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

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

ABSTRACT

The article addresses the notary's systemic position under the first Polish Law on Notaries of 27 October 1933. The analysis of the position of the notary carried out in part one of this article pointed to serious difficulties in the precise defining of this position, both among the scholars in the field and the judicature. To precisely define the systemic position of the notary, part two has provided an analysis of the provisions of the Law on Notaries regarding the professional self-government of notaries, supervision over notaries and their activities, disciplinary liability and compensatory liability of the notary, and the rules of preparation for the profession of notary. The analysis of the Law on Notaries of 1933 presented in the first and second part of this article, leads to the conclusion that the notary's position included in its legal position a combination of features of a public officer and a liberal profession. The legislature, 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 while at the same time underlining their close relationship to the state. The adoption of such a definition made it possible to grant notaries a wide range of powers. At the same time, it provided the basis to establish a professional self-government and entrust its bodies with significant powers in the area of disciplinary jurisdiction. The dualistic approach to the position of the notary was also reflected in the separate rules of training for the profession and in the special rules of notary's liability for damages. The state, by entrusting notaries with activities related to non-contentious judiciary, secured for itself an exclusive influence on the staffing of notary positions and covered the system of notaries by a strict supervision exercised by the Minister of Justice. The discussion presented in the article leads to a conclusion that

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the legislature approached the position of a notary in the Law on Notaries of 1933 in a special way, creating a combination of official and professional elements, which can be called a public function. In terms of the political and administrative system, regardless of the definition itself, the notary in practice performed the function of a person of public trust.

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

INTRODUCTION

The analysis of the position of the notary in the light of the Law on Notaries of 1933,[1] presented in part one of this article, pointed to serious difficulties in the precise defining of this position, both among scholars in the field and the judicature. 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) did not allow for a precise determination of the position of the notary in the legal system. The doubts noted therein and terminological difficulties in this respect made it necessary to analyse the provisions of Section I of the Law on Notaries entitled "System of Notaries". However, editorial limitations prevented an exhaustive analysis of all the issues regulated in this section, which had a significant impact on the final shape of the systemic position of notaries.

To clearly define the systemic position of a notary under the first Polish Law on Notaries, part two of this article also provides a more detailed analysis of the provisions of this regulation regarding the professional self-government of notaries, supervision over notaries and their activities, disciplinary liability and compensatory liability of the notary and the rules of preparation for the profession of a notary.

SELF-GOVERNMENT OF NOTARIES

The Law on Notaries of 1933 provided notaries with the professional self-government.[2] In the course of work on a uniform act on notaries, the establishment of a nation-wide notarial self-government was one of the most important postulates for the future organisation of the system of notaries.[3]

Pursuant to Article 25 § 1 of the Law on Notaries, a chamber of notaries was established at the seat of each appellate court, covering the district of a given

[1] Regulation of the President of the Republic of Poland of 27 October 1933 – Law on Notaries (Journal of Laws 1933, no. 84, item 609, as amended).

[2] A. Oleszko, *Prawo o notariacie. Część ustrojowa*, Kluczbork–Lublin 2009, p. 30.

[3] W.L. Jaworski, *Reforma notariatu*, Kraków 1929, p. 95.

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appellate court with its scope of activity. The chamber of notaries, as a form of public professional association, used to bring together all the notaries in the area of jurisdiction of the appellate court. Each chamber of notaries had legal personality, so it could be the subject of rights and obligations, purchase and sell real estate, and sue or be sued. The legal seat of the chamber was the city where the seat of the appellate court of appeal was located.[4] Notaries were required to pay annual fees for the needs of the chamber (Article 22 § 1). Upon the entry into force of the Law on Notaries, on 1 January 1934, seven chambers of notaries began operating in the districts of appellate courts in Warsaw, Lublin, Wilno (Vilnius), Poznań, Katowice, Kraków and Lwów (Lviv).[5]

In the light of Article 26 (1) of the Law on Notaries, the legislative and decision-making body of the chambers was the general meeting of notaries. General meetings of notaries used to be held at the seat of the chamber and could be either ordinary or extraordinary (Article 27 § 1). Ordinary meetings were to be held each year in May, and extraordinary meetings were to be convened as needed, within one month of the order of the president of the appellate court, a resolution of the notary council or a request of at least one-fifth of notaries-members of the chamber (Article 27 § 2). The Law on Notaries also distinguished the third type of general meetings of an organisational nature. They were to be convened only once in order to organise the notarial self-government, within one month from the entry into force of the new regulations (Article 126).

All notaries who were members of the chamber were obliged to participate in general meetings (Article 27 § 3). At the general meeting of the chamber, assistant notaries and trainee notaries were also entitled to attend and take the floor, but without the right to submit motions and vote (Article 61). Failure to appear at the general meeting without sufficient justification produced within 8 days after the date of the meeting resulted in a penalty for breach of order in the form of a fine of up to 100 zlotys (Article 27 § 4).[6]

The scope of activities of the general meeting is regulated in Article 28 of the Law on Notaries. The general meeting, as the legislative body, was responsible for the election of members of the notary council, approval of the annual report and annual financial statements presented by the notary council, as well as the adoption of the budget and the amount of the annual fee for the needs of the chamber (Article 28 items (1) to (3)). The meeting could also establish a welfare fund and compulsory

[4] J. Glass, W. Natanson, *Prawo o notariacie*, Warszawa 1934, pp. 49–50; D. Malec, *Dzieje notariatu polskiego*, Kraków 2007, p. 183.

[5] D. Malec, *Notariat Drugiej Rzeczypospolitej*, Kraków 2002, pp. 350–351.

