialty over 10 years.

Today only every sixth notary (581 notaries) of the republic is deployed in the regional centers. Only 161 notaries work in rural districts at constant basis (there are 2 386 rural districts in the republic). The termination of inflow of new notaries to rural areas is observed in recent years.

4650 people are the share of service of one notary on the average in the republic, including in the capital of the republic in Astana city 1200 inhabitants are the share of one notary, in the Alma-Ata city – 2000 people. Now this indicator is four times lower than the standard provided by Latin notariate. By this criterion nowadays Kazakhstan is among the “oversupplied” countries by number of notaries [5, 13].

For comparison: in Germany on 82 million inhabitants are about 10 thousand notaries (one is the share of 8 200 inhabitants); in France on 65 million inhabitants – about 9500 notaries (one on 6900 inhabitants); in Mongolia on 2,7 million inhabitants – about 190 notaries (one on 20 000 inhabitants); in Russia on 143 million inhabitants – about 7 000 notaries (one on 20 000 inhabitants); in the People's Republic of China on 1,3 billion inhabitants – about 11 000 notaries (one on 120 000 inhabitants); In Japan on 127 million inhabitants of 550 notaries (one notary is approximately on 230 thousand people) [6].

Necessity of improvement of Kazakhstan legislation assumes studying of international experience, and first of all activity of the International Union of Latin Notariate (further IULN) in this sphere, and also influences of IULN on the national legislation of the Republic of Kazakhstan in the sphere of notariate.

Within Latin notariate system models of its organization likewise can be various, differing by extent of involvement of the notary in civil turnover, nature of actions made by him and volume of aid and advice in legal matters given by him [7, 49].

The Kazakhstan model of notariate has a number of peculiarities. In our opinion, the most part of problems arose in connection with the inexact name of independent and free notaries by the term “private”. It is clear, that use of this term was defined by economic and political conditions of the state at the time of adoption of statute about notarial activity during this period. However there are exact categories and the requirements determined by this or that term. The word “private” is not only personal, individual, and first of all in legal understanding is having personal interest taking for certain benefit, profit (by analogy private property, private entrepreneur). This certain opposition to concept public (social). Thus, there is the following situation: in world view of people the word “private” associates with deriving of profit, work for oneself. And what we have, the notary is delegated by the state on implementation of public powers, under state control, but thus is financially free. And the status of notary is still not clear, his powers are approached to law-enforcement activity (activity on behalf of the state, the answerability to the Ministry of Justice which belongs to system of law enforcement agencies), public interest in activity of the notary is too huge. But nature of activity reminds very much commercial activity and the status of individual entrepreneur. The current legislation didn't define the true status of the notary, ideology of activity of notarial bodies and the notary specifically. If we assumed the principles of activity of Latin notariate as a basis why only the principles of Latin notariate are reflected in legislative draft. Why the ideology of Latin notariate which will help to dot all the i's and cross all the t's isn't defined.

The main distinctive feature of activity of the private notary is a self-financing in connection with which his independence (from public financing unlike the state notary) and risk and responsibility degree (liability for damage and obligations under contents and material and technical support of activity) is defined. In general provisions about Latin notariate everything is written. For this purpose it is expedient to remind general provisions about Latin notariate. Latin notariate - system of the organization of notarial activity at which notaries, remaining professional workers, carry out the functions as representatives of the state. The instruction on Latin is connected with the Roman law which has formed a basis for emergence of Latin notariate. Often it called

as free notariate, thereby emphasizing one of its main principles of construction.

Realization of this principle in practice allows to lower costs of the state for creation of system of guaranteed and necessary legal aid to citizens and legal entities, to raise liability of notaries for damage, to exclude illegal intervention of government bodies and officials, to increase qualification of notaries, to provide preservation of secret of notarial actions. At the same time freedom within Latin notariate assumes control from the state which delegated to notaries the powers in the sphere of giving to private acts of character of the public ones.

The state regulates an order of appointment to the post of notary, participates in definition of their quantity, and establishes rates of payable duties and criminal responsibility for material violations in professional activity of notary, controls observance by notaries of laws and other legal acts. Also the state is authorized to raise questions through the system of judicial authorities about deprivation of right to carry out notarial activity, establishes a number of restrictions for notaries (for example, in occupation by other activity, in commission of notarial actions within the notarial district, in advertizing, etc.). According to the principles of Latin notariate notary: a) must be rather qualified lawyer to have the right to certify transactions (including made by him) and to advise persons resorting to his services; b) carries out the state function independently and being not included in hierarchy of government officials; c) carries out his function without prejudice; d) provides storage of the statements made and certified by him, issues the certified copies having the same value, as originals; e) at execution of his function bears personal responsibility, including all the property, for the damage caused by him to any person; f) carries out his activity within the territories determined by law; g) compulsorily is a part of the collegial body created on the corporate beginnings - notarial chamber; h) observes the laws of his country and the rules of ethics established by notarial chamber. The notarial organizations of Latin notariate are united in the International Union of Latin Notariate (IULN) founded on October 2, 1948 at meeting of representatives of the national notarial organizations in Buenos Aires. Union tasks according to Art. 1 of its Charter are: assistance, codification and development of notarial activity in the international area, ensuring of independence of notary profession for the benefit of all and everyone.

