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Systemic Position of the Notary under the First Polish Law on Notaries of 27 October 1933. Part One

Pozycja ustrojowa notariusza na gruncie pierwszego polskiego Prawa o notariacie z dnia 27 października 1933 r. Część pierwsza

SUMMARY

The origins of the modern Polish system of notaries date back to the period of the Polish Second Republic. At the end of World War I, the institution of notaries in Polish lands was heterogeneous. There were three separate notary organizations, which regulated differently the systemic position, tasks and functions of the notary. The rebirth of the Polish State brought the issue of unification of the system of notaries. Works on this ground-breaking task took place for several years and ended with the creation of the Law on Notaries of 27 October 1933. The article is intended to precisely determine the systemic position of the notary under the first Polish Law on Notaries. Article 1 of the Regulation defined notary as a public functionary appointed to draw up acts and documents to which the parties were obliged or wanted to give the public attestation and to carry out other acts as entrusted to him by law. Attempts to define the concept of a public official revealed numerous terminological problems and generated the need to conduct research on the issue of the notary's position both in terms of scholarly reflection and dogmatic terms. In order to determine the systemic position of the notary, the article presents a detailed analysis of the term "public functionary" used in Article 1 of the Law on Notaries, views of the most eminent representatives of legal science in Poland on this subject and the scope of activities of the notary. The doubts and terminological difficulties identified in the course of these activities led to a deeper analysis of the provisions of Section I of the Law on Notaries, entitled "System of Notaries" (provisions of Chapters I–III) and of the case law. However, the attempt undertaken in the article to clearly define the position of the notary under the first Polish Law on Notaries did not bring a fully satisfactory result. The analysis of the position of the notary in the light of the Law on Notaries of 1933 indicates that there are serious difficulties in defining it precisely, both among the scholars in the field and the judicature. To fully define it, a closer analysis of the provisions of the Law on Notaries concerning the supervision of notaries, disciplinary and compensation liability of notaries, the professional self-government of notaries and the rules of preparation for the profession of notary was necessary. These issues have a significant impact on the

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final shape of the notary's position within the legal system. Due to editorial limitations, these issues will be addressed in the second part of this article, along with final conclusions.

Keywords: notary; system of notaries; systemic position; public functionary

INTRODUCTION

The notary is an institution necessary for the stability of social and legal life. It guarantees the security of legal transactions and constitutes an important instrument for stabilising legal relations. Undoubtedly, the most important function performed by notaries is the exercise of so-called preventive jurisdiction. The notary guards the legality of the legal acts made by the parties. At the same time, he ensures that the document drawn up by him is lawful and safeguards the interests of all the parties. By gravity of his position, confers legal force on various manifestations of economic life, which take legally crystallized and permanent forms[1]. Entrusting such an important role to a notary entails the need to define in detail the systemic position of notaries in the State. This article addresses the notary's systemic position under the first Polish Law on Notaries of 27 October 1933.

The origins of the modern Polish system of notaries date back to the period of the Polish Second Republic. At the end of World War I, the institution of notaries in Polish lands was heterogeneous. There were three separate notary organizations, which regulated differently the systemic position, tasks and functions of the notary[2]. The rebirth of the Polish State brought the issue of unification of the notarial system and the need to create the first Polish Law on Notaries. Work on this ground-breaking task took place for several years and ended with the adoption of the Law on Notaries of 27 October 1933[3].

[1] *Współczesny notariat polski*, „Przegląd Notarialny" 1937, no. 3–4, p. 51.

[2] A. Oleszko, *Notariat w systemie wymiaru sprawiedliwości*, Warszawa 2015, p. 21.

[3] Under Article 44 para. 6 of the Constitution of the Republic of Poland of 17 March 1921 (Journal of Laws 1921, no. 44, item 267 as amended) and the Act of 25 March 1933 on the Authorisation for the President of the Republic to Issue Regulations Having the Force of Statutory Law (Journal of Laws 1933, no. 29, item 249), the Minister's draft of the Law on Notaries was signed by the President of the Republic of Poland on 27 October 1933 in the form of a presidential regulation and then published in the Journal of Laws no. 84 item 609 of 29 October 1933. See also D. Malec, *Notariat Drugiej Rzeczypospolitej*, Kraków 2002, pp. 262–264; M. Allerhand, *Prawo o notariacie*, Lwów 1934, p. 8; J. Glass, W. Natanson, *Prawo o notariacie*, Warszawa 1934, p. 17; D. Malec, *Dzieje notariatu polskiego*, Kraków 2007, pp. 162–163.

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SYSTEMIC POSITION OF THE NOTARY IN THE LIGHT OF THE PROVISION OF ARTICLE 1 OF THE LAW ON NOTARIES OF 27 OCTOBER 1933

The Law on Notaries entered into force on 1 January 1934[4]. Article 1 of the Regulation defined notary as a public functionary appointed to draw up acts and documents to which the parties were obliged or wanted to give the public attestation and to carry out other acts as entrusted to him by law. The authors of the definition of notary based directly on the term *les fonctionnaires publics*, as used in Article 1 of the French Law on Notaries of 1803. However, attempts to define the term "public functionary" (Pol. *funkcjonariusz publiczny*) revealed numerous terminology problems[5]. It was wondered whether the use by the Polish legislature of the term "public functionary", instead of the term "public official" commonly adopted in the translations of Article 1 of the French Law on Notaries, was a deliberate procedure aimed at giving the notary a particular systemic position[6].