[6] M. Allerhand, *Prawo o notariacie*, Lwów 1934, pp. 54–55, 92–93; D. Malec, *Sukcesy unifikacji: działalność samorządu notarialnego po wejściu w życie Prawa o notariacie z 27 października 1933 roku*, "Nowy Przegląd Notarialny" 2005, no. 1, pp. 122–123.

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insurance for the event of death or incapacity for work of members of the chamber (Article 28 (4)). Moreover, its responsibilities covered also general matters related to the operation of the system of notaries, presented by the notary council, and to process requests in such matters (Article 28 items (5) to (6)). These requests should be submitted by at least 10 notaries at least 14 days before the date of the meeting. The submission of general requests by individual notaries was therefore inadmissible. The responsibilities of the general meeting also included adopting its own regulations following a motion from the notary's council (Article 30 § 2).[7]

Resolutions of the general meeting were valid irrespective of the number of attendees and were adopted by a simple majority of votes. In the event of a tied vote, the chairman had the casting vote (Article 29 § 1). The same rules applied to elections, except that in the event that none of the candidates obtained an ordinary majority, the further election was to take place between those who obtained the largest number of votes (Article 29 § 2). Resolutions of the general meetings were to be implemented by the notary councils (Article 34 (8)). The general meeting used to be opened by the president of the notary council or his deputy, then the chairman and deputy chairman were elected (Article 30 § 1). The presiding board of the general meeting could not include members of the then current notary council.[8] The protocols of the general meeting had to be drawn up, and the notary council presented it to the president of the appellate court (Article 40).[9]

The executive and managing body of the chambers of notaries were notary councils. The number of members in individual chambers could vary from 9 to 13 members depending on the total number of notaries in a given district of the appellate court (Article 31). The largest composition for chambers with over 200 notaries has never been appointed, because even the Warsaw chamber did not manage to exceed this threshold.[10]

Members of the notary council were elected by the general meeting of the chamber in a secret ballot (Article 28 (1), Article 29 § 3). The notary elected as a member of the council could not refuse to accept the mandate (Article 29 § 4). Both the failure to accept the mandate and the early resignation from the membership of the council could be considered a breach of the dignity of the notary profession and entail disciplinary liability.[11] The term of office of the council members was 3 years, with one-third of the members to step down each year according to seniority. The stepping down members could only be re-elected one year after they stepped down (Article 29 § 4).

[7] M. Allerhand, *op. cit.*, pp. 57–59.
[8] J. Glass, W. Natanson, *op. cit.*, p. 54.
[9] M. Allerhand, *op. cit.*, p. 59.
[10] D. Malec, *Dzieje notariatu polskiego…*, p. 185.
[11] J. Glass, W. Natanson, *op. cit.*, pp. 53–54.

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The notary council used to assume its activities on June 1 each year. At the first meeting, it elected its president and deputy president, disciplinary judges and disciplinary officers from among its members, and divided the activities among its other members. The president and deputy president should live in the town which is the seat of the chamber (Article 32 § 1). This requirement was also understood as the necessity for them to have an official premise in the town which constitutes the seat of the chamber.[12] The other members of the council could live in other localities, as long as their offices were located within the area of jurisdiction of the appellate court.[13] Promptly after its establishment, the notary council used to notify the president of the appellate court and the presidents of regional courts of a given appellate court's district about its composition (Article 32 § 2).

The notary council was managed and represented by the president or, as a substitute, by the deputy president, as set out in the council regulations (Article 33). The president also chaired the meetings and implemented resolutions of the council.[14]

Pursuant to Article 34 of the Law on Notaries, the scope of activities of the notary council was to ensure that notaries, assistant notaries and trainee notaries perform their duties duly and that they respect the dignity of the notary profession (item 1). The council participated in disciplinary courts, managed the professional education of notary trainees (items 2 and 4) and maintained registers of notaries, assistant notaries and trainee notaries (item 9). Its responsibilities also included amicable settlement of disputes between notaries, assistant notaries and trainee notaries related to the performance of official duties, if the public interest was not infringed (item 5). At the request of the parties and the notary, the council determined the amount of fee due according to the provisions (item 3) and appointed a notary public to perform a specific activity free of charge or with a reduced charge for the party who declared himself/herself a destitute person (item 6). When performing executive functions, the council used to convene the meetings of the chamber and implemented its resolutions (item 8), administered the chamber and managed its assets (item 7) and performed other activities provided for by law (item 11). These included, among other things, submitting applications regarding the transfer of a notary to a different position (Article 12 § 3) and issuing opinions on official hours in the chamber's district (Article 19 § 1).[15] The notary council also adopted its regulations (Article 34 (10)).

For the resolutions of the notary council to be valid, the quorum of at least half of the members was required. Resolutions were adopted by an ordinary majority

[12] M. Allerhand, *op. cit.*, pp. 60–61.

[13] J. Glass, W. Natanson, *op. cit.*, p. 55.

[14] *Ibidem*, p. 56.

[15] W. Natanson, *Prawo o notariacie w zestawieniu systematycznym. 3. Zakres działania Rady Notarialnej*, "Przegląd Notarialny" 1933, no. 12, p. 8; D. Malec, *Dzieje notariatu…*, p. 186.

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of votes, but in the event of a tie, the president of the council had the casting vote (Article 35).