In system of Latin notariate the notary acts, first, as the independent representative of the state allocated on behalf of the state with powers to make notarial actions; secondly, at the same time bearing a

personal responsibility for commission of notarial actions. Independence of notary provides giving to agreements of the parties "a public form and public trust" as the notary executes tasks of the public power. The monitoring of activities of notary is supervised by the state represented by judicial authorities and notarial chambers. In particular, the main system signs which characterize any national notariate of Latin type:

The notary is the public official, receiving powers from the state, realizing them from its name and under its control;

The notary is a person of liberal legal profession in the sense that he will independently organize his work, on own account acquires necessary property and employs assistants, bears full property responsibility for the inflicted damage;

The main function of notary – giving to private agreements of authentic character, special evidentiary and executive force, protection of public interest.

Zh. Yagr and Zh.-F.Piyepu write that if task of judge is to resolve the dispute, the purpose of notary is to provide performance of public service (function) of creation of proofs [8, 205].

The notary behind commission of notarial acts by him receives notarial tariff, the size and order of payment of which are established by the state. The notarial tariff is at the same time the main source for self-financing of notarial activity. Introduction of such provisions in this or that look will set thinking those who sees in activity of notary only possibility of income generation, without focusing attention on responsibility. The same provisions will confirm in a position those notaries for which the basic principle nevertheless is service to the state which the notary carries out independently, without entering to hierarchy of state employees or employees of public organizations. In addition in Latin notariate special highest level of notaries is emphasized as professional lawyers who possess knowledge in various branches of law, the presumption of knowledge of law extends exactly for them. The profession of notary belongs to a number of those who are characterized by presumption of knowledge of legislation. The same requirements according to the legislation are established only concerning judges and judicial marshals. The notaries, as well as representatives of the specified legal professions, don't have the right to digress from permission of the specific question raised before them by persons, addressed for commission of notarial action. The profession of notary doesn't know specialization which is characteristic for criminal investigators, lawyers, only recently at judges and some other legal professions. The presumption of knowledge of law

defines increased requirements to a skill level of notary.

According to the national legislation, the notary can be the person which has reached 25 years. It raises big doubts. At 21-22 years the person receives degree of the bachelor. Further magistracy, at least year, further the experience of 2 years is obligatory, training year. Even at the most rough calculation the age has to be higher. And that is even more important; according to knowledge of developmental psychology we will be able to claim that to this age person doesn't possess level of intellectual thinking, responsibility and other qualities inherent to formed personality. The identity of person is formed only by 28-30 years (the speech is not about maturity, but about values, about opportunity to resist to temptation, formation of own principles, etc.). There are unique persons formed at earlier age, but this exception from the rules. And if to consider the general tendency in our society, in education, it is possible to claim that this age is a peak of the ambitions directed to increase of welfare by various ways. If it was a question about public service, it is possible as the person will get to hard and fast system of rules with the requirements there, procedures, hierarchy, etc. In our case activity is exclusively individual, it demands high intellectual, psychological (permanent job with different people) expenses, high level of personal development.

Many notaries of Italy, Spain, Switzerland, Germany and France are at the same time Doctors of Law and university professors, thereby providing in the most literal sense science and practice communication. Thereby, high professionalism of notaries, existence of so necessary positive and solid image in society and among other corporations of professional lawyers, possibility of detailed doctrinal study of difficult practical questions of notarial activity is provided [9, 35].

The consolidation statistics data of total information of Republican notarial chamber of the Republic of Kazakhstan for 2013 once again testify to need of reforming of notarial system. For example, 295 notaries are brought to disciplinary responsibility according to the Code of honor of notaries in 2013. 15 notaries are brought to criminal responsibility; concerning three notaries from them criminal cases are stopped taking into account an absence of the event of a crime. 339 notaries are brought to civil responsibility for omissions in professional activity. It is suspended licenses of 119 notaries, in 77 cases from them violation of the law at commission of notarial actions took place. In 2013 at 14 notaries it is terminated licenses, as of two in connection with entry of judgment into legal force [5, 13-15].