The new definition of notary had become the subject of lively discussion among the most prominent scholars of law in Poland. According to J. Glass, using the best models of French and Italian notarial acts, it reflected the elements differentiating a notary from a civil servant, while emphasizing the close relationship of the former with the state. In his opinion, the adoption of such a definition allowed granting the notary certain rights of self-government, the beneficial effect and even necessity of which were recognized by all European law systems[7].

On the other hand, M. Allerhand did not fully agree with the new definition of notary. Basing on the terms contained in the Code of Civil Procedure[8] (Article 223 § 1), he considered the notary to be a person of public trust. In terms of the legal system, the legal status of a notary public as a person of public trust was manifested in the fact that in performing his duties, despite not being a state official, he enjoyed, under Article 23 of the Law on Notaries, the legal protection similar to that of state officials[9]. M. Allerhand strongly opposed the bureaucratic approach to the institution of notary and the recognition of the notary as a state official. He

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[4] Article 124 § 2 and Article 144 of the Law on Notaries became effective at the date of publication.

[5] T. Chłopecki, *Kształtowanie się Prawa o notariacie w okresie II Rzeczpospolitej (1918–1939)*, „Rejent" 2013, no. 8, pp. 123–124; W. Natanson, *Stanowisko notariusza na tle ustrojowym według polskiego prawa o notariacie*, „Przegląd Notarialny" 1934, no. 7, p. 9; A. Oleszko, *Notariat…*, pp. 22–23; idem, *Prawo o notariacie. Część ustrojowa*, Kluczbork–Lublin 2009, pp. 126–127.

[6] W. Natanson, *op. cit.*, p. 7.

[7] J. Glass, *Rzut oka na polską ustawę notarialną*, „Przegląd Notarialny" 1933, no. 10, p. 24.

[8] Regulation of the President of the Republic of Poland of 29 November 1930 – Code of Civil Procedure (Journal of Laws 1930, no. 83, item 651 as amended), hereinafter: CCP.

[9] M. Allerhand, *op. cit.*, p. 14.

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believed that no notary office or even the appearance of such an office should be created. There should be a notary and his office, not a notary office with a head who is called a notary. Other members of the Codification Committee, i.a. S. Gołąb, K. Stefko[10], were also supporters of the concept of granting a notary the status of a person of public trust. J. Glass strongly disagreed with these views, taking the position that the notary cannot be considered a person of public trust, since he owes his position to a nomination[11].

In responses to the questionnaire of the journal "Przegląd Notarialny" concerning, *inter alia*, functions and aspects of the Polish notary system, Presidents of appellate courts C. Szyszko and B. Sekutowicz noticed that the functions and legal position of the notary include a combination of features of a civil servant and a liberal profession. In their opinion, however, regardless of the definition itself, in practice, the notary performed primarily the function of a man of public trust[12].

W. Natanson believed that despite the use of the term "public functionary", there was nothing to suggest that the legislature's intention was to associate the position of notary with the terminology of official legislation. He based his position on the ruling of the Supreme Court, which was issued under the Russian Notarial Law of 1866, according to which "the need for a separate status for notaries stems from the fact that their activities and duties are of a specific nature, separating the notaries from all other offices"[13]. Therefore, if under the then applicable notarial law considering notaries as state officials, the Supreme Court took the position that there was a need to distinguish notaries, all the more so under the Law on Notaries of 1933 the notary was not a state official. The legislature, in the course of work on the new organization of the system of notaries in Poland, had at his disposal a draft made by the Codification Committee, containing the definition of a notary as a state official, but did not adopt this position and clearly ignored it[14]. At the same time, according to W. Natanson, the notary was considered under the provisions of the Criminal Code and the Code of Civil Procedure as a person of public trust. However, the legislature did not use this term in Article 1 of the Law on Notaries, as it would have meant adopting the concept that the notary is a liberal profession of a public-law nature, supervised by state authorities. At the same time, the legislature has not gone in the opposite direction and has not recognized the notary as a state official. For the avoidance of any doubts, the lawmakers gave up the noun "official" in Article 1, even though they took as a basis the French text describing

[10] *Istota i waga funkcji notariatu*, „Przegląd Notarialny" 1937, no. 3–4, pp. 14–16.

[11] J. Glass, *op. cit.*, p. 24.

[12] *Współczesny notariat…*, p. 4, 5, 7.

[13] Judgement of the Supreme Court of 1 March 1924, case ref. no. 4/23, „Przegląd Notarialny" 1934, no. 7.

[14] W. Natanson, *op. cit.*, p. 7.

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the notary as a public official (*fonctionnaire*) and finally called the notary a public functionary. W. Natanson agreed with Professor W.L. Jaworski's position, according to which the legislature approached the position of notaries in a special way, creating a synthesis of elements of public official and liberal profession elements, referred to as a public function. He concluded that it was a shaky term, not interfering with the dualistic approach to the position of the notary[15].

According to J. Skąpski, the new Law on Notaries has not entirely resolved the dispute as to whether the notary is a state official or just a man of public trust or another kind of functionary. By using the term "public functionary", the new regulation treated the notary as a state official of a specific kind in many provisions[16].