In the first years of the new law being in force, a practice of appointing delegates of individual notary councils in the seats of regional courts located in their area of operation developed. They were entrusted with settling certain matters belonging to the council's responsibility. Sometimes the councils separated a smaller presiding board, sometimes referred to as the department, consisting of notaries residing in the seat of the chamber. At that time, there was a division of powers between the plenary council and the presiding board, which dealt with local issues. Special committees to deal with specific matters were also established. Over time, these rules were perpetuated throughout the country. The main activities of notary councils focused on the matters of supervision and audit of notary offices, participation in disciplinary trials and monitoring the compliance with professional ethics.[16]

The Law on Notaries of 1933, introducing the self-government of notaries, did not provide for the establishment of a central self-government institution in the form of the supreme notary council. This constituted a significant departure from the postulates proposed in the course of the work on the organization of the system of notaries and did not take into account the proposals contained in most of the drafts of the notarial law. With the awareness that the Polish system of notaries constituted a professional entity, and due to the need to jointly settle, for the profession as a whole, the matters that exceeded the scope of the activities of individual chambers, this gap was in practice filled. The notary councils, immediately after establishment, entered the path of mutual cooperation and on 14 February 1934, the First Conference of Presidents and Deputy Presidents of Notary Councils was held. During the session, the necessity of constant communication on general matters of the system of notaries and on the unification of professional and corporate practice throughout the territory of the Republic of Poland was recognized by authorizing the President of the Notary Council in Warsaw to convene such meetings periodically.[17] During this conference, the organizational foundations and the nature of the journal "Przegląd Notarialny" as the central periodical for Polish notaries and the official publisher of notary councils were also established.[18]

During the Third Conference of Presidents and Deputy Presidents of Notary Councils in November 1934, the Inter-Chamber Secretariat of Notary Councils was established at the editorial office of "Przegląd Notarialny" and the bases for its

[16] D. Malec, *Notariat*…, pp. 367–368.

[17] W. Natanson, *Pięć lat (1934–1938) współdziałania Rad Notarialnych*, "Przegląd Notarialny" 1939, no. 1, p. 7; A. Oleszko, *Prawo o notariacie. Część*…, p. 30.

[18] T. Chłopecki, *Kształtowanie się Prawa o notariacie w okresie II Rzeczypospolitej (1918–1939)*, "Rejent" 2013, no. 8, p. 121; *Pierwsze pięciolecie współdziałania międzyizbowego Rad Notarialnych*, "Przegląd Notarialny" 1939, no. 9–10, p. 10.

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activities were defined. Its responsibilities included the implementation of the resolutions of the Conference of Presidents and Deputy Presidents of Notary Councils, preparation of drafts and memorials regarding the scope of activities of the system of notaries, and presenting at the Conference issues related to general matters of the system of notaries.[19]

Until World War II, a total of 24 Conferences of Presidents and Deputy Presidents of Notary Councils were held.[20] They addressed, i.a., state and social matters, professional issues, matters related to current legislative projects and matters related to the practical interpretation of new legislative acts. However, the greatest merit of the Conference of Presidents and Deputy Presidents of Notary Councils was the possibility of cooperation between the most prominent notaries from all regions of the country and contributing to the unification and creation of a sense of unity of the Polish system of notaries.[21] Although the resolutions of the Conference were not binding on the chambers of notaries and their governing bodies, its actual authority meant that in fact the resolutions were treated as universally accepted and implemented norms.[22]

The self-government of notaries, introduced by the Law on Notaries of 1933, did not fully meet the ambitions and expectations of the community of notaries. They used to point out that the scope of activities of the general meeting and the notary council was significantly reduced in the new law compared to the responsibilities of the former colleges and chambers of notaries in the region of Małopolska. There was also criticism of the total deprivation of the notary councils' influence on staffing the positions of notaries. On the other hand, the introduction of the notarial element to the disciplinary judiciary was appreciated, as well as the creation of a uniform system of penalties and providing the notaries with a greater influence on the results of notarial examinations.[23] At the same time, the lack of a central institution of self-government was pointed out, and the necessity to establish one was stressed.[24] However, among notaries, the general assessment of the new solutions, especially in areas where there was no professional autonomy before, was positive. This was confirmed by the experience of the first years of activity of the self-government of notaries.[25]

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[19] W. Natanson, *Współdziałanie międzyizbowe Rad Notarialnych*, [in:] *Księga pamiątkowa Lubelskiej Izby Notarialnej*, Lublin 1939, p. 17.

[20] D. Malec, *Dzieje notariatu…*, p. 189.

[21] W. Natanson, *Pięć lat…*, pp. 8–9.

[22] A. Oleszko, *Ustrój polskiego notariatu*, Kraków 1999, pp. 277–278.

[23] S. Stein, *Ogólna charakterystyka nowej ustawy notarialnej*, "Przegląd Notarialny" 1933, no. 12, pp. 4–5.

[24] Idem, *Prawo notariacie w świetle dwuletniej próby życia*, "Przegląd Notarialny" 1936, no. 3–4, p. 9.

[25] D. Malec, *Notariat…*, pp. 376–378.

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SUPERVISION OVER THE NOTARY SYSTEM AND NOTARIES

The Law on Notaries of 1933, when handing over to the notary a branch of life so important for the preservation of the legal order, namely the preventive jurisdiction, subjected the notary to strict supervision. Supervision was understood as the exercise of controlling aimed at ensuring the inviolability of statutory limits within which the institution subject to supervision had the right to act at its own discretion, subject to verification in a statutorily regulated procedure. It was emphasized that the concept of supervision should be strictly distinguished from the concept of power.[26]

The nature of supervision over the system of notaries was determined by the performance of public functions of the state by them.[27] In the light of the provisions of the Law on Notaries, it could be divided into supervision over notaries and supervision over the governing bodies of chambers of notaries.