The notary in Latin notariate – the highly professional lawyer, prestige of this profession is very high therefore requirements to the candidates in notaries are great. In our opinion, requirements in the domestic legislation are lowered. Acceptance of qualifying examination by testing probably provides transparency, however reflects only existence of certain theoretical knowledge, more specifically, knowledge of the legislation. Oral interview gives the possibility to reveal level of the applicant, his ability to think. Whereas notarial activity first of all is utilitarian activity, this is huge number of the acquired skills.

It is necessary to establish special access to the notarial profession, connected with the raised qualification requirements to the notary and nature of his preparation to execution of the profession. In the different countries there are different models of preparation for notarial profession, however practically everywhere they are difficult, connected with receiving additional education and practical skills which aren't covered by the general standard of the higher legal education.

Not clearly, why the structure of certification commission is approved for a period of three years? We consider that the structure of the commission shouldn't work for a long time. There are enough experts in the republic that the structure of the commission was regularly updated. The presence of scientist-jurist in the commission is reasonable (his specialty is of importance, there is a sense to invite experts in the sphere of civil and applied branches of law), the representative of the Ministry of Justice, the judge of the Supreme Court, and what do deputies estimate? In our opinion, the structure has to be formed from professional experts, lawyers. Competence and professionalism have to be the only and main criterion for certification.

In France as K. Verbar notes, “the notary is the position established by the state which owner is allocated with the right to certify legal acts” [10, 16]. For example, the applicant has to have degree of the master of law, training passing within two years is necessary, including about half a year is necessary at other experts (lawyers), in other establishments, legal services of the companies and training abroad is encouraged. For the persons who have gained working skills for execution of profession of the notary, but not having the university diploma, also there is a possibility of access to a position of the notary. For this purpose it is necessary to work not less than 9 years at the notary, including not less than 6 years as the first clerk. There are also other ways of receiving access to notarial profession [11, 71].

The modern system of notariate in Germany also is result of long development. The citizen of

Germany, satisfying to a number of requirements has the right for holding the post of the notary: existence of the academic preparation, the university diploma, and the successful termination of training courses with two passed qualification examinations. Besides, for holding the post only the notary it is necessary to pass, as a rule, within three years test as the notary-assessor [12, 113].

The competition to fill the vacancy of the notary is held by notarial chamber in Germany. Interested persons have the right to submit applications to fill the vacancy to justice department which registers them and transfers with enclosed documents to notarial chamber. The notarial chamber registers them, conducts interviews with candidates, being guided by legal principles of personal and professional suitability of candidates. In conclusion of this procedure the notarial chamber offers justice department the candidate for appointment to the post of the notary, it has the right to offer fallbacks. The justice department passes then a final decision [13, 196 — 197].

4. Conclusion

Thus, having studied notarial activity in the Republic of Kazakhstan, we come to the following conclusions:

1. It is offered to define legal status of the notary as follows: the notary is a person of a liberal legal profession, the public official, allocated with power from the state to carry out the notarial actions, realizing powers from a name and under state control.

2. Definition of “notarial activity”, provided by item 1 of Art. 3 of the Law of the Republic of Kazakhstan “About notariate” to state in the following edition: “Notarial activity is settled by norms of the notarial law professional, not entrepreneurial activity of notaries and other authorized officers on protection of the rights and legitimate interests of citizens, legal entities, state and society as a whole, carried out by commission on behalf of the Republic of Kazakhstan according to the procedure of notarial actions defined by the law in the sphere of indisputable jurisdiction”.

3. It is necessary to establish special highest level to profession of the notary, by legislative fixing of the raised qualification requirement to the notary and strengthening of preparation and the admission of persons to occupation by notarial activity for professional development of notaries. For this purpose it is offered to establish age of notaries of 30 years, length of service on legal specialty must be not less than 5 years. Besides the higher legal education to oblige passing of an additional preparatory course and successful of qualification examination, training

passing within 3 years (from experience of the foreign countries Germany, France).

4. According to the principles of activity of Latin notariate instead of licensing introduction of institute of granting of the notary by powers from the state as the mechanism of state regulation of notarial legal relationship and control by notarial activity is offered. Granting with powers from the state in comparison with licensing in the future will allow to be engaged in notarial activity only to the qualified notaries.

5. For the purpose of training of the highly professional notary it is necessary to organize a specialized magistracy according to international educational standards of highly skilled personnel reserve of notariate of Kazakhstan for receiving the corresponding knowledge in the sphere of legislative practice and theoretical skills, for the purpose of law enforcement in activity of notaries. And also for professional development of notaries in the sphere of law enforcement it is necessary to organize qualification upgrading courses at law departments of leading state universities of the republic.

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