
The Evolution of the Public Notary Institute in Serbia: Historical and Legal Analysis of the Laws of 1930 and 2011

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Abstract

The Institute of Public Notary in the Republic of Serbia has existed for 15 years, and the Law on Public Notaries has been in active use since September 1, 2014. year. Notaries continue to attract attention in terms of their activities, types of notarial documents, as well as one of their most important activities, which is the solemnization of non-public documents. The institute's justification in terms of legal security during the solemnization of non-public documents and with the aim of obtaining guarantees that the courts could not give in the period from 1945 to 2011, and which were most often manifested through uncertainty during certification or double sale of real estate, etc., still causes the greatest attention. In the paper, the authors will analyze the evolution of the current Law on Public Notaries from 2011 in relation to the previous Law on Public Notaries from 1930 from a historical-legal context regarding the personality of the public notary, activities, notarial documents, as well as the justification of today's institute in relation to the original public notaries, with special reference to the period of non-existence of public notaries.

Keywords: evolution of public notary, court certification, solemnization, notary documents, legal certainty

Introduction

The Latin type of notary is reflected in the principles of the International Union of Notaries where it is stated that "Notaries are legal experts and public officials appointed by the state to give credibility to legal acts and contracts contained in the documents they draw up themselves, as well as to advise persons who request their services." (<https://uinl.org/fundamental-principles/principles-of-the-notarial-function/>) The institution of public notary was introduced and legally regulated in a large number of legal systems in Europe with the aim of relieving the judiciary, realizing rights more quickly and establishing a higher level of legal certainty.(Jančić, 2018, p.269)

Globally, there are two major system divisions of notaries into notaries belonging to the European-continental system and notaries belonging to the Anglo-Saxon system. In the narrower sense of the European-continental system, notaries belonging to the Latin type of notary and notaries belonging to the state (administrative type of notary) are divided. State notary, a system in which notaries who have the status of civil servants perform notarial work, is known today, for example, certain provinces in Germany, Switzerland, Portugal, Russia, etc. (Hiber, 2006, p.10)

Legal regulations in the field of these notary systems are not uniform in Europe or in the world in general. Differences and sometimes contradictions of national legislation are shown somewhere as a tendency towards public service, and somewhere they lean more strongly in the direction of liberal professions. (Knežić Popović, 2010, p.339)

The Latin type of public notary is characterized by the following characteristics: 1. he is the holder of a public office, 2. which he performs as an independent and independent lawyer, 3. from whom an appropriate level of professional competence is required to be able to provide preventive legal protection. (Đurđević, 2011, p.161)

The Public Notary Chamber of Serbia has been a member of the International Union of Notaries since 2016. It is also a member of the Council of Notaries of the EU. The Council of Notaries of the European Union is a non-profit association of notary chambers that was founded in 1993 and officially represents the notary profession of all member states before the EU institutions. In 2017, the Chamber of Public Notaries of Serbia was accepted as a member of the Council of Notaries of the European Union, in the capacity of an observer. (<https://beleznik.org/vesti/javnobeleznicka-komora-srbije-primljena-u-clanstvo-saveta-notarijata-evropske-unije>).

From 2024, Serbian public notaries have equal access to the electronic network of notaries of the European Union, which enables them to communicate directly with all colleagues from EU member states and check notarized documents from the EU in Serbia and vice versa. (<https://beleznik.org/vesti/javnim-beleznicima-srbije-odobren-pristup-mrezi-notarijata-eu>)

The historical-legal aspect of this work is important because of the presentation of the institute in the period of the Kingdom of Yugoslavia due to all the political turmoil at that time in relation to today's political system which tends to harmonize domestic law with EU law. Also, the application of the historical-legal method is paralleled in the legislative solutions of certain institutes in the period of the first law from 1930 in relation to the currently valid law.