The supervision over notaries was twofold: official on the one hand, and self-government on the other. Official supervision was performed by administrative bodies of the justice system.[28] According to Article 37 § 1 of the Law on Notaries, the president of the regional court had the right to supervise the activities of notaries in a given court district. The same right in relation to notaries established in the district of a given appellate court was vested in the president of the appellate court. This supervision was exercised by the presidents themselves or by delegated judges (Article 37 § 2). Judges delegated to supervision acted as organs of judicial administration.[29]

The professional self-government supervision was exercised by the bodies of chambers of notaries, i.e. notary councils. Pursuant to Article 38 § 1 of the Law on Notaries, the notary council supervised the notaries of the chamber through its members or through appointed notaries who were not members of the council. The supervision of the council was to be exercised periodically in such a way that, within 3 years, all notary offices in the chamber's district were subject to a thorough audit at least once. In addition, the council could, if necessary, order extraordinary audits (Article 38 § 2), both on its own initiative and at the request of the president of the appellate court or regional court, or even at the request of the notary himself. It was considered that ordinary audits should be comprehensive and also cover all aspects of the activities of notary offices, while extraordinary audits could only concern strictly defined cases.[30] According to M. Allerhand, the right to conduct ordinary,

[26] W. Natanson, *Prawo o notariacie*..., p. 9.
[27] A. Oleszko, *Prawo o notariacie. Komentarz. Część I (art. 1–78)*, Warszawa 2011, p. 467.
[28] J. Borkowski, *Władze nadzorcze w Prawie o notariacie*, [in:] *Księga Pamiątkowa*..., p. 10.
[29] J. Glass, W. Natanson, *op. cit.*, p. 61.
[30] *Ibidem*, p. 61; A. Oleszko, *Prawo o notariacie. Część*..., p. 31.

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permanent audits was vested only in the notary council, while the presidents of regional or appellate courts could only conduct extraordinary audits.[31] For each revision, within 2 months of its completion, a detailed record was to be prepared, a copy of which was presented by the notary council to the president of the regional court, notifying him at the same time about the measures taken to remedy irregularities, if found (Article 38 § 3). A notary appointed as an auditor could not, without justifiable reason, refuse to assume this duty, under pain of disciplinary liability for breach of the dignity of the profession.[32]

The persons appointed to supervise, when carrying out the audit, could demand from the notary covered by the audit to provide any explanation and remedy the irregularities found. In the event professional misconduct was found, the presidents of courts and the notary council could refer the case to disciplinary proceedings (Article 39).

The audit records were analysed by separate audit committees, convened as needed, and then examined at meetings of the council. If major violations were found, the councils formulated requests for disciplinary liability.[33]

It used to be noted that under the provisions of Articles 37 and 38 of the Law on Notaries, the self-government supervision was a statutory duty of notary councils, and official supervision by judicial administration bodies was only their right.[34] It was emphasized that self-government supervision was defined in the Law on Notaries more broadly than official supervision, recognizing that the notary council, pursuant to Article 34 (1), exercised the so-called direct supervision.[35]

Regardless of the supervision over the activities of notaries, the Law on Notaries introduced supervision over the activities of notary chambers and their governing bodies. This supervision was regulated differently from the supervision over the activities of notaries, as it was one-path supervision.[36] It was exercised by the president of the appellate court, to whom, pursuant to Article 40 of the Law on Notaries, the notary council presented the protocols of the general meeting and other meetings, annual reports and annual budget statements and internal regulations. If the president of the appellate court noticed that a given body of the chamber of notaries violated the law or failed to perform its duties, then he presented the case to the administrative board of the appellate court, which could repeal the unlawful resolution and take remedial measures to restore legal order (Article 41 § 1). The notary council was entitled to appeal against the decision of the administrative

[31] M. Allerhand, *op. cit.*, p. 68.
[32] J. Glass, W. Natanson, *op. cit.*, p. 63.
[33] D. Malec, *Notariat…*, p. 389.
[34] J. Borkowski, *op. cit.*, p. 10.
[35] W. Natanson, *Prawo o notariacie…*, pp. 9–10.
[36] J. Borkowski, *op. cit.*, p. 11.

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board to the Minister of Justice as the second and last instance within one month of the service of the decision. His decisions were final and could not be appealed against (Article 41 § 2). The appeal did not suspend the execution of the resolution of the board (Article 41 § 3). According to M. Allerhand, the board could, however, order suspension of the execution of the resolution until the case was resolved by the Minister.[37]

The chief supervision over notaries and the bodies of chambers of notaries was exercised by the Minister of Justice (Article 42 § 1). It was assumed that the Minister could exercise the supervision as he deems appropriate, in particular by carrying out an audit of a notary, either himself or by a delegated judge. Based on Article 42 § 2 of the Law on Notaries, the Minister of Justice was also competent to dissolve the notary's council where major irregularities were found. Major irregularity was understood as a permanent inadequate action or neglect of duties.[38] In this case, the activities of the council were temporarily performed by the administrative board of the appellate court (Article 42 § 3). The supervisory orders of the Minister of Justice were final and not subject to appeal (Article 42 § 4). Based on Article 12 § 3 of the Law on Notaries, the Minister of Justice also had the right to transfer the notary to another place for the benefit of the service.

DISCIPLINARY AND COMPENSATORY LIABILITY OF THE NOTARY

The Law on Notaries of 1933, by introducing the institution of notarial self-government, entrusted its bodies with significant powers in the field of disciplinary judiciary.[39] Representatives of the self-government were members of disciplinary courts (Article 47 § 1 (a)), performed the functions of disciplinary officers (Article 48 § 2), while notary councils kept records of disciplinary courts (Article 54) and executed reprimands and admonitions (Article 53 § 3).

