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SUMMARY OF DOCTORAL DISSERTATION

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"Evolution of the notary status. Theoretical, legal and practical aspects"

The subject matter of this doctoral dissertation is the evolution of the legal status of the notary in the period since the adoption of the Law on Notaries Act of 14 February 1991 until the present day. The aim of the study is to analyze the nature of this process identifying those of the key elements of changes affecting the functions performed by the notary, which shape the security standard of notarial activities and civil law transactions, and the effects of which may affect the evidentiary proceedings in civil and criminal cases.

The pursuit of the research goal is connected with three theses. According to the first one, some of the modifications to the legal position of the notary introduced in the last two decades are not justified in the context of the the justice system needs, including the rules of court proceedings. This is due to the dispersion and internal contradictions of the axiological assumptions underlying the legislative practice. The manifestation of this feature is visible in extending the scope of the notaries' rights and obligations, while at the same time significantly limiting some guarantees of the principles of the notary's independence.

According to the second thesis, it is justified to reconstruct the axiological assumptions responsible for the function the notary should perform, which will stabilize notary's status and constitute a reliable criterion for the assessment of correctness of future changes in legislation. The third thesis is that some of the applicable standards, including those regulating obligations and rights of notaries in civil and criminal procedural law, require changes.

A critical analysis of the validity of the theses referred to above was planned through the verification of four hypotheses and the construction of the work adapted to them. The first hypothesis assumes that the incorrect regulation of the status of the notary translates significantly into his or her rights and obligations in proceedings (including court proceedings) and into inconsistent regulation of the rules of professional liability, which also directly

affects the level of legal security of the parties to notarial activities. The second hypothesis assumes that the notary status is currently shaped chiefly by specific regulations, which seriously hampers the correct performance of certain obligations and rights of the notary and causes unlawful diversification of notarial practice, including the provision of information and issuance of documents, notarial deeds among them.

The third hypothesis assumes that a representative manifestation of a defective regulation of the notary legal status is the obligation to keep notarial secrecy, which is subject to more and more exceptions, some of which have no convincing justification. This also applies to cases related to the rules of taking evidence in civil and criminal cases. The frequency of changes and their scope cause measurable damage to the principle that has so far defined the notary status, that is the principle of trust.

The fourth hypothesis assumes that the solutions used in the national legal order and the planned direction of subsequent solutions are not complementary to the institutions defining the legal position of the notary office in the legal orders whose legal culture is connected with the Polish legal system. Some legislative proposals to further limit the guarantee of the principle of trust however are similar to the mechanisms used only in a few countries in the world, and their system differs from the model of a democratic state ruled by law.

The choice of the aims and objectives of this dissertation is justified by the growing problems resulting from the deepening dissonance between the assumptions adopted for the notary status and the practice. One of the problems that notaries face on a daily basis is the contradiction between the protection of notarial secrecy (which is related to the constitutional right to privacy protection, including the protection of the privacy of the notarial party), and the admission of an increasing number of entities to the contents subject to secrecy.

The choice of the subject of the dissertation was also determined by the state of research on the issues referred to in the research hypotheses. They have not been sufficiently researched and developed by doctrine yet. The trade literature on the subject presents analyzes of the status of the notary and some of its partial elements related to it. Publications which comprehensively refer to the legal status of the notary date back many years and due to law changes introduced after their creation, some of such publications have become obsolete. The works on the process of changes in the years 2005-2013 also remained only partially valid. Furthermore, publications relating to the current changes focus on important

but individual issues. However, there is no analysis of individual issues in the context of all the elements creating the systemic position of the notary.

In order to achieve this goal of the dissertation, several research methods were applied: historical, dogmatic, comparative and sociological. The basis of the research material were the statements of the doctrine, jurisprudence, normative acts, including legislation in force in legal systems other than the Polish one, as well as draft legal acts, opinions and positions of institutions, offices, law practice self-governing organisations, and in particular the notaries self-governing society.

The structure of the work corresponds to its objectives, including the verification of research hypotheses, it consists of six chapters and a summary relating to the verification of research hypotheses and theses. The same criterion was decisive in the choice of the aforementioned research methods.

Chapter one presents the shaping of the status of the notary from the unification of law in the Second Polish Republic to 1991 in order to determine how the notary status was shaped and then evolved in the period preceding the introduction into the legal order of the currently binding Law on Notaries. The results of the research work were to enable the identification of both the origin of the axiology adopted on the basis of the currently standardized systemic position of the notary, and the establishment of premises that may have an impact, despite being derived from the past, on the current difficulties in maintaining the consistency of the regulation of the notary's rights and obligations.