Specifics of the Law on Public Notaries from 1930

Public notaries is an institute that first appeared in our country in the Law on Public Notaries from 1930. (hereinafter ZJB1930) The law was created with the intention of harmonizing the application of law in the then six territories that became part of the Kingdom of Yugoslavia. In 1930, in the territory of the Kingdom of Yugoslavia, an effort was made to standardize the regulation of public notaries, that is, to introduce the institution of public notaries in those areas where it did not exist until then. (Krešić, 2013, p. 353) The law was supposed not only to regulate the institution of public notary in a unique way, but also to implement it in those parts of the Kingdom of Yugoslavia where it did not exist until then. (Drakić, 2014, p. 201)

The institution of public notary in the Yugoslav territory existed only in the areas that were part of the former Austria-Hungary, with the exception of Bosnia and Herzegovina, that is, in the areas of the appellate courts of Ljubljana, Zagreb, Split and Novi Sad. (Krešić, 2013, p.357). Thus, within the jurisdiction of the Zagreb Court of Appeal, the Austrian Notarial Code of 1855 had been in force since 1859, whereas the Austrian Notarial Code of 1871 applied within the jurisdictions of the Split and Ljubljana Courts of Appeal. In the territory of the Novi Sad Court of Appeal (Baranja, Bačka, and Banat) and the district courts of Čakovec and Prelog (Međimurje), the Hungarian Notarial Act of 1874, as subsequently amended and supplemented, was in force (Krešić, *ibid.*)

Pursuant to Article 1 of the ZJB1930, it was stipulated that public notaries are appointed by the state authority and vested with the status of persons of public trust. In accordance with the law, they are authorized to draw up and issue public instruments regarding legal transactions, declarations, and facts upon which rights are founded; to receive documents for safekeeping, or money and securities for delivery to other persons or authorities; and to conduct proceedings assigned to them by law upon the order of courts or other public authorities.

According to this law, public notaries had three scopes of work that they performed, namely their own, that of a court commissioner, and that of a lawyer. Their own was reflected in the compilation of documents on legal affairs, on statements, on the facts on which rights are based, they issued to the participants dispatches, transcripts, extracts, and certificates based on the documents. (Trgovčević Prokić, 2012, p.53)

Notarial instruments (notarial acts, notarial minutes, and notarial certifications/attestations), as well as their official copies issued pursuant to statutory requirements, constitute public instruments, provided that all essential formalities were observed during their drafting and issuance. (ZJB1930, art.2)

The specificity that existed in ZJB1930, which is not in the current law, is reflected in the authorization of public notaries to work on the compilation of private documents at the request of the parties and to represent the parties in undisputed matters before the courts and other authorities and send submissions as proxies when these matters are directly related to a document or testimony drawn up by one of them. In civil disputed matters, in criminal and executive proceedings as well as in undisputed matters except those already mentioned, public notaries are authorized to represent parties in their official place only when there are no two lawyers in that place and when the law does not expressly prescribe representation by a lawyer. (ZJB1930, art.3)

Regarding the selection of a public notary, ZJB1930 stipulated in Article 6 that a person who is a citizen of the Kingdom of Yugoslavia, who is independent, who has reached 30 years of age, who has graduated from the Faculty of Law, and has spent 5 years in practice after graduation, of which at least two years with a public notary and one with a regular court, and the other two years with a public notary, a regular court, a lawyer or a state attorney can be appointed as a public notary. as well as having passed the bar or judge exam

Deviations from the aforementioned conditions exist in Article 8 paragraph 1 ZJB1930, where it is stipulated that state attorneys general, presidents of district courts, presidents and judges of higher courts, supreme and senior state prosecutors, and full professors of law at the university can be elected as public notaries, regardless of how long they have served in those positions and without practice, and law professors even without a bar or judge exam.

Judges of county, district and commercial courts, state prosecutors and their deputies, secretaries of higher courts with passed judicial examination as well as chiefs, inspectors and secretaries of the Ministry of Justice with passed judicial or bar examination and associate professors of law at the university if they have spent at least five years in one or more of these positions without having experience, and associate professors of law without bar or judicial examination and lawyers who practiced law at least 5 years. (ZJB1930, art.8)

The period of non-existence of the institute of public notaries from 1945 to 2011 (September 1, 2014)

With the adoption of the Law on the Invalidity of Legal Regulations and Pre-War Legal Rules enacted before April 6, 1941, and during the enemy occupation, the Law on Public Notaries was repealed. From 1945 to 2011, Serbia had a period when non-public documents for the sale of real estate, as well as signatures, transcripts and handwriting, were certified by municipal administrations and courts. In terms

of probate proceedings, as well as in terms of drafting and promulgation of wills, the courts were exclusively competent according to the Law on non-litigation proceedings.

