

Articles

**The Public Notary and the Bailiff
as Contributors to the Rule of Law**

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Abstract: The study focussed on two professional groups: the public notary and the bailiffs' professions. Indeed, these groups fulfil a particular place within society, which is among other things manifested by the fact that they are subject to a code of confidentiality and the privilege of non-disclosure. Although the main focus of this article is on their contribution to the rule of law, this article will also highlight the various manifestations of administrative mechanisms borrowed from the civil service system and how these two professionals execute the law. The article presents shortly each one of these tasks, professional standards and the legal framework. After the introduction of each professions, there is a discussion of a number of factors that may influence the execution of the law. Thirdly, the article gives an overview of their contribution. Finally, attention is paid to the Romanian and European organisation within Chambers, Unions and European Union Councils.

Keywords: review; implementation; administrative functions; civil service

1. Introduction

Besides the fact that Romanian administrative law addresses and studies the theoretical and normative aspects of the civil and public servant and the main elements of contractual staff, we should pay more attention to other agents, officials with special status who exercise administrative acts, acts of execution of legal rules. In a democratic state, most often, enforcement of legal norms activities can be carried out by autonomous functions called to perform public services. Among the agents called to participate to the administrative function of the state we find: the public notary (or the civil law notary) and the bailiff.

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2. The Public Notary

Notaries, in contrast to practising lawyers, are not likely ever to attract media attention. Even so, in civil law countries on the continent of Europe, notaries perform a key social and economic role. They combine professional independence with the status of state officials and work within a framework of strict national statutory regulation (Shaw, 2003, p. 3737).

The profession of notary (Shaw, 2006, p. 223-4), although the oldest and arguably most venerable of the legal professions in Europe as well as of continuing importance within Continental European civil law systems, has featured only marginally, if at all, in any of these debates. Ezra Suleiman's (1987) interprets the French notariat's resilience and ability to survive and even thrive on serious crises as a result of notaires' fundamentally ambiguous status as providers of both public and private legal services: as public servants, they enjoy government protection and a statutory monopoly; as members of a liberal profession they are free, in fact encouraged by their government, to engage in profit-making activities in the open market. This dual position, Suleiman argues, provides them with wide scope for political negotiation and the option to play either card as the need arises. Although most notariats in civil law countries to some degree share this dual nature, the tension between the profession's two functions and its effect on its socio-political and economic standing are far more pronounced in France than elsewhere. Notaries in France enjoy a uniquely close relationship with the state (represented by the Ministry of Justice), an exceptionally high degree of professional autonomy, an uncommonly wide range of privileges, and the built-in potential for enviable levels of prosperity.¹

Based on the French legal culture Romanian developed its system with more and less the same characteristics. The public notary² is invested to fulfil a public service and has the status of an autonomous function, and his act is a public authority and has probative value.

Notary activity provides to individuals and businesses commercial non-litigious and civil legal relations ascertainment and the exercise of the rights and interests' protection in accordance with the law. The activity is performed by public notaries and through notarial acts notarial and legal advices.

¹ For details see (Moreau, 1989, 1999)

² Law no. 36/12 May 1995.

In order to confirm the role of notary activity in the achievement of state the executive act of the Romanian regulation established that the notarial acts can also be performed by diplomatic missions and consular offices, and other institutions in the conditions and limits provided by law. Thus we can find that notarial acts may be issued on by public authorities which act abroad and are subordinated to the central government authority. (Carausan, 2012, p. 423)

By the fact that notaries are required to review the acts which dealt in order to do not contain clauses contrary to the law and ethics. Moreover, they can ask and give explanations to the parties on the content of the acts, to make sure that they understand the meaning and the effects of what they have accepted in order to prevent future disputes. In other words they contribute to the enforcement of rule of law. Furthermore, if the requested act is contrary to the law and ethics, the public notary has the opportunity to refuse its elaboration. Through the Romanian regulations the legislature conferred a special status to the public notary within the social and administrative system, namely the autonomous guardian of legal compliance. As such, the public notary benefit of stability, adding the fact that according to the law he/she cannot be moved to another location without his/her express consent and cannot be absent from the office for more than 5 days. Continuity is one of the civil service characteristics.

Romanian doesn't not shed from the Latin notaries (Shaw, 2003, p. 39), as they are called by doctrinaires, which broadly share the following key characteristics:

- notaries are public officers discharging certain statutory duties in the context of a range of important legal transactions; their acts, whether public or private, are probative, that is to say, whatever is certified by a notary is taken to be beyond dispute and proved; notaries therefore have an effective monopoly over many vital matters, including the making of wills, convincing and the setting up of limited companies.
- notaries are appointed by the respective government according to perceived need, which means that their numbers are subject to a strict numerous clauses.
- notaries' fees are determined in most cases by national governments and based on the value of the matter dealt with; this means that notaries are largely free from price competition.
- notaries are subject to more or less strict advertising prohibitions;

- notaries are mostly required to be nationals of their country, which excludes foreigners from holding notarial office.

The law enforcement authorities shall assist public notaries, if they are prevented from exercising their jobs. Also, local government authorities are obliged, within their powers, to grant public notaries concur for the performance of notarial acts.

Some public notary acts are enforceable *ex officio*, meaning that the public notary authenticated act which finds a certain and liquid debt. In the absence of the original act, the executor title may be duplicate or certified in copy from the public notary's archive copy. Thus the recordings has enforceability at claim chargeability date. (Carausan, 2012, p. 423)

The concluding notarial act mandatory includes, according to the law, the following information:

- a) the notary office;
- b) the name and number of the conclusion;
- c) the date of completion of the notarial act;
- d) the name and surname of the public notary;
- e) the place where the deed was accomplished, if was carry out of the notary office, stating the circumstances which justifies document preparation there;
- f) the name of the parties, registered office and mention that they were present in person, represented or assisted and how their identity was proved, except the closings that have a definite date documents or legalize copies of documents;
- g) the description of the conditions of substance and form of notarial act drawn up in relation to the nature of the act;
- h) the fulfilment of the notarial act and reading it by the parties;
- i) the term levying stamp duty, fees and the amount thereof;
- j) the signature of the public notary;
- k) the seal of the public notary office.