Chapter two however analyzes the current legal status forming the legal position of the notary, including the Law on Notaries, the Code of Notary Professional Ethics, deregulation acts and special norms providing for far-reaching exceptions to the basic duties of the notary, including secrecy. With regard to the analyzed legal status and the direction of its evolution, the views of the doctrine and the position of jurisprudence are reconstructed, confronted and commented on, including the public functions performed by the notary and the fulfillment of their other legal and social roles (participation in the justice system, performance of a freelance profession, status of an entrepreneur, obligations of an employer). The considerations were made on the assumptions associated with assigning notaries the attribute of public trust and obligatory membership of a professional membership organisations, including the principles of disciplinary responsibility and compliance with deontological norms. Such a research approach allowed for the verification of the first hypothesis.

Furthermore there is a discussion on the following proposed changes extending the exceptions, already existing and evoking criticism, to notarial secrecy, an example of which is the concept of a new obligation to record the course of notarial activities and its impact on the legal status of the notary. The chapter also refers to the equally controversial government bill of 17 May 2022 amending the Law on Notaries Act under which some notaries would also be called upon to perform activities in the field of legal protection and would be granted the status of a public official, which would impose on such notaries increased accountability and direct supervision of the Minister of Justice.

Chapters three and four consider the impact of the special provisions referred to in chapter two on certain elements of evidence in civil and criminal cases. Due to the position of the principle of trust among the notary's duties, these chapters are dedicated to the issue of the notary legal status in civil and criminal proceedings in the light of the obligation to maintain notarial secrecy.

The situation of a notary-witness in civil proceedings and the admissibility of presenting notarial documents as evidence in this proceeding were analyzed. The substantive legal conditions and formal requirements for releasing a notary from the obligation to keep notarial secrecy in civil proceedings were also examined. In the summary, the *de lege ferenda* postulates were formulated, taking into account the essential elements of the axiological foundations of the systemic position of the notary in the justice system.

An analysis was also conducted with regard to the legal position of the notary appearing as a witness in criminal proceedings. Both the regulation resulting from the Code of Criminal Procedure and the non-code norms were taken into account. The status of the notary in criminal proceedings was also examined when the notary is assigned the status of a suspect or an accused. The in-depth analysis also covered the issue of using notarial documents as evidence in criminal proceedings, as well as the rules for searching the notary office. Similarly to the considerations regarding civil proceedings – a research was conducted on the issue of exempting a notary from the obligation to keep notarial secrecy and questioning them in criminal proceedings, as well as on the principles of exercising by the Minister of Justice the right to release the notary from the obligation to maintain notarial secrecy in such proceedings. This part of the dissertation also presents *de lege ferenda* postulates. Such a research perspective became the basis for verifying the second and third hypotheses.

The substantive assessment of the current status of the notary, as well as the proposed changes, also required comparative legal research which was conducted in chapter five. An analysis was carried out to determine to what extent Polish solutions are similar to the solutions of the legal orders from which the traditions of Polish regulations derive, and to what extent the evolution of the Polish notary law is heading in a different direction. Research has been carried out on the legal orders of Russia, Germany and France. This choice was justified due to historical and legal ties and due to the fact that the institution of the national notary is part of the so called Latin notaries, and Poland is a member of the International Union of Notaries, therefore the legal systems of Germany and France were analyzed.

In addition, due to one of the noted directions of changes in the notary status in Poland in the form of a project, discussed in chapter two of the dissertation, recording notarial activities, the comparative perspective was expanded, including the research task of the status of the notary in Russia (a non European Union member state, but a member of the International Union of Notaries) and the institution of recording notarial activities, some of which are in force in this country. The Russian Federation is one of the three countries in the world where there are regulations providing for the recording of notarial acts, therefore an analysis of the norms in force there made it possible to verify the correctness of the axiological justification of this project, which raises the reservations of the doctrine. The analyzes carried out in this part of the dissertation were aimed at verifying the fourth hypothesis.

Chapter six presents the results of the survey of notaries' opinions on the implemented and planned changes. The aim of the sociological research was to confirm or to contradict the thesis presented in this paper about the evolution of the status of the notary, which, after the stage of strengthening its legal position, transformed, as a result of successive legislative changes, into the stage of depreciation of the role of this profession in the justice system. This change has a direct impact on lowering the standard of legal security for the parties to notarial activities. The method used in the research has been positively verified by a person who performs professional statistical research. The questions addressed to representatives of this legal profession concerned the assessment of the current status of the notary, the factors influencing the status, as well as the verification of the statement that the status has changed significantly since 1991 to this date, and the assessment of

the postulate of acceptance of another axiological perspective for further changes, other than the current one.