Pursuant to Article 44 of the Law on Notaries, disciplinary offences were divided into professional misconduct and infringement of dignity of the profession. This division was not only theoretical but also practical, as it was considered that the prosecutor of the district court could take action only when there was a professional misconduct.[40] A professional misconduct occurred when a notary was guilty of an act, negligence or omission regarding his professional duties. The infringement of dignity of the profession occurred when the notary public put at risk the norms of

[37] M. Allerhand, *op. cit.*, p. 71.
[38] A. Oleszko, *Prawo o notariacie…*, pp. 30–31; M. Allerhand, *op. cit.*, pp. 71–72.
[39] J. Glass, W. Natanson, *op. cit.*, p. 25.
[40] M. Allerhand, *op. cit.*, p. 75.

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professional ethics, violated the oath, or did not comply with the lawful demands of self-government bodies.[41]

It must be noted that the new Law on Notaries abolished proceedings for the breach of order and deprived the notary council, as a self-government body, of any jurisdiction in this respect. Pursuant to Article 44 of the Law on Notaries, all professional misconduct and breaches of the dignity of the profession of notary were to be subject to disciplinary proceedings. This put an end to the uncertainty that existed under the Austrian notarial law, where, in practice, the same misconduct of a notary could be concurrently prosecuted by the notarial chambers themselves as a breach-of-order offence and as an official trespass by disciplinary courts of appellate districts. At the same time, a uniform system of disciplinary penalties was introduced. According to Article 45, they included: fine up to 10 thousand zlotys, deprivation of the position of a notary as well as admonition and reprimand, which before had been penalties for breach of order (Article 45).[42] Admonition and reprimand were to be imposed in writing (Article 46 § 1). The penalty of reprimand entailed the loss of the right to stand for election to the notary council for 5 years, and in the case of a fine, the convicted person lost not only their right to stand for election but also the right of suffrage for 5 years (Article 46 §§ 2 and 3). The penalty of deprivation of office entailed the loss of all rights connected with holding the position of a notary (Article 46 § 4).

According to Article 47 of the Law on Notaries, the disciplinary jurisdiction was based on a two-instance procedure. The first instance was the notary chamber disciplinary court composed of two notaries, delegated by the council from among themselves, and one regional court's judge, appointed by the administrative board of the regional court located in the town where the chamber was based (Article 47 § 1 (a)). Its president was a regional court's judge (Article 47 § 3). The second instance was the disciplinary appeal court of the notary chamber, composed of two appeal judges appointed by the administrative board of the appellate court and one notary delegated by the notary council from among its members (Article 47 § 1 (b)). It was presided over by the appellate judge who had been appointed for this capacity by the board (Article 47 § 3). The boards appointed the judges for a period of 1 year, while the notaries were delegated by the council for individual meetings (Article 47 § 2). In practice, however, councils elected judges for the entire period of their term of office.[43]

The Law on Notaries contained only a few provisions in the area of disciplinary proceedings and, unless provided otherwise, it ordered to apply to notaries,

[41] J. Glass, W. Natanson, *op. cit.*, p. 68.
[42] S. Stein, *Ogólna charakterystyka…*, p. 5.
[43] D. Malec, *Dzieje notariatu…*, p. 192; eadem, *Notariat…*, p. 396.

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mutatis mutandis, the provisions of the Law on the System of Common Courts,[44] concerning disciplinary responsibility of judges and their suspension (Article 55). This applied in particular to the so-called disciplinary proceedings in the preliminary period, i.e. from the moment a charge of official misconduct or infringement of dignity of the profession is raised until the discontinuance of proceedings or the ordering of a hearing.[45]

Referring the cases to disciplinary proceedings was within the responsibility of the supervising entities, namely: the Minister of Justice, the president of the competent appellate court, presidents of regional courts within the territorial scope of the notarial chamber concerned and the notary council.[46]

Before a request to institute proceedings under Article 147 § 1 of the Law on the System of Common Courts was submitted to a disciplinary court, the facts necessary to establish the elements of the offence should be clarified. The notary council commissioned these so-called preliminary proceedings (investigation) to the appointed disciplinary officer, unless the content of the report did not provide grounds for initiating disciplinary proceedings. After the preliminary proceedings had been conducted and the circumstances justifying the disciplinary proceedings had been found, the council, upon a request from the disciplinary officer, submitted a request to the disciplinary court to initiate them. The court, having received a request from the notary council or the supervisory authority, was required to hear the conclusions of the disciplinary officer before any decision was taken (Article 48 § 1), he could also order an additional investigation to be carried out by a designated judge (Article 148 of the Law on the System of Common Courts).[47] The Disciplinary Officer represented the public interest in the proceedings by supporting the accusation and by submitting appropriate requests.[48] The disciplinary officer of the disciplinary court was a notary appointed by the council. In cases initiated following a notification by a supervising entity and in cases involving public interest, the rights of the disciplinary officer were also vested in the prosecutor of the regional court competent for the seat of the chamber (Article 48 § 2). The disciplinary officer of the disciplinary court of appeal was exclusively a prosecutor of the appellate court (Article 48 § 3). The defendant could choose a defence counsel from among notaries or advocates (Article 49).[49] When acknowledging the validity of the request to initiate proceedings, the court immediately imposed a penalty of reprimand or set a hearing by adjudicating in public session on the parties' requests

[44] Regulation of the President of the Republic of Poland of 6 February 1928 – Law on the System of Common Courts (Journal of Laws 1928, no. 12, item 93, as amended).