THE INFLUENCE OF THE SCOPE OF POWERS WITHIN THE EXCLUSIVE COMPETENCE OF THE NOTARY ON HIS OR HER SYSTEMIC POSITION

The systemic position of notaries was significantly influenced by the scope of powers within their exclusive competence. Article 1 of the Law on Notaries generally defined the basic activities of a notary, including the drafting of deeds and documents which the parties were obliged to or wished to grant them public credibility. The duties of a notary were specified in Article 63 of the Law on Notaries, which included drawing up notarial deeds, issuing copies and extracts, drawing up attestations, delivering statements to the parties, taking minutes and records, protesting bills of exchange, cheques and other documents and accepting documents, money or securities for safekeeping. It was clear from the wording of Articles 1 and 63 of the Law on Notaries that notarial activities are listed therein by way of an example and the statutes could have instructed a notary to carry out other activities[17]. Pursuant to the provision of Article 142 of the Law on Notaries, the jurisdiction of courts in Małopolska to carry out activities that could have been drawn up by a notary ceased to exist, including in particular the right of courts to accept declarations of last will. In addition, courts lost, in favour of notaries, the right to authenticate signatures, the right to declare the copy in conformity with the original and the right to protest. Article 146 of the Law on Notaries introduced similar rules on the territory of the former Prussian partition[18].

The most important power conferred on notaries, however, was the drafting of documents. In accordance with Article 81 of the Law on Notaries, notaries drafted notarial deeds, which were public documents. The Law on Notaries did not de-

[15] *Ibidem*, pp. 8–9.
[16] *Istota i waga funkcji…*, p. 17.
[17] J. Glass, W. Natanson, *op. cit.*, pp. 85–86; D. Malec, *Dzieje notariatu…*, p. 175.
[18] M. Allerhand, *op. cit.*, pp. 184–188.

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fine the notion of public document, since the procedural law did so in Article 262 CCP[19]. The obligation to draw up legal acts in the notarial form *ad solemnitatem*, as an absolute condition for the validity of a declaration of intent, was in general defined by rules of substantive law[20]. The Law on Notaries expressly reserved the preservation in force of the provisions of other statutory laws that require the use of a notarial form (Article 128 of the Law on Notaries), including the relevant provisions of the Code of Obligations[21]. According to M. Allerhand, the parties could also make a deed in notarial form where that was not required by applicable law in order to give it a public character or to obtain the advantages which the law specified for a notarial deed. The notary had a public-law obligation to draft deeds and other documents to which the parties were obliged or wished to give the character of public credibility if there were no statutory obstacles to their making. The deeds were understood as notarial deeds and the documents referred to in Article 63 of the Law on Notaries, in particular minutes/records, attestations and protests[22].

Due to the delayed codification of the property law and the urgent need to arrange the legal situation in terms of real estate transactions, the legislature has decided to include in the Law on Notaries a provision imposing a compulsory notarial form in this respect[23]. According to Article 82 of the Law on Notaries contracts of transferring, restriction or encumbrance of the right of ownership of real estate should be drawn up in the form of a notarial deed to be valid. The powers of attorney under which those contracts were to be concluded before a notary also required the form of a notarial deed for their validity. However, the Law on Notaries provided for certain exceptions in this regard. Pursuant to Article 82 § 2, the form of notarial deed was replaced by a settlement, composition or court ruling[24]. The provision of Article 82 did not affect the powers of administrative authorities under special laws. The statutory provisions allowing the form of a private deed for contracts whose legal effectiveness was dependent on the authorization or approval of a competent territorial authority also remained in force (Article 129 of the Law on Notaries)[25].

In practice, the application of Article 82 of the Law on Notaries faced certain difficulties, especially in the area of the former Austrian partition. The provision enabling the replacement of a compulsory notarial form with a settlement before

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[19] S. Szer, *Prawo o notariacie. Komentarz do czynności notarialnych*, Warszawa 1934, pp. 54–55.

[20] J. Glass, W. Natanson, *op. cit.*, p. 30.

[21] Regulation of the President of the Republic of Poland of 27 October 1933 – Code of Obligations (Journal of Laws 1933, no. 82, item 598 as amended).

[22] M. Allerhand, *op. cit.*, pp. 15–17, 172.

[23] J. Glass, W. Natanson, *op. cit.*, p. 30, 102.

[24] A. Oleszko, *Notariat…*, p. 25; D. Malec, *Dzieje notariatu…*, p. 177; J. Glass, W. Natanson, *op. cit.*, p. 102.

[25] M. Allerhand, *op. cit.*, p. 172; D. Malec, *Z dziejów notariatu w Drugiej Rzeczypospolitej. Problem tzw. przymusu notarialnego*, „Rejent" 2000, no. 9, pp. 195–196.

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court (Article 82 § 2 of the Law on Notaries) became the basis for circumventing the statutory requirements. In order to prevent this, the Ministry of Justice explained that after just six months of the Law on Notaries in force, the court could draft a settlement only if the judge, after a detailed and thorough examination, came to the conclusion that the settlement concerned the right actually disputed between the parties[26].

Article 82 of the Law on Notaries has become the subject of criticism, especially in Małopolska, and has exacerbated the conflict between the notaries and advocates. Demands were raised to abolish the requirement of notarial assistance in real estate transactions, or alternatively to limit it with regard to contracts relating to real estate of lesser value, to allow the advocates to draft notarial deeds and, in this case, to limit the role of notaries to legalize them[27]. Attacks on Article 82 of the Law on Notaries were also conducted in the parliamentary forum. It was postulated that contracts relating to real estate with an area of up to 5 hectares be exempt from the obligation of notarial form[28]. This idea was not accepted by the Sejm, but the debate resulted in a significant reduction in the notary fee and stamp fees[29].

The importance of the notarial form for the certainty and security of legal transactions was stressed by the Supreme Court in the resolution of the whole Civil Chamber on 3 April 1937. The resolution points out that performing activities in a notary form protects the parties from transactions entered into hastily and without due consideration, excludes doubts as to the definitive nature of declarations of will and, above all, constitutes evidence independent on fallible human memory that the given act was actually performed[30].