The final substantive part of the dissertation, by formulating a few conclusions, summarizes the results of the research, confronting them with the theses and hypotheses presented at the beginning. In the first place, they make it possible to identify some axiological assumptions which have been decisive in recent years (2005-2022) on the content of the transformations to which the notary status is subject. The changes, in turn, affect the standard of legal protection of the parties to notarial actions, both in the case of activities performed directly by a notary and in court proceedings in which the elements of evidence proceedings are information and documents obtained from the notary.

The conducted research verified the research hypotheses presented at the beginning. It has been confirmed that the notary status has not been regulated properly in full, which translates significantly into notary's rights and obligations in proceedings (including court proceedings) and inconsistent regulation of the rules of professional liability, which also translates directly into lowering the level of legal security of the parties to notarial activities. The assumption contained in the second hypothesis was also substantiated.

The third hypothesis was also confirmed, assuming that the rules of functioning of the obligation to maintain notarial secrecy are a specific manifestation of an incorrect regulation of the legal status of the notary, which obligation experiences more and more exceptions. The first of them was introduced to the Law on Notaries in 2001, and others in the years 2019-2021. At the same time, further exceptions to the obligation to maintain notarial secrecy have been provided for in other provisions of the constitutional act. The presence of so many norms of this type caused a significant decrease in the trust of the parties to the activity in the notary, and therefore it shook the fundamental principle of the functioning of the profession. This is also confirmed by the sociological research carried out for the purpose of this dissertation.

With regard to the fourth hypothesis, it was confirmed, on the basis of comparative studies, that despite the political foundations based on many years of European tradition, the legal status of the Polish notary is slowly but systematically modified in a way which introduces elements unknown to the Latin notary, while being guided by questionable models.

Analyzing the results of the verification of the above hypotheses, the correctness of the theses presented at the beginning was also confirmed. This is also evidenced by other, additional results of the research carried out in the course of the development of this dissertation:

The historical and legal research has confirmed that the discrepancies in the status of the Polish notary have many years of origins. In the Second Polish Republic, the Polish legislator decided to adopt the French law as a model without transferring to the Polish system the solution applied in France with regard to the status of the notary, but assuming that the notary is a public official. Despite the adoption of such an assumption, the domestic doctrine did not agree as to the interpretation of the newly introduced legal status. However, the assumption that the notary is a person of public trust has been widely accepted, due to the perception of trust as a feature that underpins the existence of this profession. After World War II, the status of the notary was changed due to systemic changes and the transformations related to them, as a result of which the notary became a state official operating in the system of an authoritarian state.

In 1989, with the return to the principles of parliamentary democracy, the ability of practicing the profession of the notary outside the structures of state notary offices was partially restored, but no other necessary changes with regard to the status of the notary were introduced. The Law on Notaries Act of 14 February 1991 became the foundation of the non-state notaries system based on the pre-war tradition. Unfortunately, in this legal act the legislator did not decide to precisely regulate the legal status of the Polish notary. It supported the statement that the notary, within the scope of his powers, acts as a person of public trust and enjoys the protection enjoyed by public officials. As a consequence of this legislative omission, an axiologically and normatively undefined space was created, which was then used to create various solutions, including those limiting the type of obligations and rights which are formed by the status of the notary as a person of public trust.

The results of the research using the historical and legal method helped to identify the premises which have facilitated, and they still do so, introducing into the legal order some heterogeneous provisions, operating outside the Law on Notaries, and sometimes also outside acts of the statutory rank, which partially in an unauthorized manner from the point of view of a democratic state of law, shape the notary duties.

This thesis was verified in detail with the use of the dogmatic method. When transforming the legal position of the notary, starting in 1991, the legislator cannot decide whether to liberalize the provisions in the direction of extending the catalogue of notarial activities by reducing the jurisdiction of courts, and thus relieving them from unchallenged cases, granting notaries a status similar to a judge (notary-judge without dispute). This omission causes, inter alia, limiting the use of the potential of the foundation for the existence of this profession, the main and overriding goal of which is to ensure the security of legal transactions.