[45] W. Natanson, *Prawo o notariacie*..., p. 10.

[46] *Ibidem*.

[47] *Ibidem*, pp. 10–11.

[48] J. Glass, W. Natanson, *op. cit.*, p. 73.

[49] M. Allerhand, *op. cit.*, pp. 79–80.

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regarding evidence. The court relied solely on the evidence disclosed during the hearing, issued the judgement and immediately promulgated its operative part.[50]

Copies of all the resolutions initiating and concluding the proceedings and ordering the setting of the hearing were served on the disciplinary officer, the defendant, the president and the prosecutor of the regional court (Article 50).

The judgement of the disciplinary court of first instance was subject to an appeal by the accused, but only if he was sentenced to a fine or deprivation of office (Article 51). The judgement of the court of first instance imposing the penalty of admonition or reprimand was final.[51] The disciplinary officer could appeal against a judgement of first instance only if he had applied for a fine or deprivation of office and the court acquitted the accused or sentenced him to a more lenient sentence than requested (Article 51). The notary's resignation after the initiation of disciplinary proceedings did not affect the continuation of the proceedings (Article 52). That notary could not be dismissed until the end of the disciplinary proceedings, since it could not concern a person who was not a notary.[52]

The execution of a sentence of admonition and reprimand was the responsibility of the notarial council, a fine was executed by the president of the regional court and the execution of a sentence of deprivation of office was the responsibility of the Minister of Justice (Article 53 § 3). As an exception, the notarial council was entitled to collect the fine imposed by it under Article 27 § 4.[53]

Liability of a notary for damages was regulated in Article 43 of the Law on Notaries. According to this regulation, apart from the persons involved in the deed, it was the notary who was solely liable for damages caused during the performance of official duties due to an intentional fault, negligence or incompetence of himself, his deputy and the office personnel (Article 43 § 1). The same liability was borne by a deputy of the notary appointed without his consent (Article 43 § 2). The claim for damages became time-barred upon 3 years from the day on which the party that had suffered the damage learned about the damage (Article 43 § 3). Thus, the pecuniary liability of the notary was based on the general principles of civil law on the compensation of damage. It used to be emphasized that a request of a client who had suffered damage did not exclude the notary from disciplinary responsibility for professional misconduct.[54]

Controversy was aroused by the expression "apart from the persons involved in the deed". It was treated as a mistake in drafting, believing that the word "to-

[50] J. Glass, W. Natanson, *op. cit.*, p. 78.
[51] Natanson, *Prawo o notariacie…*,, p. 75.
[52] M. Allerhand, *op. cit.*, p. 82.
[53] S. Stein, *Ogólna charakterystyka…*, p. 5.
[54] J. Glass, W. Natanson, *op. cit.*, p. 67.

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wards" should be used here instead of "apart from".[55] A different opinion was also expressed, according to which, the phrase was used intentionally by the legislature in order to emphasize that the persons participating in the deed, having an impact on its drafting and the content of the statement, are liable for the damage jointly and severally with the notary, and even solely, if they misled the notary through no fault of his own. It did not, however, refer to persons summoned to assist in the activity, e.g. witnesses or experts.[56]

It was pointed out that while deputies and the office staff were not directly liable towards the party, they were liable towards the notary, who could demand by way of recourse the return of what he had to pay as compensation for the damage. The liability of the notary was absolute and could not be waived or limited contractually.[57]

THE RULES FOR PROFESSIONAL TRAINING OF NOTARIES

The Law on Notaries of 27 October 1933 introduced uniform rules throughout the country for notary training. The rules of the Law on Notaries, by requiring high professional qualifications from candidates for the position of a notary and introducing separate rules for the training of notary trainees and conducting notary examinations, enabled the process of formation of notaries as an independent profession.[58]

The qualification requirements for the position of a notary are set out in Article 7 of the Law on Notaries, modelled on Article 82 of the Law on the System of Common Courts. In the light of this provision, a Polish citizen who had full civil rights was of impeccable character and had good command of written and spoken Polish could be appointed a notary. The minimum age of 25 years determined for a judge was increased for a notary to 30 years. At the same time, in accordance with the principle of professionalism, the legislature required the candidate to be a graduate of university law studies with the exams required in Poland, to undergo notarial training and to pass a notarial examination. The requirement of "impeccable character" was a matter of moral judgement within the discretion of the Minister of Justice.[59]

The legislature made exceptions from the adopted principle of professionalism, which in practice played a significant role. Article 8 § 1 of the Law on Notaries exempted from the obligation to carry out the notary training and pass the notarial

[55] M. Allerhand, *op. cit.*, pp. 72–73.

[56] K. Wolny, *Odpowiedzialność cywilna notariusza. Próba interpretacji art. 43 Prawa o notariacie*, "Przegląd Notarialny" 1934, no. 7, p. 4.

[57] M. Allerhand, *op. cit.*, p. 74.

[58] J. Glass, *Rzut oka na polską ustawę notarialną*, "Przegląd Notarialny" 1933, no. 10, p. 26.

[59] J. Glass, W. Natanson, *op. cit.*, pp. 35–36.