S. Breyer noted that Article 82 of the Law on Notaries was an important step in the unification of the law in Poland, was beneficial for the State Treasury and met the demands of the public interest[31].

Article 1 of the Law on Notaries also obliged notaries to perform other activities set out in law. Pursuant to Article 79 § 1 of the Law on Notaries, notaries charged state and municipal fees. In the light of the Act on Stamp Fees, notaries were official bodies competent to levy and collect stamp fees on notarial deeds drawn up

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[26] S. Guzikowski, *Przymus notarialny w Małopolsce wobec obchodzenia § 1 art. 82 pr. o not.*, „Przegląd Notarialny" 1934, no. 18, p. 4.

[27] *Akcja przeciwko przymusowi notarialnemu*, „Przegląd Notarialny" 1936, no. 21, pp. 6–7; *Niesłychane wystąpienie adwokatury Małopolskiej*, „Przegląd Notarialny" 1936, no. 13–14, p. 29; W.D. Paszkowski, *Projekty aktów notarialnych i taksa notarialna*, „Przegląd Notarialny" 1934, no. 24, pp. 3–5.

[28] *Forma notarialna. Istota funkcji notariatu – znaczenie przymusu formy notarialnej – sprawa kosztów czynności notarialnych*, „Przegląd Notarialny" 1937, no. 23, p. 7.

[29] *Wobec zapowiedzi obniżenia taksy notarialnej*, „Przegląd Notarialny" 1938, no. 2, pp. 3–4; *Obniżenie taksy notarialnej*, „Przegląd Notarialny" 1938, no. 13–14, p. 6.

[30] Resolution of the Civil Chamber, l.C.Prez.5/36, „Przegląd Notarialny" 1937, no. 13–14, p. 26.

[31] S. Breyer, *Przymus notarialny w ogniu krytyki*, „Przegląd Notarialny" 1934, no. 5, p. 8.

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with their assistance and on original documents presented to them for the purpose of performing official activities[32]. In the former Austrian partition, notaries also acted as court commissioners[33].

SYSTEMIC POSITION OF THE NOTARY UNDER THE PROVISIONS OF SECTION I OF THE LAW ON NOTARIES OF 1933

The designation of a notary in Article 1 of the Law on Notaries of 1933 as a "public functionary" and the scope of notarial activities defined by the legislature (Article 1 § 1 in conjunction with Article 79 of the Law on Notaries) do not yet allow for a precise determination of the position of the notary in the legal system. The doubts noted above and terminological difficulties in this respect make it necessary to analyze the provisions of Section I entitled "System of Notaries". Only an appropriate interpretation of the provisions of this part of the regulation may cast more light on the systemic position of a notary under the first Polish notary law[34].

In accordance with the generally accepted view that the state, when entrusting notaries with activities as part of non-contentious justice, must have exclusive powers of the appointment of notaries, Article 6 of the Law on Notaries introduced the principle of nomination of notaries by the Minister of Justice. The Minister's decision in this respect was made at his discretion and neither professional self-government bodies nor judicial supervisory bodies took part in taking this decision[35]. Before appointing a notary, the Minister of Justice was not obliged to consult the president of the appellate court or district court and the opinion of the notary council about the person to be appointed. However, he could do so and decide that applications for the position of notary must be submitted through these bodies[36]. Unlike the notarial laws of other countries, the new regulation did not provide for rules governing the nomination procedure, including the obligation to hold a competition or this post. The solution adopted, which was modeled on the procedure used in the former Russian partition, was subject to criticism, as it sought to influence informally the choice of the nominee, and also caused too much haste in the process of nomination. There were proposals to introduce, by

[32] J. Szczygielski, *Uprawnienia i obowiązki notariusza i wydziału hipotecznego*, „Notariat – Hipoteka" 1938, no. 9–10, p. 95.

[33] S. Guzikowski, *Notariusz jako funkcjonariusz publiczny i jako komisarz sądowy na tle art. 82 prawa o notariacie i patentu niespornego z 1854 roku*, „Przegląd Notarialny" 1935, no. 8, pp. 6–9.

[34] A. Oleszko, *Prawo o notariacie. Część…*, pp. 126–128.

[35] Idem, *Prawo o notariacie. Komentarz. Część I (art. 1–78)*, Warszawa 2011, p. 289; S. Stein, *Prawo o notariacie w świetle dwuletniej próby życia*, „Przegląd Notarialny" 1936, no. 3–4, pp. 9–10; A. Oleszko, *Ustrój polskiego notariatu*, Kraków 1999, p. 39.

[36] M. Allerhand, *op. cit.*, p. 23; A. Oleszko, *Notariat…*, p. 22.

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means of a regulation implementing Article 6 of the Law on Notaries, provisions governing the appointment of notaries through a competition[37]. The decision of the Minister of Justice on the nomination was of a personal nature. Therefore, there was no right of appeal against it[38].

An appointed notary could be a person who met the requirements laid down in the Law on Notaries. At the same time, it was considered that the appointment as a notary of a person who did not meet them was valid, since whether the person concerned was a notary was determined by the very act of appointment. The notarial activities carried out by such a notary were valid and could only be removed through penal or disciplinary action[39].

The notary should have appeared at the president of the competent regional court to take up his post within 14 days from the date of receipt of the official notification of appointment, possibly from the date of dismissal from previous duties in the state service. Unjustified failure to appear within this period gave the Minister of Justice the right to annul the nomination (Article 9 of the Law on Notaries)[40].