According to the Law on Authentication of Signatures, Manuscripts and Transcripts in Article 2, it is prescribed that the authentication of signatures, manuscripts and transcripts is performed by the municipal court, unless otherwise specified. Certification of signatures, manuscripts and transcripts is also performed by the municipal administration as entrusted tasks. Certification is performed by an official designated by the decision.

The sale of real estate was regulated by the provisions of the Law on Sale of Real Estate, Article 4. The contract for sale of real estate is concluded in writing, and the signatures of the contracting parties are certified by the court. Contracts that are not concluded in the specified manner do not produce legal effect. The court can recognize the legal effect of a real estate transaction contract, which was concluded in writing, on which the contractor's signatures were not certified by the court, provided that the contract was fulfilled in whole or in part, that the right of pre-emption was not violated and that the compulsory regulation was not violated. The court that verified the signature on the contract, i.e. made a decision to that effect, is obliged to submit a copy of the certified contract, i.e. legally binding decision, to the republican authority responsible for determining and collecting public revenues, within ten days from the date of signature verification, i.e. from the day the decision becomes legally binding.

The conduct of probate proceedings, the compilation of the death certificate, the inventory and appraisal of the estate, as well as the determination of the estate, fell within the jurisdiction of the court.

Drafting of a will, as well as the preservation of a will, before the entry into force of public notaries, was exclusively under the jurisdiction of the courts. Later, the court will leave the promulgation of the will to public notaries during the probate proceedings.

Specifics of the Law on Public Notary from 2011

The public notary did not exist as an institute in the period from 1945 to 2011. Formally, public notaries start their work on September 1, 2014. year. Public notaries operate throughout the territory of the Republic of Serbia, except for places that still do not have appointed notaries. There are currently 229 public notaries in Serbia. (<https://mpravde.gov.rs/vesti/novoimenovani-javni-beleznik-polozio-zakletvu>)

Regarding the systematics of the 2011 Law on Public Notaries itself, it has 182 articles which are divided into four parts. The first part regulates the position and activities of public notaries, while the second part regulates the association of public notaries and the relationship with state authorities. The third part of the law regulates the notarial deposit, and the fourth part contains transitional and final provisions. (Đurđević, 2011, p.8)

Unlike the previous law that regulated notaries, according to the current ZJB in Article 2 paragraph 4, a public notary is an expert in the field of law, appointed by the minister responsible for justice, who, on the basis of public authority, accepts declarations of will from the parties and gives them the necessary written form and issues documents that have the character of public documents, keeps the originals of those documents and other trusted documents, issues copies of documents, publicly confirms facts, gives advice to the parties on issues that are the subject of his activity and undertakes other actions and performs other tasks specified by law. Here we see that terms such as legal expert and appointed by the minister clearly define the Latin type of notary.

It is similarly defined by the Code of Ethics of Public Notaries "A public notary, as an expert in the field of law who is entrusted with the exercise of public authority, is a special agent of the justice system that enables citizens and legal entities to exercise their rights more quickly and simply, with the primary duty to contribute to the rule of law, legality and fairness through their professional and other public activities and to protect public order." (The Code of Ethics of Public Notaries, *art. 1*)

Notary activity is regulated by law. The public notary is authorized to perform the following tasks: 1) compile, certify and issue public documents on legal affairs, statements and facts on which rights are based and certify private documents; 2) takes custody of documents, money, securities and other items; 3) on the basis of this law and according to the decision of the court, he performs tasks that can be entrusted to him by law; 4) undertakes other actions in accordance with the law. (ZJB, *art. 4*)

The evolution is also reflected in the wider range of notarial documents that are regulated in positive legislation in relation to the previous law. Notarial documents are documents about legal affairs and statements made by public notaries (notary records), records of legal and other actions performed or attended by public notaries (notary records) and certificates of facts witnessed by public notaries (notary certificates), non-public documents certified by public notaries (notary solemnization), as well as non-public documents in which the public the notary certified the signature, i.e. certified the authenticity of the transcript, translation or extract (notary certification). (ZJB, *art. 6*)

Also, where the institute of public notary has developed the most is in entrusting work by the court, in terms of conducting probate proceedings. The court still formally initiates the probate proceedings and entrusts it to the public notary for further proceedings. The public notary prepares the death certificate, performs an inventory and valuation of the property, possibly determines temporary measures to secure the property, if necessary, conducts probate proceedings and issues a decision on inheritance.