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examination those who had held the positions of judges or prosecutors for at least 5 years, both in common courts and in military or administrative courts.[60] The lack of a decision specifying the percentage of assistant notaries, judges and prosecutors to be nominated was criticized and raised concerns about the proper functioning of the system of notaries.[61] Pursuant to Article 8 § 2 of the Law on Notaries, in exceptional cases, the Minister of Justice, with the consent of the Prime Minister, could appoint a person who, due to personal qualities and activity in the public service, guaranteed the proper performance of the profession. However, such a person should take a notarial exam. This made it possible to appoint a person who did not even have basic legal education for the position of a notary.[62]

The experience of the first years of the Law on Notaries of 1933 being in force showed that the staffing policy of the Ministry of Justice led to a kind of reversal of proportions. Namely, the rule provided for in Article 7 of the Law on Notaries became an exception, and the exceptions provided for in Article 8 of the Law on Notaries replaced the rule. In the first years of the new law being in force, out of about 230 nominations for the position of notaries, only 76 were assistant notaries, while 152 notaries were nominated under Article 8 of the Law on Notaries, Such practice caused disappointment about the profession of notary among young lawyers.[63]

The Law on Notaries of 1933 introduced a separate notary training throughout the country, concluded with a notarial examination. Managing professional training of trainee notaries, in the light of Article 34 (4) of the Law on Notaries, was within the responsibility of the notarial council. The new regulation introduced exclusivity for the notarial training, making it impossible, with certain exceptions during the transitional period, to deem it tantamount to a judicial or attorney-at-law's training.[64]

A notary trainee could be one who had Polish citizenship, enjoyed full civil rights, was of an impeccable character, had a good command of written and spoken Polish and graduated from university law studies with the examinations required in Poland. A prerequisite was also the submission by the candidate of a certificate issued by a notary (patron) of his willingness to accept the candidate for the training (Article 56).[65]

The notarial council used to decide about accepting a candidate as a trainee notary, but before accepting him, it had to obtain the consent of the president of the appellate court (Article 57 § 1). This solution was justified by the general right of supervision over notaries and the specific interest of the state in the proper selection

[60] J. Glass, *Rzut oka na polską ustawę*..., p. 24.

[61] S. Stein, *Ogólna charakterystyka*..., p. 4.

[62] J. Glass, *Rzut oka na polską ustawę*..., p. 24.

[63] T. Makowski, *Notariat jako ujście dla młodych prawników*, "Przegląd Notarialny" 1937, no. 2, p. 17.

[64] T. Kostórkiewicz, *Stanowisko aplikanta i asesora notarialnego w świetle polskiego Prawa o notariacie*, "Przegląd Notarialny" 1934, no. 17, p. 10.

[65] T. Chłopecki, *op. cit.*, p. 126.

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of its composition.[66] As a result, the notary training was given a public-legal nature.[67] A negative resolution could be appealed against by the candidate within one month by submitting a complaint to the administrative board of the court of appeal, which finally settled the case (Article 57 § 2). Failure to reply to an application for accepting the candidate as a trainee notary within 3 months of the date of submission of the application was considered as a refusal of registration (Article 57 § 3).

The notary traineeship lasted 5 years and consisted in learning about all the areas of the notary's activities (Article 58 § 1). The trainee was obliged to work in the patron's office under his direct management and participate in the work organized by the notary council for the purpose of professional training (Article 58 § 2). Until the outbreak of World War II, it was not possible to establish a uniform, nationwide system of educating trainees by notary councils. In practice, two main systems could be distinguished. In the first one, the so-called passive didactics, notary councils or other institutions organized courses or lectures during which appropriate lecturers provided their participants with information on notarial practice and issues. In the second system, so-called active didactics, notary councils only provided trainee notaries with topics to study and later convened meetings with the participation of notaries, assistant notaries and trainee notaries, where these topics were discussed.[68] Notary councils made admission to the notarial exam dependent on the participation of the trainee notary in the works organized for their professional training.[69]

After completing the notarial traineeship, the trainee could take the notarial examination before the examination board operating at the relevant notary council (Article 59 § 1). The examination board consisted of: a judge of the appellate court delegated by the president of that court, who chaired the board, and three notaries delegated by the notary council (Article 59 § 2). The exam itself was divided into a written and oral part, and it covered all the areas of law, the knowledge of which was essential for a notary to hold the office (Article 59 § 3).[70] In the event of an unsuccessful result of the first exam, the trainee could try again only after 3 months. If the result of the re-examination was also unsuccessful, admission to the examination for the third time depended on the consent of the examination board, before which the trainee had taken the second examination (Article 59 § 4).

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[66] T. Kostórkiewicz, *Zasady przygotowania do zawodu notarialnego*, "Przegląd Notarialny" 1936, no. 13–14, p. 25.

[67] Idem, *Stanowisko aplikanta…*, p. 10.

[68] J. Pawłowicz, *Zasady kształcenia aplikantów notarialnych*, "Przegląd Notarialny" 1939, no. 9–10, pp. 37–38.

[69] W. Natanson, *Kształcenie zawodowe aplikantów notarialnych*, "Przegląd Notarialny" 1934, no. 22, p. 2.

[70] D. Malec, *Dzieje notariatu…*, p. 171.

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Pursuant to Article 60 of the Law on Notaries, a trainee notary, after passing the notary examination, became an assistant notary.[71] The lists of assistant notaries were kept by notary councils (Article 36 § 1). Assistant notaries were supervised by the notary councils (Article 34 (1)). Assistant notaries were subject to disciplinary liability in accordance with the modified provisions on disciplinary liability of notaries (Article 62 § 2).

The Law on Notaries of 1933 did not specify the length of the period for being an assistant notary and did not guarantee the priority for assistant notaries in notary nominations. One of the few powers related to the status of assistant notary was the possibility of acting as a substitute for a notary (Article 60 § 2).