When taking up their positions, the notaries took an oath to the president of the regional court. The notary's oath was similar in content to the advocate's oath, but in addition, notaries swore to pay obedience and respect to their superior authorities[41].

The Law on Notaries of 1933 was based on the principle of lifetime appointment of notaries and their non-transferability. The appointment of a notary for a certain period of time, and the commitment of a notary to vacate his post after that period, a solution that had been used at the area of the former Prussian partition, was unacceptable[42]. However, the principle of appointment of a notary for an indefinite period was infringed in the new regulation. In the light of Article 125 of the Law on Notaries, within ten years of the entry into force of the new law, the Minister of Justice was authorized, in the event of a vacant position of notary, to delegate temporarily a judge or prosecutor to perform the duties of notary. This provision applied to judges and prosecutors of all courts, both general and military and administrative courts[43]. The delegated judge or prosecutor carried out activities on his own, used his own seal, but could not attend the general meeting and could not be a member of the notary board or a member of the examination board[44]. That provi-

[37] S. Stein, *Prawo notariacie*…, p. 10.

[38] I. Szymczak, *Funkcje ustrojowe oraz zadania zawodowe samorządu notarialnego (rozważania prawnoporównawcze)*, „Rejent" 1997, no. 10, p. 106; A. Oleszko, *Prawo o notariacie. Komentarz*…, pp. 289–290.

[39] M. Allerhand, *op. cit.*, pp. 24–25.

[40] D. Malec, *Dzieje notariatu*…, p. 178.

[41] M. Allerhand, *op. cit.*, p. 30.

[42] *Ibidem*, pp. 23–24.

[43] J. Glass, W. Natanson, *op. cit.*, p. 128; D. Malec, *Dzieje notariatu*…, p. 169.

[44] M. Allerhand, *op. cit.*, pp. 170–171.

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sion constituted an important breach in the general principle of the appointment of notaries. Due to the long transition period, the principle of lifelong appointment of notaries was not fully implemented before the outbreak of World War II[45].

Cases in which a notary could be dismissed from the post are listed in Article 12 § 1 of the Law on Notaries. The Minister of Justice could dismiss a notary public at his request, when due to a physical disability or loss of physical or mental strength he became permanently incapable of service, in the event of the loss or limitation of civil rights under a court ruling, and also as a result of a disciplinary sentence. The mere declaration of a notary on his resignation did not result in the loss of the post. The notary was obliged, under the pain of disciplinary and financial liability, to perform his duties until released[46].

Notaries appointed before the entry into force of the Law on Notaries generally retained their rights. However, in the transitional period from 29 October 1933, i.e. the date of announcement of the new Law on Notaries, until its entry into force on 1 January 1934, the Minister of Justice obtained, under Article 124 § 2 of the Law on Notaries, the right to transfer notaries without their consent to other places and to dismiss them from their positions[47]. He largely exercised this right, which resulted in serious personnel changes in the Polish notary system. More than 300 existing notaries were removed and new ones were appointed at the same time, many of whom were judges and prosecutors, often retired[48]. The suspension of the principle of non-transferability for organizational reasons was provided for in Article 11 of the Law on Notaries. The Minister of Justice could, without the consent of the notary, transfer him to another town in the event of the liquidation of his position in the previous town[49].

An important exception to the principle of non-transferability was the possibility of transferring a notary to another town for the sake of the service. The decision in this respect belonged to the Minister of Justice, but could only be taken at the request of the notary council or the president of the court of appeal (Article 12 § 3 of the Law on Notaries). The question of whether the sake of the service required the transfer of a notary was assessed by the Minister of Justice at his discretion, once the notary was allowed to provide explanations[50].

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[45] D. Malec, *Notariat*..., p. 288.

[46] M. Allerhand, *op. cit.*, pp. 31–32.

[47] J. Glass, W. Natanson, *op. cit.*, p. 127; D. Malec, *Reorganizacja i zmiany polskiego notariatu po wprowadzeniu zunifikowanego prawa o notariacie z 27 października 1933 roku*, „Nowy Przegląd Notarialny" 2004, no. 4, p. 115.

[48] D. Malec, *Kwalifikacje zawodowe notariuszy w II Rzeczypospolitej*, „Rejent" 2001, no. 10, pp. 167–168.

[49] J. Glass, W. Natanson, *op. cit.*, p. 38.

[50] M. Allerhand, *op. cit.*, pp. 32–35.

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In Article 2 of the Law on Notaries, the legislature introduced the *numerus clausus* rule, according to which the number of notaries and their seats in the area of each regional court was to be designated by the Minister of Justice by way of ordinances[51]. On 1 January 1934, the Minister of Justice determined the new number of notaries at 780 nationwide, reducing the number of posts across the country by nearly 100[52]. In the following years, the number of notaries gradually increased. The last ordinance of the Minister of Justice in the inter-war period set the number of notaries at 845, thus approaching the number that existed before the entry into force of the Law on Notaries[53].

The new Law on Notaries of 1933 adopted the principle that the office of notary cannot be combined with any other profession or state official post. The prevailing view was that the combination of a post of notary with any state official post, in particular a judicial one, as well as the combination with the profession of advocate, could not take place without express prejudice to the judiciary[54].

In the light of Article 15 of the Law on Notaries, a notary was not permitted to hold any state office, with the exception of the posts of a professor, associate professor or lecturer in academic schools, provided that such a post did not prevent him from performing official duties. A notary could also be a deputy professor, deliver lectures and also take up the position of assistant[55].