Research has confirmed that the notary status remains heterogeneous. There is no legal definition of the structural elements of this status, and some of them are regulated in a different, incidental manner in various legal acts. The Law on Notaries only stipulates that the notary acts as a person of public trust in terms of the power to perform notarial activities. Pursuant to the law the notary is not a public official but enjoys the protection of such officials. He is a member of the notary self-governing organisation, membership of which is obligatory.

In civil proceedings, the notary does not have a special status, and under criminal law he or she has been directly recognized as a public official. In business transactions, the legislator initially explicitly decided that the notary was not an entrepreneur, and then radically changed their position, deciding that, however, the notary should also be considered an entrepreneur. On the basis of commercial law, the profession of notary has been recognized as the so-called freelance. Within the meaning of the labor law, if a notary employs employees, he or she also becomes an employer.

The multiplicity of roles and their legal characteristics causes inconsistency in the assessment of the notary status, also in the statements of jurisprudence and judicature. The doctrine, noticing the legal definition of an entrepreneur, indicates that the legal position of the notary differs from that of a typical entrepreneur, emphasizing that the notary is a special type of entrepreneur, a quasi-entrepreneur, and even an entrepreneur of public trust.

Four positions can be distinguished among the views of the jurisprudence. The Court of Justice of the European Union believes that the notary is an entrepreneur conducting business activity like any other entity, and that he or she is also an entrepreneur performing regulated activities. The Constitutional Tribunal perceives the notary not only as a person of public trust, but also as a person who at the same time performs auxiliary functions in relation

to the administration of justice. On the other hand, the Supreme Court takes a variable position in some judgments, presenting the view that the notary is a participant in the broadly understood administration of justice, and in other judicatures, stating that notaries, as entrepreneurs, should be subject to regulations dedicated to them. However, the Supreme Administrative Court consistently opposes the recognition of the status of the notary as an entrepreneur, but accepts the view that, despite not having the status of an entrepreneur, the notary may conduct gainful activities.

One of the consequences of the multitude of views of the doctrine and jurisprudence regarding the notary legal status is the difficulty in making an unambiguous assessment of the notary's activity which is under the protection of a given legal regulation or subject to other effects of legal norms. This leads to the application of different criteria for verifying the notarial activities under different laws and procedures, causing uncertainty in the result of such assessment. This translates into lowering the standard of legal security for both the notary and, more importantly, the parties to notarial activities. The consequence of this are also the practical problems of performance of the tasks imposed upon the notary by the state so as not to violate some legal norms while implementing others. It is also one of the risk factors for the parties to a notarial act, who are not clear and certain about the law applicable to them, in particular securing the confidentiality of information entrusted by them to the notary.

Legal and comparative studies have confirmed that the legal status of the Polish notary is similar to the status of the notary in other legal systems which belong to the Latin notary practice. However, differences were also noticed, some of which can be considered significant.

Sociological research confirmed in turn that notaries mostly identify their status both with the status resulting from the Law on Notaries and the Civil Code (notary as an entrepreneur). Statements of notaries are largely consistent with the views presented by the doctrine and jurisprudence.

In the light of the obtained results, a dozen or so *de lege ferenda* postulates have been formulated with a view to a consistent and comprehensive regulation of the legal status of the notary, including to: define the status of the notary in the Law on Notaries by clearly stating that the notary is a public official and clearly stating that he or she is not an entrepreneur; definitely end the expansion of exceptions to the principle of maintaining notarial

secrecy; remove the notary from among the entities obliged to provide information both on tax schemes and related to the act on counteracting money laundering and financing of terrorism; index notary fees and introduce minimum rates; introduce flat-rate fees for certain activities or a fixed tax; introduce rules of conduct in the event of a leave, maternity, long-term illness, and in the event of notary's death; change the method of educating candidates for notaries and raise the requirements for compulsory internships before taking office.

Among the postulates for the future, attention was also drawn to the need to expand the notary's competences with regard to non-contentious court cases, in particular by granting the notary the status of a court within the meaning of the EU succession regulation, taking into account the remuneration corresponding to the actual workload and professional liability incumbent on the notary.

De lege ferenda postulates were also put forward in relation to the Code of Notary Professional Ethics.

It was emphasized in this dissertation that due to the functions the notaries can and should perform, they should be protected for the benefit of citizens and the state, therefore the legislator should not question trust in the notaries, and in particular should protect notarial secrets.

The last part of the work is a list of legal acts, trade literature and jurisprudence used in the dissertation, as well as a list of figures and tables used or prepared.