The first years of the Law on Notaries of 1933 demonstrated a serious problem that the notarial staff had been poorly replenished by younger generations of lawyers. The situation was particularly dramatic in areas which did not know the professional preparation for the notarial profession before 1 January 1934. In the Lublin Notarial Chamber, there was one trainee notary per six notary offices and one assistant notary per 42 notary offices as of 31 October 1937.[72] Little interest among young lawyers in the notarial traineeship was due to very few nomination opportunities. An example of this could be data from the area of Lwów appellate court, stating that the youngest assistant notary could only expect nomination after around 35 years, i.e. at the age of 60.[73] Despite the efforts made, until World War II it was not possible to educate a large group of trainee notaries and assistant notaries based on the new rules, which would guarantee the successful development of notaries as an independent legal profession.

CONCLUSIONS

The granting of the status of public official to notaries under the first Polish Law on Notaries did not close the discussion on the actual position of notaries within the system of government. A comprehensive analysis of the Law on Notaries of 1933 presented in the first and second part of this article, shows that the notary's position includes in its functions and legal position a combination of features of a public officer and liberal profession. The legislature, 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

[71] M. Allerhand, *op. cit.*, p. 92.

[72] *Zagadnienie aplikacji notarialnej (O zasadę przymusu przyjmowania aplikantów)*, "Przegląd Notarialny" 1938, no. 9, p. 10.

[73] J. Pawłowicz, *Położenie asesorów notarialnych w Małopolsce*, "Przegląd Notarialny" 1939, no. 2, p. 13.

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emphasize the existing differences between them while at the same time underlining their close relationship to the state. The adoption of such a definition made it possible to grant notaries a wide range of powers. At the same time, it provided the basis to establish a professional self-government and entrust its bodies with significant powers in the area of disciplinary jurisdiction. The dualistic approach to the position of the notary was also reflected in the separate rules of training for the profession and in the special rules of notary's liability for damages, which were based on the general principles of civil law on the compensation for damage.

On the other hand, the state, by entrusting notaries with activities of non-contentious judiciary, secured for itself an exclusive influence on the staffing of notary positions and introduced the principle that the position of notary could not be combined with any other profession or state function. In view of the notary's peculiar position, the legislature disallowed notaries to perform incidental activities which would interfere with the performance of their official duties or were contrary to the gravity or dignity of their position. The character of a notary as a public functionary was also a basis for the obligation to serve on weekdays and to keep confidentiality of the circumstances of which the notary had become aware when performing his duties. At the same time, the Law on Notaries, when handing over to the notary a branch of life that is so important for the preservation of the legal order, namely the preventive jurisdiction, subjected the notary to strict supervision.

In view of the above analysis, I believe that the legislature approached the position of a notary in the Law on Notaries of 1933 in a special way, creating a combination of official and professional elements, which can be called a public function. In terms of the political and administrative system, regardless of the definition itself, the notary in practice performed the function of a person of public trust.

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ABSTRAKT

Artykuł dotyczy problematyki pozycji ustrojowej notariusza na gruncie pierwszego polskiego Prawa o notariacie z dnia 27 października 1933 r. Dokonana w części pierwszej opracowania analiza pozycji ustrojowej notariusza wykazała istnienie poważnych trudności w precyzyjnym jej określeniu, zarówno wśród przedstawicieli doktryny, jak i judykatury. W celu precyzyjnego określenia pozycji ustrojowej notariusza w części drugiej przeprowadzono analizę postanowień Prawa o notariacie dotyczących samorządu zawodowego notariatu, nadzoru nad notariatem i notariuszami, odpowiedzialności dyscyplinarnej i odszkodowawczej notariusza oraz zasad przygotowania do zawodu notariusza. Przedstawiona w obu częściach artykułu analiza przepisów Prawa o notariacie z 1933 r. prowadzi do wniosku, że stanowisko notariusza zawierało w swoim położeniu prawnym połączenie cech urzędniczych i cech wolnego zawodu. Prawodawca, używając w art. 1 określenia „funkcjonariusz publiczny", a nie „funkcjonariusz państwowy", oraz nadając notariuszom w art. 23 Prawa o notariacie ochronę prawną przysługującą urzędnikom państwowym, chciał wyraźnie zaakcentować istniejące między nimi różnice, a zarazem podkreślić ich bliski związek z państwem. Przyjęcie takiej definicji

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umożliwiło przyznanie notariuszom szerokiego zakresu kompetencji. Jednocześnie stworzyło ono podstawy do powołania samorządu zawodowego oraz powierzenia jego organom istotnych uprawnień w zakresie sądownictwa dyscyplinarnego. Dualistyczne ujęcie stanowiska notariusza znalazło odzwierciedlenie również w odrębnych zasadach przygotowania do zawodu oraz w szczególnych zasadach odpowiedzialności odszkodowawczej notariusza. Powierzając notariuszom czynności należące do sądownictwa niespornego, państwo zapewniło sobie wyłączny wpływ na nadawanie posad notariuszom oraz poddało notariat ścisłemu nadzorowi Ministra Sprawiedliwości. Przedstawione w opracowaniu rozważania prowadzą do wniosku, że prawodawca ujął w Prawie o notariacie z 1933 r. stanowisko notariusza w sposób szczególny, stwarzając syntezę pierwiastków urzędniczego i wolno-zawodowego, którą można określić mianem funkcji publicznej. W zakresie ustrojowym, niezależnie od samej definicji, notariusz w praktyce pełnił funkcję osoby zaufania publicznego.

Słowa kluczowe: notariusz; notariat; pozycja ustrojowa; funkcjonariusz publiczny; osoba zaufania publicznego

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