In view of the notary's peculiar position, Article 16 of the Law on Notaries prohibited a notary from performing incidental activities which would interfere with the performance of his official duties or were contrary to the gravity or dignity of his position. In particular, he was not allowed to run commercial, industrial and brokerage businesses. The notary was obliged to notify the president of the regional court, who, having consulted the notary council, decided whether the occupation concerned was covered by the prohibition under Article 15 or 16 (Article 17 of the Law on Notaries). There was also a notification obligation where the notary was of the opinion that a specific occupation was admissible and did not prevent him from performing his notarial duties. The decision of the president of the regional court was final and it was not subject to appeal to the Supreme Administrative Tribunal[56]. The ban on running commercial and industrial businesses was considered to be

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[51] *Ibidem*, pp. 17–18; D. Malec, *Dzieje notariatu…*, p. 168; A. Oleszko, *Prawo o notariacie. Część…*, p. 30.

[52] *Ustalenie stanowisk notariuszów. Od 1 I 1934 r. – 780 notariuszów w państwie*, „Przegląd Notarialny" 1933, no. 12, p. 17.

[53] *6 nowych stanowisk notariuszów. Od 11 VII 1939 r. – 845 notariuszów w państwie*, „Przegląd Notarialny" 1939, no. 15–16, p. 6.

[54] S. Stein, *Ogólna charakterystyka nowej ustawy notarialnej*, „Przegląd Notarialny" 1933, no. 12, p. 3.

[55] M. Allerhand, *op. cit.*, pp. 38–39; D. Malec, *Dzieje notariatu…*, p. 173.

[56] M. Allerhand, *op. cit.*, pp. 40–43.

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interpreted broadly. It included not only being registered with the commercial register, but also the actual participation in the management of the company, in person or by substituted persons. On the other hand, notaries were allowed to hold shares in commercial companies and to participate in general meetings of shareholders, supervisory boards and audit committees[57].

The prohibition on combining practicing as an advocate and as a notary was not clearly expressed in the new regulation, but indirectly resulted from Articles 15–17 of the Law on Notaries and from the introductory provisions applicable for the former Prussian partition, which, upon the entry into force of the Law on Notaries, repealed the provisions enabling the notary to practice as an advocate at the same time. Article 144 of the Law on Notaries imposed on notaries practicing in this area also as advocates an obligation to declare to the Minister of Justice whether they intend to remain notaries within one month from the date of publication of the new notarial law[58].

Pursuant to Article 3 of the Law on Notaries, the notary carried out his activities in the area of the regional court in which he was seated, regardless of the place of residence of the persons and the location of the place concerned. The seat of the notary was defined by the place of his permanent office, specified in the act of nomination[59]. An act made by a notary outside the area of the competent regional court had no notarial effect, it was invalid if according to the Law a notary form was required for its validity. In other cases, such a document was a private document, but the date on it could be regarded as a certain date, although it was certified by a notary not authorized to act[60].

A notary could only have one office in his area (Article 18 § 1 of the Law on Notaries). For the sake of public interest, the Law on Notaries introduced an institution of so-called notarial sessions, allowing a notary to take office on designated days in a place outside his official seat. However, this could only be done upon an order of the president of the regional court, issued after consulting the notary council (Article 18 § 2 of the Law on Notaries)[61].

Since the notary was acting in the capacity of a public official, he was obliged to be available at the office on weekdays, for at least 7 hours a day and in urgent cases even in non-official hours and on Sundays and public holidays. In principle, the notary carried out notarial activities only in person (Article 19 of the Law on

[57] J. Glass, W. Natanson, *op. cit.*, p. 42.
[58] S. Stein, *Ogólna charakterystyka…*, p. 3; D. Malec, *Reorganizacja i zmiany…*, p. 115.
[59] J. Glass, W. Natanson, *op. cit.*, p. 32.
[60] M. Allerhand, *op. cit.*, pp. 18–19.
[61] D. Malec, *Dzieje notariatu…*, p. 178; S. Stein, *Ogólna charakterystyka…*, p. 2.

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Notaries). In exceptional cases, however, he could use in the performance of his duties the help of his deputy, who could only be an assistant notary[62].

In the light of Article 13 of the Law on Notaries, the notary was obliged to guard the gravity and dignity of his position and to carry out his duties in accordance with the law and conscience. Notaries were not allowed to carry out acts contrary to law, public order or morality (Article 64 of the Law on Notaries). An act opposed to the law if, according to a statutory provision, was invalid or justified an appeal and where, being valid, exposed a party to adverse effects[63]. Nor could the notary perform activities which concerned himself, his spouse, relatives or relatives with lineal consanguinity or affinity without limiting the degree and collateral consanguinity to the fourth and third degree inclusive. The prohibition also covered persons related to the notary by adoption, foster care or guardianship and institutions or companies in the governing bodies of which the notary was a member (Article 65 § 1 of the Law on Notaries). A notarial deed made in breach of that prohibition had no force of a public document (Article 88 of the Law on Notaries). That effect took place automatically and it was therefore not necessary for a judicial ruling to be given in advance declaring the act to be devoid of the force of a public document[64]. For making an unlawful act, the notary could be held liable under civil law (Article 43 of the Law on Notaries), disciplinary action, as a misconduct of service (Article 44 of the Law on Notaries), and even held liable under criminal law (Article 286 of the Criminal Code[65]). However, a notary may have been exposed to similar liability for an overtly unfounded refusal to perform an activity[66]. The provisions of Articles 64 and 65 of the Law on Notaries not only prohibited such acts, but at the same time did not allow a notary to refuse to perform a notarial activity for other reasons. The review of the reasons of the refusal was the responsibility of the regional court having jurisdiction over the location of the office of the notary (Article 66 § 1 of the Law on Notaries)[67].