A public notary, working on probate matters, behaves like a judge, but his position is not completely equal to that of a judge, and therefore, the competent court has the obligation to supervise the work of a public notary. The court can ask the public notary at any time to hand over the case file for inspection and to submit a written report on his work. (Kaščelan&Tošić, 2021, p.250)

A new form of testament was introduced—the notarial will—whereby the public notary drafts it in the form of a notarial act.

Some of the notarial documents have the force of an executive document. The introduction of the notarial document as an executive document is a very useful and positive innovation in the legislation of the Republic of Serbia. (Krstinić & Zarubica, 2021, p.51)

The notarial deposit institute was also established, as is the court deposit. Money, securities except for serial and dematerialized ones, as well as other documents that can be cashed, documents that cannot be cashed, writings, manuscripts, records, personal archives, documents, decorations, works of art, precious metals, jewelry, valuables and other items made of precious metals, when this is not prohibited by law (objects of deposit) can be submitted to the notarial deposit.

Conclusion

Trust in the public notary institute is at a high level nowadays. This trust is justified by the normative organization of the institute and the tendency for impartiality, objectivity, economy and legal certainty.

Regarding the original law and regulation of the institute of public notaries, we can see that the evolution brought a positive influence on the current public notaries.

The development is also reflected in the notary activity itself. Today, public notaries are persons who are top experts in the field of civil law, who in a way preventively act to relieve the burden of civil proceedings through guarantees for the solemnization of non-public documents, all with the aim of providing legal certainty and preventing possible proceedings that would arise from such situations. Acceleration is also reflected in the conduct of complete probate proceedings by public notaries, to relieve the courts and devote themselves to the resolution of disputed relationships and the provision of legal protection, which is the primary goal of the courts.

The need to introduce public notaries arose because of the accession chapters for EU accession. The EU mandates in the accession chapters that each country standardizes its judiciary to a system that is uniform throughout Europe for reasons of legal equality and legal certainty. This can be seen e.g. according to the electronic network of public notaries, that with one click can be determined whether a notarial document issued somewhere in Europe is authentic. This was made possible by the implementation of the modernization of the judicial system and the introduction of digitization in the current judiciary. In the end, we can safely conclude that the return of the institute and the current development of the public notary in the positive legislation of the Republic of Serbia have fulfilled the expectations regarding the efficiency of the judiciary.

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Evolucija instituta javnog beležništva u Srbiji: Istorijskopravna analiza zakona iz 1930. i iz 2011. godine

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Sažetak

Institut javnog beležništva u Republici Srbiji postoji već 15 godina, a Zakon o javnom beležništvu je aktivnoj primeni od 01.09.2014. godine. Javni beležnici i dalje izazivaju pažnju u pogledu svoje delatnosti, vrstama javnobeležničkih isprava, kao i jednoj od njihove najznačajnije delatnosti, a to je solemnizacija nejavnih isprava. Najveću pažnju i dalje izaziva opravdanost instituta u pogledu pravne sigurnosti prilikom solemnizacije nejavnih isprava a sa ciljem dobijanja garancija koje u periodu od 1945 do 2011. godine sudovi nisu mogli da daju, a koje su se najčešće ispoljavale kroz nesigurnost prilikom overe ili duplu prodaju nepokretnosti i sl. Autori će u radu analizirati evoluciju važećeg Zakona o javnom beležništvu iz 2011. godine u odnosu na prethodni Zakon o javnim beležnicima iz 1930 sa istorijsko-pravnog konteksta u pogledu same ličnosti javnog beležnika, delatnosti, javnobeležničkih isprava, kao i opravdanosti današnjeg instituta u odnosu na prvobitne javne beležnike, sa posebnim osvrtom na period nepostojanja javnih beležnika.

Ključne reči: evolucija javnih beležnika, sudska overa, solemnizacija, javnobeležničke isprave, pravna sigurnost