For the acts performed in the public notary activity, according to the rules in matter, the public notary are disciplinary administrative responsible in front of the National Union of Public Notaries and the Minister of Justice.

The disciplinary liability of the public notary is draw for: delay or negligence in performing; unjustified absence from the office; the breach of professional secrecy; detrimental conduct to the honour or professional integrity.

However, his/her work is professional administrative supervised by the National Union of Notaries Public through its Governing Board or by the Board of the Chamber of Notaries Public in case of delegation. It envisages: the organisation of public notaries offices; quality of the acts and documents signed by notaries public.

Given the coordinating work of the Ministry of Justice, established by law and the possibility of carrying out at the orders of the Minister, through the specialised superintendent of an administrative control of his/her activity. By this type of administrative control of an authority of the central government, we can observe how the public notary acts and activity give rise to legal relations which falls under the administrative law incidence. Notarial acts like any other enforcement acts are subject, under the law, to the court control. (Carausan, 2012, p. 424)

3. The Bailiff

As in most other countries, Romanian citizens cannot simply take the law into their own hands, and, in practice, the execution of legal decisions is charged to bailiffs. Bailiffs serve the attachments and the evictions ordered or approved by the court, and, accompanied by a high-ranking police official, are authorised to enter a debtor's home against his wishes, so that he cannot frustrate the consequences of a court's decision. (Struiksma & Jongbloed, 2006, p. 201)

The bailiff¹ sworn to fulfils a public service consisting in the enforcement of the civil provisions of the titles and other duties assigned by law in their jurisdiction. The fulfilled bailiff's act is equal with a public authority one and it has probative value.

The duties of bailiffs concern:

- a) the enforcement of the civil provisions within the executive titles;
- b) the notification of the judicial and extrajudicial documents;
- c) the communication of the procedural documents;
- d) the amicably recovery of any claims;
- e) the implementation of the measures ordered by the court;

¹ Law no. 188/1st of November 2000.

- f) declaration of status quo in terms of the Civil Procedure Code;
- g) drawing up the reports finding, if a real offer is followed by a debtor amount recording, according to the Civil Procedure Code;
- h) drawing up, by law, the protest of non-payment of bills, promissory notes and checks, as appropriate;
- i) any other acts or operations established by law in his/her competence.

As shown the Romanian legislator made it clear that the bailiff enforces the law (civil) and apply precautionary measures established by the courts. In this regard executor documents are either legal enforcement acts or acts which carry out the judicial act.

Bailiffs exercise personally their powers and enjoy stability in office and, also as the public notary, cannot be transferred to another location without their consent, except in cases provided by legislation.

The bailiffs' duty is to keep the professional secrecy. So, it is prohibited to give information on the acts and deeds which they have acquired in their work and to allow access to documents from the archive office of others, outside parties, successors and their representatives, and those who can demonstrate a legitimate right or interest. The territorial jurisdiction extends throughout the court district in which he/she has its office registered.

The bailiff is appointed by the Minister of Justice, by order, based on the request of the interested and on the brief prepared by the directorate of the Ministry of Justice about the conditions of appointment, provided by law. The specialized department act will be accompanied, usually, by a motivated proposal of the Council of the National Union of Bailiffs on whether or not the conditions of appointment were executed.

The order of appointment shall specify the court in which jurisdiction the bailiff's office will be, as well as its obligation within 90 days to register he/she individual's office or, where appropriate, in collaboration with another bailiff. Consequently, termination and suspension of infringement or bailiff has, where appropriate, also the Minister of Justice.

The Minister of Justice is also the controlling activity by bailiffs through general inspector, according to law, whenever deemed necessary. (Carausan, 2012, p. 425)

The control is mainly about the professional activity of bailiffs: keeping proper records, preservation of the archive, the quality of the acts and the work carried out

and also his/her conduct in carrying out its duties in relation to public authorities and natural or legal persons. In some situations they are asked, by the Minister of Justice to provide information on the activities of other bailiffs through the Union Council or the Board of the Chamber of Bailiffs. The resulted acts will be communicated to specialized directorate within the Ministry of Justice and attached in the bailiff's professional file.

If case of disciplinary offenses the Board of the Chamber of Bailiffs or the Minister of Justice exercises the disciplinary action within 1 year from the date when they became aware of misconduct, but not later than 3 years after it occurred. The disciplinary action is judged by the Disciplinary Board elected by the general assembly of the Chamber of Bailiffs for a period of 3 years, which consists of 3 members. (Carausan, 2012, p. 426)

4. Instead of Conclusion

Within 22 European Union Member States based on Latin civil law notaries are public office holders and part of the legal order. Their essential mission is to confer authenticity on the legal acts and contracts they establish for their clients in areas of law as diverse as marriage contracts, company statutes, wills, real estate transactions etc. (Notaries of Europe)

Nearly half a century after the signing of the Treaty of Rome, the profession of notaries along with the one of bailiff have moved into the firing-line of European regulatory reform. The crucial issue of the next period of state's reform will be whether, individually and collectively, Romanian notaries and bailiffs are sufficiently dynamic, flexible and forward-looking to avoid defensiveness and defeatism, and instead to turn the situation to their own advantage while remaining loyal to their core values.

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