Notaries, when exercising preventive jurisdiction, were obliged not only to previously check the admissibility of a specific notarial deed, but also at the request of the parties, or on their own initiative when they deemed it necessary, to instruct the parties with all necessary explanations regarding the legal aspects of the deed (Article 2 of the Law on Notaries).

According to Article 14 § 1 of the Law on Notaries, the notary was obliged to keep confidential the circumstances which he learned about when holding his

[62] S. Stein, *Ogólna charakterystyka…*, p. 4.

[63] M. Allerhand, *op. cit.*, pp. 95–96.

[64] D. Malec, *Dzieje notariatu…*, p. 175; M. Allerhand, *op. cit.*, pp. 97–100.

[65] Regulation of the President of the Republic of Poland of 11 July 1932 – Criminal Code (Journal of Laws 1932, no. 60, item 571 as amended).

[66] J. Glass, W. Natanson, *op. cit.*, pp. 88–89.

[67] S. Szer, *op. cit.*, pp. 17–22.

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position. This provision did not specify precisely the nature of the information to be kept in secret by the notary, or the circumstances of their acquisition. Only the later interpretation of the provisions, as well as placing them in Chapter III on the obligations and rights of notaries, defined the notion of professional secrecy. They included all the information about which the notary learned while performing his professional duties[68].

The obligation of secrecy ceased in cases provided for by law and when the notary testified as a witness before the court (Article 14 § 2 of the Law on Notaries). The provisions of the Law on Notaries do not specify cases where the obligation to maintain secrecy ceased by operation of law. This obligation continued even after the notary had been dismissed from his post[69].

SYSTEMIC POSITION OF THE NOTARY AS VIEWED BY THE JUDICATURE

The judicature also made an attempt to precise the position of a notary under the first Polish Law on Notaries. In a resolution of the Civil Chamber of 1934, the Supreme Court stated that since the notary was defined in Article 1 of the Law on Notaries as a public functionary, his activity falls within the scope of state activity. The fact that the terms "public official" or "state official", proposed in the earlier drafts of the notarial act, was replaced in the course of further works with the words "public functionary", indicated the desire to note that the notary was not an official within the meaning of the acts on official relations of state officials, but that he was an official person of a special kind. Membership in the Chamber of Notaries, and thus a certain professional autonomy, did not waive this character[70]. Combining the feature of public credibility with deeds or documents drawn up by a notary (Article 1 of the Law on Notaries), stating that a notarial deed is a public document (Article 81 of the Law on Notaries) and stating that the notary has exclusivity in the field of documentation (Articles 142 and 146 of the Law on Notaries), the Law on Notaries indicated that it was about the activity of an official body and its activities were a manifestation of state activity. In the opinion of the Supreme Court, this was also manifested in the terminology used in many provisions of the Law on Notaries, which referred to the "service" of the notary (Article 12 § 1 point 2 of the Law on Notaries), his "official duties" (Article 16 of the Law on Notaries), the "official seat" (Article 18 of the Law on Notaries), about the "notary official language" (Article 4

[68] R. Sztyk, *Tajemnica zawodowa notariusza*, „Rejent" 1998, no. 9, p. 54.

[69] *Ibidem*, p. 55.

[70] Resolution of the Civil Chamber, l.C.Prez.15/34, „Przegląd Notarialny" 1935, no. 13–14, p. 27; A. Oleszko, *Prawo o notariacie. Komentarz…*, p. 289.

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of the Law on Notaries), the "legal protection of state officials" (Article 23 of the Law on Notaries)[71]. The fact that the notary was a public functionary was also evidenced by the fact that he remained in an official relationship of subordination with the state authority, seen in the rules for appointment, release or transfer. The resolution stated that the notary was a paid state official belonging to the group of persons performing paid state service within the meaning of Article 17 of the March Constitution. It was assumed that this provision also covered a state service, which was paid from non-state funds[72].

The issue of the systemic position of the notary was also raised in the Supreme Administrative Tribunal's judgement concerning tax on premises intended for notarial offices (no. reg. 8852/34). The judgement noted that the provisions of the Law on Notaries of 1933 could not be understood as recognizing the notary as a state official. It was stressed that the lawmakers, using in Article 1 the term "public functionary", and not "state official", and giving notaries in Article 23 of the Law on Notaries the legal protection enjoyed by state officials, wanted to clearly emphasize the existing differences between them. The different treatment of the notary by the legislature was also evidenced by the provision of Article 24 § 2 of the Law on Notaries, which made it possible to combine the position of a notary with being paid a state pension. Due to the fact that no one could be both a pensioner and a state official, it was clear that the notary was not a state official. According to the Supreme Administrative Tribunal, notaries did not perform their activities in the public interest but in the private interest of the parties, and in the light of the provisions of the Code of Civil Procedure they were persons of public trust[73].

An interesting evolution of views on the legal nature of the position of notaries can be observed in the judicial decisions of the Supreme Court. In 1933, the Supreme Court explained that in the meaning of the Criminal Code, when it comes to certifying a false circumstance (the so-called intellectual falsehood), a notary is not an official, but a person of public trust (1K.519/33)[74]. In 1937, however, the Supreme Court decided that in the light of the applicable legislation, a notary is a public official, whose duties and rights are shaped according to the rules set out for officials. Therefore, notaries were to be criminally liable for criminal acts committed when performing their official duties, in accordance with the provisions of

[71] Resolution of the Civil Chamber, l.C.Prez.15/34, pp. 27–28.

[72] *Ibidem*, p. 28.

[73] *Istota stanowiska notariusza. Wyrok N.T.A. w sprawie podatku od lokali od kancelarii notarialnych*, „Przegląd Notarialny" 1937, no. 1, p. 23; A. Oleszko, *Prawo o notariacie. Komentarz…*, p. 289.

[74] *Odpowiedzialność notariusza za poświadczenie nieprawdy*, „Przegląd Notarialny" 1934, no. 6, p. 22.

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Chapter 41 of the Criminal Code on civil servant offences[75]. The rights and duties of a notary were likewise defined in 1938 by the Supreme Court in a judgement concerning the issue of defamation of a notary. By deeming the notary an official, the Supreme Court took the position that the prosecution of his defamation may take place at the request of the president of the competent regional court as the authority superior to the official[76]. The interpretation recognizing the presidents of courts as the "superior authority" over the official was subject to criticism. It was pointed out that in principle they only supervise notaries[77].

Taking into account the views expressed in the case law of the Supreme Court, a clear tendency to emphasize the civil servants' elements in the position of notaries can be observed over the years. This did not, however, affect the general feeling of being part of a liberal profession whose members performed public activities[78].

CONCLUSION

The above analysis of the position of the notary in the light of the Law on Notaries of 1933 indicates that there are serious difficulties in defining it precisely, both among the scholars in the field and the judicature. To determine precisely how the position of the notary was shaped by the first Polish Law on Notaries, it is necessary to perform a more in-depth analysis of the provisions of that regulation with regard to the supervision of the notary system and notaries, the disciplinary and compensation liability of notaries, the professional self-government of notaries and the rules of preparation for the profession of notary. These issues have a significant impact on the final shape of the notary's position within the legal system. However, due to editorial limitations, these issues will be addressed in the second part of this article, along with final conclusions.

[75] Judgement of the Supreme Court, case ref. no. 2K732/37, „Przegląd Notarialny" 1938, no. 13–14, pp. 35–36.

[76] Judgement in the case 3K 3152/37, „Przegląd Notarialny" 1939, no. 6, p. 17.

[77] W.N., *Tryb ścigania zniewagi notariusza*, „Przegląd Notarialny" 1939, no. 7, pp. 14–15.

[78] D. Malec, *Notariat…*, p. 282.

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STRESZCZENIE

Początki współczesnego notariatu polskiego sięgają okresu Drugiej Rzeczypospolitej. Pod koniec I wojny światowej instytucja notariatu na ziemiach polskich była ukształtowana w sposób niejednolity. Obowiązywały trzy odrębne organizacje notariatu, w różny sposób regulujące pozycję ustrojową notariusza, jego zadania i funkcje. Wraz z odrodzeniem Państwa Polskiego powstało zagadnienie unifikacji notariatu. Prace nad tym przełomowym zadaniem trwały kilkanaście lat i zakończyły się powstaniem Prawa o notariacie z dnia 27 października 1933 r. Celem artykułu jest precyzyjne określenie pozycji ustrojowej notariusza na gruncie pierwszego polskiego Prawa o notariacie. Art. 1 rozporządzenia określał notariusza jako funkcjonariusza publicznego powołanego do sporządzania aktów i dokumentów, którym strony obowiązane były lub pragnęły nadać znamię wiary publicznej, a także do spełniania innych czynności zleconych mu przez prawo. Próby definicji pojęcia „funkcjonariusz publiczny" ujawniły liczne problemy terminologiczne i stworzyły konieczność przeprowadzenia badań nad zagadnieniem stanowiska notariusza zarówno pod kątem doktrynalnym, jak i w ujęciu dogmatycznym. W celu określenia pozycji ustrojowej notariusza w niniejszym artykule poddano

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szczegółowej analizie użyte w art. 1 Prawa o notariacie określenie „funkcjonariusz publiczny", poglądy najwybitniejszych przedstawicieli nauki prawa w Polsce na ten temat oraz przedmiotowy zakres czynności notariusza. Ujawnione w toku tych czynności wątpliwości i trudności terminologiczne doprowadziły do głębszej analizy przepisów Działu I Prawa o notariacie zatytułowanego „Ustrój notariatu" (przepisy Rozdziałów I–III) oraz orzecznictwa. Podjęta w opracowaniu próba jednoznacznego sprecyzowania stanowiska notariusza na gruncie pierwszego polskiego Prawa o notariacie nie przyniosła jednak w pełni zadowalającego rezultatu. Dokonana analiza pozycji ustrojowej notariusza w świetle Prawa o notariacie z 1933 r. wskazuje na istnienie poważnych trudności w precyzyjnym jej określeniu, zarówno wśród przedstawicieli doktryny, jak i judykatury. Do jej pełnego ustalenia niezbędna okazała się bliższa analiza postanowień Prawa o notariacie, dotyczących nadzoru nad notariatem i notariuszami, odpowiedzialności dyscyplinarnej i odszkodowawczej notariusza, samorządu zawodowego notariatu oraz zasad przygotowania do zawodu notariusza. Zagadnienia te mają istotny wpływ na ostateczny kształt pozycji ustrojowej notariusza. Ze względu na ograniczenia redakcyjne kwestiom tym i wnioskom końcowym poświęcona będzie druga część niniejszego artykułu.

Słowa kluczowe: notariusz; notariat; pozycja ustrojowa; funkcjonariusz publiczny